Australian
Competition &
Consumer
Commission

Hutchison's undertakings with respect to the supply of its Mobile Terminating Access Service (MTAS)

Final Decision

June 2006

Abbreviations

Act	*Trade Practices Act 1974*
CDMA	Code Division Multiple Access
Commission	Australian Competition and Consumer Commission
cpm	Cents per minute
CSP	Carriage Service Provider
DCITA	Department of Communication, Information Technology and the Arts
EBITDA	Earnings before interest, taxation, depreciation and amortisation
ECPR	Efficient Component Pricing Rule
EPMU	Equi-Proportionate Mark-Up
FL-LRIC	Forward-looking long-run incremental cost
FL-LRIC++	Forward-looking long run incremental cost plus two mark-ups; one to account for the recovery of common costs based on Ramsey-Boiteux principles, and the other to reflect a 'network externality surcharge'
FTF	Fixed-to-fixed
FTM	Fixed-to-mobile
H3GA	Hutchison 3G Australia Pty Ltd
HTAL	Hutchison Telecommunications (Australia) Limited
Hutchison	Together HTAL and H3GA
GBV	Gross Book Value
GSM	Global System for Mobiles
GST	Goods and Services Tax
LRIC	Long run incremental cost
LRMC	Long run marginal cost
LTIE	Long term interests of end users
MNO	Mobile Network Operator
MSR	Mobile Services Review
MTAS	Mobile Terminating Access Service
MTF	Mobile-to-fixed

MTM	Mobile-to-mobile
Non- PMTS	Non- Public Mobile Telecommunications Service
Non-PMTS Undertakings	Undertakings relating to calls originating on fixed and international networks
Optus	Optus Mobile Pty Limited and Optus Networks Pty Limited
PMTS	Public Mobile Telecommunications Service
PMTS Dual Rate Undertakings	Undertakings for calls originating and terminating on mobile networks with two explicit rates
PMTS Single Rate Undertakings	Undertakings for calls originating and terminating on mobile networks with a single rate
POI	Point of interconnection
PSTN	Public Switched Telephone Network
RAF	Regulatory Accounting Framework
SAOs	Standard Access Obligations
SIO	Services in operation
Telstra	Telstra Corporation Limited
TSLRIC	Total service long-run incremental cost
TSLRIC+	Total service long-run incremental cost plus a mark-up to account for a proportion of organisational-level common costs based on an EPMU approach
Undertakings	Undertakings lodged by Hutchison with the Commission on 7 October 2005 for the supply price of the MTAS
Vodafone	Vodafone Australia Pty Ltd

1. Commission's Decision

Pursuant to section 152BV(2)(a)(i) and (ii) of the Act, the Commission has published the Undertakings and invited submissions on them. Further, the Commission has considered the submissions received in forming its views on the Undertakings.

Pursuant to section 152BV(2)(b) of the Act, the Commission is satisfied that the Undertakings are not consistent with the SAOs that are applicable to Hutchison.

Pursuant to section 152BV(2)(d) of the Act, the Commission is not satisfied that the terms and conditions specified in the Undertakings are reasonable for the reasons outlined in this report.

The Commission therefore rejects the Undertakings. The full reasons for the decision to reject are set out below in Chapters 4, 5, 6 and 7. A summary of the reasons is set out below.

Summary of Reasons

The Commission is not satisfied that the terms and conditions in the Undertakings are reasonable, therefore the Commission's decision is that the Undertakings be rejected. The reasons for these decisions are briefly outlined below and supported with detailed considerations contained within this report.

Price Reasonableness of the PMTS Single Rate Undertakings

Having had regard to the criteria in section 152AH(1) of the Act the Commission has concluded that acceptance of the PMTS Single Rate Undertakings would:

- be likely to promote the LTIE by:
    - at worst not negatively impacting but more likely promoting competition in relevant markets, and
    - leading to a more efficient use of, and investment in, the infrastructure;
    - but would not impact any-to-any connectivity;
- not compromise Hutchison's legitimate business interests;
- not adversely impact the interests of persons who have a right to use the MTAS;
- not lead to arrangements between access providers and access seekers that encourage the unsafe or unreliable operation of a carriage service, telecommunications network or facility; and
- be likely to promote the economically efficient operation of a carriage service/telecommunications network/facility.

As a result, the Commission is of the view that the price terms and conditions are reasonable, relevant to the PMTS Single Rate Undertakings.

Price Reasonableness of the PMTS Dual Rate Undertakings

Having had regard to the criteria in section 152AH(1) of the Act the Commission has concluded that acceptance of the PMTS Dual Rate Undertakings would:

- be unlikely to promote the LTIE by:
    - not promoting competition in the market within which FTM services are provided, and the market within which retail mobile services are provided; and
    - leading to a less efficient use of, and investment in, the infrastructure used to provide fixed services, the MTAS and retail mobile services;
    - but would not impact any-to-any connectivity;
- result in MTAS prices greater than what are necessary to protect the legitimate business interests of Hutchison and its investment in facilities used to supply the MTAS;
- be less likely to promote the interests of persons who have a right to use the MTAS;
- mean that in some instances prices would be well above the direct costs Hutchison incurs in providing the MTAS;
- not lead to arrangements between access providers and access seekers that encourage the unsafe or unreliable operation of a carriage service, telecommunications network or facility; and
- be less likely to promote the economically efficient operation of a carriage service/telecommunications network/facility.

As a result, the Commission is of the view that the price terms and conditions relevant to the PMTS Dual Rate Undertakings are not reasonable.

Price Reasonableness of the Non-PMTS Undertakings

Having had regard to the criteria in section 152AH(1) of the Act the Commission has concluded that acceptance of the PMTS Dual Rate Undertakings would:

- be unlikely to promote the LTIE by:
    - not promoting competition in the market within which FTM services are provided, and the market within which retail mobile services are provided; and
    - leading to a less efficient use of, and investment in, the infrastructure used to provide fixed services, the MTAS and retail mobile services;
    - but would not impact any-to-any connectivity;
- result in MTAS prices greater than what are necessary to protect the legitimate business interests of Hutchison and its investment in facilities used to supply the MTAS;
- be less likely to promote the interests of persons who have a right to use the MTAS;
- mean that in some instances prices would be above the direct costs Hutchison incurs in providing the MTAS;
- not lead to arrangements between access providers and access seekers that encourage the unsafe or unreliable operation of a carriage service, telecommunications network or facility; and

- be less likely to promote the economically efficient operation of a carriage service/telecommunications network/facility.

As a result, the Commission is of the view that the price terms and conditions relevant to the Non-PMTS Undertakings are not reasonable.

The Undertakings as alternatives

Hutchison requested that the Commission considers the Undertakings in combination. The Undertakings combined related to the PMTS Dual Rate Undertakings with the Non-PMTS Undertakings. The other combination which Hutchison requested the Commission to consider was the PMTS Single Rate Undertaking combined with the Non-PMTS Undertakings. Having had regard to the criteria in section 152AH(1) the Commission has concluded as follows:

PMTS Dual Rate Undertakings combined with the Non-PMTS Undertakings

As the price terms and conditions in either the PMTS Dual Rate Undertakings or the Non-PMTS Undertakings are not considered reasonable when viewed individually, the Commission considers that the price terms and conditions for the Undertakings when combined are also found to be unreasonable.

The Commission considers that the non-price terms and conditions are not reasonable for the Undertakings when combined because of the high level of uncertainty created between existing agreements and provisions in the Undertakings.

Overall, therefore, the Commission is of the view that the terms and conditions in the Undertakings when combined and as alternatives are not reasonable.

PMTS Single Rate Undertakings combined with Non-PMTS Undertakings

As the price terms and conditions in the PMTS Single Rate Undertakings are considered reasonable but the price terms and conditions are not reasonable in the Non-PMTS Undertakings when viewed individually, the Commission considers that the price terms and conditions for the Undertakings when combined are found to be unreasonable.

The Commission considers that the non-price terms and conditions are not reasonable for the Undertakings when combined because of the high level of uncertainty created between existing agreements and provisions in the Undertakings.

Overall, therefore, the Commission is of the view that the terms and conditions in the Undertakings when combined and as alternatives are not reasonable.

Conclusion on non-price terms and conditions

Section 152BV provides that the Commission must not accept an undertaking unless the Commission is satisfied that the terms and conditions specified in the undertaking are reasonable.

The Commission's view is that reasonableness is assessed both in terms of particular terms and conditions and overall having regard to the relevant criteria.

In the present case, the Commission cannot be satisfied as to the reasonableness of particular clauses (i.e. clauses 4.1, 5.2 and 5.3) nor of the proposed scheme as a whole. As written, the Undertakings seek to override all existing commercial agreements. The Commission does not believe that this is reasonable in itself – it is not in the LTIE nor does it adequately address the interests of persons who have rights

to use the declared service concerned. The Commission is also of the view that the level of confusion or uncertainty that is likely to arise in relation to the operation of clauses 4.1, 5.2 and 5.3 is unreasonably high. The Commission also has concerns regarding the reasonableness of clauses 7.7 through 7.9.

The Commission does note however:

- that had the Undertakings clearly specified that they applied only to those cases where there had been a failure to agree on specific terms and conditions;
- that the Undertaking would affect only those specific terms and conditions on which there had been a failure to agree; and
- that if the Commissions concerns regarding clauses 7.7 through 7.9 could be overcome

it is more likely that the Commission would have considered the non-price terms and conditions reasonable

Standard Access Obligations

Because of the uncertainty caused by the proposed adoption of the terms and conditions of existing agreements, the Commission cannot be satisfied that the Undertakings will be consistent with the applicable SAOs. If the Commission was satisfied that the Undertakings would adopt the provisions set out in Attachment B, it is likely that the Commission would also be satisfied that the Undertakings were consistent with the SAOs.

2. Background on the Undertakings

On 7 October 2005, Hutchison Telecommunications (Australia) Limited (HTAL) and Hutchison 3G Australia Pty Ltd (H3GA) (together Hutchison), lodged three ordinary access Undertakings (the Undertakings) each pursuant to Division 5 Part XIC of the *Trade Practices Act 1974* (the Act) with the Australian Competition and Consumer Commission (the Commission). The substance of the Undertakings lodged by HTAL are the same as those lodged in relation to H3GA (except for the entity involved).

The Undertakings specify certain terms and conditions upon which Hutchison will meet its SAOs to supply the domestic digital MTAS, which was declared by the Commission on 30 June 2004.[1]

Hutchison's three classes of Undertakings are the:

- PMTS Single Rate Undertakings;
- PMTS Dual Rate Undertakings; and
- Non-PMTS Undertakings.

Hutchison defines PMTS Calls as 'a voice call originating from a Mobile Service Number on a Mobile Network in Australia and terminating on a Mobile Service Number on a Mobile Network in Australia'. That is, the PMTS Single Rate Undertakings and PMTS Dual Rate Undertakings apply exclusively to domestic MTM traffic.

Hutchison defines Non-PMTS Calls as 'a voice call other than a PMTS Call'. The Non-PMTS Undertakings which relate to Non-PMTS Calls from domestic FTM traffic and traffic originating on overseas networks.

2.1. PMTS Single Rate Undertakings

The PMTS Single Rate Undertakings propose the supply of MTAS for MTM calls at a single usage charge rate of 12 cpm on a reciprocal basis (i.e. provided the access seeker agrees or is otherwise required to supply Hutchison with MTAS on the access seeker's mobile network at 12 cpm). The PMTS Single Rate Undertakings are proposed to expire on 31 December 2007.[2]

Attachment A to the PMTS Single Rate Undertakings states Hutchison will charge an access seeker a single usage charge of 12 cpm for the Hutchison MTM terminating access service on the condition that:

(a) the access seeker agrees to charge Hutchison, or is required to charge Hutchison, an amount equal to the usage charge for the MTAS acquired by Hutchison from that access seeker for the purpose of terminating, on that access seeker's mobile network, a PMTS call originating on Hutchison's mobile network(s); and

(b) the access seeker only acquires the Hutchison MTM MTAS for the purpose of terminating, on Hutchison's mobile network(s), a PMTS call originating in

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1 The declared MTAS covers voice termination on all digital mobile networks (including third generation or '3G' networks).

2 *Trade Practices Act 1974*, Section 152BS(7) provides that an undertaking must specify the expiry time of the undertaking.

Australia from that access seeker's mobile network or the mobile network of a related body corporate of the access seeker.

The PMTS Single Rate Undertakings provide for a single rate but no 'fall back' or alternate rate if these conditions are not met.

When accepting the PMTS Single Rate Undertakings, the access seeker must acknowledge:[3]

- Hutchison may cease to charge the Usage Charge in the event that Hutchison reasonably believes that the Access seeker is not complying, or is unlikely to comply, with the conditions that apply to that Usage Charge;
- in the event of a dispute between the parties as to whether the Access Seeker has complied, or will comply, with the applicable conditions, the dispute will be resolved in accordance with the dispute resolution procedure in the Existing Agreement or Non-price Terms applicable pursuant to clause 5 of the Undertakings; and
- the Access Seeker agrees to provide Hutchison, upon request, with all reasonable assistance, including all relevant documents or information, to enable Hutchison to determine whether the Access Seeker is complying with any conditions that apply to the Usage Charge payable or paid by that Access Seeker.

Price outcomes likely to emerge with the PMTS Single Rate Undertakings

The PMTS Single Rate Undertakings seek to impose a condition of reciprocal pricing on access seekers and do not apply to transit traffic.[4] The PMTS Single Rate Undertakings also require the access seeker to acknowledge a number of other conditions relating to Hutchison's rights in the event of specified future outcomes.

The price outcomes likely to emerge with the PMTS Single Rate Undertakings is 12 cpm for the supply of MTAS for MTM calls if reciprocity and transit traffic conditions are met and if these conditions are not met a price likely in the range of 15 to 18cpm. The rate of 15 to 18cpm is referenced from arbitrated outcomes and prices negotiated between access seekers and providers which the Commission understands prevail as at June 2006.

Price outcomes likely to emerge without the PMTS Single Rate Undertakings

The price outcomes likely to emerge without the PMTS Single Rate Undertakings are in the range of 15 to 18cpm.

2.2. PMTS Dual Rate Undertakings

The PMTS Dual Rate Undertakings also apply to MTM calls. They contain an offer by Hutchison to supply the MTAS at the usage charge rate of 12 cpm if the reciprocal pricing and transit traffic conditions are met. The 'fall back' rate applies to access seekers that do not accept Hutchison's 12 cpm reciprocal offer or do not meet the

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3 Clauses 2.3 -2.6 of Attachment A of the PMTS Single Rate Undertakings.

4 That is traffic that an access seeker wished to terminate on Hutchison's network that did not originate on the access seeker's network. This transit traffic may have originated from a third party's fixed, mobile or an overseas network.

transit traffic condition. The PMTS Dual Rate Undertakings are proposed to expire on 31 December 2007.[5]

Attachment A to the PMTS Calls Dual Rate Undertakings states that Hutchison will supply the Hutchison MTM terminating access service at the 12 cpm usage charge on the condition that:

(a) the access seeker agrees to charge Hutchison, or is required to charge Hutchison, an amount equal to 12 cpm (the 'reciprocal rate') for the MTAS acquired by Hutchison from that access seeker for the purpose of terminating, on that access seeker's mobile network, a PMTS call originating on Hutchison's mobile network(s); and

(b) the access seeker only acquires the Hutchison MTM MTAS for the purpose of terminating, on Hutchison's mobile network(s), a PMTS Call originating in Australia from that access seeker's mobile network or the mobile network of a related body corporate of the access seeker.

Price outcomes likely to emerge with the PMTS Dual Rate Undertakings

The price outcomes from the PMTS Dual Rate Undertakings are 12cpm for MTM calls if the conditions of reciprocal pricing and transit traffic are met. In the event that these conditions are not met the PMTS Dual Rate Undertakings state that Hutchison will supply the MTAS for relevant MTM calls at the fall back rate of 21 cpm.

Price outcomes likely to emerge without the PMTS Dual Rate Undertakings

The price outcomes likely to prevail without the PMTS Dual Rate Undertakings are likely to be in the range of 15 to 18cpm. The rate of 15 to 18cpm is referable to arbitrated outcomes and prices negotiated between access seekers and providers which the Commission understands prevail as at June 2006.

2.3.Non-PMTS Undertakings

The Undertakings submitted by Hutchison for Non-PMTS traffic are proposed to expire on 30 June 2006.[6]

Price outcomes likely to emerge with the Non-PMTS Undertakings

The price outcomes with the Non-PMTS Undertakings is a price for the MTAS for fixed-to-mobile (FTM) and overseas-originated calls at a single rate of 18 cpm. The 18 cpm rate is a flat rate and is not subject to any conditional requirements as is the case with the PMTS Undertakings.

Price outcomes likely to emerge without the Non-PMTS Undertakings

The price outcomes without the Non-PMTS Undertakings would be a rate between 15 to18 cpm.

2.4.Non-Price Terms of the Undertakings

The relevant clauses of the Undertakings provide:

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5 *Trade Practices Act 1974,* Section 152BS(7) provides that an undertaking must specify the expiry time of the undertaking.

6 ibid.

3.2 In this Undertaking, unless the contrary intention appears:
…a reference to this Undertaking includes its attachments…

4.1 This Undertaking overrides any commercial agreement for the supply of the [Hutchison] Mobile Terminating Access Service between [Hutchison] and any other third party.

5.1 [Hutchison] undertakes to the Commission that while the Undertaking is in effect, it will provide Access Seekers with the [Hutchison] Mobile Terminating Access Service:
(a) on the terms and conditions specified in Attachment A; and
(b) on such other terms (the **Non-price Terms**) as are determined in accordance with clauses 5.2 or 5.4.

5.2 Where an Access Seeker has an agreement with [Hutchison] for the supply of the mobile terminating access service or any other service such as SMS or MMS that is in force on the date on which this Undertaking commences (an **Existing Agreement**), the supply of the [Hutchison] Mobile Terminating Access Service will be governed by all the Non-price Terms in the Existing Agreement.

5.3 For the avoidance of doubt, if an Existing Agreement governs the supply of the [Hutchison] Mobile Terminating Access Service by reason of clause 5.2, the terms of this Undertaking prevail to the extent of any inconsistency.

5.4 Where an Access Seeker does not have an Existing Agreement, the Non-price Terms contained in Attachment B will govern the supply of the [Hutchison] Mobile Terminating Access Service.

Hutchison's explanation of the proposal

Hutchison submits that the purpose and intention of the clauses is to incorporate two different sources of terms and conditions into the Undertakings. Firstly, where there is an existing agreement on foot, the non-price terms and conditions of that agreement are incorporated into the Undertakings. Secondly, where there is no existing agreement, Attachment B applies. Hutchison submits that Attachment B is closely based on the model terms and conditions specified in Annexure A to the Telecommunications Access Code 1998.

Attachment B to the Undertakings contains a number of non-price terms and conditions, including provisions relating to the following:

- scope of the agreement;
- service and interconnection;
- quality of service;
- calling line identification;
- information support;
- fees, charges and GST;
- network protection and related network matters;
- network provision and operations liaison;
- intellectual property rights;
- confidentiality;
- liability and indemnity; and
- commencement, duration and consequences of breach.

Attachment B to the Undertakings also contains a number of schedules, including those relating to:

- technical standards;
- billing and settlement procedures;
- ordering and provisioning procedures;
- operations and maintenance procedures;
- dispute resolution procedures;
- access to POI space; and
- communication information (billing and interconnect invoicing).

In explaining the operation of clause 5.3 (which appears on its face to strike down the terms and conditions of existing agreements to the extent that that are inconsistent with the Undertakings. including Attachment B), Hutchison states that the expression "Undertakings" in clause 5.3 should *not* be read as including Attachment B. However, Hutchison also submits that, in the interests of certainty, it would support a variation of clause 5.3 so that it read:

> For the avoidance of doubt, if an Existing Agreement governs the supply of the [relevant Hutchison service] by reason of clause 5.2, the terms of this Undertaking, excluding Attachment B, will prevail to the extent of any inconsistency.

Hutchison has suggested this variation could be made pursuant to section 152BY. Section 152BY allows for the variation of undertakings once the undertaking has been accepted and is in operation.

For reasons which are set out in Chapters 5 and 6, the Commission does not agree that the Undertakings, when given their natural and ordinary meaning, have the effect which Hutchison intends. The Commission's view is, where there is an existing agreement, that agreement is overridden to the extent of any inconsistency with Attachment B.

2.5. Terms and Conditions for the Combined Undertakings

Hutchison has asked that:

> The PMTS Dual Rate Undertakings and the PMTS Single Rate Undertaking are submitted by Hutchison as alternatives.
>
> Hutchison submits that the LTIE is best served by the Commission accepting the PMTS Dual Rate Undertaking coupled with the Non-PMTS Undertaking.
>
> Hutchison submits that the LTIE would also be served by the Commission accepting the PMTS Single Rate Undertaking coupled with the Non-PMTS Undertaking. This approach, however, would not be as beneficial to the LTIE as the former approach,
>
> Notwithstanding the views expressed above, Hutchison submits that each individual Undertaking promotes the LTIE. Acceptance of one or more of the Undertakings submitted by each of HTAL and H3GA would therefore be in the LTIE.[7]

Attachment A to the Undertakings sets out the price terms and conditions on which Hutchison undertakes to supply the MTAS to access seekers.

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[7] Hutchison, *Submission to the Australian Competition and Consumer Commission Access Undertakings domestic digital mobile terminating access service: Hutchison Telecommunications (Australia) Limited and Hutchison 3G Australia Pty Limited, (Hutchison Undertakings Submission)*, October 2005, p. 5.

In addition, there is an Attachment B to each of the Undertakings which is titled *'Agreement for the provision of mobile to mobile terminating access service'*, and contains the non-price terms and conditions of access. Hutchison has advised the Commission that the terms set out in Attachment B apply to all three Undertakings lodged by HTAL and H3GA respectively.

3. Analysis of the price terms and conditions

Three pricing conditions are explicit in the proposed Undertakings that need consideration.

The first relates to reciprocal pricing, which is an explicit pricing condition contained in the PMTS Undertakings in order that the 12 cpm price for the supply of the MTAS to apply for MTM calls.

The second issue is the price condition for transit traffic. This condition seeks to ensure that access seekers do not route calls that originate on a fixed or international network through mobile networks to receive price advantages that are only intended to apply to MTM calls under the PMTS Undertakings.

The third issue relates to differential pricing outcomes. As outlined briefly in sections 2.1 to 2.3 and 3.3, the differential pricing outcomes emerge because of the reciprocal pricing and transit traffic conditions in the PMTS Undertakings and the different prices of 18 cpm set for the Non-PMTS Undertakings compared with 12 cpm (and 21 cpm) in the PMTS Undertakings.

3.1. Reciprocal Pricing

The Commission provides its general views on reciprocal pricing arrangements for the supply of the MTAS.

Commission's view

The Commission's preferred approach to the pricing of declared services is to use a TSLRIC pricing methodology which best promotes the LTIE and the other objectives of the statutory criteria.[8] Conceptually, the TSLRIC methodology only refers to those costs that can be attributed to the production of the service. Costs common to more than one service cannot be attributed to a particular service and therefore do not form part of a 'pure' TSLRIC. However, in practice, the Commission accepts that network common costs may form part of the measure of costs. Additionally, a contribution to organisational-level costs is accounted for in a mark-up or '+' added to the TSLRIC to form a 'TSLRIC+'.

In the *Mobile Terminating Access Service (MTAS) Final Report*, the Commission found the TSLRIC+ pricing principle to be appropriate for the pricing of the MTAS because it:

- reflects the direct cost of supplying the service;
- ensures equally-efficient access seekers in related markets are able to compete on an equal footing with integrated access providers as both will face similar input costs for the declared service;
- takes account of the interests of both access providers and access seekers; and

[8] ACCC, *Access Pricing Principles – Telecommunications, A Guide*, 1997 (*Access Pricing Principles Guidelines*), p. 28.

- encourages the economically efficient use of, and economically efficient investment in, the infrastructure used to provide telecommunications services.[9]

The Commission has long regarded that commercially-negotiated reciprocal pricing arrangements may not result in efficient prices for the MTAS and for telecommunications services that require the MTAS as an input. This is because in the absence of regulation, MNOs have an incentive and ability to set the price for access to the MTAS at a level well above the direct costs of providing the service.[10]

As stated, the Commission's preference is that the price of the MTAS reflects the underlying efficient cost of providing the service. In addition, the cost of supplying the MTAS would not seem to be impacted by where the terminated call originates (which is one of the key pricing consequences of the reciprocal arrangements under both the PMTS Undertakings).

The Commission notes that the alternative pricing outcomes implicit in the PMTS Single Rate Undertakings of 15 to 18 cpm are likely to emerge because of the reciprocal pricing conditions affecting some access seekers. These prices for the supply of the MTAS which are likely to emerge if the price conditions are not met are considered above the efficient costs of providing the service.[11] However, in stating this, the Commission notes that the alternative prices that are likely to emerge (if the pricing conditions are not met by access seekers) are not dissimilar to pricing outcomes already in existence either arising from arbitrated or commercially-negotiated processes.

The price outcomes for MTM calls that are expected to prevail under the PMTS Dual Rate Undertakings if the reciprocal pricing conditions are not met are intended to be 21cpm. Price outcomes such as these are exactly what the Commission is concerned about when it has stated that MNOs have an incentive to set prices for the supply of the MTAS well above the efficient (and direct) costs of providing the service.

It is the Commission's view that acceptance of the PMTS Dual Rate Undertakings will lead to pricing outcomes which the Commission considers to be well above the efficient costs of supplying of the MTAS.

The Commission also notes that reciprocal pricing is not a condition or consideration for the Non-PMTS Undertakings.

In summary, the Commission considers that, as at June 2006, reciprocal pricing outcomes which yield a rate for the supply of the MTAS of 12 cpm are considered reasonable but in some cases the reciprocal pricing arrangements will result in a price well above the efficient cost of supply of the MTAS.

3.2. Transit Traffic Condition

Telstra submits that the offer of a 12 cpm price subject to the condition that the access seeker only acquires the Hutchison MTM terminating access service for the purpose of terminating a PMTS Call originating in Australia from the access seeker's mobile

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9 ACCC, *Mobile Services Review Mobile Terminating Access Service- Final Decision on whether or not the Commission should extend, vary or revoke its existing declaration of the mobile terminating access service, (MTAS Final Report)*, June 2004, p. 205.

10 ibid., pp. 67-70.

11 At this point in time the Commission considers 12 cpm is still reflective of the most reliable and robust estimate of the conservative upper bound of the TSLRIC+ of the supply of the MTAS.

network may raise concerns under subsections 45(2)(a)(i) and (ii) and (b)(i) and (ii) and subsection 47(3) of the Act. Telstra does not comment on Hutchison's purpose. However, Telstra submits that the effect of this condition on competition may be significant given the Commission's previously articulated view (which Telstra does not necessarily accept) that the relevant markets for the MTAS are narrowly defined as the markets for the wholesale MTAS supplied on each individual mobile network operator's network.[12]

Commission's view

Pricing outcomes arising from the transit traffic conditions

One of the effects of the restriction on transit traffic is to prevent calls that originate on a fixed-line network from switching in-transit to a third party's mobile network before terminating on Hutchison's mobile network. This removes the potential for fixed-line operators to use transit arrangements to route calls via a MNO in order to access the lower MTM MTAS charge rather than the higher MTAS charge that would otherwise apply. That is, the transit arrangements proposed in the Undertakings will prevent access seekers routing calls from fixed and international networks through a mobile network to benefit from lower MTAS prices of 12 cpm that apply to MTM calls.

The transit traffic conditions that Hutchison seeks to impose on access seekers has identical pricing outcomes if the reciprocal pricing conditions are not met, that is, different and higher prices will apply for the MTAS:

- the pricing outcomes for the PMTS Single Rate Undertakings of 15 to 18 cpm that are likely to emerge will lead to prices for the supply of the MTAS above the efficient costs of providing the service but which are not dissimilar to pricing outcomes already in existence either by arbitrated or commercially negotiated processes
- the pricing outcomes under the PMTS Dual Rate Undertakings of 21cpm are well above the efficient (and direct) costs of providing the service.

Relevance of sections 45 and 47

In respect of the concerns raised by Telstra, the Commission is of the view that, on the basis of the information before it, it cannot be satisfied that a breach of sections 45 or 47 of the Act would (or is even likely to) occur.

In relation to the Commission's draft decision, Telstra has reiterated its concerns that the Undertakings may be in breach of the Act, but has not provided any further material to support its view. However, the Commission does not consider that Hutchison would meet the threshold of purpose or that there is any evidence to suggest a substantial lessening of competition in the market.

Hutchison's right to cease charging 12 cpm

Telstra submits that the price condition contained in clause 2.4 of Attachment A of the Hutchison PMTS Single Rate Undertakings is unreasonable because Hutchison:

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[12] Telstra, *Submission in response to the ACCC's Discussion Paper: Hutchison's Undertaking in relation to the Domestic Digital Mobile Terminating Access Service, (Telstra Submission on ACCC Discussion Paper)*, December 2005, p. 10.

- should not have the right to cease supplying 12 at cpm solely by reference to its reasonable belief; and
- should not have the right to cease supplying at 12 cpm simply because it has a belief that the access seeker is 'unlikely to comply' with the relevant conditions.[13]

Telstra also has concerns with the condition that imposes an obligation on access seekers to provide Hutchison 'on request' with all reasonable assistance, including relevant documents and information, to enable Hutchison to determine whether the access seeker is complying with the conditions attached to the 12 cpm pricing.[14]

In this regard, Telstra submits that an unlimited discretion on the part of Hutchison to trigger this obligation, compliance with which is likely to be onerous and require the divulging of confidential information, is also unreasonable.[15]

In its draft decision, the Commission noted that the terms and conditions of the Undertakings are set out in the Undertakings, Attachment A and, where appropriate, Attachment B. Clause 2.4(b) of Attachment A states that, in the event of a dispute, the dispute resolution mechanisms contained in the existing agreement or Schedule 6 of Attachment B are to be used. For the reasons set out in Chapter 5 of this decision, the non-price terms and conditions of existing agreements are overridden by Attachment B. Therefore, disputes are to be resolved in the manner set out in Attachment B. Again, for the reasons outlined in Chapter 6, an alteration of the rights of the parties in this way is not reasonable. Therefore, the Commission is not satisfied that the net effect of clause 2.4 is reasonable.

In Telstra's submission on the Draft Decision, Telstra submitted that the Commission's preliminary view on the reasonableness of the good faith and dispute resolution mechanisms was potentially inconsistent with views previously expressed by the Commission.[16] In the circumstances, the Commission has found that the operation of clause 2 is unreasonable, but on different grounds. If the Commission was wrong on these grounds, the Commission would have found that clause 2.4(a) should have been limited to circumstances where there had been a failure to comply. Alternatively, if the *likelihood* of non-compliance remained, clause 2.4(a) should have included indicia to determine how likely non-compliance would be, and the notice to be provided to the access seeker to remedy the situation.

3.3. Differential Pricing Outcomes for the Undertakings

A clear consequence of the reciprocal pricing arrangements and transit traffic conditions implicit in the PMTS Single Rate Undertakings and explicit in the PMTS Dual Rate Undertakings, is that different price outcomes will emerge (differential pricing).

It is important to draw the distinction between the different price outcomes likely to emerge across the Undertakings for the supply of the same service.

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13 ibid., p. 11.

14 ibid., and Clause 2.5 of Attachment A of PMTS Single Rate Undertakings.

15 Telstra, *Telstra Submission on ACCC Discussion Paper*, p. 11.

16 Telstra, *Submission in response to the ACCC's Draft Decision: Hutchison's Undertaking in relation to the Domestic Digital Mobile Terminating Access Service, (Submission in response to Draft Decision)*, May 2006, p. 5.

The key differentiator between the PMTS Single Rate Undertakings and the PMTS Dual Rate Undertakings is that no alternative fall back MTAS price is specified in the PMTS Single Rate Undertakings if the conditions of reciprocity and the requirements for transit traffic are not met.

This gives rise to differential prices for the supply of the same service (MTM MTAS) across each of the PMTS Undertakings. However, the price outcomes likely without the Undertakings would be similar.

The Non-PMTS Undertakings provide for a different rate for the supply of the MTAS of 18 cpm compared with 12 cpm for the PMTS Undertakings (if the price conditions are met).

The key different price outcomes for the supply of the MTAS with and without the Undertakings is summarised in the table below:

Undertakings	**Call type**	**Reciprocal Pricing and Transit Traffic Conditions met**	**Price Outcomes Undertakings Rate (With Undertakings) (cpm)**	**Price Outcomes Arbitrated or Commercially negotiated rate (Without Undertakings) (cpm)**
PMTS Single Rate	MTM	Yes	12	15 to 18
		No	15 to 18	
PMTS Dual Rate	MTM	Yes	12	15 to 18
		No	21	
Non-PMTS	FTM and International to Mobile	N/A – no conditions set	18	15 to 18

It is clear from the table above that:

1. Different MTAS prices will emerge across all the Undertakings and in some cases these different prices will be higher than 12 cpm.
2. A higher price of 21 cpm will emerge with the PMTS Dual Rate Undertakings for the MTAS if the reciprocal pricing and transit traffic conditions are not met compared with the 15 to 18 cpm that is likely to emerge in arbitrated or commercially negotiated outcomes.
3. A higher price of 18 cpm will emerge with the Non-PMTS Undertakings for the MTAS if the reciprocal pricing and transit traffic conditions are not met compared with the 15 to 18 cpm that is likely to emerge in arbitrated or commercially negotiated outcomes.

Hutchison's view

Hutchison's view of the objective of the different prices is outlined below:

> The purpose of the PMTS Dual Rate Undertaking is twofold: it allows access seekers to benefit from a 12 cpm reciprocal rate, a rational price for an efficient mobile operator,

> while providing certainty of pricing for those access seekers that do not choose the 12 cpm reciprocal offer. The key concept in this alternative pricing approach is choice for the access seeker. The PMTS Dual Rate Undertaking would, if accepted, govern Hutchison's supply of the MTAS to all access seekers; those who choose to comply with the terms and conditions associated with the Rate 2 Usage Charge of 12 cpm and those who do not. Hutchison has lodged the PMTS Single Rate Undertaking as an alternative to the PMTS Dual Rate Undertaking in the event that the Commission is minded not to accept the latter due to the optional rate of 21 cpm, such rate being above the target rate determined by the Commission in the MTAS pricing principle.[17]

Submitters' views

PowerTel stated that having a differential rate for termination on a mobile network based on where the call originated:

- 'means by definition that the cost of termination is not based on the TSLRIC of providing that termination and as a result that this is not in the LTIE;
- will exacerbate further the existing gap that already exists between the price of a MTM call compared with the price of a FTM call (which are often more expensive);
- will cause more people to make MTM calls instead of FTM calls when it may be more efficient for them to make a FTM call; and
- will result in greater investment in mobile networks at the expense of fixed networks than would have otherwise been the case.'[18]

Telstra submits that the alternative pricing arrangement is unreasonable as they:

- are not representative of Hutchison's investment in MTAS facilities;
- are not representative of Hutchison's direct costs of providing the service;
- do not provide for the economically efficient operation of a carriage service; and
- do not encourage the economically efficient use of and investment in infrastructure.[19]

Vodafone considers differential pricing between the PMTS and Non-PMTS Undertakings but does not specifically address the differential pricing embodied in the PMTS Single Rate Undertakings.

Commission's view

The Commission has outlined in its *Access Pricing Principles – Telecommunications – a guide* 1997 (*Access Pricing Principles Guidelines*) access prices should not discriminate in a way which reduces efficient competition. In the guide, the Commission acknowledges that commercially-negotiated outcomes may differ for a

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17 Hutchison, *Submission in response to the Australian Competition and Consumer Commission's discussion paper Access Undertakings domestic digital mobile terminating access service: Hutchison Telecommunications (Australia) Limited and Hutchison 3G Australia Pty Limited, (Hutchison Submission on ACCC Discussion Paper)*, December 2005, p. 4.

18 PowerTel, *PowerTel submission to the Australian Competition and Consumer Commission re Hutchison's Undertakings in relation to the Domestic Digital Mobile Terminating Access Service, (PowerTel Submission on ACCC Discussion Paper)*, November 2005, pp. 2-3.

19 Telstra, *Telstra Submission on ACCC Discussion Paper*, p. 7.

range of reasons, but that differential pricing may reduce competition and discourage investment.[20]

Having stated that the Commission's preference is for prices that do not discriminate, provide for a single rate for the MTAS, which is reflective of the efficient costs of supply.

3.3.1. PMTS Single Rate Undertakings

Under the PMTS Single Rate Undertakings different rates or price outcomes for the MTAS will emerge of either 12 cpm or 15 to 18 cpm. The pricing outcomes in the PMTS Single Rate Undertakings have implicit rather than explicit differential prices as no alternative rate is stated if the 12 cpm does not apply.

As stated, the proposed rate of 12 cpm is reflective of the Commission's indicative prices for the MTAS for the period 1 January 2007 to 30 June 2007, and is a rate which would be, therefore, *prima facie* acceptable to the Commission for the period for which the PMTS Dual Rate Undertakings apply. It is noted, however, that Hutchison is seeking to apply the 12 cpm price for a period to 31 December 2007, which is beyond the time period in which the Commission's indicative prices currently apply. Without attempting to pre-empt the outcome of any future regulatory processes concerning the identification of the cost of providing the MTAS, the Commission anticipates that it is likely that the price of the MTAS (based on the previous empirical work contained in the *MTAS Final Report*) will be lower not higher than 12 cpm.

The PMTS Single Rate Undertakings may yield an outcome where the pricing for the MTAS is above efficient cost levels, and not consistent with the principles for pricing the MTAS set out in the *MTAS Final Report*.

Having identified that different prices will emerge under the PMTS Single Rate Undertakings, the question for the Commission is what is the impact of these different prices on access seekers.

The implicit differential pricing embodied in the PMTS Single Rate Undertakings may seem contrary to the principle of setting a price for the MTAS using a measure reflective of its efficient costs of supply.

In the case of differential pricing outcomes under the PMTS Single Rate Undertakings, a fall in price for the MTAS for some MTM calls to 12 cpm will produce favourable pricing outcomes for those access seekers that meet Hutchison's (12 cpm rate) conditions; and other access seekers will be no worse off than they would have been if the PMTS Single Rate Undertakings were rejected. Overall the different prices implicit in the reciprocity arrangements and transit traffic conditions will not make any access seeker worse off and, some access seekers may be better off. Further, the outcomes that may emerge in circumstances where some access seekers may be better off, will produce prices more reflective of the efficient costs of the supply of the MTAS.

3.3.2. PMTS Dual Rate Undertakings

The key difference between the PMTS Single and Dual Rate Undertakings is that the PMTS Dual Rate Undertakings provide for an explicit fall-back rate of 21 cpm in the

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[20] ACCC, *Access Pricing Principles Guidelines*, pp. 14-15.

absence of the 12 cpm rate applying. As a result, different prices may prevail for the MTAS and at the fall back rate of 21 cpm which is well above the Commission's view of the upper bound of the TSLRIC+ of the supply of the MTAS (of 12 cpm).

On this basis, the impact of differential prices likely to emerge under the PMTS Dual Rate Undertakings is that some access seekers will face pricing for the MTAS well above the TSLRIC+ or efficient costs of supply.

The Commission considers that some access seekers may also face pricing outcomes much higher than they are likely to obtain from either commercially-negotiated outcomes or arbitrated processes in the absence of the PMTS Dual Rate Undertakings.

3.3.3. Non-PMTS Undertakings

The Non-PMTS Undertakings propose a single rate for the MTAS of 18 cpm, which is also different from the rates proposed in the PMTS Dual Rate Undertakings (12 cpm or 21 cpm) or the PMTS Single Rate Undertakings (12 cpm or a commercially-negotiated or arbitrated rate).

The Commission considers that if it accepted the Non-PMTS Undertakings access seekers are likely to experience pricing outcomes that are higher than they could obtain from either commercially-negotiated outcomes or arbitrated processes in the absence of the Undertakings.

3.3.4. Undertakings as a whole

Differential pricing outcomes for the supply of the same service emerge across the Undertakings as a whole.

If the Undertakings are considered in the combinations as proposed by Hutchison, the price of the MTAS will vary according to the willingness or ability of the access seeker to meet certain conditions or be referable to the originating network of the call. Further the Commission understands that if the price conditions Hutchison is proposing to impose on access seekers were not in place, there would be insignificant changes to the cost of the supply of the MTAS for Hutchison. As a result the Commission's primary concern in relation to the different pricing outcomes likely to emerge if the Undertakings were to be accepted are that the prices likely to emerge in some cases would not reflect the pricing principles outlined in the *MTAS Final Report.* And consequently prices would prevail which are above the efficient cost or TSLRIC+ of the supply of the MTAS.

In relation to Hutchison's preferred combination of Undertakings, the combined PMTS Dual Rate Undertakings with the Non-PMTS Undertakings will result in prices of 12cpm for MTM calls that meet the reciprocity and transit traffic conditions set down by Hutchison, 21cpm for those MTM calls that do not meet the conditions and 18 cpm for FTM calls and calls originating on international networks.

In relation to combining the PMTS Single Rate Undertakings with the Non-PMTS Undertakings, FTM calls and calls originating on international networks would be charged a price of 18 cpm; 12 cpm price would apply for MTM calls for those access seekers that meet the reciprocal pricing and transit traffic conditions; and a higher unspecified price likely around 15 to 18 cpm would apply for all other MTM calls.

The outcome of the Undertakings in either of the combinations proposed by Hutchison would result in the supply of the same service (MTAS) being priced between 12 cpm to 21 cpm.

As already stated, the Commission understands that the cost of supply of the MTAS is not a function of the originating network of a call or the other price conditions Hutchison is seeking to impose.

4. Findings on the reasonableness of the price terms and conditions

4.1. PMTS Single Rate Undertakings

This section considers the reasonableness of the price terms and conditions of the PMTS Single Rate Undertakings.

The Commission considers that it cannot accept an undertaking unless it is satisfied that the terms and conditions are 'reasonable' based on the criteria set out in section 152AH(1) of the Act[21] and that where more than one undertaking has been submitted simultaneously, each of those undertakings must individually be considered 'reasonable' against this set of criteria.

In applying the 'future with and without' test (as outlined in Appendix 1), the Commission has compared the following two situations:

1. the pricing options available under the PMTS Single Rate Undertakings; and
2. the pricing outcomes the Commission believes are likely otherwise to occur – having regard to the procedures and protections for access seekers that arise under Part XIC of the Act.

The Commission has only applied the 'future with or without' where it believes it facilitates the Commission's analysis as an analytical aid. Where the Commission has applied the test, this has been stated. It should also be noted that the Commission has not applied the test in assessing the overall reasonableness of the Undertakings.

Pricing options set out in the Undertakings

The pricing structure proposed in the PMTS Single Rate Undertakings is intended to encourage competition through a single reciprocal rate of 12 cpm for the MTAS for calls originating on mobile networks that meet certain conditions regarding reciprocal pricing and transit traffic.

Pricing outcomes in the absence of the Undertakings

In the event that the Commission decided not to accept the PMTS Single Rate Undertakings, a number of alternative pricing outcomes might arise in the range of 15 to 18 cpm through arbitral processes or commercial negotiation.

The Commission's assessment of the price terms and conditions contained in the Undertakings against the statutory criteria set out in section 152AH(1) of the Act (as outlined in Appendix 1) is considered in turn below.

4.1.1. The LTIE

In considering the LTIE, the Commission has applied the 'future with and without' test.

[21] It is also noted that the Commission is not limited by the matters to which regard may be had, as set out in *Trade Practices Act 1974*, section 152AH(2).

Hutchison's view

Hutchison submits that the 12 cpm price of supplying the MTAS under the PMTS Single Rate Undertakings promotes the LTIE as it reflects 'a rational price for an efficient mobile operator' and is consistent with the Commission's indicative MTAS pricing. Hutchison submits that '12 cpm represents an appropriate price for the MTAS' and considers the Commission's adjustment path to be unnecessary given the substantial period of time that has lapsed since the adjustment path was first proposed.[22]

Hutchison argues that the LTIE is promoted through reciprocal pricing under the PMTS Single Rate Undertakings, in that 12 cpm pricing for supplying the MTAS 'will foster competition' amongst MNOs, address pass-through concerns in FTM markets, and increase pressures for economic efficiencies in integrated MNOs.[23] Specifically, Hutchison submits that reciprocal pricing under the PMTS Single Rate Undertakings promotes the LTIE as it:

- is based on a TSLRIC approach to pricing for the MTAS that reflects economically efficient costs for the provision of the MTAS rather than actual costs incurred by existing mobile operators;
- enhances consumer welfare by providing transparency in mobile tariffs and reduces the capacity of MNOs to maintain artificially high MTAS supply prices;
- reduces the capacity for asymmetrical MTAS supply pricing to maintain productive and allocative economic inefficiencies, particularly subsidisation of inefficient MNOs by efficient MNOs; and
- provides MTAS supply pricing certainty to access seekers and thereby promotes any-to-any connectivity.[24]

Hutchison submits that while reciprocity conditions promote the LTIE, the PMTS Single Rate Undertakings 'would not be as beneficial to the LTIE' as the PMTS Dual Rate Undertakings coupled with the Non-PMTS Undertakings. Hutchison submits that the PMTS Single Rate Undertakings 'will not be nearly as effective' as the PMTS Dual Rate Undertakings coupled with the Non-PMTS Undertakings as the PMTS Single Rate Undertakings do not incorporate FTM terminating calls. Hutchison argues that an integrated approach to MTAS supply pricing in both FTM and MTM terminating calls is necessary to maximise the LTIE. Hutchison submits that:

> Lower fixed-to-mobile call prices are unlikely to be achieved through reductions in MTAS charges alone given the uncompetitive state of the fixed-to-mobile market. Rather, such reductions create a windfall for providers of fixed-line services.[25]

In addition, Hutchison submits that the 12 cpm price of supplying the MTAS under the PMTS Single Rate Undertakings promote the economically efficient use and investment in infrastructure.[26]

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22 Hutchison, *Hutchison Undertakings Submission*, pp. 7-8.

23 ibid., p. 17.

24 Hutchison, *Hutchison Submission on ACCC Discussion* Paper, p. 3.

25 Hutchison, *Hutchison Undertakings Submission*, p. 4.

26 ibid., p. 14.

In relation to dynamic efficiency, Hutchison submits that the PMTS Single Rate Undertakings promote the economically efficient use of and investment in infrastructure by promoting the expansion of 3G networks (allowing Hutchison to supply termination services at a lower cost than GSM technology) and:

- increasing the incentive for carriers to establish their own 3G networks, as carriers will no longer be able to protect the profitability of their GSM networks; and
- increasing the incentive for carriers, once they have established 3G networks, to migrate their customers onto that new network.[27]

Hutchison submits that allocative efficiency would be promoted by acceptance of the PMTS Single Rate Undertakings as the Undertakings ensure a closer association of the price of the MTAS with the underlying cost of providing the MTAS.[28]

Hutchison also submits that as the price of 12 cpm offered in the PMTS Single Rate Undertaking is reflective of the efficient, forward looking costs of providing that service, it is consistent with productive efficiency.[29]

In relation to these views on efficiency, Hutchison states that a price of 12 cpm is unlikely to achieve effective competition in the FTM market without an effective pass-through mechanism to ensure any wholesale price reductions for the MTAS are passed-through to FTM retail customers. Instead, Hutchison argues that a 12 cpm price reduction will provide fixed-network operators with a financial 'windfall'.[30]

Hutchison cites submissions from consumer groups, industry participants, and international comparative data to conclude that 'the impact of a reciprocal price of 12 cpm upon mobile network operators would not be so adverse as to outweigh the benefits that such a price would have for the LTIE'. To further validate its argument, Hutchison refers to the *Mobile Service Review 2004*, where the Commission estimated that the underlying cost of supplying the MTAS lies between 5 to 12 cpm.[31]

Hutchison justifies its proposal for reciprocal pricing in its PMTS Undertakings on the basis that it is inherent to the TSLRIC approach in determining an 'efficient operator' industry-wide network access charge. Hutchison believes that a reciprocal pricing approach is in line with the Commission's views on efficient forward looking costs as the basis for access charges for the MTAS, and avoids the subsidies that flow from efficient network operators to inefficient ones. Further, Hutchison believes that reciprocal pricing positively impacts on consumer welfare. In support of its views, Hutchison cites a paper by Gans and King[32] which states that consumers' inability to determine the network on which their calls terminate is instrumental in maintaining

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27 ibid., p. 18.

28 ibid., p. 19.

29 ibid.

30 ibid., p. 4. The Commission also notes that in the Mobile Services Review, Hutchison submitted that the downstream markets affected by the MTAS were the mobile services market (including MTM terminating services) and the FTM market. Hutchison submitted that lower access prices were unlikely to be passed through to retail consumers since there was insufficient competition in the FTM market.

31 ibid., pp. 7-8.

32 ibid., p. 10.

high access charges for the MTAS. Finally, Hutchison notes the gradual move by regulators, in particular in European jurisdictions, to a reciprocal pricing structure.[33]

Overall, Hutchison submits that the LTIE is best served by the Commission accepting the PMTS Dual Rate Undertakings coupled with the Non-PMTS Undertakings. Hutchison also submits that the LTIE would be promoted by the Commission accepting the PMTS Single Rate Undertakings coupled with the Non-PMTS Undertakings. This approach, however, would not, in Hutchison's opinion, be as beneficial to the LTIE as the former approach.[34]

Finally, Hutchison submits that each individual Undertaking promotes the LTIE and is consistent with the SAOs applicable to the supply of the MTAS. Acceptance of one or more of the Undertakings submitted by each of HTAL and H3GA would therefore be in the LTIE.[35]

Draft Decision

In relation to the draft decision, Hutchison concurs with the Commission's assessment of the price terms and conditions in the PMTS Single Rate Undertaking.[36] Further, Hutchison submits that the Commission's view on the reasonableness of the 12cpm reciprocal rate proposed in the Single Rate Undertaking applies equally to the PMTS Dual Rate Undertaking.[37]

Submitters' views

PowerTel submits that the PMTS Single Rate Undertakings will not promote the LTIE if accepted in combination with the Non-PMTS Undertakings. While recognising that the proposed rate of 12 cpm for MTM calls is consistent with the range specified by the Commission in the *MTAS Final Report*, PowerTel submits that the proposed 12 cpm price exceeds existing costs of providing the MTAS. PowerTel further submits that the proposed differential MTAS price rates between MTM and FTM services will not promote the LTIE as it:

- is not based on the TSLRIC and thereby does not reflect the true costs of providing the MTAS;
- exacerbates existing pricing disparity between MTM and FTM calls;
- encourages MTM service use when FTM may be more efficient; and
- promotes potentially inefficient investment in mobile networks at the expense of fixed-line-networks.

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33 ibid.

34 ibid., p. 5.

35 Hutchison, *Hutchison Submission on ACCC Discussion Paper*, p. 9.

36 Hutchison, *Submission in response to the Draft Decision of the Australian Competition and Consumer Commission: Access Undertakings domestic digital mobile terminating access service Hutchison Telecommunications (Australia) Limited and Hutchison 3G Australia Pty Limited, (Submission in response to Draft Decision)*, May 2006, pp. 7-9.

37 ibid., pp. 7-10.

As a result, PowerTel considers that all six of the Undertakings should be rejected because the charges specified in each of the Undertakings are not reasonable on the basis that they are not in the LTIE.[38]

Telstra submits that an immediate decrease in the price of supplying the MTAS to 12 cpm is reasonable. However, Telstra submits that the terms and conditions of the PMTS Single Rate Undertakings are unreasonable as they allow Hutchison to cease charging 12 cpm solely by reference to its own belief that the access seeker is not complying, or unlikely to comply, with the reciprocity and transit conditions of the undertaking. In addition, Telstra submits that access seeker obligations provide unlimited discretion on the part of Hutchison to obtain confidential commercial information from access seekers. [39]

Vodafone submits that the PMTS Single Rate Undertakings are not in the LTIE as they neither promote competition nor the economically efficient use of and investment in infrastructure.[40]

Specifically, Vodafone submits that MTAS prices proposed under the PMTS Single Rate Undertakings is based on the prices 'published' by the Commission in the *MTAS Final Report*, which Vodafone submits are derived from methodologically flawed cost modelling and analysis. Vodafone submits that the mobiles market is currently 'effectively competitive' and that any-to-any connectivity 'is unlikely to be further promoted through MTAS pricing proposed by Hutchison'.[41]

Vodafone argues that Hutchison's Undertakings and supporting material is in contrast to Vodafone's detailed economic modelling which, according to Vodafone, demonstrates that a MTAS target rate of 16.15 cpm would promote the LTIE. Vodafone considers that Hutchison's proposed rates would not achieve the objective of promoting competition or the objective of encouraging the economically efficient use of, and the economically efficient investment in, infrastructure. This is because those rates are based on the Commission's target rates, which Vodafone submits are indicative only and not based on a methodology that is consistent with the LTIE. In particular, Vodafone argues that the estimates are not a reliable and robust estimate of the range of TSLRIC+ for MTAS. Thus, Vodafone claims, Hutchison's PMTS Single Rate Undertakings would require Vodafone to price MTAS at 12 cpm, inconsistent with the LTIE.[42]

Vodafone further submits that the use of a 'glide path' to an identified target price is necessary to manage the change in its prices needed to move from an allocation of fixed and common costs on a Ramsey-basis to an allocation based on the equi-proportionate mark-up (EPMU) required under TSLRIC. In this way, Vodafone submits that the use of a 'glide path' is in the LTIE and is consistent with the statutory criteria.[43]

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38 PowerTel, *PowerTel Submission on ACCC Discussion Paper*, p. 3.

39 Telstra, *Telstra Submission on ACCC Discussion Paper*, pp. 4-5.

40 Vodafone, *Submission to the Australian Competition and Consumer Commission: Response to Hutchison's Undertaking in relation to the Domestic Digital mobile Terminating Access Service, (Vodafone Submission on ACCC Discussion Paper)*, December 2005, p. 5.

41 ibid., pp. 6-7.

42 ibid., p. 5.

43 ibid., p. 4.

Vodafone also notes that Hutchison does not distinguish between the costs of supplying the MTAS on a 3G network from those of supplying MTAS on a 2G network. However, it argues, the Commission's target termination rate of 12 cpm commencing 1 July 2007 is based on benchmarked overseas termination charges for 2G only. Vodafone states that is not aware of any publicly available TSLRIC+ modelling for the cost of termination on a 3G network. Therefore, it claims it cannot understand how Hutchison can justify the price of 12 cpm for termination on Hutchison's 3G network.[44]

Vodafone disagrees with Hutchison's view as to the state of competition in the mobiles market. In particular, Vodafone considers that that market is effectively competitive.[45]

Vodafone considers that the objective of any-to-any connectivity is unlikely to be further promoted by the PMTS Single Rate Undertakings, but did not elaborate on the reasons for this view.[46]

In relation to the objective of encouraging efficient investment in infrastructure, Vodafone notes the Commission's view that in the absence of forward looking efficient prices, a misallocation of resources will occur leading to an under or over investment in the MTAS depending on the mobile termination rate.[47]

Commission's view

The Commission has published a guideline explaining what it considers is meant by the phrase LTIE, an outline of which is summarised Appendix 1.

Competition in relevant markets

Individual markets for MTAS on each MNO's network

The Commission concluded in the *MTAS Final Report* that there was a separate single market for the MTAS on each MNO's network. The Commission also reached the view that MNOs are not constrained in their pricing decisions for the MTAS and MNOs also have the ability and incentive to raise the price of the MTAS above its underlying cost of production due to of the presence of weak substitutes for the service.[48] The MTAS is a wholesale service which is not sold as part of a bundle or cluster of retail mobile services, such that any competition in the retail mobile market would not act as a constraint on the price MNOs would be able to charge for the MTAS.[49]

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44 ibid., pp. 4-5.

45 ibid., p. 6.

46 ibid.

47 ibid., p. 7.

48 In the *MTAS Final Report*, the Commission found that the termination services of individual MNOs are not substitutable for each other, irrespective of the size of individual operators or the network technology they employ. Further, the Commission concluded that alternative forms of communication, such as fixed-line network services, SMS messages, email and calls using voice over Internet protocol technology (VoIP), are not sufficiently substitutable means of contacting a mobile subscriber to constrain providers of a MTAS. ACCC, *MTAS Final Report*, pp. 29-56.

49 ibid., pp. 42-55.

MNOs generate 'above-normal' profits if the price of supplying the MTAS is greater than its TSLRIC+.

Each mobile subscriber therefore brings with it a source of economic profits as it enables the MNO to charge above-cost prices for calls made to each subscriber. As a result of this, the Commission believes that MNOs may, depending on the level of competition they face when attracting subscribers to their network, seek to attract more subscribers to their network by subsidising the prices they offer potential mobile subscribers for retail mobile services. This suggests MNOs may have an incentive to transfer part of the economic profits from pricing the MTAS above cost to retail mobile subscribers in the form of subsidised prices for retail mobile services (e.g. handset subsidies, free access plans, etc.). The greater is the level of competition for retail mobile services, the greater will be the incentive to transfer economic profits earned from the MTAS to retail mobile subscribers. The Commission believes, therefore, that MNOs may determine a cross-subsidised structure of prices with higher-than-cost prices for the MTAS and below-cost prices for some retail mobile services.

The Commission is of the view the PMTS Single Rate Undertakings will have no impact on competition in the individual markets for MTM calls on each MNO's network.

Market within which FTM services are provided

In the *MTAS Final Report*, the Commission indicated that it expected that the greatest competitive benefit from regulation of the MTAS was likely to occur in the market within which FTM services are provided.

In general, the Commission believes that the ability to raise the price of the MTAS above its underlying cost of production (in the absence of regulation of this service), enables MNOs to make above normal economic profits when providing this service. While some integrated MNOs and mobile-only MNOs can benefit somewhat from a higher MTAS price, the consequence for fixed-only operators is higher input costs than should prevail.[50]

Higher MTAS prices increase the cost to providers of FTM calls above the underlying cost of the service and which in turn may result in higher prices for FTM calls.

Hutchison's proposed price of 12cpm in the PMTS Single Rate Undertakings is consistent with the Commission's view of the conservative upper bound of the TSLRIC+ or efficient cost of supplying the MTAS as identified in the MTAS final report.

However, Hutchison submits that a price of 12 cpm is unlikely to promote competition in the market in which FTM services are provided unless there is a mechanism to require wholesale price reductions are passed-through to FTM retail customers. Hutchison argues that a price reduction of MTAS to 12 cpm will likely provide fixed-network operators with a financial 'windfall'.

However, the Commission is of the view that a closer association of price and cost will allow equally or more efficient FTM providers to place more competitive pressure on integrated providers of FTM services to improve their own efficiency and

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[50] By reducing the ability of incumbent mobile network owners to frustrate new entrants into the market. ACCC, *MTAS Final Report*, Chapters 5 and 6.

reduce the FTM prices charged to their own subscribers. Therefore, this approach to pricing is likely to provide a stimulus for increased competition between existing FTM providers, and possibly also from new entrants. The Commission notes that this increased competition can manifest itself in many ways, including reduced prices and improvements in the quality and range of product offerings made available by providers of fixed-line services.

The Commission believes that the competitive issues prevalent in the market in which FTM services are provided may be improved by a price of 12 cpm, as is proposed in the PMTS Single Rate Undertakings for MTM calls.

However, the Commission considers that such competitive benefits could be greater the more immediate and complete the price of the MTAS was reduced toward its underlying efficient cost (TSLRIC+) of providing the service and further if the 12 cpm rate applied to all calls regardless of the originating network and pricing conditions such as reciprocity and transit traffic restrictions that Hutchison is seeking to impose on access seekers.

The Commission notes, however, that the PMTS Single Rate Undertakings do not specify a price or prices for the MTAS in respect calls other than MTM calls which meet the conditions for supply as proposed by Hutchison (i.e. the reciprocal pricing and transit traffic conditions).

As already outlined, the application of the 12 cpm price to MTM calls will give rise to differential pricing of the MTAS according to the originating network of the call and the nature of reciprocal pricing arrangements between Hutchison and access seekers, which is likely to be different and higher than the 12 cpm price offered for these 'complying' MTM calls.

Despite this differential impact, the Commission recognises that the lower prices for some ('complying') MTM calls will have positive competitive impacts in lowering wholesale input prices for some access seekers, which will likely flow through (albeit indirectly) as lower prices to the market in which FTM services are provided. This is likely to come about by, at first lower pricing of retail mobile services, which will then encourage lower pricing of retail FTM services to discourage the substitution of fixed-to-mobile services by consumers. In this way, lower MTM wholesale prices may indirectly and positively influence the competition in the market in which FTM services are provided.

Retail mobile services

In relation to the retail mobile services market, the Commission noted in the *MTAS Final Report* that while the retail mobile services market is exhibiting more encouraging market outcomes than the markets for fixed-line telecommunications services, it is unlikely to be effectively competitive. This was because:

- there continued to be a high level of concentration at the carrier network level (where the Commission estimated the combined market shares of Telstra, Optus and Vodafone was greater than 94 per cent at that time);
- barriers to effective entry into the market (associated with national coverage and sunk costs) remain high; and
- established MNOs (and in particular Telstra and Optus) are making profits well in excess of those the Commission would expect in competitive markets for these services.[51]

Despite recent developments with price capping schemes at the retail level which have on the whole reduced retail prices, the Commission continues to believe that structural features of the mobile industry, as evidenced by infrastructure sharing agreements for the deployment of 3G mobile networks and as detailed in the *MTAS Final Report* indicate the retail mobile services market still remains not effectively competitive.[52] Having said this, the market share of Hutchison's two mobile networks has increased since June 2004.[53] However, the market shares of both Telstra and Optus, as well as Vodafone, still ensure that the market is highly concentrated.

Within this context, the question is whether competition would be better promoted in the provision of retail mobile services by the acceptance or rejection of the PMTS Single Rate Undertakings.

In the Commission's view, high termination charges common to a small number of mobile carriers operating in the retail market can be a means by which the carriers can prevent downward pressure on retail prices.[54] In effect, high MTM termination charges are a manifestation of the lack of effective competition in the market for retail mobile services. In this context, a unilateral reduction in any one carrier's termination charge is unlikely to occur. If a reduction in termination charges is accompanied by a decrease in retail price, this is unlikely to be profit maximising behaviour for any MNO as any increase in market share will be offset by a net outflow of termination revenue with a possibility of the latter effect outweighing the former. In this context, multilateral action may be necessary to perturb the market away from this high-price equilibrium, and any movement towards the multilateral reduction in termination charges is likely to place downward pressure on retail prices, and therefore be an agent for the promotion of competition.

The Commission believes that the immediate reduction of the MTAS rate to 12 cpm, as proposed in the PMTS Single Rate Undertakings, is predicated on the basis that some (although not necessarily all) MNOs will agree to the reciprocity and transit traffic conditions. And that if this occurs the supply the MTAS at 12 cpm by Hutchison is likely to place downward pressure on retail mobile services prices and thereby promote competition in this market.

The Commission notes that even if it rejects the PMTS Single Rate Undertakings, it expects MTAS prices will over the proposed term of the Undertakings reflect the 12

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51 ibid., pp. 70-75.

52 ibid., pp. 75-79.

53 Hutchison estimates that its total service revenue market share has increased to around 7 percent of the market. *Hutchison Annual Report 2005*, released 30 March 2006, p. 9.

54 ACCC, *MTAS Final Report*, p. 199.

cpm price proposed by Hutchison. The Commission sees the main benefit of acceptance of the PMTS Single Rate Undertakings is that they may result in MTAS prices reaching this expected level in a shorter period of time than might otherwise occur if the PMTS Single Rate Undertakings were not accepted. The consequence of which is the faster manifestation of the competitive benefits of lower prices in the retail mobile services market.

Accordingly, the Commission believes that competition in the provision of retail mobile services is more likely to be promoted if the PMTS Single Rate Undertakings were accepted rather than if they were rejected.

Any-to-any connectivity

The Commission believes that any-to-any connectivity is unaffected by the acceptance or rejection of the PMTS Single Rate Undertakings.

Efficient use of, and investment in, infrastructure

Hutchison's PMTS Single Rate Undertakings are – to some extent – likely to promote efficient use of, and investment in, infrastructure by which telecommunications services are provided. The reason for this is that if the price of the MTAS for MTM calls decreased while the price of the MTAS for FTM calls were held constant, there would be both a positive effect and a negative impact on economic efficiency.

To the extent that the lower MTM input prices were passed through as lower MTM retail prices, efficiency would be improved directly in the retail MTM market. This is because the proposed 12 cpm MTAS price for PMTS calls is what the Commission considers is a conservative estimate of the TSLRIC+ of supplying the MTAS. To the extent that the lower MTM input prices were passed through in lower MTM retail prices, efficiency would be improved directly in the retail MTM market. This would be as a consequence of moving the price closer to the underlying cost of production, improving efficiency by the difference between the willingness to pay for the newly-created units and their cost of production.

On the other hand, there could be a reduction in efficiency by the diversion of calls away from relatively low-cost FTM service to the relatively high-cost MTM service; especially considering the large gap between the FTM prices and the underlying costs of production. In the absence of empirical information, the Commission is unable to be decisive about the relative magnitude of these two dichotomous effects, or of other possible efficiency implications.

The Commission also notes that in accepting the price reasonableness of the Single Rate PMTS Undertakings it has considered the incentives for, and the risks involved in, investing in new and existing infrastructure. In doing so the Commission notes that the Single Rate PMTS Undertakings apply equally to Hutchison's 2G and 3G networks and Hutchison submits that the proposed pricing is appropriate with reference to the fair and reasonable costs of providing the MTAS. As costs are a manifestation of risk, the Commission considers that the proposed price of 12 cpm also represents an appropriate price to cover such risks of investment.

Overall the Commission considers that the economically efficient operation of a carriage service or telecommunications facility would be more likely to be promoted if the Commission accepted the PMTS Single Rate Undertakings than would be the case if the Commission were to reject them.

At this juncture, in the absence of better information about the net impact on efficiency of the dichotomous effects of the price of MTAS for MTM calls falling but the price of the MTAS for FTM calls remaining constant, the Commission places greater weight on the direct positive impact on efficiency flowing from the reduction in the MTM charge.

Conclusion in relation to the LTIE

Relevant markets

If the promotion of competition in the relevant markets criterion was the only objective when setting MTAS prices, the Commission believes it would be appropriate to reduce the price of the MTAS to the TSLRIC+ of supply. Hutchison's proposed 12cpm price for the MTAS (if certain conditions are met) is consistent with the Commission's view on the conservative upper bound of the TSLRIC+ for the cost of supplying the MTAS. But the Commission notes that in some cases a higher rate for FTM calls and calls originating on international networks will be higher.

In summary, the Commission believes that if the PMTS Single Rate Undertakings were accepted it is likely that competition would:

- be unchanged in the individual markets for the MTAS on each MNO's network; and
- may be improved, but at worst would remain the same, in the national market for retail mobile services and the market within which FTM services are provided.

Any-to-any connectivity

The Commission considers that the acceptance or rejection of the PMTS Single Rate Undertakings will not impact the objective of any-to-any connectivity

Efficient use of, and investment in, infrastructure

The Commission considers that the acceptance of the PMTS Single Rate Undertakings will likely result in the positive benefits outweighing the negative benefits in relation to the more efficient use of and investment in infrastructure.

4.1.2. The legitimate business interests of the carrier or carriage service provider concerned and the carrier's or provider's investment in facilities used to supply the declared service concerned

In considering this criterion, the Commission has not applied the 'future with and without' test.

The reasonableness criteria in section 152AH of the Act require the Commission to take into account the legitimate business interests of Hutchison, and its investment in facilities used to supply the MTAS when assessing the Single Rate PMTS Undertakings.

Hutchison's view

Hutchison submits that the 12 cpm price of supplying the MTAS under the PMTS Single Rate Undertakings reflects its legitimate business interests and 'strikes an

appropriate balance between the legitimate interests of access seekers and the LTIE'. Hutchison submits that the 12 cpm price of supplying the MTAS under the PMTS Single Rate Undertakings represents 'a rational price for an efficient mobile operator'[55] and promotes competition amongst MNOs, addresses pass-through concerns in FTM markets, and increases pressure for economic efficiencies in integrated MNOs.[56]

Hutchison submits that the proposed rate of 12 cpm for MTM calls is consistent with the range specified by the Commission in the *MTAS Final Report* and is based on a TSLRIC approach to MTAS supply pricing that reflects economically efficient costs for the provision of the MTAS, rather than actual costs incurred by existing mobile operators.[57]

Hutchison further submits that in considering its legitimate business interests the Commission should take into account the:

- interplay between all of the price related terms and conditions in the Undertakings; and
- different markets in which those terms and conditions apply.[58]

Hutchison submits that its legitimate business interests are congruous with the statutory factors of promoting further competition and allowing for the economically efficient use of and investment in infrastructure.[59]

Submitters' views

PowerTel submits that the 12 cpm MTAS price proposed by Hutchison exceeds the costs of supplying the MTAS and that estimates of the TSLRIC for the MTAS overseas establish estimates in the range of 5 to 12 cpm.[60]

Telstra submits that the 12 cpm price of supplying the MTAS under the PMTS Single Rate Undertakings is reasonable. Telstra supports the view of Hutchison that the 12 cpm price should be applied immediately and that the adjustment path proposed by the Commission in the *MTAS Pricing Principles Determination* is unnecessary.[61] However, Telstra submits that 'the Undertakings provide for pricing well above that which Hutchison says is a rational price for an efficient mobile operator'.[62] In addition, Telstra submits that reciprocity arrangements stipulated under the PMTS Single Rate Undertakings 'may raise concerns' under subsections 45(2)(a)(i) and (ii) and (b)(i) and subsection 47(3) of the Act.[63]

Vodafone submits that 12 cpm price of supplying the MTAS under the PMTS Single Rate Undertakings is 'less than the forward looking efficient cost to Vodafone of

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55 Hutchison, *Hutchison Undertakings Submission*, p. 7.

56 ibid., p. 17.

57 ibid., p. 9.

58 ibid.

59 ibid., p. 14.

60 PowerTel, *PowerTel Submission on ACCC Discussion Paper*, p. 1.

61 Telstra, *Telstra Submission on ACCC Discussion Paper*, p. 4.

62 ibid., p. 6.

63 ibid., p. 10.

supplying mobile termination'. Vodafone cites an estimate of 16.15 cpm by PwC as the efficient price of suppling MTAS. Vodafone submits that the 12 cpm price of supplying the MTAS under the PMTS Single Rate Undertakings will mean that 'Vodafone would be unable to recover its efficient costs of providing the MTAS'.[64]

Commission's view

Appendix 1 outlines the approach the Commission takes when assessing this criterion.

Hutchison's PMTS Single Rate Undertakings propose a 12 cpm price for MTM calls which meet certain price conditions.

As previously discussed, the Commission considers that a rate of 12 cpm is an estimate of the conservative upper bound of the TSLRIC+ of supply of the MTAS.

The Commission notes that Hutchison's proposal is to move to a price of 12 cpm at a slightly faster pace than the path specified in the *MTAS Pricing Principles Determination* for those MTM calls that meet the conditions of supply as proposed by Hutchison.

Given that Hutchison has willingly and voluntarily submitted the Undertakings, the Commission considers that reaching the 12 cpm price before 1 January 2007 would not be inconsistent with Hutchison's legitimate business interests.

The Commission notes Vodafone's submission that 12 cpm is less than the forward looking efficient cost of supplying mobile termination.

The Commission reiterates that at present it considers that 12 cpm remains the most reliable and robust estimate of the conservative upper bound of the TSLRIC+ of the supply of the MTAS. In saying this, the Commission notes that its Final Decision about the Vodafone MTAS Undertaking found that Vodafone's estimate of the supply of the MTAS as proposed by Vodafone is likely to overstate the efficient costs of supply.[65]

4.1.3. The interests of persons who have the right to use the declared service

In considering the interests of persons who have the right to use the declared service, the Commission has applied the 'future with and without' test.

Hutchison's view

Hutchison submits that the 12 cpm price of supplying the MTAS under the PMTS Single Rate Undertakings promotes the interests of access seekers as it reflects economically efficient costs for the provision of the MTAS. Hutchison submits that the reciprocity conditions under the PMTS Single Rate Undertakings promote the interests of access seekers by providing transparency in mobile tariffs and pricing certainty. Hutchison submits that the 12 cpm price of supplying the MTAS under the PMTS Single Rate Undertakings 'is an appropriate price having regard to the fair and reasonable costs of providing the MTAS and that acceptance of the reciprocal offer would be the rational choice of any efficient mobile operator'. Hutchison cites

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64 Vodafone, *Vodafone Submission on ACCC Discussion Paper*, p. 7.

65 ACCC, *Assessment of Vodafone's mobile terminating access (MTAS) undertaking: Final Decision, (Vodafone Undertaking Final Decision)*, March 2006, pp. 27-70.

submissions from consumer groups, industry participants, international comparative data, and the Commission's *MTAS Final Report* as support for the 12 cpm price.[66]

Submitters' views

PowerTel submits that while the 12 cpm price of supplying the MTAS under the PMTS Single Rate Undertakings is within the price range specified by the Commission in the *MTAS Final Report*, the 12 cpm price 'is still too high'.[67] PowerTel acknowledges that reciprocal pricing specified under the PMTS Single Rate Undertakings 'positively impacts on consumer welfare', but argues that a single industry-wide price rate will increase demand from access seekers. However, PowerTel supports reciprocal pricing and believes there should be a single industry wide MTAS rate that reflects the upper bound of the TSLRIC of providing the MTAS.[68]

Telstra submits that an immediate decrease in the price of supplying the MTAS to 12 cpm is reasonable.[69] However, Telstra submits that the terms and conditions of the PMTS Single Rate Undertakings are unreasonable as they allow Hutchison to cease charging 12 cpm solely by reference to its own belief that the access seeker is not complying, or unlikely to comply, with the reciprocity and transit conditions of the Undertakings. Telstra further submits that access seeker obligations provide unlimited discretion on the part of Hutchison to obtain confidential commercial information from access seekers.[70]

Vodafone submits that the 12 cpm price of supplying the MTAS under the PMTS Single Rate Undertakings is unreasonable and not in the interests of access seekers. Vodafone submits that the 12 cpm price 'does not reflect forward looking efficient costs' and is thereby detrimental to economically efficient investment by access seekers.[71]

Commission's view

Appendix 1 outlines the approach the Commission takes when assessing this criterion.

Consideration of the interests of persons who have rights to use the MTAS includes consideration of the ability for access seekers to compete for the custom of end-users on the basis of their relative merits. Terms and conditions favouring one competitor, or class of competitors, over another may distort the competitive process and harm the interests of persons who have rights to use the MTAS.

The Commission believes a price for the MTAS tending downward to the TSLRIC+ of providing the service would be more likely to be in the interests of persons that have a right to use the declared service. This is because a closer association of the price of the MTAS with its underlying cost will allow equally and more efficient MNOs to compete on their merits in the markets for FTM and retail mobile services.

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66 Hutchison, *Hutchison Undertakings Submission*, p. 7.

67 PowerTel, *PowerTel Submission on ACCC Discussion Paper*, p. 1.

68 ibid., pp. 9-10.

69 Telstra, *Telstra Submission on ACCC Discussion Paper*, p. 6.

70 ibid., pp. 10-11.

71 Vodafone, *Vodafone Submission on ACCC Discussion Paper*, p. 7.

In saying this, the Commission notes Vodafone's submission that a price of 12 cpm is not in the interests of access seekers as it 'does not reflect forward looking efficient costs'. In this respect, the Commission contends that lower MTAS (input) prices would be preferable to higher input prices for access seekers. The Commission also restates as it has done that 12 cpm represents at present the most reliable and robust estimate of the conservative upper bound of the TSLRIC+ of supplying the MTAS.

However, the Commission notes that the PMTS Single Rate Undertakings only propose a price of 12 cpm for the MTAS for certain MTM calls, i.e. those calls which meet the reciprocal pricing and transit traffic conditions.

As noted previously, the Commission expects MTAS prices will, over the proposed term of the PMTS Single Rate Undertakings, reflect the lower prices contained in the Undertakings even if they are rejected. However, the Commission notes that acceptance of the Undertakings may result in MTAS prices reaching this expected level in a shorter period of time than might otherwise occur if the PMTS Single Rate Undertakings were rejected.

Consequently, the Commission is of the view that a price of 12 cpm (which is reflective of the upper bound of the TSLRIC+ of supplying the MTAS) and may apply to some MTM calls, is a preferable pricing outcome even if this price does not prevail across the board for all MTM calls. The Commission notes that acceptance of the Undertakings may result in the circumstances of different prices applying for the same service, but that the price for some access seekers may be lower at 12 cpm than if the Undertakings were rejected.

In the event that the Undertakings were accepted and the 12 cpm price did not prevail (because the conditions proposed by Hutchison were not met by the access seeker) these access seekers would be no worse off than if the PMTS Single Rate Undertakings were rejected. In this way, the PMTS Single Rate Undertakings may improve but would not change the interests of persons who already have a right to use the declared service, compared with the situation in which the PMTS Single Rate Undertakings would be rejected.

4.1.4. The direct costs of providing access to the declared service

In considering this criterion, the Commission has not applied the 'future with and without' test.

Hutchison's view

Hutchison submits that the 12 cpm price of supplying the MTAS under the PMTS Single Rate Undertakings reflects the economically efficient costs for the provision of the MTAS. Hutchison submits that, in setting the Undertakings pricing on a reciprocity-based condition, it has proposed a price that is consistent with the economically efficient costs of providing the Undertaking service. As noted earlier, Hutchison submits that the 12 cpm price of supplying the MTAS under the PMTS Single Rate Undertakings represents 'the rational choice of any efficient mobile operator' and cites submissions from consumer groups, industry participants, international comparative data, and the Commission's *MTAS Final Report* to justify the 12 cpm price.[72]

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[72] Hutchison, *Hutchison Undertakings Submission*, pp. 7-8.

Submitters' views

PowerTel submits that while the 12 cpm price of supplying the MTAS under the PMTS Single Rate Undertakings is within the price range specified by the Commission, the 12 cpm rate is still too high.[73] PowerTel acknowledges that reciprocal pricing specified under the PMTS Single Rate Undertakings positively impacts on consumer welfare.[74]

Telstra submits that an immediate decrease in the price of supplying the MTAS to 12 cpm is reasonable. However, Telstra submits the terms and conditions of the PMTS Single Rate Undertakings are unreasonable, as they allow Hutchison to cease charging 12 cpm solely by reference to its own belief that the access seeker is not complying, or is unlikely to comply, with the reciprocity and transit conditions of the Undertakings. Telstra further submits that the access seeker obligations provide unlimited discretion on the part of Hutchison to obtain confidential commercial information from access seekers.[75]

Vodafone submits that the 12 cpm price of supplying the MTAS under the PMTS Single Rate Undertakings is 'less than the forward looking efficient cost to Vodafone of supplying mobile termination'. Vodafone cites an estimate of 16.15 cpm by PwC as the efficient price of suppling MTAS. Vodafone submits that the reciprocal 12 cpm price of supplying the MTAS under the PMTS Single Rate Undertakings will mean that 'Vodafone would be unable to recover its efficient costs of providing the MTAS'.[76]

More generally, Vodafone submits that a reciprocal rate of 12 cpm does not reflect forward looking efficient costs.[77]

Commission's view

Appendix 1 outlines the approach the Commission takes when assessing this criterion.

The Commission notes that the 12 cpm price for the supply of the MTAS under the PMTS Single Rate Undertakings is in line with the upper bound estimate of the TSLRIC+ of supplying the MTAS and consistent with the 12 cpm indicative price included in the *MTAS Pricing Principles Determination* for the period from 1 January 2007.

The Commission also acknowledges Hutchison's submission that '12 cpm is an appropriate price having regard to the fair and reasonable costs of providing the MTAS'.

The Commission remains of the view that the 12 cpm price specified in the *MTAS Final Report* is the best available estimate of the upper-bound of the TSLRIC+ and hence a relevant direct cost of supplying the MTAS at this point in time.[78]

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73 PowerTel, *PowerTel Submission on ACCC Discussion Paper*, p. 1.

74 ibid., p. 9.

75 Telstra, *Telstra Submission on ACCC Discussion Paper*, pp. 10-11.

76 Vodafone, *Vodafone Submission on ACCC Discussion Paper*, p. 7.

77 ibid.

Therefore, if the direct costs of providing the service was the only criterion the Commission was required to consider, an immediate reduction in the price of the MTAS to its TSLRIC+ of supply would be appropriate.

Accordingly, even though the PMTS Single Rate Undertakings only applies to a subset of MTM calls (is those access seekers who agree or otherwise comply with the conditions in the Undertakings), the price of these calls is more closely aligned with the direct costs of supplying the MTAS. Hence, for these MTM calls, the Commission considers that the price of the MTAS under the PMTS Single Rate Undertakings, if accepted, is more likely to reflect the direct costs of supply.

4.1.5. The operational and technical requirements necessary for the safe and reliable operation of the carriage service/telecommunications network/facility

In considering this criterion, the Commission has not applied the 'future with and without' test.

Appendix 1 outlines the approach the Commission takes when assessing this criterion.

The Commission has received no submissions that suggest that there is any risk that the price-related terms and conditions of the Undertakings (if accepted) could lead to unsafe or unreliable operation of a carriage service, telecommunications network or facility.

4.1.6. The economically efficient operation of a carriage service/telecommunications network/facility

In considering this criterion, the Commission has applied the 'future with and without' test.

Appendix 1 outlines the approach the Commission takes when assessing this criterion.

Like the test described under the 'efficient use of, and investment in, infrastructure' LTIE criterion, this criterion also relates to the productive and allocative efficiency of the proposed Undertakings.

For the reasons discussed under the 'efficient use of, and investment in, infrastructure' LTIE criterion, the Commission considers that the economically efficient operation of a carriage service/telecommunications facility may have both a positive effect and a negative impact on economic efficiency.

The Commission concluded that in the absence of better information at this point in time about the net impact on efficiency of the dichotomous effects of the price of MTAS for MTM calls falling but the price of MTAS for FTM calls remaining constant, the economically efficient operation of a carriage service/telecommunications network/facility may likely be promoted if the Commission accepted the PMTS Single Rate Undertakings (in isolation) than would be the case if the Commission were to reject them.

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[78] While top-down models to estimate the forward-looking efficient costs of supplying the MTAS have been developed by Optus and Vodafone, the Commission notes that it had many significant concerns with these model in terms of their methodology and empirical inputs *inter alia*, such that they cannot be considered reliable estimates. See ACCC, *Optus' undertaking with respect to the supply of its Domestic GSM Terminating Access Service (DGTAS): Final Decision, (Optus Undertaking Final Decision)*, February 2006; and ACCC, *Vodafone Undertaking Final Decision*.

4.1.7. Other matters

The Commission did not have regard to any other matters in determining whether the terms and conditions are reasonable as permitted by section 152AH(2).

4.2. PMTS Dual Rate Undertakings

This section considers the reasonableness of the price terms and conditions of the PMTS Dual Rate Undertakings against the criteria set out in section 152AH(1) of the Act.[79]

In applying the 'future with and without' test[80] to the PMTS Dual Rate Undertakings (as outlined in Appendix 1), the Commission has compared the following two situations:

1. the pricing options available under the PMTS Dual Rate Undertakings; and
2. the pricing outcomes the Commission believes are likely to otherwise occur – having regard to the procedures and protections for access seekers that arise under Part XIC of the Act.

As with the PMTS Single Rate Undertakings this section outlines where the future with and without test applies in assessing the overall reasonableness of the Undertakings.

Pricing options set out in the Undertakings

Hutchison proposes a 12 cpm price for the supply of the MTAS under the PMTS Dual Rate Undertakings if certain conditions are met, including reciprocal pricing arrangements by access seekers and the exclusion of transit traffic.

If either of these conditions is not met then a higher price for the MTAS or a price of 21 cpm will apply.

Pricing outcomes in the absence of the Undertakings

In the absence of the PMTS Dual Rate Undertakings, a number of alternative pricing outcomes might arise in the range of 15 to 18 cpm through arbitral processes or commercial negotiation.

The Commission notes Hutchison's submission in relation to the PMTS Dual Rate Undertakings that no access seeker would choose to pay 21cpm for the MTAS and that it considers that the 21cpm rate will act as a commercial incentive for access seekers to meet the conditions for the supply of MTAS at the 12cpm rate. The Commission remains concerned that despite this intention, that a rate of 21 cpm may prevail in some circumstances, and it is on this basis that the following assessment of the price terms and conditions contained in the Undertakings against the statutory criteria set out in section 152AH(1) of the Act (as outlined in Appendix 1) is considered.

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79 It is also noted that the Commission is not limited by the matters to which regard may be had, as set out in *Trade Practices Act 1974*, section 152AH(2).

80 Refer to Appendix 1 for further detail about the future with and without test.

4.2.1. The LTIE

In considering the LTIE, the Commission has applied the 'future with and without' test.

Hutchison's view

Hutchison submits that the 12 cpm price of supplying the MTAS under the PMTS Dual Rate Undertakings promotes the LTIE as it reflects 'a rational price for an efficient mobile operator' and facilitates competition across mobiles services markets. The rationale for this submission has been summarised earlier.[81]

Hutchison submits that the PMTS Dual Rate Undertakings permit mobile access seekers to avail themselves of a mutually beneficial commercial relationship in accepting the 'forward-looking' efficient cost-based access charge of 12 cpm, while still offering access to the MTAS at a higher price of 21 cpm. Hutchison believes that this pricing structure offers access seekers the flexibility of choosing what is optimal for them, while offering those access seekers who do not opt for a reciprocal pricing structure the benefit of pricing certainty at 21 cpm.[82]

Hutchison submits that, while the reciprocity conditions under the PMTS Single Rate Undertakings promote the LTIE, it 'would not be as beneficial to the LTIE' as the PMTS Dual Rate Undertakings coupled with the Non-PMTS Undertakings. Hutchison submits that the PMTS Dual Rate Undertakings coupled with the Non-PMTS Undertakings promote the LTIE by increasing competition and economic efficiency.[83] Specifically, Hutchison submits that:

> A review of all of the price related terms and conditions *in context* reveals a broader consistency with the principles expressed by the Commission in its MTAS Final Decision and the LTIE…when considered together, the PMTS Dual Rate Undertaking and the Non-PMTS Undertaking provide a rate structure that addresses the different issues arising in relevant markets, promotes competition in those markets and ensures a closer association of the price of the MTAS with its underlying cost in such a way as to promote the LTIE.[84]

Hutchison submits that the 21 cpm price for the MTAS supply 'is the most recent commercially negotiated rate' and thus there 'is no basis for offering a lower rate to an access seeker who does not accept the 12 cpm rate on a reciprocal basis'.[85] Hutchison submits that while the 21 cpm price for the MTAS supply under the PMTS Dual Rate Undertakings is not 'in any way reflective of the underlying cost of providing the MTAS', it is appropriate for promoting the LTIE when coupled with the Non-PMTS Undertakings. Specifically, Hutchison submits that 'this optional rate' of 21 cpm price for the MTAS supply under the PMTS Dual Rate Undertakings 'is appropriate when coupled with the offer of the lower, reciprocal rate of 12 cpm'.[86]

In addition, Hutchison submits that while the PMTS Dual Rate Undertakings may 'benefit Hutchison commercially', any benefits accrued will be used to further

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81 Hutchison, *Hutchison Undertakings Submission*, p. 7.

82 ibid.

83 ibid., p. 5.

84 ibid., p. 6.

85 ibid., p. 7.

86 ibid., p. 6.

innovation and investment to promote the LTIE.[87] Specifically, Hutchison submits that:

> …any benefit accrued by Hutchison as a result of the access seekers opting for the non-reciprocal price of 21 cpm will be applied to continued innovation which promotes the LTIE.[88]

Hutchison makes no reference about how the 21 cpm rate ('fall back' charge) proposed as the alternative rate (if conditions underlying the reciprocal usage charge of 12 cpm are not met) addresses the criterion of promoting competition.

In addition, Hutchison submits that the PMTS Undertakings promote the economically efficient use of and investment in infrastructure, as they provide a price for the MTAS which reflects the costs that an efficient forward-looking operator would incur in providing the service.[89]

In relation to dynamic efficiency, Hutchison submits that the PMTS Undertakings promote the economically efficient use and investment in infrastructure by promoting the expansion of 3G networks (allowing Hutchison to supply termination services at a lower cost than GSM technology):

- increasing the incentive for carriers to implement their own 3G networks, as carriers will no longer be able to protect the profitability of their GSM networks; and
- increasing the incentive for carriers, once they have implemented 3G networks, to migrate their customers onto that new network.[90]

Hutchison submits that allocative efficiency would be promoted by acceptance of the Undertakings which would ensure a closer association of the price of the MTAS with the underlying cost of providing the MTAS.[91]

Hutchison also submits that by terminating calls on its 3G network, Hutchison provides termination services at the minimum cost, and that the price of 12 cpm offered in the Undertakings is reflective of the efficient, forward-looking costs of providing that service, consistent with productive efficiency.[92]

In relation to these views on efficiency, Hutchison states that a price of 12 cpm is unlikely to achieve effective competition in the FTM market, without an effective pass-through mechanism to ensure any wholesale price reductions for the MTAS are passed-through to FTM retail customers. Instead, Hutchison argues that a 12 cpm price reduction will provide fixed-network operators with a financial 'windfall'.[93]

Hutchison makes no reference to how the 21 cpm rate (rate 1 usage charge) proposed as the alternative rate (if conditions underlying the rate 2 usage charge of 12 cpm are

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87 ibid., p. 10.

88 ibid., p. 17.

89 ibid., p. 14.

90 ibid., p. 18.

91 ibid., p. 19.

92 ibid., p. 18.

93 ibid.

not met) addresses the criterion of encouraging economically efficient use and investment in infrastructure.

Hutchison's submission on the Draft Decision

In response to the Draft Decision, Hutchison has submitted that the Commission has not properly assessed the pricing structure proposed by the PMTS Dual Rate Undertakings in relation to the LTIE. Hutchison submits that the Commission has not considered the interplay between the PMTS Dual Rate Undertakings and those access disputes on foot under Part XIC of the Act that will establish the price charged by carriers to Hutchison for the MTAS. Hutchison submits that the Commission must consider current market conditions and relevant regulatory developments in order to fulfil its statutory obligation to take into account the matters listed in section 152AH(1) of the Act.[94]

Hutchison submits that no access seeker will choose to pay 21cpm for the MTAS in circumstances where that access seeker is required, by reason of a final determination, to charge Hutchison a rate less than 21cpm. Hutchison therefore considers that the 21cpm rate will act as a commercial incentive for access seekers to meet the conditions for the supply of MTAS at the 12cpm rate.[95]

Submitters' views

PowerTel submits that the PMTS Dual Rate Undertakings will not promote the LTIE. While recognising that the proposed rate of 12 cpm for MTM calls is consistent with the range specified by the Commission in the *MTAS Final Report*, PowerTel submits that the 12 cpm price exceeds existing costs of providing the MTAS. PowerTel further submits that the 21 cpm fallback condition exceeds the TSLRIC of termination as determined by the Commission in the *MTAS Final Report*.[96]

PowerTel submits that the 21 cpm 'fallback' condition under the PMTS Dual Rate Undertakings is unreasonable as it provides a 'financial windfall' to Hutchison above efficient supply costs. In addition, PowerTel submits that 'fixed line operators have for several years been paying MNOs way above costs' and that this is detrimental to market competition. PowerTel submits that it 'struggles to compete in the retail FTM market because it is required to pay … 21 cpm for termination on a mobile network'.[97] PowerTel also submits that the proposed differential MTAS price rates between MTM and FTM services will not promote the LTIE as it:

- is not based on the TSLRIC and thereby does not reflect the true costs of providing the MTAS;
- exacerbates existing pricing disparity between MTM and FTM calls;
- encourages MTM service use when FTM may be more efficient; and
- promotes potentially inefficient investment in mobile networks at the expense.[98]

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94 Hutchison, *Submission in response to Draft Decision*, p. 11.

95 ibid.

96 PowerTel, *PowerTel Submission on ACCC Discussion Paper*, p. 9.

97 ibid., p. 11.

98 ibid., p. 5.

Telstra submits that an immediate decrease in the price of supplying the MTAS to 12 cpm is reasonable.[99] However, Telstra submits that the PMTS Dual Rate Undertakings are not reasonable and do not promote the LTIE.[100] Telstra submits that the 21 cpm price exceeds the MTAS Pricing Principles stated in the *MTAS Final Report*. Telstra further submits that Hutchison's proposed commitment to apply this economic rent in 'continued innovation which promotes the LTIE' fails to adequately define 'innovation', demonstrate how this 'innovation' promotes the LTIE, or provide assurance that any innovation will in fact occur.[101]

Telstra submits that PMTS Dual Rate Undertakings are inconsistent with the *MTAS Pricing Principles* adopted by the Commission and, consequently, the non-reciprocal 21 cpm 'fall back' rate:

> … fails the 'future with or without' test which Hutchison asks the Commission to apply in considering the reasonableness of the terms of the Undertakings. In all likelihood, particularly having regard to the Commission's MTAS pricing principles and the interim determinations recently made by the Commission in the Vodafone and Optus MTAS access disputes, the 'future without' will involve MTAS pricing that is significantly less that 21 cpm.[102]

In addition, Telstra submits that the terms and conditions of the PMTS Dual Rate Undertakings are unreasonable as they allow Hutchison to cease charging 12 cpm solely by reference to its own belief that the access seeker is not complying, or unlikely to comply, with the reciprocity and transit conditions of the undertaking. In addition, Telstra submits that access seeker obligations provide unlimited discretion on the part of Hutchison to obtain confidential commercial information from access.[103]

Vodafone submits that the pricing options proposed by Hutchison under the PMTS Dual Rate Undertakings are not in the LTIE as they neither promote competition nor the economically efficient use of and investment in infrastructure. Specifically, Vodafone submits that MTAS prices proposed under the PMTS Single Rate Undertakings are based on the prices 'published' by the Commission in the *MTAS Final Report*, which Vodafone submits are derived from methodologically flawed cost modelling and analysis.[104] In addition, Vodafone submits that the mobiles market is 'effectively competitive' and that any-to-any connectivity 'is unlikely to be further promoted through MTAS pricing proposed by Hutchison'.[105]

Vodafone further submits that the 21 cpm MTAS supply pricing proposed under the PMTS Dual Rate Undertakings is unreasonable as it 'would merely give Hutchison a windfall and this would not promote the LTIE'. Vodafone submits that the mobiles market is 'effectively competitive' and that the proposed 21 cpm MTAS supply pricing is economically inefficient.[106] Specifically, Vodafone submits that MTAS supply pricing proposed under the PMTS Dual Rate Undertakings will not promote the LTIE as:

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99 Telstra, *Telstra Submission on ACCC Discussion Paper*, p. 4.

100 ibid., p. 5.

101 ibid., p. 7.

102 ibid., pp. 7-8.

103 ibid., pp. 10-11.

104 Vodafone, *Vodafone Submission on ACCC Discussion Paper*, p. 5.

105 ibid., p. 6.

106 ibid.

> Hutchison simply selected the 21 cpm rate for MTAS based on their last commercially negotiated rate, a rate which is not, on the basis of the material which Hutchison has provided, obviously derived from TSLRIC+ pricing principles.[107]

Vodafone also submits that Hutchison has not explained why the 21 cpm MTAS supply pricing proposed under the PMTS Dual Rate Undertakings is reasonable or likely to promote the LTIE when coupled with the 12 cpm rate for the supply of MTAS.[108]

Commission's view

Appendix 1 outlines the approach the Commission takes when assessing this criterion.

There are three main matters the Commission will consider in assessing whether the LTIE has been promoted:

- competition in relevant markets;
- any-to-any connectivity; and
- economically efficient use of, and investment in, infrastructure.

Promoting Competition

In the event that the 12 cpm price proposed in the PMTS Dual Rate Undertakings prevailed, the assessment of the competitive impacts in relevant markets would be the same as that outlined for the PMTS Single Rate Undertakings. In this respect, the Commission considers that 12cpm will likely promote competition in the market in which FTM services are provided and the retail mobile services markets, but would have no impact on the each MNO's network.

However, in the circumstances in which the 21 cpm price prevails, the Commission outlines its reasoning about the promotion of competition in relevant markets below. In considering the impact of competition in the three relevant markets if a price of 21 cpm prevailed under the PMTS Dual Rate Undertakings, the Commission concludes that:

- *The individual markets for MTAS on each MNO's network:* The rate 1 charge of 21 cpm will not promote competition in the wholesale markets for MTAS on each MNO's network regardless of whether the PMTS Dual Rate Undertakings were accepted or rejected.
- *The market within which FTM services are provided:* If the rate 1 charge of 21 cpm prevails, the PMTS Dual Rate Undertakings propose a higher rate than 12 cpm which Hutchison considers reflects 'the cost an efficient operator using forward-looking technology would incur in providing the same service'.[109] A rate of 21 cpm or the 'fall back' charge as proposed by the PMTS Dual Rate Undertakings would weaken competition in the market in which FTM services are supplied compared to the situation if the Undertakings were rejected. The Commission acknowledges that 12 cpm (for complying MTM calls) is a price that it considers is the conservative upper bound estimate of the efficient cost

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[107] ibid., p. 10.

[108] ibid., p. 11.

[109] Hutchison, *Hutchison Undertakings Submission*, p. 18.

(TSLRIC+) of supplying the MTAS. However, the Commission notes that the price for the MTAS of 21 cpm is well above what the Commission considers is the underlying efficient cost (or TSLRIC+) of providing the service. The Commission considers that a reduction in the price of the MTAS toward the underlying TSRLIC+ of supply will most effectively promote competition in the market within which FTM services are provided. The Commission already noted that the reciprocal usage charge in the PMTS Dual Rate Undertakings may lead to lower retail mobile services prices and may exert some downward pressure on the pricing of retail FTM services, resulting in the possibility of competitive benefits.

However, this positive impact is likely to be offset by a contrary effect associated with the 'fall back' charge of 21 cpm in the PMTS Dual Rate Undertakings. Due to this offsetting effect, the Commission is of the view that the PMTS Dual Rate Undertakings would be unlikely to effectively promote competition in the market within which FTM services are supplied compared to the likely situation if the PMTS Dual Rate Undertakings were rejected.

- *Retail mobile services:* The Commission believes that the immediate reduction of the MTAS rate to 12 cpm, as proposed in the PMTS Single Rate Undertakings, and the likelihood that some (although not necessarily all) MNOs will agree to the reciprocity and transit traffic conditions and supply the MTAS to Hutchison at 12 cpm, is likely to place downward pressure on retail mobile services prices and thereby promote competition in this market. However, the Commission considers that the differential pricing of the MTM MTAS, as provided for by the PMTS Dual Rate Undertakings may have the effect of protecting some of the source of market power of some operators and thus impeding the ability of equally or more efficient operators to compete with these operators in the retail mobile services market (through cross-subsidisation of their retail mobile prices).

  It is the Commission's view that prices aligned to the TSRLIC+ of supplying the MTAS provide the best opportunity for promoting competition in the retail mobile services market, as MNOs would then be forced to compete on the basis of their relative efficiencies and relative merits in the market for retail mobile services. If a rate of 21 cpm applied, which is well above the Commission's estimate of the TSLRIC+ of supply of the MTAS, then higher input prices would impede a reduction in retail prices in the retail mobile services market.

Overall, the Commission is not convinced that acceptance of the PMTS Dual Rate Undertakings would promote competition in any of the relevant markets compared with the situation that would arise if the PMTS Dual Rate Undertakings were rejected. This is because the MTAS would be supplied to some MNOs at a rate well above the conservative upper bound estimate of the underlying efficient cost of providing the MTAS and higher than the prices the Commission expects would emerge (through both arbitral determinations and commercial negotiations) if the PMTS Dual Rate Undertakings were rejected.

Any-to-any connectivity

The Commission notes that as a 'standing offer' to supply the MTAS, Hutchison's Non-PMTS Undertakings will be *prima facie* consistent with the objective of achieving any-to-any connectivity.

The Commission believes that the PMTS Dual Rate Undertakings are consistent with the object of achieving any-to-any connectivity.

As such, the Commission believes that the object of any-to-any connectivity is likely to be unaffected whether the Commission accepts or rejects the PMTS Dual Rate Undertakings and regardless of what price prevails.

Economically efficient use of, and investment in, infrastructure

In the circumstances that the 12 cpm price proposed in the PMTS Dual Rate Undertakings prevailed, the assessment of the economically efficient use of, and investment in infrastructure would be the same as that outlined for the PMTS Single Rate Undertakings. In this respect, the Commission considers that the positive benefits are likely to outweigh any of the negative benefits previously outlined in relation to the more efficient use of and investment in infrastructure.

However, if the proposed rate of 21 cpm or 'fall back' charge emerged, the Commission is not convinced that acceptance of the PMTS Dual Rate Undertakings would promote the efficient use of, and investment in, infrastructure.

The Commission holds this view because it considers that the pricing of the MTAS should, to effectively promote allocative and dynamic efficiency, reflect the TSLRIC+. To the extent that the appropriate price is TSLRIC+, this would imply the price of the service should be reduced to at least 12 cpm (or the conservative upper-bound of the TSLRIC+ of the MTAS). This is further reinforced by Hutchison's submission that it considers that 12 cpm is an appropriate price to reflect the 'fair and reasonable costs' of supplying the MTAS.

If the promotion of efficient investment in, and efficient use of, the infrastructure by which telecommunications services are provided is the only objective when setting prices for the MTAS, the Commission believes it would be appropriate to reduce the price of the service to its efficient cost level immediately.

As a result, the Commission considers that the differential pricing outcomes under the PMTS Dual Rate Undertakings which may result in a price for the MTAS for MTM calls of 21 cpm, are likely to have potentially distortionary impacts for investment, particularly as this rate is well above the underlying cost of providing the MTAS.

To the extent that Hutchison might use any revenues it receives in excess of its 12 cpm rate to fund further 'innovation and reductions in retail prices',[110] the Commission considers this may represent over-investment in (and consequently lead to more than an efficient use of) telecommunications infrastructure.

The Commission has considered the incentives for the risks involved in investment in new and existing infrastructure. In doing so, the Commission notes that the Dual Rate PMTS Undertakings apply across both Hutchison's 2G and 3G networks. Further, that rejection of the Dual Rate PMTS Undertakings is likely to result in some instances in prices for the supply of the MTAS above what it could supply the MTAS under the Undertakings if the 12 cpm applied. As Hutchison also submits that a rate

[110] ibid., p. 10.

of 12 cpm is an appropriate price with reference to the fair and reasonable costs of providing the MTAS, and costs are a manifestation of risk, the Commission considers that as along as a price of at least 12 cpm prevails, that the Undertakings propose a price to cover such risks of investment.

The Commission considers that the objective of promoting efficient use of, and investment in, telecommunications infrastructure would best be promoted by rejecting the PMTS Dual Rate Undertakings.

4.2.2. The legitimate business interests of the carrier or carriage service provider concerned and the carrier's or provider's investment in facilities used to supply the declared service concerned

In considering this criterion, the Commission has not applied the 'future with and without' test.

Hutchison's view

Hutchison submits that the optional 21 cpm default rate provides a 'fall back for those access seekers who choose not to accept the reciprocal 12 cpm offer' and that 12 cpm represents 'a rational price for an efficient mobile operator'.[111]

Hutchison submits that the 21 cpm price of supplying the MTAS under the PMTS Dual Rate Undertakings may 'benefit Hutchison commercially'. However, Hutchison submits that any benefits accrued will be used to further innovation and investment to promote the LTIE.[112]

Hutchison submits that its legitimate business interests are congruous with the statutory factors of promoting further competition and allowing for the economically efficient use of and investment in infrastructure.[113]

Submitters' views

PowerTel submits that the 12 cpm MTAS price proposed by Hutchison exceeds the costs of supplying the MTAS and that estimates of TSLRIC for the MTAS overseas establish estimates in the range of 5 to 12 cpm. PowerTel further submits that the proposed 'fallback' rate of 21 cpm is 'way in excess of the TSLRIC of termination'. PowerTel argues that the 21 cpm is not a legitimate business interest of Hutchison as it exceeds the TSLRIC of termination as determined by the Commission in the *MTAS Final Report* and maintains inefficient MTAS pricing whereby 'fixed line operators have for several years been paying MNOs way above costs'. PowerTel 'rejects the notion' that Hutchison is justified in gaining a 'financial windfall' by charging 21 cpm for the supply of MTAS if reciprocity conditions are not agreed upon.[114]

Telstra submits that the 21 cpm price for the supply of MTAS under the PMTS Dual Rate Undertakings 'represents a price above the efficient costs of providing the MTAS'. Telstra notes that Hutchison acknowledges that the 21 cpm will 'result in it receiving a windfall gain' and submits that this represents an unreasonable business interest. In addition, Telstra submits that the terms and conditions of the PMTS Dual

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111 ibid., p. 6.

112 ibid., p. 10.

113 ibid., p. 19.

114 PowerTel, *PowerTel Submission on ACCC Discussion Paper*, p. 6.

Rate Undertakings are unreasonable as they allow Hutchison to cease charging 12 cpm solely by reference to its own belief that the access seeker is not complying, or unlikely to comply, with the reciprocity and transit conditions of the Undertakings. In addition, Telstra submits that access seeker obligations provide unlimited discretion on the part of Hutchison to obtain confidential commercial information from access seekers.[115] Specifically, Telstra submits that the PMTS Dual Rate Undertakings are unreasonable as they:

- are not representative of Hutchison's investment in facilities used to supply the MTAS;
- are not representative of Hutchison's direct costs of providing access to the MTAS;
- do not provide for the economically efficient operation of the MTAS; and
- do not encourage the economically efficient use of and investment in infrastructure by which listed services are provided.[116]

Vodafone submits that the 21 cpm MTAS supply pricing proposed under the PMTS Dual Rate Undertakings is unreasonable as it 'would merely give Hutchison a windfall' and 'is above current commercial arrangements for the MTAS'.[117]

Commission's view

Appendix 1 outlines the approach the Commission takes when assessing this criterion.

Hutchison's PMTS Dual Rate Undertakings propose to move to the 12 cpm rate for complying MTM calls at a slightly faster pace than the path the Commission set out in the *MTAS Pricing Principles Determination*, to the extent that the reciprocal and transit traffic conditions are met by access seekers.

In addition, Hutchison has submitted that for it '12 cpm is an appropriate price having regard to the fair and reasonable costs of providing the MTAS'.

However, the Commission notes that Hutchison has proposed as part of the PMTS Dual Rate Undertakings that in some circumstances 21 cpm will apply to MTM calls, which is higher than the what Hutchison considers is an 'appropriate price' of 12 cpm.

Given that Hutchison has willingly submitted the Undertakings and considers that 12 cpm reflects the costs of providing the MTAS, the Commission is satisfied that in the circumstances of these Undertakings that targeting a price of 12 cpm (which reflects the Commission's view of the conservative upper-bound of the TSLRIC+ of the MTAS) before 1 January 2007 would not be inconsistent with Hutchison's legitimate business interests.

In relation to the 'fall back' charge of 21 cpm, the Commission notes that this price is reflective of the indicative price for MTAS set out in the *MTAS Pricing Principles Determination* for the period 1 July 2004 to 31 December 2004, and is above the price (of 12 cpm) that Hutchison itself considers an appropriate price that reflects the fair and reasonable costs of providing the MTAS. Further the Commission notes that if

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115 Telstra, *Telstra Submission on ACCC Discussion Paper*, pp. 10-11.

116 ibid., p. 7.

117 Vodafone, *Vodafone Submission on ACCC Discussion Paper*, p. 6.

this price prevailed, it is also higher than prices that access seekers may commercially negotiate or achieve in arbitrated processes.

In this respect, a price for the MTAS of 21 cpm would not be considered in the Commission's view a rate that would compromise Hutchison's legitimate business interests because of Hutchison's own submission that 12 cpm is an appropriate price reflecting the 'fair and reasonable costs' of providing the MTAS for it.

Given these circumstances, the Commission believes that if the PMTS Dual Rate Undertakings were rejected Hutchison's legitimate business interests would be adequately protected.

4.2.3. The interests of persons who have the right to use the declared service

In considering the LTIE, the Commission has applied the 'future with and without' test.

Hutchison's view

Hutchison submits that the 12 cpm price of supplying the MTAS under the PMTS Dual Rate Undertakings promotes the interests of access seekers as it reflects economically efficient costs for the provision of the MTAS and is thereby consistent with the rates that would have been arrived at through commercial negotiations. In addition, Hutchison submits that the reciprocity conditions under the PMTS Dual Rate Undertakings promote the interests of access seekers by providing transparency in mobile tariffs and pricing certainty.[118]

Hutchison's submission on the Draft Decision

Hutchison submits that the Commission has not taken into account the structure of the pricing in the PMTS Dual Rate Undertakings in assessing the interests of persons who have a right to use the declared service. Hutchison submits that the only rational commercial option for access seekers when faced with a 21 cpm rate is to choose the 12 cpm reciprocal rate and that the PMTS Dual Rate Undertakings will ensure that all access seekers will adopt the lower usage charge for the MTAS.[119]

Submitters' views

PowerTel submits that the 21 cpm price for the supply of MTAS under the PMTS Dual Rate Undertakings exceeds the TSLRIC of termination as determined by the Commission in the *MTAS Final Report* and that 'fixed line operators have for several years been paying MNOs way above costs'. PowerTel submits that it 'struggles to compete in the retail FTM market because it is required to pay … 21 cpm for termination on a mobile network'.[120]

Telstra submits that the terms and conditions of the PMTS Dual Rate Undertakings are unreasonable as they allow Hutchison to cease charging 12 cpm solely by reference to its own belief that the access seeker is not complying, or unlikely to

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[118] Hutchison, *Hutchison Submission on ACCC Discussion Paper*, p. 3.

[119] Hutchison, *Submission in response to Draft Decision*, p. 13.

[120] PowerTel, *PowerTel Submission on ACCC Discussion Paper*, p. 6.

comply, with the reciprocity and transit conditions of the undertaking. In addition, Telstra submits that access seeker obligations provide unlimited discretion on the part of Hutchison to obtain confidential commercial information from access seekers.[121]

Vodafone submits that the proposed price of MTAS supply under the PMTS Dual Rate Undertakings is unreasonable and cites findings by its consultant PwC to conclude that:

> A rate of 12 cpm for MTAS puts Vodafone's legitimate business interests at risk, not just in terms of new investment but also in terms of current operations…Vodafone would be unable to recover its efficient costs of providing the MTAS if the service were priced at 21 cpm.[122]

Vodafone further submits that the differential pricing between PMTS Dual Rate Undertakings and Non-PMTS Undertakings 'may also frustrate pricing agreements through economic arbitrage' whereby integrated MNOs are 'able to disguise calls and make them appear to be mobile calls when in fact they are originating from a fixed line in order to take advantage of the termination pricing differential.[123]

Commission's view

Appendix 1 outlines the approach the Commission takes when assessing this criterion. The Commission notes as it did in section 4.1.2 that Vodafone's estimate of the price for purpose of the MTAS as prepared in its undertaking is likely to overstate the efficient costs of supply.[124]

The Commission believes a price for the MTAS that reflects the TSLRIC+ of providing the service would be more likely to be in the interests of persons that have a right to use the declared service. This is because a closer association of the price of the MTAS with its underlying efficient cost will allow equally and more efficient MNOs to compete on their merits in the relevant markets for retail mobile services and within which FTM services are provided.

Consequently, the Commission is of the view that maintaining the price of the MTAS above the TSLRIC+ of production for some access seekers may not be in the best interest of those who have the right to use the MTAS.

In the circumstances where a price for the MTAS of 12 cpm would apply, the Commission considers that the interests of persons who have the rights to use the declared service are protected, as this rate reflects the Commission's view of the conservative upper bound of the TSLRIC+ of supply of the MTAS.

However, in the circumstances in which the 'fall back' charge of 21 cpm applies, the Commission considers this may not be in the interests of access seekers because this is well above what Hutchison considers is an appropriate price (of 12 cpm) that reflects the fair and reasonable costs of providing the MTAS.

As there is a likelihood that a rate of 21 cpm may prevail, the Commission is not convinced that the interests of all persons who have the right use the declared service are best served by acceptance of the PMTS Dual Rate Undertakings.

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121 Telstra, *Telstra Submission on ACCC Discussion Paper*, pp. 10-11.

122 Vodafone, *Vodafone Submission on ACCC Discussion Paper*, p. 7.

123 ibid., p. 8.

124 ACCC, *Vodafone Undertaking Final Decision*, pp. 27-70.

The Commission considers that the explicit differential pricing outcomes contained in the PMTS Dual Rate Undertakings discriminate between users depending on whether the relevant access seeker is able to meet the conditions of reciprocity and transit traffic that Hutchison is seeking to impose. The Commission considers that access seekers with fixed networks may be more disadvantaged than those with integrated or mobile-only networks. In this respect, the Commission considers that Hutchison's proposed price discrimination based on the ability of access seekers to meet its price conditions under the PMTS Dual Rate Undertakings, may affect the interests of users in very different ways and increase the inherent structural advantages already prevalent in the relevant markets amongst operators.

In these circumstances, the Commission considers if the 'fall back' charge of 21 cpm prevails, which is significantly above what the Commission understands the service is being currently priced at in commercial negotiations or arbitral processes,[125] the interests of persons who have the right to use the MTAS will be protected if the PMTS Dual Rate Undertakings were rejected rather than accepted.

4.2.4. The direct costs of providing access to the declared service

In considering the LTIE, the Commission has not applied the 'future with and without' test.

Hutchison's view

Hutchison submits that the 12 cpm price of supplying the MTAS under the PMTS Single Rate Undertakings reflects the economically efficient costs for the provision of the MTAS. Hutchison also submits that, in setting its Undertakings pricing on a reciprocity-based condition, it has proposed a price that is consistent with the economically efficient costs of providing the Undertaking service.[126]

Hutchison further submits that while the 21 cpm price for the MTAS supply under the PMTS Dual Rate Undertakings is not 'in any way reflective of the underlying cost of providing the MTAS',[127] the price differential will be used to further innovation and investment to promote the LTIE. Hutchison submits that 'any benefit accrued by Hutchison as a result of the access seekers opting for the non-reciprocal price of 21 cpm will be applied to continued innovation which promotes the LTIE'.[128]

Submitters' views

Vodafone submits that the 12 cpm price of supplying the MTAS under the PMTS Dual Rate Undertakings is 'less than the forward looking efficient cost to Vodafone of supplying mobile termination'. Vodafone cites an estimate of 16.15 cpm by PwC as the efficient price of suppling MTAS. Vodafone submits that the 12 cpm price of supplying the MTAS under the PMTS Single Rate Undertakings will mean that 'Vodafone would be unable to recover its efficient costs of providing the MTAS'.[129]

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125 Between 15 and 18 cpm.

126 Hutchison, *Hutchison Undertakings Submission*, p. 18.

127 ibid., p. 6.

128 ibid., p. 18.

129 Vodafone, *Vodafone Submission on ACCC Discussion Paper*, p. 7.

Telstra submits that the 21 cpm price for the supply of MTAS under the PMTS Dual Rate Undertakings 'represents a price above the efficient costs of providing the MTAS' and that it is not representative of Hutchison's direct costs of providing access to the MTAS.[130]

Commission's view

Appendix 1 outlines the approach the Commission takes when assessing this criterion.

As already indicated in this report, the concept of the 'direct' costs of providing access to a declared service encompasses those that are necessarily incurred (or caused) by the provision of access.

The Commission notes that the PMTS Dual Rate Undertakings contain a rate of 12 cpm that Hutchison itself concedes is an 'appropriate price having regard to the fair and reasonable costs of providing the MTAS'.

In the *MTAS Final Report*, the Commission also concluded that 12 cpm is the conservative upper bound estimate of the efficient costs (or TSLRIC+) of supplying the MTAS. Since the *MTAS Final Report*, the Commission has not had a more reliable or robust estimate of the efficient cost of supply of the MTAS in an Australian context put before it that would alter this view at present.

As a result, the Commission remains of the view that the 12 cpm price specified in the *MTAS Pricing Principles Determination* provides an indication of the upper bound of underlying efficient cost, and hence the direct cost, of supplying the MTAS. Therefore, if the direct costs of providing the service was the only criterion to which the Commission had regard, an immediate reduction in the price of the MTAS to 12 cpm may be considered appropriate (as the conservative upper-bound estimate of the TSLRIC+ of supply of the MTAS).

That said, the Commission considers that if the rate of 12 cpm prevailed under the PMTS Dual Rate Undertakings that this pricing outcome would reflect the direct costs of supplying the MTAS. However, pricing outcomes in which the 'fall back' charge of 21 cpm applied would not reflect the direct costs of supplying MTAS.

As a result, the Commission considers that in some circumstances the PMTS Dual Rate Undertakings would result in pricing outcomes that would exceed the direct costs of the MTAS.

4.2.5. The operational and technical requirements necessary for the safe and reliable operation of the carriage service/telecommunications network/facility

In considering the LTIE, the Commission has not applied the 'future with and without' test.

Appendix 1 outlines the approach the Commission takes when assessing this criterion.

The Commission has received no submissions that suggest that there is any risk that the price-related terms and conditions of the Undertakings could lead to unsafe or unreliable operation of a carriage service, telecommunications network or facility, regardless of which price prevails under the PMTS Dual Rate Undertakings.

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[130] Telstra, *Telstra Submission on ACCC Discussion Paper*, p. 7.

4.2.6. The economically efficient operation of a carriage service/telecommunications network/facility

In considering the LTIE, the Commission has applied the 'future with and without' test.

Appendix 1 outlines the approach the Commission takes when assessing this criterion.

In the circumstances that the 12 cpm price proposed in the PMTS Dual Rate Undertakings prevailed, the assessment of the economically efficient operation of a carriage service/telecommunications network/facility would be the same as that outlined for the PMTS Single Rate Undertakings. In this respect, the Commission considers that the positive benefits are likely to outweigh any of the negative benefits as previously outlined in relation to the more efficient use of and investment in infrastructure, relevant to this criterion.

However, if the proposed rate of 21 cpm or 'fall back' charge emerged, the Commission is not convinced that acceptance of the PMTS Dual Rate Undertakings would promote the economically efficient operation of a carriage service/telecommunications network/facility.

Consequently, the Commission considers that the economically efficient operation of a carriage service/telecommunications facility would be more likely to be promoted if the Commission rejected the PMTS Dual Rate Undertakings than would be the case if the Commission were to accept it.

4.2.7. Other Matters

The Commission did not have regard to any other matters in determining whether the terms and conditions are reasonable as permitted by section 152AH(2).

4.3. Non-PMTS Undertakings

This section considers the reasonableness of the price terms and conditions of the Non-PMTS Undertakings against the criteria set out in section 152AH(1) of the Act.[131]

In applying the 'future with and without' test[132] to the Non-PMTS Undertakings (as outlined in Appendix 1), the Commission has compared the following two situations:

1. the pricing options available under the Non-PMTS Undertakings; and
2. the pricing outcomes the Commission believes are likely to otherwise occur – having regard to the procedures and protections for access seekers that arise under Part XIC of the Act.

As with the PMTS Undertakings this section outlines where the future with and without test applies in assessing the overall reasonableness of the Undertakings.

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[131] It is also noted that the Commission is not limited by the matters to which regard may be had, as set out in *Trade Practices Act 1974*, section 152AH(2).

[132] Refer to Appendix 1 for further detail about the future with and without test.

Pricing options set out in the Undertakings

The price terms and conditions specified in the Non-PMTS Undertakings set a single price of 18 cpm for the supply of the MTAS for FTM calls and calls originating on overseas networks.

Pricing outcomes in the absence of the Undertakings

In the absence of the PMTS Dual Rate Undertakings, a number of alternative pricing outcomes might arise in the range of 15 to 18 cpm through arbitral processes or commercial negotiation.

4.3.1. The LTIE

In considering the LTIE, the Commission has applied the 'future with and without' test.

Hutchison's view

Hutchison argues that in assessing whether the LTIE criterion is met by its Non-PMTS Undertakings, the Commission should consider two separate markets:

- the national market for mobile services; and
- the national market for retail FTM services.[133]

Hutchison submits that the FTM market is not effectively competitive and that the proposed 18 cpm price for the supply of the MTAS for FTM originating calls will promote the LTIE. Specifically, Hutchison submits that:

> Existing market structures provide vertically-integrated fixed and mobile network operators with considerable scope and incentive to use their control over access to the MTAS to engage in anti-competitive price-squeeze behaviour. Given the lack of competition in the fixed-to-mobile market, Hutchison considers it very unlikely that lower MTAS charges will be reflected in lower fixed-to-mobile prices in the absence of more effective regulation of those retail prices. Without a mechanism to require pass through, competition in the fixed-to-mobile market from the end users' perspective will not be promoted. Further, without pass through, significant reductions in access prices may adversely affect price competition in the mobile services market. With pass through, the lower fixed-to-mobile call prices may lead to increased fixed-to-mobile call traffic enhancing competition in both the mobile services and fixed-to-mobile markets.[134]

Hutchison submits that its proposed Non-PMTS Undertakings price of 18 cpm for the supply of the MTAS, which amounts to a 14 per cent decline over its most recently negotiated price for the MTAS, is therefore appropriate in view of the existing pricing structure of the FTM market. Hutchison argues that this price decline provides a means of gauging whether fixed-network operators intend to transfer any reductions in the MTAS wholesale access charge to their retail customers. Hutchison submits that when its Non-PMTS Undertakings expire, on 30 June 2006, it will be in a position to reassess its pricing structure for the MTAS, in view of the developments in prices for FTM services and revisions to the retail price control scheme.[135]

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133 Hutchison, *Hutchison Undertakings Submission*, p. 10.

134 ibid., pp. 10-11.

135 ibid., p. 11.

In relation to its proposed Non-PMTS Undertakings price of 18 cpm for the MTAS, Hutchison argues that the proposed price is:

- an improvement over previous commercially-negotiated MTAS charges;
- within the Commission's adjustment path in the *MTAS Pricing Principles Determination*; and
- acceptable in view of the fact that the Non-PMTS Undertakings will expire at 30 June 2006.[136]

Hutchison believes that the mobile services market lacks effective competition and that the FTM market is even less competitive. It is in view of these market characteristics, Hutchison submits, that its proposed differential structure of access charges for the MTAS is appropriate.[137]

Hutchison further submits that its arguments about lack of pass-through in the FTM market are equally applicable to traffic originating from overseas networks; hence an access charge of 18 cpm for the MTAS is also appropriate for this segment of the mobile services market.[138]

Hutchison submits that the LTIE would be best promoted by the Commission accepting the PMTS Dual Rate Undertakings in combination with the Non-PMTS Undertakings. Hutchison submits that, although the LTIE would also be served if the Commission accepted the PMTS Single Rate Undertakings in combination with the Non-PMTS Undertakings, this option would not confer the same benefits on the LTIE as accepting the PMTS Dual Rate Undertakings together with the Non-PMTS Undertakings would.[139]

In addition, Hutchison submits that a future with the Undertakings is more likely to promote the LTIE, in that the pricing structure proposed in the PMTS and Non-PMTS Undertakings will lead to the adoption of a lower access charge for the MTAS and thus greater benefits for end-users than the Commission's adjustment path for the price of the MTAS.[140]

Hutchison addresses the statutory criteria utilising the framework established by the Commission in relation to economic efficiency, which covers the objectives of dynamic efficiency, allocative efficiency, and productive efficiency.[141]

In respect of dynamic efficiency, Hutchison states that its 3G network has a lower cost structure than its 2G network and argues that, by accepting its Undertakings, the Commission will implicitly be committing to further utilisation of lower-cost 3G networks for termination services as an industry benchmark. Hutchison argues this will compel other industry participants to upgrade their network technologies, since it

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136 ibid., p. 17.

137 ibid.

138 ibid., pp. 17-18.

139 ibid., p. 5.

140 ibid., p. 16.

141 ACCC, *Access Pricing Principles Guidelines.*

will not be commercially viable to offer termination services over their higher cost GSM networks.[142]

In respect of the allocative efficiency objective, Hutchison argues that its Non-PMTS Undertakings allow for a 'closer association of the price of the MTAS and the underlying cost of providing the MTAS'.[143]

Further, the Non-PMTS access charge will allow for a closer association of price and cost whilst precluding any 'windfall' gains accruing to fixed-line operators.[144]

Hutchison's submission on the Draft Decision

Hutchison states that it strongly disagrees with the Commission's assessment of the LTIE in relation to the Non-PMTS Undertakings.[145]

Hutchison is not satisfied that the Commission's Draft Decision deals with the fact that given the lack of competition in the FTM market, a pass-through mechanism is required to ensure a reduction in FTM retail prices; and that without pass through, significant reductions in the access prices may adversely affect price competition in the retail mobile services market. Hutchison submits that the rate of 18 cpm strikes an appropriate balance until such time as an adequate pass through occurs.[146]

Submitters' views

PowerTel submits that the Non-PMTS Undertakings will not promote the LTIE as the proposed differential price for supply of the MTAS, based on where a call originated, is:

- not based on the TSLRIC of supplying the MTAS;
- likely to exacerbate the existing price differential between MTM and FTM for consumers;
- likely to promote MTM instead of FTM calls when greater efficiencies may accrue from FTM calls; and
- likely to increase investment in mobile networks at the expense of fixed-line networks that may be more economically efficient.[147]

PowerTel submits that the FTM retail market is currently competitive and that the FTM differentiated pricing structure proposed under the Non-PMTS Undertakings 'is not relevant to a consideration of pricing for MTAS'. PowerTel further submits that the 18 cpm price for supplying the MTAS for FTM originating calls is unreasonable as it exceeds the TSLRIC of termination determined by the Commission in the *MTAS Final Report*.[148]

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142 Hutchison, *Hutchison Undertakings Submission*, p. 18.

143 ibid., p. 19.

144 ibid.

145 Hutchison, *Submission in response to Draft Decision*, p. 15.

146 ibid., pp. 15-16.

147 PowerTel, *PowerTel Submission on ACCC Discussion Paper*, pp. 6-7.

148 ibid., p. 6.

In respect of efficiency, PowerTel submits that the Non-PMTS Undertakings will not promote the LTIE, as the proposed differential rate for FTM and MTM terminating prices 'is not the result of a consideration of underlying costs'.[149] PowerTel concludes that the 18 cpm price for the supply of the MTAS under the Non-PMTS Undertakings 'will be detrimental to ends [sic] users because it will lead to higher prices for retail FTM calls'.[150]

Telstra submits that the Non-PMTS Undertakings are unreasonable and do not promote the LTIE. Specifically, Telstra submits that the Non-PMTS Undertakings do not promote the LTIE as they:

- are not representative of Hutchison's investment in facilities used to supply the MTAS;
- are not representative of Hutchison's direct costs of providing access to the MTAS;
- do not provide for the economically efficient operation of the MTAS; and
- do not encourage the economically efficient use of, and investment in, infrastructure by which listed services are provided.[151]

Telstra further submits that the Non-PMTS Undertakings do not reflect the Commission's *MTAS Pricing Principles Determination* and that the 'error underlying these submissions is that they fail to consider the correct counterfactual demanded by the "future with or without" tests'. Telstra also submits that the short operational time period of the Non-PMTS Undertakings 'is irrelevant' to the 'correct counterfactual demanded by the future with or without test'.[152]

Vodafone submits that the Non-PMTS Undertakings will not promote the LTIE. Vodafone argues that its own cost modelling for the supply of the MTAS produces an optimal price of 16.15 cpm for promoting the LTIE. Vodafone submits that the 18 cpm price for the supply of the MTAS under the Non-PMTS Undertakings is inappropriately based on a 14 per cent reduction on the last commercially negotiated price and reflects, what Vodafone considers, the methodologically flawed approach of the Commission's *MTAS Pricing Principles Determination*. Specifically, Vodafone submits that:

> Hutchison does not explain what a 14% decrease from their last negotiated price means in terms of TSLRIC+ pricing. The price of 18 cpm is simply part of the glide path in the ACCC's final decision on mobile termination and bears a numerical relationship to the other numbers on the path. Hutchison's simply picking one of the numbers from the glide path is nonsensical and not reasonable.[153]

Vodafone further submits that the Non-PMTS differential pricing will not promote the LTIE, as it neither guarantees that reductions in MTAS pricing will be passed-through to FTM originating calls nor adequately explains the impact of the 18 cpm pricing compared with the 12 cpm under the PMTS Single and Dual Rate Undertakings on fixed-line carriers. Vodafone submits that the inclusion of MTAS pricing for calls

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149 ibid., p. 16.

150 ibid., p. 13.

151 Telstra, *Telstra Submission on ACCC Discussion Paper*, p. 7.

152 ibid., p. 9.

153 Vodafone, *Vodafone Submission on ACCC Discussion Paper*, p. 9.

originating overseas is not substantiated by either cost modelling or evidence that the LTIE will be promoted. Vodafone also submits that the 'cost of providing mobile termination to a mobile call from another carrier should be the same irrespective of the origination of the call inside or outside Australia'.[154]

Commission's view

Appendix 1 outlines the approach the Commission takes when assessing this criterion.

There are three main matters the Commission will consider in assessing whether the LTIE has been promoted:

- competition in relevant markets;
- any-to-any connectivity; and
- economically efficient use of, and investment in, infrastructure.

Promoting competition

In considering the three relevant markets impacted by the MTAS, the Commission concludes that:

- *The individual markets for MTAS on each MNO's network:* The rate of 18 cpm for non-PMTS calls will not promote competition in the wholesale markets for MTAS on each MNO's network regardless of whether the Non-PMTS Undertakings were accepted or rejected.
- *The market within which FTM services are provided:* The Non-PMTS Undertakings would weaken competition in the market within which FTM services are supplied compared to the likely situation if the Non-PMTS Undertakings were rejected. This is because the Non-PMTS Undertakings would price the MTAS above the underlying efficient cost of providing the service. The Commission considers that a reduction in the price of the MTAS towards the underlying TSRLIC+ (cost of production) will most effectively promote competition in the market within which FTM services are provided. The Commission believes that such a reduction in input costs will encourage the pass-through of MTAS cost savings in the form of retail FTM prices. The Commission acknowledges Hutchison's submission that a pass-through mechanism is required to achieve a reduction in FTM retail prices. However, the Commission maintains that reductions in the MTAS to the efficient cost of supply, will create the conditions by which operators can compete on their own merits providing the impetus for reductions in the prices in the markets in which FTM services are provided.

  The pricing outcomes that the Commission expects to emerge in the absence of the Non-PMTS Undertakings would be significantly lower than those likely to emerge as proposed in the Non-PMTS Undertakings. Hence acceptance of the Non-PMTS Undertakings would result in an adverse impact on competition and would be less likely to promote competition in this market than rejection of the Non-PMTS Undertakings would.
- *Retail mobile services:* It is the Commission's view that prices set at the TSLRIC+ of supplying the MTAS, provide the best opportunity for promoting

[154] ibid., pp. 11-12.

competition in the relevant markets, as all operators would then be forced to compete on the basis of their relative efficiencies and relative merits. The Commission's view is that reductions in the MTAS towards its TSLRIC+ of supply would be likely to result in pass-through, to some degree, of lower these cost reductions in the form of lower FTM retail prices. In the circumstances where prices of 18 cpm for the MTAS are likely to emerge under the Non-PMTS Undertakings, this will not provide the best opportunity for operators to compete on their relative efficiencies and merits and is likely to impede pass through of lower FTM prices. That said, the Commission also recognises that acceptance of the Non-PMTS Undertakings may not necessarily negatively impact competition in the retail services market, and at worst the Commission considers that the level of competition would be no worse off if the Non-PMTS Undertakings were rejected.

Overall, the Commission does not believe that acceptance of the Non-PMTS Undertakings would have the net impact of promoting competition in the relevant markets compared with the situation that would arise if the Non-PMTS Undertakings were rejected. This is because the MTAS would be supplied at a rate higher than even a conservative estimate of the underlying cost of providing the service and well above both the price the service is currently being negotiated commercially or achieved in arbitrated process, which the Commission expects would emerge if the Non-PMTS Undertakings were rejected.

Any-to-any connectivity

The Commission believes that the Non-PMTS Undertakings are consistent with the object of achieving any-to-any connectivity.

As such, the Commission believes that the object of any-to-any connectivity is likely to be unaffected whether the Commission accepts or rejects the Non-PMTS Undertakings.

Efficient use of, and investment in, infrastructure

This section specifically addresses the Commission's views on whether Hutchison's Non-PMTS Undertakings are likely to promote efficient use of, and investment in, infrastructure.

The Commission is not convinced that acceptance of the Non-PMTS Rate Undertakings would promote the efficient use of and investment in infrastructure.

The Commission holds this view because it considers that the pricing of the MTAS should, to effectively promote allocative and dynamic efficiency, reflect the TSLRIC+. To the extent that the appropriate price is TSLRIC+, this would imply the price of the service should be reduced to at least 12 cpm (which reflects the conservative upper-bound of the TSLRIC+ of the MTAS). This is further reinforced by Hutchison's submission that it considers that 12 cpm is an appropriate price to reflect the 'fair and reasonable costs' of supplying the MTAS.

The Commission also notes that the pricing of MTAS above the underlying cost of production eases competitive pressure over the provision of the FTM services and may contribute to a further mark-up of prices above cost in this market. This in turn may provide further funds (from above normal returns on FTM services) for integrated operators to subsidise retail mobile services – such as through handset subsidies. The Commission notes that, by failing to establish a price closer to the

TSLRIC+ of supplying of the MTAS, the Non-PMTS Undertakings could, to some extent, have the effect of discouraging efficient investment in, and efficient use of, the infrastructure by which telecommunications services are provided. Rather, the Commission believes it is likely that the price of the MTAS will move closer towards its optimal level, and more quickly, if the Non-PMTS Undertakings were to be rejected.

If the promotion of efficient investment in, and efficient use of, the infrastructure by which telecommunications services are provided was the only objective when setting prices for the MTAS, the Commission believes it would be appropriate to reduce the price of the service to its efficient cost level immediately.

As a result, the Commission considers that the pricing outcomes under the Non-PMTS Undertakings which will result in a price for Non-PMTS calls of 18 cpm, are likely to have potentially distortionary impacts for investment particularly as this rate is well above the underlying cost of providing the MTAS.

To the extent that Hutchison might use any revenues it receives in excess of its 12 cpm rate to fund further 'innovation and reductions in retail prices',[155] the Commission considers this may represent over-investment in (and consequently the inefficient use of) telecommunications infrastructure.

The Commission has considered the incentives for the risks involved in investment in new and existing infrastructure. In doing so, the Commission notes that the Non-PMTS Undertakings apply across both Hutchison's 2G and 3G networks. Further, that rejection of the Non-PMTS Undertakings is likely to result in prices for the supply of the MTAS through arbitration or commercial negotiation in the range 15 to 18 cpm, which is equivalent or below what it could supply the MTAS under the Undertakings if the 18 cpm applied. As Hutchison also submits that a rate of 12 cpm is an appropriate price with reference to the fair and reasonable costs of providing the MTAS, and costs are a manifestation of risk, the Commission considers that because a price of 18 cpm is proposed, the Undertakings will enable Hutchison to cover such risks of investment in new and existing infrastructure.

The Commission considers that the objective of promoting efficient use of, and investment in, telecommunications infrastructure would best be promoted by rejecting the Non-PMTS Undertakings.

4.3.2. The legitimate business interests of the carrier or carriage service provider concerned and the carrier's or provider's investment in facilities used to supply the declared service concerned.

In considering the LTIE, the Commission has not applied the 'future with and without' test.

Hutchison's view

Hutchison submits that its legitimate business interests are congruous with the statutory factors of promoting further competition and allowing for the economically efficient use of, and investment in, infrastructure. Specifically, Hutchison submits that:

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[155] Hutchison, *Hutchison Undertakings Submission*, p. 10.

> The interests of Hutchison, as a new entrant and an efficient forward-looking operator, are wholly consistent with the statutory factors which make up the LTIE test, namely promoting competition and the economically efficient use of, and investment in, infrastructure. The acceptance of the Undertakings will promote Hutchison's legitimate business interests not at the expense, but rather in furtherance of, the LTIE.[156]

Submitters' views

PowerTel submits that the FTM market is competitive and that the 18 cpm price for the supply of the MTAS under the Non-PMTS Undertakings is 'way in excess of the TSLRIC of termination as determined by the Commission in the MSR [the *MTAS Final Report*]'.[157] Specifically, PowerTel submits that the Non-PMTS Undertakings do not reflect the legitimate business interests of Hutchison as the:

- 18 cpm price for the supply of the MTAS is not based on the TSLRIC;
- 18 cpm price exceeds the Commission's price guidelines established in the MSR; and
- issue of pass-through is not relevant to the determination of TSLRIC.[158]

Telstra submits that the 18 cpm price for the supply of the MTAS under the Non-PMTS Undertakings does not reflect the legitimate business interests of Hutchison as it 'provides an unjustifiable windfall to Hutchison'. Telstra further submits that the 18 cpm price exceeds the Commission's adjustment path in the *MTAS Pricing Principles Determination* and price-relative terms and conditions, as well as the TSLRIC+ of supplying the MTAS.[159]

Commission's view

Appendix 1 outlines the approach the Commission takes when assessing this criterion.

The Commission notes that the 18 cpm price for the supply of the MTAS under the Non-PMTS Undertakings is well above the indicative prices contained in the *MTAS Pricing Principles Determination*.

Specifically, the Commission notes that in considering the legitimate business interests of access providers, in its indicative price path outlined in the *MTAS Pricing Principles Determination*, an MTAS rate of 18 cpm was considered appropriate for the 2005 calendar year and a rate of 15 cpm for the 2006 calendar year.

Further, the Commission notes that the 18 cpm price rate proposed by Hutchison is above what Hutchison itself submits 'is an appropriate price having regard to the fair and reasonable costs of providing the MTAS' of 12 cpm.

In this context, the Commission notes that 18 cpm is more than necessary to meet Hutchison's legitimate business interests.

Accordingly, the Commission is of the view that the prices proposed by Hutchison in the Non-PMTS Undertakings are above what Hutchison considers is the appropriate price for the MTAS (with regard to the fair and reasonable costs of provision of the

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156 ibid., p. 19.

157 PowerTel, *PowerTel Submission on ACCC Discussion Paper*, p. 7.

158 ibid., p. 11.

159 Telstra, *Telstra Submission on ACCC Discussion Paper*, p. 8.

service) and beyond what would seem necessary to protect the legitimate business interests of Hutchison and its investment in facilities used to supply the MTAS.

4.3.3. The interests of persons who have the right to use the declared service

In considering the LTIE, the Commission has applied the 'future with and without' test.

Hutchison's view

Hutchison submits that the interests of access seekers utilising the terms of the PMTS Undertakings will be served through the advantages conferred by price certainty and reciprocal pricing arrangements. Hutchison argues that the Non-PMTS Undertakings maintain 'an appropriate balance between the interests of fixed-line/integrated operators and mobile only operators'. Further, Hutchison argues that its proposed reduction in the MTAS price for FTM calls will preclude fixed-line operators from benefiting from a 'windfall' and maintain a closer association of price and cost.[160]

Submitters' views

PowerTel submits that the 18 cpm price for the supply of the MTAS under the Non-PMTS Undertakings exceeds the TSLRIC of providing the MTAS and constrains competitiveness of access seekers. PowerTel further submits that, contrary to Hutchison's submission, the Non-PMTS Undertakings do not 'maintain an "appropriate balance" between the interests of fixed line operators and MNOs'.[161] In addition, PowerTel submits that the expiry period of the Non-PMTS Undertakings is unreasonable as it 'certainly does not deliver on the promise of certainty which is what undertakings are meant to be all about'.[162]

Commission's view

Appendix 1 outlines the approach the Commission takes when assessing this criterion.

In summary, the Commission believes a price for the MTAS equal to (or in the range of) the TSLRIC+ of providing the service would be more likely to be interests of persons that have a right to use the declared service. This is because a closer association of the price of the MTAS with its underlying cost will allow equally and more efficient MNOs to compete on their merits in the markets for FTM and retail mobile services.

The Commission notes PowerTel's submission that the Non-PMTS Undertakings do not 'maintain an "appropriate balance" between the interests of fixed line operators and MNOs'. In this respect the Commission considers that the Non-PMTS Undertakings are likely to discriminate between users. In this respect, the Commission considers that access seekers with fixed networks are more disadvantaged than those with integrated or mobile-only networks.

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160 Hutchison, *Hutchison Undertakings Submission*, p. 20.

161 PowerTel, *PowerTel Submission on ACCC Discussion Paper*, p. 18.

162 ibid., p. 5.

In this respect, the pricing outlined in the Non-PMTS Undertakings is above what the Commission believes the TSLRIC+ of providing the service and, further, above what Hutchison itself believes is an appropriate price, having regard to the fair and reasonable costs of supplying the service. Accordingly, the Commission believes the Non-PMTS Undertakings are more likely to:

- improve the ability of mobile operators to compete at the expense of fixed operators in their respective markets; and
- encourage inefficient FTM substitution and inhibit the ability of fixed operators to compete in supply of voice services to end users.

The Commission further notes the limited operating period of the Non-PMTS Undertakings. In this respect, the Commission agrees with submission by PowerTel that the Non-PMTS Undertakings fail to provide market certainty for any significant period of time.[163]

The Commission also considers that the proposed rate of 18 cpm is above what the Commission understands the service is being currently priced at in commercial negotiations or arbitral processes.[164] For this reason, the Commission considers that the interests of persons who have the right to use the MTAS will be protected if the Non-PMTS Undertakings were rejected rather than accepted.

4.3.4. The direct costs of providing access to the declared service

In having regard to this criterion, the Commission does not consider that it would be helpful to use the 'with and without' test.

Hutchison's view

Hutchison submits that the FTM market is not effectively competitive and that the proposed 18 cpm price for the supply of the MTAS for FTM originating calls will promote the LTIE. Hutchison believes that its proposed Non-PMTS price of 18 cpm for the MTAS, which amounts to a 14 per cent reduction over its most recently negotiated price for the MTAS, is therefore appropriate in view of the existing pricing structure of the FTM market.[165]

Submitters' views

PowerTel submits that the 18 cpm price for the supply of the MTAS under the Non-PMTS Undertakings exceeds the TSLRIC and the price guidelines established by the Commission in the *MTAS Final Report*.[166]

Telstra submits that the 18 cpm price for the supply of the MTAS under the Non-PMTS Undertakings is unreasonable. Specifically, Telstra submits that:

> … this pricing is not reflective of the efficient costs of supplying MTAS, is inconsistent with various of the statutory criteria, is in excess of those prices stipulated in the Commission's MTAS Pricing Principles and fails the 'future with or without' test proposed by Hutchison.[167]

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163 The Commission notes that it is its understanding that industry participants typically negotiate prices for the MTAS that will apply over a period of 12 months.

164 Between 15 and 18 cpm.

165 Hutchison, *Hutchison Undertakings Submission*, p. 11.

166 PowerTel, *PowerTel Submission on ACCC Discussion Paper*, p. 7.

167 Telstra, *Telstra Submission on ACCC Discussion Paper*, p. 5.

Commission's view

Appendix 1 outlines the approach the Commission takes when assessing this criterion.

As noted previously, the Commission is of view that the 18 cpm price for the supply of the MTAS under the Non-PMTS Undertakings is above the pricing outcomes of 15 to 18 cpm currently being negotiated between access seekers and providers and also in excess of the indicative prices included in the *MTAS Pricing Principles Determination*.

In the *MTAS Final Report*, the Commission concluded that 12 cpm is at the conservative upper bound estimate of the efficient costs (or TSLRIC+) of supplying the MTAS. Since the *MTAS Final Report*, the Commission has not had a more reliable or robust estimate of the efficient cost of supply of the MTAS in an Australian context put before it that would alter this view at present.

Specifically, the Commission notes that an indicative rate for the supply of the MTAS of 18 cpm was appropriate for the 2005 calendar year and a rate of 15 cpm for the 2006 calendar year in the *MTAS Pricing Principles Determination*, and that by 1 January 2007, a price of 12 cpm reflecting the conservative upper bound estimate of cost of 12 cpm was appropriate.

Further, the Commission notes that the 18 cpm price is above what Hutchison itself concedes is appropriate. Hutchison states that '12 cpm is an appropriate price having regard to the fair and reasonable costs of providing the MTAS'.

Hence, the Commission concludes that 18 cpm is above what the Commission believes is the direct costs of supplying the MTAS.

4.3.5. The operational and technical requirements necessary for the safe and reliable operation of the carriage service/telecommunications network/facility

The Commission has not considered the 'with and without' test in relation to this criterion.

The Commission has received no submissions that suggest that there is any risk that the price-related terms and conditions of the Non-PMTS Undertakings could lead to unsafe or unreliable operation of a carriage service, telecommunications network or facility.

4.3.6. The economically efficient operation of a carriage service/telecommunications network/facility

The Commission considers that it would be helpful to use the 'with and without' test, in assessing this criterion.

Appendix 1 outlines the approach the Commission takes when assessing this criterion.

Like the test described under the 'efficient use of, and investment in, infrastructure' LTIE criterion, this criterion also relates to the productive and allocative efficiency of a proposed undertaking. An undertaking should encourage access providers to select the least-cost method of providing the service and provide those services most highly valued by access seekers.

For the reasons outlined above under the 'efficient use of, and investment in, infrastructure' LTIE criterion, the Commission considers that the economically efficient operation of a carriage service/telecommunications facility would be more likely to be promoted if the Commission rejected the Non-PMTS Undertakings than would be the case if the Commission were to accept them.

4.3.7. Other Matters

The Commission did not have regard to any other matters in determining whether the terms and conditions are reasonable as permitted by section 152AH(2).

4.4. Alternative Undertakings combinations

This section provides a brief assessment of the two alternative combinations of the PMTS and Non-PMTS Undertakings proposed by Hutchison and the Commission's view on the reasonableness of the price conditions of these alternatives proposed.

4.4.1. Commission's application of the reasonableness test

The Commission's approach to the 'reasonableness test' is to have regard to the section 152AH criteria and any other matters considered relevant to this assessment. The Commission considers that it must apply the reasonableness test to each of the Undertakings submitted by Hutchison. Contrary to Hutchison's submission, the Commission does not consider that it is able, or even desirable, to apply the reasonableness test to a group of undertakings considered together, without first considering the reasonableness of the undertakings individually. In other words, the Commission considers that where more than one undertaking has been submitted simultaneously, each of those undertakings must individually be considered 'reasonable'. It is not open to the Commission to combine an otherwise unreasonable undertaking with another reasonable undertaking so that 'on balance' the combined undertakings are reasonable.

As Hutchison has requested that certain combinations of the Undertakings are considered together – i.e. the PMTS Dual Rate Undertakings with the Non-PMTS Undertakings and, alternatively, the PMTS Single Rate Undertakings with the Non-PMTS Undertakings – the Commission also addresses the appropriateness of these proposed combinations of the Undertakings.

It should be noted that, as the Commission has been asked to assess certain Undertakings together and consider the reasonableness of these combined Undertakings in terms of the statutory criteria, an outcome of Hutchison's proposed approach to joining certain Undertakings together may be that the Commission assesses an otherwise reasonable undertaking as unreasonable, because it is combined with an unreasonable undertaking.

The background to the statutory criteria and the Commission's approach to applying the reasonableness test has been outlined in Appendix 1 in detail, and assessed against each of the individual Undertakings.

This section considers the findings of the reasonableness of the price terms and conditions in the Undertakings outlined in previous sections and briefly assesses the reasonableness of the price terms and conditions of the combined Undertakings, as

proposed by Hutchison. The Commission's separate assessment of the reasonableness of the price terms and conditions of each of the combinations is considered below.

Hutchison's views on the Draft Decision

Hutchison reiterates its views and submissions that the Commission should assess the joint effect of the Undertakings. Hutchison states that the fact that each of its Undertakings, in isolation, may have been regarded as unreasonable does not necessarily preclude the Commission from finding that their combined effect is reasonable. The Commission rejects this approach.[168]

4.4.2. The reasonableness of the price terms and conditions of the PMTS Dual Undertakings and the Non-PMTS Undertakings

Hutchison's view

Hutchison submits that the LTIE is best served by the acceptance of the PMTS Dual Rate Undertakings coupled with the Non-PMTS Undertakings.[169]

Commission's view

In Sections 4.2 and 4.3, the Commission found that it could not accept the reasonableness of the price terms and conditions of either the PMTS Dual Rate Undertakings and the Non-PMTS Undertakings.

The Commission does not accept Hutchison's view that if the Undertakings individually are assessed as unreasonable it is still open to the Commission to find that the combined effect is reasonable. The Commission does not consider it a reasonable (price) condition that a price of 21 cpm for MTM MTAS is used as an incentive for access seekers to meet the conditions for obtaining the 12 cpm price for MTM MTAS. It has outlined why it considered a price of 18 cpm for FTM calls and calls originating on overseas networks is not price reasonable in section 4.3. The differential pricing that would result from the combined Undertakings, namely 12 cpm for those access seekers that meet the price conditions for MTM calls, 21 cpm for those that do not meet the price conditions for MTM calls and 18 cpm for all other Non-PMTS calls, is not reflective of the cost of providing the MTAS.

Therefore, the Commission is of the view that the price terms and conditions in combination for the PMTS Dual Rate and Non-PMTS Undertakings are not reasonable.

4.4.3. The reasonableness of the price terms and conditions of the PMTS Single Undertakings and the Non-PMTS Undertakings

Hutchison's view

Hutchison submits that the LTIE would also be served by the acceptance of the Single Rate Undertakings coupled with the Non-PMTS Undertakings, even though this would not be as beneficial as the coupling of the PMTS Dual Rate Undertakings and the Non-PMTS Undertakings. The PMTS Single Rate Undertakings were submitted as an alternative to the PMTS Dual Rate Undertakings to accommodate the possibility that the Commission may regard the optional rate of 21 cpm as a departure from its

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168 Hutchison, *Submission in response to Draft Decision*, pp. 19-20.

169 Hutchison, *Hutchison Undertakings Submission*, p. 6.

MTAS pricing principle which affects the reasonableness of the PMTS Dual Rate Undertakings.[170]

Commission's view

Overall, the Commission is of the view that while the price terms and conditions in the PMTS Single Rate Undertakings are reasonable (as outlined in section 4.1), the price terms and conditions in the Non-PMTS Undertakings are not reasonable, as outlined in Section 4.3 above.

As a consequence of finding that the price terms and conditions of the PMTS Single Rate Undertakings are reasonable and the Non-PMTS Undertakings were unreasonable, the Commission cannot find that combined the price terms and conditions of these Undertakings are reasonable.

4.4.4. Conclusion

The Commission in considering the Undertakings proposed both individually and in the two combinations: PMTS Dual Rate Undertakings and Non-PMTS Undertakings; and PMTS Single Rate Undertakings and Non-PMTS Undertakings; finds that the price terms and conditions of the Undertakings are not reasonable.

[170] ibid., pp. 6-7.

5. Analysis of the non-price terms and conditions

This section contains the Commission's identification of the non-price terms and conditions which form part of the undertaking.

The relevant provisions of the Undertakings are as follows:

3.2 In this Undertaking, unless the contrary intention appears:
…a reference to this Undertaking includes its attachments…

…

4.1 This Undertaking overrides any commercial agreement for the supply of the [Hutchison] Mobile Terminating Access Service between [Hutchison] and any other third party.

…

5.1 [Hutchison] undertakes to the Commission that while the Undertaking is in effect, it will provide Access Seekers with the [Hutchison] Mobile Terminating Access Service:
(a) on the terms and conditions specified in Attachment A; and
(b) on such other terms (the **Non-price Terms**) as are determined in accordance with clauses 5.2 or 5.4.

5.2 Where an Access Seeker has an agreement with [Hutchison] for the supply of the mobile terminating access service or any other service such as SMS or MMS that is in force on the date on which this Undertaking commences (an **Existing Agreement**), the supply of the [Hutchison] Mobile Terminating Access Service will be governed by all the Non-price Terms in the Existing Agreement.

5.3 For the avoidance of doubt, if an Existing Agreement governs the supply of the [Hutchison] Mobile Terminating Access Service by reason of clause 5.2, the terms of this Undertaking prevail to the extent of any inconsistency.

5.4 Where an Access Seeker does not have an Existing Agreement, the Non-price Terms contained in Attachment B will govern the supply of the [Hutchison] Mobile Terminating Access Service.

5.1. Hutchison's submissions regarding the identification of the non-price terms and conditions

In its submission on the Draft Decision, Hutchison states:

> *Provided that an access undertaking complies with the formal requirements specified in s152BS and satisfied the criteria set out in s152BV of the Act, including the reasonableness criterion, the Commission has the power to accept an undertaking that purports to override existing agreements.*
>
> *Hutchison does not contend that access undertakings can override existing agreements in all circumstances. However, s152AY(2)(b) envisages that access undertakings will override existing contractual arrangements 'failing agreement' between carriers and access seekers.*
>
> *Hutchison and access seekers have failed to reach agreement about the price of the MTAS. The Commission is cognisant of this given the 12 access disputes that have been notified by Hutchison and other parties in relation to the price of the MTAS.*
>
> *In these circumstances, the Undertakings, if accepted, will automatically govern the terms and conditions of supply of the MTAS in accordance with s152AY(2)(b) of the Act. Clause 4.1 merely clarifies the operation of the relevant statutory provisions in these circumstances.*[171]

[171] Hutchison, *Submission in response to Draft Decision*, p. 21.

Hutchison also states:

> *Clause 4.1 is contained in the Undertakings to make it clear that, given Hutchison and other parties' failure to agree on the price of the MTAS, its Undertakings will automatically govern supply of the MTAS to those access seekers in accordance with s152AY(2)(b) of the Act in the event that the Undertakings are accepted.*
>
> *In addition, to the extent that access seeker's existing contractual non-price terms and conditions of supply are effectively incorporated into the Undertakings by virtue of clause 5.2, acceptance of the Undertakings will not result in access seekers being deprived of their non-price contractual rights.*[172]

Further, Hutchison states:

> *Clause 5 of the Undertakings provides two alternative sources of non-price terms and conditions on which Hutchison will supply the MTAS:*
>
> - *the non-price terms and contained in Attachment B to the Undertakings; or*
> - *the access seeker's existing agreement with Hutchison for the supply of the MTAS, SMS, MMS or any other service (the existing agreement option).*[173]

Hutchison also states:

> *[It is] Hutchison's submission that the non-price terms and conditions of the existing agreements must be reasonable, having been subject to a process of commercial negotiation between Hutchison and access seekers.*
>
> …
>
> *The non-price terms contained in existing agreements do not depart significantly from those set out in Attachment B to the Undertakings.*[174]

Further, Hutchison states:

> *The Commission has interpreted clause 5.3 to mean the following:*
>
> > In the present case, the net effect of the 'existing agreement option' is that all 'consistent' terms and conditions are to be read into the Undertaking, while inconsistent clauses are replaced by the relevant clauses set out in Attachment B.
>
> *Hutchison understands that the Commission has interpreted the reference to 'the terms of this Undertaking' in clause 5.3 to include all the terms and conditions contained in Attachment B. This would clearly have the effect summarised by the Commission above, i.e. Attachment B and the existing agreements may operate concurrently. However, such an interpretation is contrary to Hutchison's purpose in including two separate sources of non-price terms for access seekers.*

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[172] ibid., p. 24.

[173] ibid., p. 25.

[174] ibid., p. 26.

Hutchison's intention in submitting two sources of non-price terms was to allow continuity and certainty for access seekers with existing agreements.

In Hutchison's view, there is no requirement that an existing agreement be consistent with Attachment B, as Attachment B does not form part of the Undertakings in circumstances where an access seeker is party to an existing agreement. Clause 5.2 makes it clear that Attachment B does not apply to such access seekers. Therefore, Attachment B should not be regarded as part of the Undertakings for the purposes of determining whether an inconsistency exists under clause 5.3 All that clause 5.3 requires is consistency with the balance of the terms and conditions specified in the Undertaking and in Attachment A of the Undertaking.

In the interest of certainty, Hutchison would support the making of the following minor variation pursuant to s152BY of the Act if it would satisfy the Commission as to the certainty of the inconsistency clause:

> For the avoidance of doubt, if an Existing Agreement governs the supply of the [relevant Hutchison service] by reason of clause 5.2, the terms of this Undertaking, excluding Attachment B, will prevail to the extent of any inconsistency.

Hutchison will supply the MTAS to access seekers on the non-price terms and conditions contained in existing agreements regardless of any inconsistency with Attachment B to the Undertakings. Accordingly, Hutchison submits that the Commission's concerns regarding uncertainty arising from clause 5.3 are unfounded. It will not be unduly difficult for the parties to determine whether the 'inconsistency' clause is triggered, and with what effect.[175]

Previously, Hutchison submitted that:

Attachment B is closely based on the model terms and conditions at Annexure A to the Telecommunications Access Code 1998.[176]

5.2. Submitters' views on the identification of the relevant terms

Telstra submits:

- the Undertakings cannot override any existing commercial agreements in the manner set out in clause 4.1 of the Undertakings;[177] and
- given that the definition of 'existing agreements' includes agreements for MTAS or 'any other service such as SMS or MMS', there may be multiple relevant agreements and, if so, the Undertaking does not establish an order of precedence for these agreements nor is there any indication as to which existing agreement is to be incorporated pursuant to clause 5.2.[178]

No other submissions were received on this point.

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175 ibid., p. 28.

176 Hutchison, *Hutchison Undertakings Submission*, p. 12.

177 Telstra, *Telstra Submission on ACCC Discussion Paper*, p. 14.

178 ibid., p. 12.

5.3. Commission's analysis of the identification of the relevant terms

Clause 4.1

In its draft decision, the Commission indicated that it was concerned that there appeared to be no statutory or lawful basis for clause 4.1. In particular, the Commission was concerned that the Undertaking purported to override all existing commercial agreements. The Commission also stated that it appeared that the statutory presumption in section 152AY was that commercial agreements would take precedence over undertakings.

In response to this concern, Hutchison's submission on the Draft Decision states:

> *Provided that an access undertaking complies with the formal requirements specified in s152BS and satisfied the criteria set out in s152BV of the Act, including the reasonableness criterion, the Commission has the power to accept an undertaking that purports to override existing agreements.*
>
> *Hutchison does not contend that access undertakings can override existing agreements in all circumstances. However, s152AY(2)(b) envisages that access undertakings will override existing contractual arrangements 'failing agreement' between carriers and access seekers.*
>
> *Hutchison and access seekers have failed to reach agreement about the price of the MTAS. The Commission is cognisant of this given the 12 access disputes that have been notified by Hutchison and other parties in relation to the price of the MTAS.*
>
> *In these circumstances, the Undertakings, if accepted, will automatically govern the terms and conditions of supply of the MTAS in accordance with s152AY(2)(b) of the Act. Clause 4.1 merely clarifies the operation of the relevant statutory provisions in these circumstances.*[179]
>
> **And further,**
>
> *Clause 4.1 is contained in the Undertakings to make it clear that, given Hutchison and other parties' failure to agree on the price of the MTAS, its Undertakings will automatically govern supply of the MTAS to those access seekers in accordance with s152AY(2)(b) of the Act in the event that the Undertakings are accepted.*
>
> *In addition, to the extent that access seeker's existing contractual non-price terms and conditions of supply are effectively incorporated into the Undertakings by virtue of clause 5.2, acceptance of the Undertakings will not result in access seekers being deprived of their non-price contractual rights.*[180]

Clause 4.1 provides:

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[179] Hutchison, *Submission in response to Draft Decision*, p. 21.

[180] ibid., p. 24.

> This Undertaking overrides any commercial agreement for the supply of the [relevant MTAS] between [Hutchison] and any other party.

In the Commission's opinion, clause 4.1 is clear on its face. The clause should be given its ordinary and natural meaning. There is nothing in the language of clause 4.1 which purports or even alludes to a limitation of that clause to circumstances in which there has been a failure to agree.

If Hutchison's intention at the time it lodged these Undertakings in October 2005 was that the Undertakings would only affect those agreements where there had been a "failure to agree" within the meaning of section 152AY (whether on price or any other aspect), it would not have been difficult for Hutchison to include words in the Undertakings to make that clear. For instance, clause 1.3 could have been inserted and stated:

> For the avoidance of doubt, this Undertaking only applies where there has been a failure to agree within the meaning of section 152AY of the Act.

However, Hutchison chose not to include any such clarifying statement in the Undertakings. Therefore, in the Commission's view, and taking the ordinary and natural meaning of clause 4.1, the Undertakings purport to override any existing commercial agreement, irrespective of whether there has been any failure to agree.

Even if the Commission was wrong on this point, the Commission does not accept that section 152AY operates in the way that Hutchison submits.

Hutchison submits:

> *Hutchison does not contend that access undertakings can override existing agreements in all circumstances. However, s152AY(2)(b) envisages that access undertakings will override existing contractual arrangements 'failing agreement' between carriers and access seekers.*[181]

In effect, Hutchison is arguing that a failure to agree on one particular matter in an existing agreement renders the entire agreement liable to be set aside and replaced with an Undertaking. The Commission is not satisfied that section 152AY operates in this way.

Section 152AY provides:

> **152AY Compliance with standard access obligations**
>
> (1) This section applies if a carrier or carriage service provider is required to comply with any or all of the standard access obligations.
>
> (2) The carrier or carriage service provider must comply with the obligations:
>
> (a) on such terms and conditions as are agreed between the following parties:
>
> (i) the carrier or carriage service provider, as the case requires;
>
> (ii) the access seeker; or
>
> (b) failing agreement:
>
> (i) if an access undertaking given by the carrier or carriage service provider is in operation and specifies terms and conditions about a particular matter—on such terms and conditions relating to that matter as are set out in the undertaking; or
>
> (ii) if an access undertaking given by the carrier or carriage service provider is in operation, but the undertaking does not specify terms and conditions about a particular matter—on such terms and conditions relating to that matter as are determined by the Commission under Division 8 (which deals with arbitration of disputes about access); or

[181] ibid., p. 21.

(iii) if there is no such undertaking—on such terms and conditions as are determined by the Commission under Division 8 (which deals with arbitration of disputes about access).

Note: An agreement mentioned in paragraph (a) may be registered under Division 9.

The Commission does not disagree that there has been the requisite "failure to agree" where parties have, despite agreement on all other aspects of an access arrangement, failed to agree on price. Hutchison's submission is that a failure to agree on a single matter renders the entire existing agreement liable to be overridden by an accepted undertaking. The Commission's view is that section 152AY(2)(b) only applies to the *extent* of the failure to agree. In other words, section 152AY(2)(b) permits the replacement of the terms and conditions relating to the particular matter on which there has been a failure to agree. It does *not* operate to displace or override those aspects of the agreement where the parties are not in dispute or disagreement.

If Hutchison's interpretation was correct, any minor or trivial disagreement between the parties could result in the agreement being overturned. This may be in direct contrast to the remedies provided for under the agreement itself or the express intention of the parties. The Commission is *not* satisfied that such an interpretation was contemplated by the Parliament when section 152AY was inserted.[182] In fact, the Explanatory Memorandum confirms:

> *It may be that in a particular case, the terms and conditions on which a carrier or a carriage service provider must comply with a particular standard access obligation in relation to a particular declared service will be:*
>
> - *partly agreed (for example, arrangements to supply billing information);*
> - *partly set out in an access undertaking (for example, arrangements about provisioning of networks); and*
> - *partly determined under an arbitration (for example, the pricing arrangements).*[183]

Similarly, the Commission is not satisfied that Hutchison's interpretation is one that other parties to existing agreements are likely to have considered at the time they entered the agreement. This is discussed further in the following chapter on reasonableness.

Clause 5

In relation to the operation of clause 5, the Commission expressed a number of concerns in its draft decision. Most of those concerns arose from uncertainty regarding the operation of clauses 5.2 and 5.3. In particular, the Commission was concerned that the effect of clause 5.3 was to incorporate an unknown number of

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[182] This should be contrasted against Parliament's express statement that the Commission may effectively, override existing agreements in arbitrations. See *Trade Practices Act 1974*, section 152CP where Parliament empowered the Commission to specify (i) the terms and conditions on which the carrier or provider is to comply with any or all of the standard access obligations applicable to the carrier or provider and, (ii) any other terms and conditions of the access seeker's access to the declared service. There are no limitations to "particular matters" in section 152CP as there are in section 152AY.

[183] Explanatory Memorandum to the *Trade Practices Amendment (Telecommunications) Bill 1996.*

agreements (and their respective terms and conditions) into the Undertakings. This concern was premised on the basis that the effect of clause 5.3 was that existing agreements would be incorporated into the Undertakings. Existing clauses, irrespective of whether they related to price or non-price matters, would then have to be compared against the Undertakings (comprising the head document, Attachment A and Attachment B). Inconsistent provisions would be struck down to the extent of any inconsistency with the Undertakings. Additional provisions, as they would now be effectively incorporated into the Undertakings, would all have to be individually assessed against the statutory criteria.

It was not clear on the material in front of the Commission at that time that Hutchison's intention was that clause 4.1 would *only* operate where there had been a failure by the parties to agree on a particular term or condition, nor that the word "Undertakings" as it is used in clause 5.3, should not be taken to include Attachment B. However, Hutchison has now submitted:

> *Clause 5 of the Undertakings provides two alternative sources of non-price terms and conditions on which Hutchison will supply the MTAS:*
>
> - *the non-price terms and contained in Attachment B to the Undertakings; or*
> - *the access seeker's existing agreement with Hutchison for the supply of the MTAS, SMS, MMS or any other service (the existing agreement option).*[184]
>
> …
>
> *[It is] Hutchison's submission that the non-price terms and conditions of the existing agreements must be reasonable, having been subject to a process of commercial negotiation between Hutchison and access seekers.*[185]
>
> …
>
> *The non-price terms contained in existing agreements do not depart significantly from those set out in Attachment B to the Undertakings.*[186]
>
> …
>
> *The Commission has interpreted clause 5.3 to mean the following:*
>
> > In the present case, the net effect of the 'existing agreement option' is that all 'consistent' terms and conditions are to be read into the Undertaking, while inconsistent clauses are replaced by the relevant clauses set out in Attachment B.
>
> *Hutchison understands that the Commission has interpreted the reference to 'the terms of this Undertaking' in clause 5.3 to include all the terms and conditions contained in Attachment B. This would clearly have the effect summarised by the Commission above, i.e. Attachment B and the existing agreements may operate concurrently. However, such an interpretation is contrary to Hutchison's purpose in including two separate sources of non-price terms for access seekers.*

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184 Hutchison, *Submission in response to Draft Decision*, p. 25.

185 ibid., p. 26.

186 ibid.

Hutchison's intention in submitting two sources of non-price terms was to allow continuity and certainty for access seekers with existing agreements.

In Hutchison's view, there is no requirement that an existing agreement be consistent with Attachment B, as Attachment B does not form part of the Undertakings in circumstances where an access seeker is party to an existing agreement. Clause 5.2 makes it clear that Attachment B does not apply to such access seekers. Therefore, Attachment B should not be regarded as part of the Undertakings for the purposes of determining whether an inconsistency exists under clause 5.3. All that clause 5.3 requires is consistency with the balance of the terms and conditions specified in the Undertaking and in Attachment A of the Undertaking.

In the interest of certainty, Hutchison would support the making of the following minor variation pursuant to s152BY of the Act if it would satisfy the Commission as to the certainty of the inconsistency clause:

> For the avoidance of doubt, if an Existing Agreement governs the supply of the [relevant Hutchison service] by reason of clause 5.2, the terms of this Undertaking, excluding Attachment B, will prevail to the extent of any inconsistency.[187]

Hutchison will supply the MTAS to access seekers on the non-price terms and conditions contained in existing agreements regardless of any inconsistency with Attachment B to the Undertakings. Accordingly, Hutchison submits that the Commission's concerns regarding uncertainty arising from clause 5.3 are unfounded. It will not be unduly difficult for the parties to determine whether the 'inconsistency' clause is triggered, and with what effect.

The Commission has now considered Hutchison's submissions. The Commission is not satisfied that clauses 5.2 and 5.3 should be interpreted in the manner suggested by Hutchison.

Clauses 5.2 and 5.3 provide:

5.2 Where an Access Seeker has an agreement with [Hutchison] for the supply of the mobile terminating access service or any other service such as SMS or MMS that is in force on the date on which this Undertaking commences (an **Existing Agreement**), the supply of the [Hutchison] Mobile Terminating Access Service will be governed by all the Non-price Terms in the Existing Agreement.

5.3 For the avoidance of doubt, if an Existing Agreement governs the supply of the [Hutchison] Mobile Terminating Access Service by reason of clause 5.2, the terms of this Undertaking prevail to the extent of any inconsistency.

The definition of "Undertakings" in clause 3.2 (b) is:

> In this Undertaking, unless the contrary intention appears:
>
> …
>
> (b) A reference to an Attachment is a reference to an attachment to this Undertaking and a reference to this Undertaking includes its attachments.

Hutchison's submission is that:

- the *"purpose"* of the Undertakings was to provide two alternative sources of non-price related terms and conditions – existing agreements and, where no there is no existing agreement, Attachment B;[188]

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187 ibid., p. 28.

188 Hutchison, *Hutchison Undertakings Submission*, p. 12; and Hutchison, *Hutchison Submission on ACCC Discussion Paper*, p. 28.

- the non-price terms and conditions of existing agreements would be "*effectively incorporated*" into the Undertaking by the operation of clause 5.2;[189] and
- the "*intention in submitting two sources of non-price terms was to allow continuity and certainty for access seekers with existing agreements*".[190]

The net effect therefore was that, although existing agreements would be overridden, the non-price terms and conditions would be saved, Attachment B would not replace them, and access seekers would be able to rely on their existing agreements.

The difficulty is that the wording of the Undertakings does not support Hutchison's purpose or intention.

When the wording of the Undertakings is given its ordinary and natural meaning, Attachment B replaces the non-price terms and conditions of existing agreements to the extent of their inconsistency.[191]

Specifically, while clause 5.2 *does* state that the supply of the relevant service will be governed by all the non-price terms in the existing agreement, clause 5.3 clarifies how clause 5.2 is to be read.

- Clause 5.3 confirms that if there is an inconsistency between an existing agreement and the Undertaking, the Undertaking is to prevail.
- Unless the contrary intention appears, clause 3.1 confirms that an "Undertaking" is taken to be a reference to the Undertaking including its Attachment.
- Despite the relative ease with which a contrary intention *could* have been inserted into the Undertakings (eg Hutchison's proposed variation to insert the words "excluding Attachment B" into clause 5.3), no contrary intention actually appears.
- While Hutchison may have had a contrary intention, that intention did not make its way into the written document.
- Therefore, clause 5.3 literally and effectively provides that, where the terms and conditions of an existing agreement are inconsistent with the Undertaking, Attachment A and Attachment B, the latter documents will prevail.

Accordingly, not only does clause 4.1 attempt to override any existing agreement, clause 5 confirms this and provides the mechanism to do it. Clause 5 does not, as Hutchison asserts, save the existing provisions. It only saves those terms that are "not inconsistent" with Attachment B. Therefore, in order to determine which terms are preserved and which are replaced, both the Commission and the parties would have to undertake a clause-by-clause comparison of the documents. The end result of that process would be that Attachment B would replace inconsistent clauses. Attachment

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189 Hutchison, *Hutchison Submission on ACCC Discussion Paper*, p. 26.

190 ibid, p. 28.

191 ibid. Hutchison confirms that differences do exist when it states, "*The non-price terms contained in existing agreements do not depart significantly from those set out in Attachment B to the Undertakings.*"

B could then be assessed against the statutory criteria. The Commission would then have to identify and assess any "additional but not inconsistent" clauses from all existing agreements, and assess them against the statutory criteria.

The proposed minor variation

In relation to that proposed "minor variation", the Commission simply notes that no formal request for a variation has been received, nor would it be open to the Commission to accept such a variation *prior to* accepting the Undertakings. Section 152BY provides that an undertaking may be varied once it is in operation. For an undertaking to be "in operation" it must have first been accepted. As such, there is no power for the Commission to accept a variation under section 152BY at this stage. Also, as section 152BU(2) provides that the Commission must consider "the undertaking" which is placed before it, the Commission has not placed any weight on Hutchison's statement that it "would support the making of [the minor variation]". The Commission must therefore, consider the Undertakings as lodged, rather than as they *might* be at some future time.

Similarly, in relation to Hutchison's statement that they would supply access seekers on the current terms, notwithstanding any inconsistency, the Commission must assess the Undertakings as lodged. It is not open to the Commission to assess them in light of what Hutchison *might* do.

The terms and conditions where no existing agreement is in place

The Commission notes that, where there is no existing agreement in place, the terms and conditions of the Undertakings will apply. That is, in relation to non-price terms and conditions, Attachment B will apply in all cases.

Conclusion

Where there is an existing agreement in force on the date on which the Undertakings commence, the non-price terms and conditions will comprise:

- where there is an inconsistency between a term of an existing agreement and Attachment B – the Attachment B term; and
- where an existing agreement contains an "additional" non-price term – that additional term.

Where there is no existing agreement in force on the date on which the Undertakings commence – the Attachment B terms and conditions.

These findings have significant implications for the Commission's assessment of reasonableness and consistency with the SAOs. These matters are discussed in the following chapters.

6. Findings on the reasonableness of the non price terms and conditions

As noted previously, determining whether the terms and conditions of the Undertakings are reasonable must include an assessment of both the price and non-price terms and conditions taken as a whole. This Chapter considers the reasonableness of the non-price terms and conditions. The Commission's approach to the assessment of reasonableness is set out in Appendix 1.

The Commission's findings on the reasonableness of the non-price terms and conditions are discussed in two separate sections:

- clauses 4.1, 5.2 and 5.3; and
- the other terms and conditions of the Undertakings.

6.1. Clauses 4.1, 5.2 and 5.3

As discussed in the last chapter, Hutchison submits:

> *Clause 4.1 is contained in the Undertakings to make it clear that, given Hutchison and other parties' failure to agree on the price of the MTAS, its Undertakings will automatically govern supply of the MTAS to those access seekers in accordance with s152AY(2)(b) of the Act in the event that the Undertakings are accepted.*
>
> *In addition, to the extent that access seeker's existing contractual non-price terms and conditions of supply are effectively incorporated into the Undertakings by virtue of clause 5.2, acceptance of the Undertakings will not result in access seekers being deprived of their non-price contractual rights.*[192]

The Commission has found that, when clauses 4.1, 5.2 and 5.3 are given their ordinary and natural meaning, the Undertakings purport to have a much broader effect. Specifically, the Undertakings purport to override any existing commercial agreement, not merely those where there has been a failure to agree within the meaning of section 152AY. Further, the terms and conditions of existing agreements are only preserved to the extent that they are "not inconsistent" with Attachment B. Therefore, in conducting its assessment of reasonableness, the Commission has taken into account the need to determine the reasonableness of both Attachment B and the existing agreements to the extent that Attachment B does not override them.

The first step for the Commission is to determine whether the operation of the Undertakings is reasonable. Taking into account:

- the legitimate business interests of Hutchison;
- the interests of all persons who have rights to use the declared service;
- the need for certainty in the terms of the agreement; and
- the desirability of fairness and balance

the Commission is not satisfied that the operation of the Undertakings is reasonable.

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[192] ibid., p. 24.

The Commission's specific findings are set out below.

The Commission is not satisfied that it is necessary for existing agreements to be overridden by the Undertakings to protect the legitimate business interests of Hutchison. Hutchison's legitimate business interests were protected by virtue of the commercially negotiated existing agreements. Clauses 4.1, 5.2 and 5.3 effectively override and replace those negotiated agreements. This is simply not necessary in the circumstances to protect the legitimate business interest of Hutchison. When the Commission applies the 'future with and without' test, the result is the same – Hutchison's legitimate business interests were best represented by the existing agreements. If, as Hutchison has suggested, the Attachment B does not depart significantly from the existing agreements, overriding those agreements would not advance Hutchison's position vis-a-vis the other parties.

The Commission does not believe that the interests of persons who have rights to use the declared service under existing agreements should be adversely affected in this way. The Commission is not satisfied that Parliament intended that section 152AY could be used to override entire existing commercial agreements due to a failure to agree on one particular matter. Further, access seekers with existing agreements are entitled to believe that those agreements will continue to govern the relationship of the parties within the parameters of the original agreement. Finally, notwithstanding Hutchison's submission that "acceptance of the Undertakings will not result in access seekers being deprived of their contractual rights", the language of the Undertakings has that exact result. This is not reasonable in the circumstances. When the 'future with and without' test is applied, access seekers with existing agreements are worse off if the Undertaking is accepted – their existing agreements are overridden and inconsistencies are resolved in favour of Attachment B.

This alteration of the rights of the parties is neither fair nor balanced. This is particularly so when the parties had already negotiated and come to an agreement regarding their respective rights. In all likelihood, that process resulted in a fair and balanced approach. To replace that approach with one that attempts to unilaterally replace existing terms and conditions is not reasonable.

While Hutchison:

- relies on its interpretation of section 152AY;
- refers to the "*purpose*" of allowing two separate sources of terms and conditions; and
- notes its "*intention…to allow certainty and continuity*"

none of these matters are mentioned in the Undertakings. As a consequence, there is neither clarity nor certainty in the operation of the Undertakings. To give the Undertakings the meaning which Hutchison suggests, both the Commission and access seekers would need to be apprised of Hutchison's desired outcome and the statutory basis upon which it relies. This simply does not occur in the Undertakings as lodged. While it may be that the proposed variation to clause 5.3 would have this effect, that varied clause is not before the Commission now. It may never even come before access seekers. Therefore, the Undertakings have neither the clarity or certainty which is reasonably required nor which access seekers with existing rights are entitled to.

Even if Hutchison *was* correct in its interpretation of section 152AY, the recourse to section 152AY is not clear on the face of the document. In order to conclusively establish that section 152AY operates in this way, either Hutchison or an access seeker would need to seek declaratory or other orders from a Court. Given the need for clarity and certainty on the face of the document, this is unreasonable in itself. However, even if such orders were obtained, it would not determine the net result. The replacement of "inconsistent" terms would still require assessment, negotiation and, potentially, further Court orders. Again, this does not provide the certainty and clarity that should be reasonably apparent on the face of the document itself.

Accordingly, the Commission is *not* satisfied that clauses 4.1, 5.2 and 5.3 reasonably determine the terms and conditions of the Undertakings. This is sufficient in itself for the Commission to find that the Undertakings are not reasonable within the meaning of section 152AH and to reject the Undertakings in accordance with sections 152BU(2) and 152BV(2)(d).

6.2. The other terms and conditions of the Undertakings

Notwithstanding the Commission's findings in relation to the operation of clauses 4.1, 5.2 and 5.3, and for the sake of completeness, the Commission has also considered the reasonableness of the terms and conditions which Hutchison submits would actually comprise the Undertakings.

Hutchison's submission

Hutchison submits:

> *The terms and conditions contained in the Undertakings and their combined effect satisfy the relevant statutory factors. The Undertakings are therefore reasonable and should be accepted by the Commission in the manner proposed by Hutchison.*[193]
>
> *The non-price terms and conditions of existing agreements must be reasonable, having been subject to a process of commercial negotiation between Hutchison and access seekers.*[194]
>
> *The non-price terms and conditions contained in the [existing agreements] do not depart significantly from those set out in Attachment B to the Undertakings.*[195]
>
> *Attachment B is closely based on the model terms and conditions at Annexure A of the Telecommunications Access Code 1998.*[196]

Submitters' views

Telstra takes exception to the manner in which Hutchison has suggested 'that the reasonableness of various terms should not be considered in isolation...[and that] the combined effect of all terms and conditions in a given undertaking should be considered when applying the statutory criteria.'[197] Telstra further submits that

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193 Hutchison, *Hutchison Undertakings Submission*, p. 19.

194 Hutchison, *Submission in response to Draft Decision*, p. 26.

195 ibid.

196 Hutchison, *Hutchison Undertakings Submission*, p. 12.

197 Telstra, *Telstra Submission on ACCC Discussion Paper*, p. 4.

adopting the 'combined effect' approach goes against previous Commission practice whereby the Commission had found that every term and conditions in an undertaking must be reasonable, and, if one term of an undertaking is unreasonable, then the undertaking must be rejected.[198]

Telstra also submits that the various non-price terms and conditions proposed by Hutchison are, in any event, unreasonable. In particular, Telstra submits that:

- as the Commission has not been provided with copies of existing agreements, the Commission does not have sufficient information to form a view as to the reasonableness of those terms and conditions;[199]
- in relation to Hutchison's submission that Attachment B is closely based on Annexure A to the *Telecommunications Access Code 1998*, this is insufficient of itself to establish the reasonableness of the terms and conditions;[200]
- clauses 7.7 through 7.9 of Attachment B are unreasonable insofar as they allow Hutchison to demand and set the quantum of security that Hutchison will require to supply MTAS; and
- clause 13.10 is unreasonable insofar as it provides that the Agreement may be terminated on 5 business days notice if the parties cannot agree on an amendment to the Agreement within 90 days of commencement of negotiations in relation to that proposed amendment.[201]

Neither PowerTel nor Vodafone made any specific submissions in relation to the reasonableness of the non-price terms and conditions of the Undertakings. PowerTel did state however, that, as it did not consider that the price terms and conditions of the Undertakings were reasonable, it had not reviewed the non-price terms and conditions in detail, nor had it formed a view on their reasonableness.

Commission's view

Terms and conditions of existing agreements

The Commission does not accept Hutchison's submission that

> *The non-price terms and conditions of existing agreements must be reasonable, having been subject to a process of commercial negotiation between Hutchison and access seekers.*

One of the reasons Part XIC establishes a telecommunications access regime is that commercial negotiations, by themselves, will not always promote the long term interests of end users. The fact that parties have agreed to certain terms and conditions through commercial negotiation does not automatically mean that those terms and conditions are reasonable according to the statutory criteria in section 152AH. Agreement between the parties is merely one matter that may be taken into account.

198 ibid.

199 ibid., pp. 5 and 12.

200 ibid.

201 ibid., p. 5.

In a submission to the ACCC on 30 March 2006, Hutchison explained that existing agreements are *"effectively incorporated"* into the undertakings. However, the existing agreements were not submitted to the Commission together with Hutchinson's proposed access undertaking or otherwise available to the Commission at that time. One such agreement did not even exist when the undertakings were lodged. Two further agreements were varied after the Undertakings were given. The existing agreements were only provided to the Commission on 25 May and 15 June 2006, following a request by the Commission under section 152BT on 10 May 2006.

The Commission accepts that the terms and conditions of an undertaking can be specified by reference to another document or to a series of documents. However, these terms and conditions must still be considered by the Commission to determine if the criteria in section 152BV are satisfied. If Hutchinson had wanted the terms and conditions of existing agreements to be 'effectively incorporated' into the undertakings, those existing agreements needed to have been made available to the Commission when the undertakings were submitted. The Commission's decision must be made in accordance with the time limits in section 152BU. The Commission cannot assess the various terms and conditions contained in different agreements when they are provided.

For these reasons, the Commission is not satisfied that these terms and conditions are reasonable.

Annexure A of the *Telecommunications Access Code 1998*

As mentioned, Hutchison submits that Attachment B is 'closely based' on the model terms and conditions in Annexure A to the *Telecommunications Access Code 1998*. Telstra queries whether this is sufficient of itself to amount to reasonableness.

In its *Final Determination – Model Non-price Terms and Conditions (October 2003)* (Model Non-price Terms and Conditions), the Commission stated that parts of the *TAF Code* (officially known as the *Telecommunications Access Code 1998*) were useful in terms of what could be considered fair and reasonable terms and conditions of access. Accordingly, the Commission was itself guided by parts of the *TAF Code* in developing its model terms and conditions where it considered that the provisions represented fair and reasonable terms and conditions of access and were appropriate to address the particular matters in question.[202] Therefore, as early as 2003, the Commission indicated that the terms and conditions specified in the *TAF Code* did not necessarily reflect reasonable terms and conditions in all cases. In part, this recognises that the Commission is obliged to have regard to the statutory considerations, rather than merely confirm that the proposed terms and conditions are consistent with an industry code.

In coming to its decision in this matter, the Commission has assessed the proposed terms and conditions in accordance with section 152AH. In doing so, it has also taken into account the matters raised in the *Model Non-price Terms and Conditions* and the submissions of the parties.

Subject to the findings in relation to Security and Termination below, the Commission is satisfied that:

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[202] ACCC, *Final Determination – Model Non-price Terms and Conditions*, October 2003, p. 12.

- Attachment B does closely reflect Annexure A; and
- the balance of the terms and conditions set out in Attachment B are reasonable.

However, for reasons already provided, the Commission is not satisfied that the terms and conditions of Attachment B would be the only terms and conditions incorporated into the Undertakings.

Security

Clauses 7.7 through 7.9 are relevant and provide:

> **7.7** **Security to be provided**
> The Access Seeker must provide (at the Access Seeker's cost) to [Hutchison] and maintain for the term of this agreement a bank guarantee in such an amount as determined by [Hutchison] in respect of amounts owing by the Access Seeker to [Hutchison] under this Agreement.
>
> **7.8** **Information regarding creditworthiness**
> [Hutchison] may reasonably from time to time require information concerning the ongoing creditworthiness of the Access Seeker, and the Access Seeker must promptly supply that information. Depending upon that information, [Hutchison] may, subject to clause 7.9, reasonably alter the security required of the Access Seeker, and the Access Seeker shall promptly provide that altered security.
>
> **7.9** **Amount of security**
> As a statement of general principle the amount of any security required must be calculated by reference to the value of the Service likely to be provided to the Access Seeker under this Agreement over a reasonable period, being not less than 3 months.

Telstra states that this means that Hutchison has an 'unlimited ability…to demand and set the quantum of security' and that this is unreasonable.[203]

The Commission understands that clauses 7.7 through 7.9 operate as follows:

- clause 7.7 provides that a bank guarantee needs to be provided in respect of amounts owing by the Access Seeker to Hutchison under the agreement;
- clause 7.8 provides that the amount of security to be provided can be adjusted due to Hutchison's assessment of the Access Seeker's creditworthiness from time to time; and
- clause 7.9 provides that the security to be provided must be calculated having regard to the services that are likely to be provided over a reasonable period, such period being not less than 3 months.

In order to give practical effect to the provisions, the reference to 'owing' in clause 7.7 cannot be limited to amounts owing at the time the assessment is made (i.e. outstanding liabilities). To adopt that approach would lead to a situation where security would have to be adjusted on a continuous basis so that it kept pace with the amounts incurred. In this light, the Commission believes the provision must be read as a reference to amounts that might reasonably be owed over a reasonable period. That reasonable period should be calculated in accordance with clause 7.9.

While the Commission does have some concerns regarding the potential open-endedness that the expression 'not less than 3 months' implies, the Commission does

[203] Telstra, *Telstra Submission on ACCC Discussion Paper*, p. 5.

not agree with Telstra's assertion that Hutchison's ability to set levels of security is *'unlimited'*.

In its draft decision, the Commission noted that the period is still limited to what is 'reasonable' in the circumstances, and the parties have an obligation to act in good faith (clause 14.4). In turn, Telstra submits that it has concerns that such an obligation does not afford sufficient protection to access seekers and that therefore, 'fairness and balance' between the parties may not be achieved.

The Commission has already noted that undertakings should provide certainty and clarity for all parties from the outset. If undertakings did so, it would significantly reduce the likelihood of disputes occurring and arguments arising over what "reasonable" means in the particular circumstances. In the present case, and notwithstanding the inclusion of concepts of 'reasonable' and 'good faith', the parties would still need to have recourse to the Courts or mediation/arbitration processes to resolve disputes. This could be avoided if the clauses were more proscriptive in relation to amounts and timeframes. For instance, clause 7.7 could provide the method of calculation that must be used, rather than leave it to Hutchison and the 'good faith' clause. In relation to clause 7.8, limits might be placed on the frequency of review (including trigger events) and the percentage increase in security (perhaps linked to the percentage increase in financial exposure). In relation to clause 7.9, an upper limit could be placed on the timeframe.

Given these findings, and taking into account:

- the legitimate business interests of Hutchison,
- the interests of persons with rights to use the declared services;
- the economically efficient operation of relevant facilities,

the Commission has concluded that the current Security provision is not reasonable.

Termination

Clause 13.10(h) effectively requires the parties to agree on amendments to the agreement within 90 days of the start of negotiations. Where they cannot agree, either party can terminate on 5 business days notice.[204]

Telstra submits that the end result is unreasonable because Hutchison may request a variation to any of the terms of the Undertakings and, when no agreement can be reached on the variation within 90 days, Hutchison would be permitted to terminate on 5 days notice.

In its draft decision, the Commission noted that the power to seek an amendment or to terminate where agreement is not reached does *not* rest with Hutchison alone. The rights are mutual rights. Either party to the Undertakings could seek an amendment. If negotiations were not finalised within 90 days, either party would have the right to terminate. The agreement is not, therefore, one that favours Hutchison over access seekers.

In relation to the 5 or 90 day periods, the Commission did not consider that the periods are not reasonable within the meaning of section 152AH. In coming to its conclusion, the Commission noted, *inter alia*:

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[204] Telstra, *Submission in response to Draft Decision*, p. 5.

- Telstra does not submit that the balance of clause 13.10 or the bases on the agreement may be terminated are unreasonable;
- the clause does not appear to go beyond what Hutchison reasonably requires to protect its legitimate business interests; and
- the periods do not unreasonably affect the interests of persons who have rights to use the relevant services.

In response to the draft decision, Telstra submitted the reciprocal termination rights do not provide the requisite certainty to access seekers, and afford insufficient protection against the unfair exercise of the power by Hutchison against access seekers. Further, the 5 business day notice period for termination was unreasonable and the clause goes beyond what is reasonably required to protect Hutchison's legitimate business interests.[205]

The Commission does not accept Telstra's argument in relation to the termination clauses in the Undertakings and remains of the view that the clause is reasonable.

[205] ibid., pp. 5-6.

7. Consistency with the SAOs

Under section 152BV(2)(b) of the Act, the Commission must not accept an undertaking unless it is satisfied that it is consistent with the SAOs that are applicable to a carrier or CSP. The SAOs become applicable when an access provider supplies a declared service to itself or others. These obligations were referred to above in section 3.2.2. The purpose of this provision is to ensure that an undertaking at least meets the basic level of access obligations that would normally apply to the provider of the declared service, but for the undertaking.

This chapter assesses whether Hutchison's Undertakings are consistent with the SAOs applicable to Optus through its proposed supply of the MTAS. Appendix 1 outlines the Commission's approach to assessing consistency with the SAOs, while section 7.2 contains the actual assessment.

In conducting its assessment, the Commission has considered whether the *non*-price terms and conditions specified in the Undertakings are consistent with each of the applicable SAOs. The Commission considers that the price terms and conditions contained in the Undertakings are more relevant to an assessment of reasonableness.

The applicable SAOs

The Act requires that there be consistency between the proposed undertaking and the applicable SAOs.

The Explanatory Memorandum to the Trade Practices Amendment (Telecommunications) Bill 1996 explains that:

> The *applicable standard access obligations* are those obligations set out in proposed section 152AR that are applicable to the carrier or provider making the access undertaking. A standard access obligation may not be applicable because of an exemption … or because the carrier or carriage service provider does not supply the declared service concerned.[206]

Hutchison submits that the following SAOs apply to the Undertakings:

- the supply of the declared service (section 152AR(3)(a));
- the technical and operational quality of the declared services to be supplied (section 152AR(3)(b));
- fault detection, handling, rectification and timing of the service to be supplied (section 152AR(3)(c));
- the interconnection of facilities required to supply carriage services (section 152AR(5)); and
- the provision of billing information (sections 152AR (6) and (7)).[207]

The Commission is satisfied that these are the applicable SAOs.

Service to be supplied

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[206] Explanatory Memorandum for the *Trade Practices Amendment (Telecommunications) Bill 1996*, p. 57.

[207] Hutchison, *Hutchison Submission on ACCC Discussion Paper*, p. 6; and Hutchison, *Submission in response to Draft Decision*, p. 29.

The applicable SAO in respect of the supply of a declared service is set out in section 152AR(3)(a) of the Act. It provides that, if requested to do so by an access seeker, an access provider must supply an active declared service to the access seeker in order that the access seeker can provide carriage and/or content services.

The MTAS Declaration applies to all voice services terminating on all digital mobile telephony networks.

As noted above, Hutchison has used a separate set of Undertakings for HTAL and HG3A. Each Undertaking is limited to a subset of the declared service, namely:

Entity	Services covered	Services not covered
HTAL	mobile to mobile (MTM) voice calls, fixed to mobile (FTM) voice calls and voice calls originating on overseas networks	SMS, MMS, video, content and data services and the H3GA W-CDMA terminating voice access service
H3GA	mobile to mobile (MTM) voice calls, fixed to mobile (FTM) voice calls and voice calls originating on overseas networks	SMS, MMS, video, content and data services and the HTAL CDMA terminating voice access service

The Commission is of the view that an access provider can give an access undertaking in relation to a subset of a declared service. Conversely, an access seeker could seek access to all or a subset of a declared service. If the Undertakings were to be accepted in their present forms by the Commission, HTAL or H3GA would remain under an obligation to provide access to that part of the declared service not covered by the Undertakings. Access to that part of the service would be subject to commercial agreement or failing that, arbitration by the Commission.

Further, even though an undertaking can pertain to part of a declared service, the terms and conditions of the undertaking, which includes the service description, are still subject to a reasonableness test.

Clause 5.1 of the Undertakings states that '[Hutchison] undertakes to the Commission that while this Undertaking is in effect, it will provide Access Seekers with the [relevant Hutchison] Mobile Terminating Access Service' on the terms and conditions set out in Attachment A and adopted in accordance with clauses 5.2 or 5.4.

To the extent that Hutchison gives Undertakings for the supply of a declared service, albeit part of a declared service, in purported compliance with the obligation under section 152AR(3)(a) to supply the declared service, the Commission is satisfied that these parts of the Undertakings are consistent with the applicable SAO.

Technical and operational quality of the service to be supplied

The applicable SAO in respect of the technical and operational quality of the service to be supplied is set out in section 152AR(3)(b) of the Act, which provides that an access provider must take all reasonable steps to ensure that the technical and operational quality of the service supplied to the access seeker is equivalent to that which the access provider provides to itself.

Clauses 2.2 and 2.3 of Attachment B relevantly provide:

> **2.2 Non-discrimination principles**
>
> In supplying the Service, [Hutchison] must treat the Access Seeker on a non-discriminatory basis, including but not limited to, if requested by the Access Seeker:

(a) taking all reasonable steps to ensure that the technical and operational quality and timing of the Service supplied to the Access Seeker is equivalent to that which [Hutchison] provides to itself;

(b) taking all reasonable steps to ensure that the Access Seeker receives in relation to the Services supplied to the Access Seeker, fault detection, handling and rectification of a technical and operational quality and timing that is equivalent to that which [Hutchison] provides to itself; and

(c) taking all reasonable steps to ensure that if a standard is in force under section 384 of the Act that the Interconnection complies with the standard.

2.3 Limit on non-discrimination principles

(a) The non-discrimination principles referred to in clause 2.2 are intended to promote the long term interests of end users of Carriage Services and of services supplied by means of Carriage Services, in accordance with section 152AB of the TPA.

(b) The non-discrimination principles in clause 2.2 are intended to be implemented in a way which will promote competition in markets for Listed Carriage Services having regard to (amongst other things) the extent to which relevant things will remove obstacles to end-users of Listed Carriage Services gaining access to the Listed Carriage Services and to achieve the other objectives contained in section 152AB(2) of the TPA.

(c) The non-discrimination principles contained in clause 2.2 must not limit an Access Seeker's ability to request Services of a superior or inferior quality than [Hutchison] provides to itself, provided always that [Hutchison] will not be required to accept such a request.

Apart from these general non-discrimination principles, the Undertakings do not contain any specific provisions about how Hutchison will give effect to the obligation to provide technical and operational quality of service on a non-discriminatory basis.

The Commission notes, however, that there is no obligation on Hutchison to specify the precise terms and conditions on which it will implement the principle.

Because the Commission has found that clauses 4.1, 5.2 and 5.3 operate to effectively replace the inconsistent non-price terms and conditions of existing agreements with Attachment B, it is only necessary to assess Attachment B. As such, and had the Commission been satisfied as to the reasonableness of the Undertakings, it is likely that the Commission would have also been satisfied that the Undertakings were consistent with the applicable SAO. In particular, there is nothing in clause 2.3 which the Commission believes unreasonably limits the operation of clause 2.2.

Fault detection, handling, rectification and timing of the service to be supplied

The applicable SAO in respect of fault detection, handling, rectification and timing of the service to be supplied is set out in section 152AR(3)(c) of the Act. This provides that an access provider must take all reasonable steps to ensure that the access seeker receives, in relation to the supplied service, fault detection, handling and rectification of a technical and operational quality and timing that is equivalent to that which the access provider provides to itself.

Clauses 2.2 Attachment B relevantly provides:

2.2 Non-discrimination principles

In supplying the Service, [Hutchison] must treat the Access Seeker on a non-discriminatory basis, including but not limited to, if requested by the Access Seeker:

…

(b) taking all reasonable steps to ensure that the Access Seeker receives in relation to the Services supplied to the Access Seeker, fault detection, handling and

rectification of a technical and operational quality and timing that is equivalent to that which [Hutchison] provides to itself;

…

Clause 5 of Schedule 5 to Attachment B *(Operations and maintenance procedures)* provides:

5.2 Fault reporting and identification

5.2.1 Fault reporting and identification procedures must be non-discriminatory, including (but not limited to) the response time targets.

5.2.2 As a general principle, priority will be given to faults that have the highest service loss impact in terms of the number of customers affected.

5.2.3 Initial responsibility for identifying a fault rests with the person who first becomes aware of the fault.

5.2.4 If an end user reports a fault in respect of an Eligible Service provided to the end user by [Hutchison], [Hutchison] and the Access Seeker must comply with the relevant ACIF procedures in relation to fault reporting and rectification, as defined from time to time.

For the reasons set out above in relation to the operation of clauses 4.1, 5.2 and 5.3, had the Commission been satisfied as to the reasonableness of the Undertakings, it is likely that the Commission would have also been satisfied that the fault detection, handling, rectification and timing of services provisions are consistent with this SAO.

Interconnection

The Commission notes that the Undertakings would appear to be in relation to the provision of a service that require the interconnection of facilities.

The nature of the Undertakings and the service concerned suggests to the Commission that section 152AR(5) is an applicable SAO for the purposes of supplying the declared service. Hutchison has also acknowledged this.

Section 152AR(5) of the Act relevantly effectively provides that:

> If an access provider owns or controls one or more facilities; the access provider must, if requested to do so by a service provider:
>
> - permit interconnection of those facilities with the facilities of the service provider to allow the service provider to supply carriage services and/or content services;
> - take all reasonable steps to ensure that:
>   - the technical and operational quality and timing of the interconnection is equivalent to that which the access provider provides to itself; and
>   - take all reasonable steps to ensure that the service provider receives, in relation to the interconnection, fault detection, handling and rectification of a technical and operational quality and timing that is equivalent to that which the access provider provides to itself.

Clause 2.2 of Attachment B relevantly provides:

> **2.2 Non-discrimination principles**
>
> In supplying the Service, [Hutchison] must treat the Access Seeker on a non-discriminatory basis, including but not limited to, if requested by the Access Seeker:
>
> …
>
> (c) taking all reasonable steps to ensure that if a standard is in force under section 384 of the Act that the Interconnection complies with the standard.

Clause 2.4.7 of Schedule 2 of Attachment B (*Technical standards: specific issues*) provides, in relation to routing:

> 2.4.7 Routing of all interconnect traffic will be performed by [Hutchison] in a non-discriminatory manner and [Hutchison] will treat an Access Seeker's interconnect traffic, for routing purposes, on an equivalent basis to that which [Hutchison] provides in respect of its own traffic.

Further, clause 3 *(Service and Interconnection)* and Schedule 5 (Operations and maintenance procedures) of Attachment B provide further guidance as to the manner in which interconnection will be achieved.

The Commission considers that an undertaking which used the provisions of Attachment B would permit the interconnection of Hutchison's facilities with those of an access seeker, based on certain terms and conditions (i.e. price and non-price) in order that an access seeker can procure a the declared service – in this case, Hutchison's MTAS.

For the reasons set out above in relation to the operation of clauses 4.1, 5.2 and 5.3, had the Commission been satisfied as to the reasonableness of the Undertakings, it is likely that the Commission would also have been satisfied that the fault detection, handling, rectification and timing of services provisions are consistent with this SAO.

Provision of billing information

Sections 152AR(6) and (7) of the Act provides that if an access seeker uses a declared service supplied by an access provider, the access provider, if requested to do so by the access seeker, must give the access seeker billing information in connection with the supply of the declared service. Further, the billing information must be given at such times or intervals, and in such manner and form, and set out such particulars, as ascertained by the Trade Practice Regulations (the Regulations). This is a SAO that applies to providers of declared services generally.

Regulation 28S of Division 2 of the Regulations sets out the nature of the billing information required to be provided pursuant to section 152AR(7) of the Act.

Generally, the Regulations provide that billing information must be given at the times agreed and in a manner and form agreed and must include the number from which the call was made, the time the call started, the duration of the call and certain other particulars.

Schedule 3 to Attachment B *(Billing and settlement procedures)* sets out the manner in which Hutchison will undertake billing procedures. Clause 3.2.1 states:

> 3.2.1 [Hutchison] must provide Communication Information to the Access Seeker in connection with matters associated with, or incidental to, the supply of the Service:
>
> (a) at such times or intervals ascertained in accordance with any regulations made under sections 152AR(6) and (7) of the TPA, including any regulations made pursuant to these regulations (collectively ***regulations***);
>
> (b) in a manner and form ascertained in accordance with the regulations; and
>
> (c) with such particularity ascertained in accordance with the regulations.

Clause 8.1 of Schedule 8 to Attachment B *(Communication information)* states:

> **8.1 Billing information**
>
> [Hutchison] will provide the Access Seeker with billing information each month for the preceding calendar month, this information will be sent to the nominated contact at [Hutchison] as specified in paragraph 8.4 within the first 5 Business Days of the month.

For the reasons set out above in relation to the operation of clauses 4.1, 5.2 and 5.3, had the Commission been satisfied as to the reasonableness of the Undertakings, it is

likely that the Commission would also have been satisfied that the billing provisions of the Undertakings are consistent with this SAO.

APPENDICES

Appendix 1 Statutory Criteria for assessing an undertaking

Section 152BV(2) of the Act sets out the matters which need to be satisfied before the Commission can accept an undertaking. This section applies where an access undertaking is given to the Commission that *does not* adopt a set of model terms and conditions set out in the telecommunications access code as relevant to the Hutchison Undertakings.

Section 152BV(2) of the Act specifies that:

> (2) The Commission must not accept the undertaking unless:
>
> (a) the Commission has:
>
> (i) published the undertaking and invited people to make submissions to the Commission on the undertaking; and
>
> (ii) considered any submissions that were received within the time limit specified by the Commission when it published the undertaking; and
>
> (b) the Commission is satisfied that the undertaking is consistent with the standard access obligations that are applicable to the carrier or provider; and
>
> (c) if the undertaking deals with a price or a method of ascertaining a price – the Commission is satisfied that the undertaking is consistent with any Ministerial pricing determination; and
>
> (d) the Commission is satisfied that the terms and conditions specified in the undertaking are reasonable; and
>
> (e) the expiry time of the undertaking occurs within 3 years after the date on which the undertaking comes into operation.

The approach of the Commission to assessing each of these matters is considered in turn below.

Public submission process

Hutchison lodged the Undertakings on 7 October 2005.

On 26 October 2005, the Commission published the Undertakings and Hutchison's submission in support of the Undertakings, on its website at www.accc.gov.au.

On 18 November 2005, the Commission released a Discussion Paper in relation to the Undertakings and sought interested parties' views on the Undertakings and the supporting submissions.

On 21 April 2006 the Commission released its draft decision and invited interested parties to make submissions by 12 May 2006.

Submissions received in both of these processes are identified below:

Discussion Paper Submissions:

> **Hutchison Telecommunications (Australia) Pty Ltd and Hutchison 3G Australia Pty Ltd.**
>
> Hutchison, *Submission in response to the Australian Competition and Consumer Commission's discussion paper, Access Undertakings domestic digital mobile terminating access service,* 19 December 2005.

PowerTel Limited

PowerTel, *PowerTel submission to the Australian Competition and Consumer Commission regarding Hutchison's undertakings in relation to the Domestic Digital Mobile Terminating Access Service*, 22 December 2005.

Telstra Corporation Limited

Telstra, *Submission in response to the ACCC's discussion paper, Hutchison's Undertaking in relation to the Domestic Digital Mobile Terminating Access Service*, 23 December 2005.

Vodafone Australia Limited

Vodafone, *Response to Hutchison's Undertaking in relation to the Domestic Digital Mobile Terminating Access Service*, 21 December 2005.

Draft decision submissions:

Hutchison Telecommunications (Australia) Pty Ltd and Hutchison 3G Australia Pty Ltd.
Submission in response to the Draft Decision of the Australian Competition and Consumer Commission, Access Undertakings domestic digital mobile terminating access service, May 2006.

Telstra Corporation Limited
Submission in response to the ACCC's Draft Decision: Hutchison's Undertaking in relation to the Domestic Digital Mobile Terminating Access Service, May 2006.

Vodafone Australia Limited
Vodafone, *Response to Hutchison's Undertaking with the respect to the supply of its Mobile Terminating Access Service (MTAS) Draft Decision May 2006*

Consistency with the SAOs

The Act does not specify any particular approach for assessing whether an undertaking is consistent with the SAOs applicable to an access provider. Notwithstanding this, the Commission finds it useful to adopt the following approach:

- identify those SAOs that are applicable to a particular access provider; and
- assess whether the proposed undertaking is consistent with the applicable SAOs.

This assessment may involve consideration of whether the terms and conditions raise any inconsistencies with the applicable SAOs. If the terms and conditions are not found to be inconsistent with the SAOs, the Commission is likely to regard the undertaking as being consistent with the applicable SAOs.

The Commission's view is that the meaning of the word 'consistent' in section 152BV(2)(b) is that it takes its ordinary and natural meaning. The Commission believes that the ordinary and natural meaning of '*consistent with*' is that there be some uniformity and adherence to the thing in question but that there is no

requirement for exact or complete correspondence. The Commission, therefore, in applying this test to the relevant subject matter will not be requiring that a matter be precisely in accordance with the applicable SAOs, but rather, there be at least a reasonable level of conformity with the obligation.

For an obligation to be consistent with the applicable SAOs, it must be consistent with all the obligations imposed on the access provider. The SAOs are aggregated to determine consistency under section 152BV(2)(b). In this context, the Commission is not concerned with the reasonableness of the terms and conditions of the Undertakings as required under section 152BV(2)(d) – these matters are addressed separately, in their own Chapters.

The Commission's view is that the SAOs require an access provider to:

- supply an active declared service to the service provider in order that the service provider can provide carriage and/or content services;
- take all reasonable steps to ensure that the technical and operational quality of the service supplied to the service provider is equivalent to that which the access provider is supplying to itself;
- take all reasonable steps to ensure that the service provider receives, in relation to the active declared service supplied to the service provider, fault detection, handling and rectification of a technical and operational quality and timing that is equivalent to that which the access provider provides to itself;
- permit interconnection of its facilities with the facilities of the service provider for the purpose of enabling the service provider to be supplied with active declared services in order that the service provider can provide carriage and/or content services;
- take all reasonable steps to ensure that the technical operational quality and timing of the interconnection is equivalent to that which the access provider provides to itself;
- if a standard is in force under section 384 of the *Telecommunications Act 1997*, take all reasonable steps to ensure that the interconnection complies with the standard;
- take all reasonable steps to ensure that the service provider receives interconnection fault detection, handling and rectification of technical and operational quality and timing that is equivalent to that which the access provider provides to itself;
- provide particular billing information to the service provider; and
- supply additional services in circumstances where a declared service is supplied by means of conditional-access customer equipment.

The Undertakings compliance with the SAO's is discussed in Chapter 7.

Consistency with Ministerial Pricing Determination

Division 6 of Part XIC of the Act provides that the Minister may make a written determination setting out the principles dealing with price-related terms and conditions relating to the SAOs.[208]

A Ministerial Pricing Determination has not been made in relation to the MTAS. Accordingly, the Commission is not required to assess the Hutchison Undertakings against this criterion.

Whether the terms and conditions are reasonable

The Commission considers that it must apply the reasonable test to each of the Undertakings submitted by Hutchison. In determining 'reasonableness' in this context, the Commission must have regard to the range of matters set out in section 152AH(1) of the Act:

- whether the terms and conditions promote the long-term interests of end-users (LTIE) of carriage services or of services supplied by means of carriage services;
- the legitimate business interests of Hutchison, and its investment in facilities used to supply the declared service;
- the interests of all persons who have rights to use the declared service;
- the direct costs of providing access to the declared service;
- the operational and technical requirements necessary for the safe and reliable operation of a carriage service, a telecommunications network or facility; and
- the economically efficient operation of a carriage service, a telecommunications network or a facility.

In addition, the Commission may consider any other relevant matter.[209]

Application of the reasonable test

The reasonableness of the *price* and *non-price* terms and conditions in the Undertakings is considered in Chapters 4 and 5 respectively. Set out below is a summary of the key phrases and words used in assessing the above matters. It should be noted that only some of the criteria have been judicially considered, and in other contexts. Accordingly, in taking these matters into account, it is necessary for the Commission to form its own view as to their meaning.

It will be noted that some of the criteria set out in section 152AH(1) of the Act are not particularly directed at the non-price terms and conditions. For instance, the criterion dealing with the 'direct cost' of providing access to the declared service, and the economically efficient operation of a carriage service appear more relevant to considering the price terms and conditions. There are, however, a number of criteria that lend themselves to consideration from a non-price perspective. These, and how

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[208] Under *Trade Practices Act 1974*, section 152CH 'price-related terms and conditions' means terms and conditions relating to price or a method of ascertaining price.

[209] *Trade Practices Act 1974*, Section 152AH does not use the expression 'any other relevant matter'. Rather, section 152AH(2) of the Act states that the matters listed in section 152AH(1) of the Act do not limit the matters to which the Commission may have regard. Thus, the Commission interprets this to mean that it may consider any other relevant matter.

they are relevant to the non-price terms and conditions, are discussed more fully below.

LTIE

The Commission has published a guideline explaining what it understands by the phrase 'long-term interests of end-users' in the context of its declaration responsibilities.[210] The Commission considers that a similar interpretation would seem to be appropriate in the context of assessing an access undertaking.

In the Commission's view, particular terms and conditions promote the interests of end-users if they are likely to contribute towards the provision of goods and services at lower prices, higher quality, or towards the provision of greater diversity of goods and services.[211] To consider the likely impact of particular terms and conditions, the Act requires the Commission to have regard to whether the terms and conditions are likely to result in:

- promoting competition in markets for carriage services and services supplied by means of carriage services;
- achieving any-to-any connectivity; and
- encouraging the economically efficient use of, and economically efficient investment in:
    - the infrastructure by which listed carriage services are supplied; and
    - any other infrastructure by which listed services are, or are likely to become, capable of being supplied.[212]

In considering whether Hutchison's proposed prices contained in Undertakings are likely to promote competition, it is first useful to identify the relevant markets in which competition may be affected. In the *MTAS Final Report*, the Commission identified the following markets as being relevant to the question of whether it should declare the MTAS and, if so, the pricing principles it should specify for this service:

- the individual markets for the MTAS on each MNO's network;
- the national market within which FTM services are provided; and
- the national market for retail mobile services.

The Commission continues to believe that these are the most appropriate markets to consider for the purposes of the Hutchison Undertakings.

The Australian Competition Tribunal (the Tribunal), in its decision on access to subscription television services, noted in relation to the terms that make up the LTIE that:

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

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210 ACCC, *Telecommunications services — Declaration Provisions: A Guide to the Declaration Provisions of Part XIC of the Trade Practices Act*, July 1999.

211 ibid., pp. 32-33.

212 *Trade Practices Act 1974*, Section 152AB(2).

> Interests: the interests of end-users lie in obtaining lower prices (than would otherwise be the case), increased quality of service and increased diversity and scope of product offerings. This would include access to innovations … in a quicker timeframe than would otherwise be the case;
>
> Long-term: the long-term will be the period over which the full effects of the … decision will be felt. This means some years, being sufficient time for all players (being existing and potential competitors …) to adjust to the outcome, make investment decisions and implement growth – as well as entry and/or exit – strategies. [213]

The Commission also notes that in *Seven Network Limited (No 4),*[214] the Tribunal expressed its general agreement with the Commission's approach to applying the LTIE test established by the Commission's publication, *Access Pricing Principles, Telecommunications*, and the Commission's use of TSLRIC pricing. In the decision, the Tribunal relevantly stated that, in its view, the key pricing principles in applying the LTIE include:

- The price of a service should not exceed the minimum costs that an efficient firm will incur in the long-run in providing the service.
- The costs are the forward-looking costs, including a normal return on efficient investment (which takes into account the risk involved).
- Forward-looking means prospective costs using best-in-use technology. The access provider should only be compensated for the costs it would incur if it were using this technology, not what it actually incurs, for example in using out-of-date technology which is more costly. Of course, a firm may be using older technology because it was the best available at the time the investment was made and replacing it cannot be justified commercially. In a competitive market, however, that firm would only be able to charge on the basis of using the most up-to-date technology because, if it did not (in this hypothetical competitive market) access seekers would simply take the service from an alternative service provider.
- The cost of providing the service should be the cost that would be avoided in the long-run by not having to provide it. Thus, it is the additional or incremental costs necessarily incurred, assuming other production activities remain unchanged.[215]

Further, the Tribunal noted that 'in the general case where access prices need to be regulated, unless pricing is on a TSLRIC basis, efficient investment is unlikely to be encouraged.'[216]

In the Commission's view, the phrase 'economically efficient use of, and economically efficient investment in, infrastructure' refers to the concept of economic efficiency. This concept consists of three components:

- *Productive efficiency* – This is achieved where individual firms produce the goods and services that they offer at least cost;
- *Allocative efficiency* – This is achieved where the prices of resources reflect their underlying costs so that resources are then allocated to their highest valued uses (i.e. those that provided the greatest benefit relative to costs); and

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213 Application by *C7 Pty Limited & Seven Network Limited re: Foxtel and Telstra* reasons for decision, 23 December 2004 at paragraph 120.

214 [2004] ACompT 11.

215 *Seven Network Limited (No 4)* [2004] ACompT 11, paragraph 135.

216 ibid., paragraph 136.

- *Dynamic efficiency* – This reflects the need for industries to make timely changes to technology and products in response to changes in consumer tastes and in productive opportunities.

The Commission notes that the Tribunal decision makes it clear that the incentives for investment in new and existing infrastructure and the risks of making such an investment are given due consideration in assessing whether the particular thing promotes the efficient use of and efficient investment limb of the LTIE test. As acknowledged by the Tribunal decision, and cited above, TSLRIC pricing includes a normal return on efficient investment (which takes into account the risk involved).

The Commission also notes that amendments to section 152AB change the way the Commission should assess whether an undertaking promotes the economically efficient use of, and investment in, telecommunications infrastructure. The amended criterion clarifies, *inter alia*, that in considering whether a particular thing promotes the efficient use of and efficient investment in infrastructure, the Commission must consider the incentives for, and the risks involved in, investment in new and existing infrastructure.[217] The Commission notes that the purpose of the amendment was to make it clear that the incentives for investment in new and existing infrastructure, and the risks of making such an investment, are given due consideration in assessing whether the particular thing promotes the efficient use of and efficient investment limb of the LTIE test.

The legitimate business interests of the carrier or carriage service provider concerned and the carrier's or provider's investment in facilities used to supply the declared service concerned

The Commission is of the view that the concept of legitimate business interests should be interpreted in a manner consistent with the phrase 'legitimate commercial interests' used elsewhere in Part XIC of the Act. Accordingly, it would cover the carrier/ CSP's interest in earning a normal commercial return on its investment. This does not, however, extend to receiving compensation for the loss of any 'above-normal' economic profits that occur as a result of increased competition. In this regard, the Explanatory Memorandum for the *Trade Practices Amendment (Telecommunications) Bill 1996* states:

> ... the references here to the 'legitimate' business interests of the carrier or carriage service provider and to the 'direct' costs of providing access are intended to preclude arguments that the provider should be reimbursed by the third party seeking access for consequential costs which the provider may incur as a result of increased competition in an upstream or downstream market.[218]

When considering the legitimate business interests of the carrier or CSP in question, the Commission may consider what is necessary to maintain those interests. This can provide a basis for assessing whether particular terms and conditions in the undertaking are necessary (or sufficient) to maintain those interests.

The Commission's *Access Undertakings – A Guide to Part IIIA of the Trade Practices Act* (the Access Undertakings Guideline) states that:

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[217] Explanatory Memorandum to *Telecommunications Legislation Amendment (Competition and Consumer Issues) Bill 2005*, pp. 4 and 8.

[218] Explanatory Memorandum for the *Trade Practices Amendment (Telecommunications) Bill 1996*, p. 44.

> The Commission's analysis of legitimate business interests of the service provider will focus on commercial considerations of the service provider. The Commission will take into account the provider's obligations to shareholders and other stakeholders, including the need to earn a commercial return on the facility. It will also aim to ensure that any undertaking provides appropriate incentives for the provider to maintain, improve and invest in the efficient provision of the service.[219]

The *Access Undertakings Guideline* also states that:

> The Commission will take an interest in the extent to which competition arising from access to a service generates real benefits to intermediate and final consumers and the community in general. It will not assess business interests as legitimate if they have the purpose or effect of preventing the objectives of the Trade Practices Act being realised, in particular the objective of enhancing the welfare of Australians through the promotion of competition and efficiency. In addition, and in line with the stated intentions of the access regime, the Commission will not allow for reimbursements of forgone monopoly profits which the provider may incur as a result of increased competition in an upstream or downstream market, except insofar as they affect the ability of the firm to discharge CSOs.[220]

In this regard, the Commission noted in the *Access Pricing Principles Guidelines* that:

> As an access price consistent with these principles allows efficient access providers to recover their costs of production it will not violate their legitimate business interests.[221]

That said, the Commission noted in its *MTAS Final Report* that, in the case of the MTAS, an immediate reduction in the price of the service toward its underlying TSLRIC+ cost of production 'would impinge upon the legitimate business interests of access providers who have, to date, based their business plans around existing pricing structures and the previous retail benchmarking pricing principle'.[222]

In recognition of this, the Commission included in its *MTAS Pricing Principles Determination* an adjustment path of 30 months duration for the price to fall from above 21 cpm from 1 July 2004 to the Commission's price of 12 cpm on 1 January 2007. As set out in the *MTAS Final Decision*, (pp. 220-221) the Commission was:

> … mindful that an immediate and significant reduction would give mobile operators little time to adjust their business plans in response … [The] Commission considers that this period allows sufficient time for MNOs to unwind or realise their business decisions made in reliance on the previous regulatory approach …

Underlying this view was a belief that 3 cpm per annum reductions in the MTAS charge, over a three year period, would be achievable without harming a MNO's ability to recover reasonable costs (inclusive of a normal profit), and without placing undue pressure on any pricing plans that an MNO had designed and/or implemented for other services.

In relation to the non-price terms and conditions, the Commission views this criterion as requiring an assessment of the broader commercial interests of the access provider in conducting its own business affairs. An access provider, as an owner or controller of particular facilities, should not, simply because it is under an obligation to provide access to its service, be unduly compromised in the conduct of its own legitimate

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219 ACCC, *Access Undertakings – A Guide to Part IIIA of the Trade Practices Act*, 30 September 1999, pp. 4-5.

220 ibid., p. 6.

221 ACCC, *Access Pricing Principles Guidelines*, p. 18.

222 ACCC, *MTAS Final Report*, p. 216.

business interests. For instance, an access provider must have the right to make reasonable decisions about modifications and upgrades to its network or the right to set reasonable requirements for billing and the payment of accounts. Generally speaking, an access provider is entitled to have some legitimate control over its relationship with an access seeker to the extent reasonably required to protect its business concerns.

Interests of persons who have rights to use the declared service

Persons who have rights to use a declared service will, in general, use that service as an input to supply carriage services, or a service supplied by means of carriage services, to end-users. In the Commission's view, these persons have an interest in being able to compete for the custom of end-users on the basis of their relative merits. Terms and conditions that favour one or more service providers over others and thereby distort the competitive process may prevent this from occurring and consequently harm those interests.

While section 152AH(1)(c) of the Act directs the Commission's attention to those persons who already have rights to use the declared service in question, section 152AH permits the Commission to also consider the interests of persons who may wish to use that service.

Direct costs

The Commission's *MTAS Pricing Principles Determination* notes that 'direct costs' are those costs necessarily incurred in the provision of access. At a minimum, in this context, the phrase 'direct costs' is interpreted to mean that an access price should cover the direct incremental costs incurred in providing access. It does not, however, extend to receiving compensation for loss of any 'monopoly profits' that occurs as a result of increased competition. As stated in the Explanatory Memorandum:

> … 'direct' costs of providing access are intended to preclude arguments that the provider should be reimbursed by the third party seeking access for consequential costs which the provider may incur as a result of increased competition in an upstream or downstream market.[223]

This requires that the access price should not be inflated to recover any profits the access provider (or any other party) may lose in a dependent market as a result of the provision of access. In particular the Efficient Component Pricing Rule (ECPR) may be inconsistent with this criterion.

At a minimum, an access price should cover the direct incremental costs incurred in providing access and should not exceed the 'stand-alone costs of providing the service', where this is defined to mean:

> … costs an access provider will incur in producing a service assuming the access provider produced no other services.[224]

The Commission considers that the TSLRIC+ of providing the MTAS reflects the direct incremental cost of providing access. In addition, the TSLRIC+ does not provide any compensation for foregone monopoly profits.

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[223] Explanatory Memorandum for the *Trade Practices Amendment (Telecommunications) Bill 1996*, p. 44.

[224] ACCC, *Access Pricing Principles Guidelines*, p. 10.

Economically efficient operation of, and investment in, a carriage service

In the Commission's view, the phrase 'economically efficient operation' embodies the concept of economic efficiency set out above. It would not appear to be limited to the operation of carriage services, networks and facilities by the carrier or CSP supplying the declared service, but would seem to include those operated by others (e.g. service providers using the declared service).

To consider this matter in the context of assessing an undertaking, the Commission may consider whether particular terms and conditions enable a carriage service, telecommunications network or facility to be operated in an efficient manner. This may involve, for example, examining whether they allow for the carrier or CSP supplying the declared service to recover the efficient costs of operating and maintaining the infrastructure used to supply the declared service under consideration.

In general, there is likely to be considerable overlap between the matters that the Commission takes into account in considering the LTIE as it relates to the efficient use and investment of infrastructure and its consideration of this matter.[225]

Other relevant matters

The Commission is not limited in its assessment of reasonableness to these criteria but may consider other matters relevant to the reasonableness of the non-price terms and conditions.

The Commission considers there are some common themes or indicia arising from these statutory criteria that serve as a useful guide to the Commission's assessment of the non-price terms and conditions. They are as follows.

A non-price issue may arise in relation to **timeliness**. That is, the time it takes for an access seeker to obtain access or any other matter related to access. This will include an assessment of the process an access seeker must negotiate to obtain access.

Intertwined with this concept is the issue of **delay** or **potential for delay** in providing access. Unreasonable delay is tantamount to no access. In relation to the above issues, the Commission will look at conditions that specify timeframes and preconditions that may attach to timeframes in the context of what potential obstacles to access may exist.

As the Undertakings will govern the terms and conditions of access and form the basis on which Hutchison will satisfy the applicable SAOs, there should be **certainty** in the terms of the agreement. This certainty should be reflected in the technical and non-technical aspects of the agreement. Silence or lack of clarity in an agreement may deprive an agreement of certainty. The undertakings have to provide certainty on the face of the proposed agreement. That is, it should not require the Commission to make inquiries to seek clarification as to the intended terms and operation of an agreement.

The Commission is generally concerned to see that undertakings (if they deal with dispute resolution) have clear and decisive mechanisms for resolving disputes in a timely manner, especially since an access seeker will not be able to avail itself of the arbitration route once an undertaking is accepted.

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[225] Relevantly, and as noted above, in considering whether particular terms and conditions will promote the LTIE, the Commission must have regard to their likely impact on the economically efficient use of, and the economically efficient investment in, the infrastructure by which listed carriage services are supplied and any other infrastructure by which listed services are, or are likely to become capable of being supplied.

Encompassing all of the above matters are the concepts of **fairness** and **balance**. As noted above, the criteria require the Commission to have regard to the interests of both the access provider and seeker. Accordingly, undertakings should reflect the balanced rights of these parties. In this regard, terms and conditions that tend to unfairly treat an access seeker, in comparison to the rights of an access provider, might be regarded as unreasonable.

In deciding whether particular non-price terms and conditions are reasonable, the Commission will to some extent also be guided by any applicable ACIF Codes relevant to the matters under consideration, as well as having regard to current industry norms and practices. The reasonableness of the non-price terms and conditions are assessed on this basis.

Future with and without test

To assist (as opposed to 'determine') the Commission's assessment of whether the price and non-price terms are reasonable, the Commission will use, where appropriate, the 'with and without' test in relation to particular criteria. These criteria include:

- whether the terms and conditions promote the long-term interests of end-users (LTIE) of carriage services or of services supplied by means of carriage services;
- the interests of all persons who have rights to use the declared service; and
- the economically efficient operation of a carriage service, a telecommunications network or a facility.

The Commission does not simply form a view as to a specific price that it considers to be the 'reasonable' cost of providing the MTAS and then compare that price with Hutchison's proposed price terms and conditions. The Commission does, however, have in mind what it considers to be a range of reasonable cost estimates of providing the MTAS, and this is relevant when applying the 'future with and without' test in respect of particular section 152AH criteria. Nevertheless, this is not determinative of the matter. The 'reasonableness' assessment encompasses a much broader range of considerations that are detailed in this Annexure.

The Commission believes that it is appropriate to use the future 'with and without' test expressed in the Sydney Airports case.[226] The Commission notes that in the Seven Network Ltd case,[227] the Tribunal was of the view that the 'future with and without' approach provides helpful guidance in applying the LTIE test. Similarly, the Commission considers it an appropriate analytical tool in applying the reasonableness criteria set out in section 152AH(1) of the Act (which includes the LTIE test).

Essentially, the test enables the Commission to benchmark an undertaking against other potential outcomes in the absence of the undertaking, in relation to specific criterion. This is particularly important because the Commission must assess an undertaking in terms of its reasonableness over the life of the undertaking and not just according to the present circumstances. Accordingly, the Commission must take a

[226] *Sydney Airports Corporation Ltd* (2000) 156 FLR 10.

[227] *Seven Network Ltd* [2004] ACompT 11 at paragraph 119.

short and longer term view as to the possible effects of the Undertakings through a consideration of the counterfactual circumstances.[228]

Having said that, the Commission notes that the 'future with and without' test lends itself to some, but not all, of the relevant criteria in section 152AH(1) of the Act as set out above. Accordingly, in using the 'future with and without' test, the Commission will only use the test in having regard to those criteria where it facilitates the Commission's analysis toward the Commission ultimately determining the overall reasonableness of the Undertakings' terms and conditions.

Alternative Regulatory and Commercial Price Setting Processes available

The Commission notes the following aspects of the regulatory and commercial environments:

- The protection embodied in the provisions of Part XIC of the Act, whereby the Commission can arbitrate disputes between the access seeker and access provider in relation to the supply of the MTAS;
- The specific rights conferred under section 152AR of the Act in which access seekers are able to seek a binding resolution by the Commission to any disputes they may have with Hutchison regarding access to the MTAS on Hutchison's mobile telephony networks;
- Given commercial imperatives for certainty and the costs involved with pursuing regulatory outcomes, some access seekers may continue to determine terms and conditions of access via commercial negotiation without recourse to their arbitral rights; and
- The likelihood, based on the conduct of access seekers to date, that some access seekers will continue to avail themselves of their arbitral rights in respect of Hutchison's supply of the MTAS and the influence this market behaviour will have on commercial outcomes in respect of Hutchison's supply of the MTAS to other access seekers.
- That the regulatory regime for arbitrations has been modified to allow the Commission to issue immediate interim determinations with the provision of natural justice under section 152 CAP of the Trade Practices Act.

It should not be assumed that the Commission would necessarily set prices at the same level as those set out in its *MTAS Pricing Principles Determination* in a final determination in an access dispute if more up-to-date or reliable information came to light.

In addition to the rights conferred under section 152AR of the Act, access seekers are able to seek a binding resolution by the Commission to any disputes they may have with Hutchison regarding access to the MTAS on Hutchison's mobile telephony networks. This is available under Division 8 of Part XIC of the Act, which gives the Commission power to arbitrate access disputes. Under Division 8, the Commission must make a final determination on any matter relating to access by the access seeker to the declared service, which binds both parties to the dispute. The Commission has been notified of a number of access disputes in relation to supply of the MTAS by Hutchison. As detailed on the Commission's website (www.accc.gov.au), the

[228] *Sydney Airports Corporation Ltd (2000) 156 FLR 10* at paragraphs 106-111.

Commission is currently arbitrating a number access disputes to which Hutchison is a party.

Alternatively, other access seekers may continue to seek to determine terms and conditions of access via commercial negotiation without recourse to the Commission. In this regard, the Commission notes that some access seekers have currently not notified the Commission of an access dispute in relation to the supply of the MTAS by Hutchison.

The Commission appreciates that given commercial imperatives for certainty and the costs involved with pursuing a regulatory outcome, there may be some instances where an access seeker will negotiate an access price higher than it believed could be obtained using regulatory means. Based on the behaviour of some access seekers to date (in availing themselves of their arbitral rights under Part XIC of the Act in respect of Hutchison's supply of the MTAS), however, the Commission believes it likely that in the event the Undertakings were rejected, some parties would continue to avail themselves of their arbitral rights under Part XIC with respect to supply of the MTAS by Hutchison in future periods.

Without seeking to prejudge the outcome of any arbitral disputes, the Commission notes that a number of outcomes could be possible in relation to those access disputes that are ongoing in relation to the supply of the MTAS by Hutchison. In this regard, the Commission notes that one of the price outcomes could be consistent with the indicative price related terms and conditions for the MTAS outlined in its *MTAS Pricing Principles Determination*.

Whilst the Commission does not comment publicly on specific arbitrations, it notes that, under section 152AQA(6) of the Act, it is required to have regard to any pricing principles determination in arbitrating an access dispute in relation to the declared service.

The Commission emphasises that it should not be assumed that it would necessarily set prices at the same level as set out in its *MTAS Pricing Principles Determination* in a final determination in an access dispute. This could be for a number of reasons, including that:

- access disputes are generally bi-lateral in nature, such that it may be appropriate to specify different terms and conditions in final determinations in different disputes; and/or
- new material may be put before the Commission in an arbitration that suggests either the TSLRIC+ principle on which the *MTAS Pricing Principles Determination* is based, or the 12 cpm price contained within it, are not appropriate.

The Commission believes that if it rejected the Undertakings, it would be likely that similar prices for the supply of the MTAS would emerge for all access seekers (regardless of the originating network of the calls) to the 12 cpm price contained in the PMTS Undertakings.

That is, in the event of an access dispute, it is likely that the Commission would set a price for the MTAS that would be similar to that specified in the PMTS Single Rate Undertakings – even if it rejected the PMTS Single Rate Undertakings. Further, the Commission expects that similar (although not necessarily exactly the same) pricing

outcomes would occur through commercial negotiations undertaken between Hutchison and access seekers within the context of the regulatory framework.

The Commission notes that in the context of assessing these Undertakings it has explicitly set out the price outcomes for each of the Undertakings with and without acceptance of the Undertakings (section 2.1 to 2.3 and 3.3) and it has also clearly outlined against each of the statutory criteria used to assess the Undertakings if it has employed the with or without test.

Statutory decision making period

The Commission has a six-month statutory time frame in which to make a decision to either accept or reject an access undertaking. If the Commission does not make a decision within this six-month statutory timeframe, section 152BU(5) of the Act stipulates that:

> … the Commission is taken to have made, at the end of that 6-month period, a decision under subsection (2) to accept the undertaking.

For the purpose of calculating the six-month time frame, certain periods of time are disregarded. Specifically, section 152BU(6) of the Act states that in calculating the six-month timeframe, the Commission should disregard:

> (a) if the Commission has published the undertaking under paragraph 152BV(2)(a) – a day in the period:
>
> (i) beginning on the date of publication; and
>
> (ii) ending at the end of the time limit specified by the Commission when it published the undertaking; and
>
> (b) if the Commission has requested further information under section 152BT of the Act in relation to the undertaking – a day during any part of which the request, or any part of the request, remains unfulfilled.[229]

Notwithstanding the six-month time limit, and those days which are to be disregarded as outlined above, the Commission notes that section 152BU(7) of the Act states that:

> The Commission may, by written notice given to the carrier or provider, extend or further extend the 6-month period referred to in subsection (5), so long as:
>
> (a) the extension or further extension is for a period of not more than 3 months; and
>
> (b) the notice includes a statement explaining why the Commission has been unable to make a decision on the undertaking within that 6-month period or that 6-month period as previously extended, as the case may be.

The decision-making period in relation to the Undertakings submitted by Hutchison is discussed below.

Calculating the decision-making period for the Undertakings

Public consultation process

On 18 November 2005, the Commission released a Discussion Paper and called for submissions on the Undertakings. In this Discussion Paper, the Commission

[229] In relation to information requests about the undertaking, *Trade Practices Act 1974,* section 152BT(2) states that 'the Commission may request the carrier or provider to give the Commission further information about the undertaking; while section 152BU(3) states that 'the Commission may refuse to consider the undertaking until the carrier or provider gives the Commission the information'.

indicated that the period of time for interested parties to make submissions was by no later than 16 December 2005.

Extension of the decision making period

As noted above, under the Act the Commission may extend the decision-making period for the assessment of an ordinary access undertaking under section 152BU(7) of the Act by written notice to the applicant for so long as the extension is for a period of not greater than three months and the notice includes a statement explaining why the extension was sought.

On 23 March 2006, the Commission notified Hutchison that it had extended the decision-making period by three months. The reasons provided for seeking this extension are outlined below:

1. The Commission was asked to consider the likely competitive and efficiency outcomes of the Public Mobile Telecommunications Service (PMTS) Dual Rate Undertakings and the PMTS Single Rate Undertakings and the Non-PMTS Undertakings for each entity, individually and coupled per Hutchison's preferences as outline in its submission. This required additional time to adequately assess the price and non-price reasonableness of each undertaking individually and then combined as proposed by Hutchison (coupling of the PMTS Dual Rate Undertakings with the Non-PMTS Undertakings or the PMTS Single Rate Undertakings with the Non-PMTS Undertakings, in that order). Limited efficiencies have been realised in the decision making process because of the necessity to deal with each undertaking and combination of undertakings on their individual merits. The assessment of price reasonableness against the statutory criteria was undertaken as if it was for 5 separate undertakings.
2. The differential pricing outcomes that underpin the PMTS Undertakings (PMTS Single Rate Undertakings and PMTS Dual Rate Undertakings) have required examination of the impact of each different price point within the relevant undertakings so that the Commission could satisfy itself that the competitive and efficiency impacts of the proposed prices for the Mobile Terminating Access Service (MTAS) are appropriately identified and assessed.
3. The Commission has not been previously asked to consider the interaction of existing agreements which have been commercially negotiated by access seekers and access providers and Undertakings. Of particular note, is the lack of a statutory or legal basis for the Undertaking, even if accepted by the Commission, to override an existing commercial agreement between third parties.

Pursuant to the requirements of section 152BU(8) of the Act, notice of the extension and the reasons for it, was placed on the Commission's website.

Information request under section 152BT

On 10 May 2006, the Commission requested copies of Hutchison's agreements for the supply of MTAS. On 25 May 2006, Hutchison provided a response to this information request. A further response was provided on 15 June 2006.

In the Commission's view, the Undertaking 'clock' was stopped during the period outlined above.

Revised undertaking assessment period

The Commission wrote to Hutchison on 23 March 2006 regarding the extension of the decision making period outlining that the 'clock' would expire on 7 August. Hutchison wrote to the Commission on 30 March acknowledging the Commission's decision to extend the time period for consideration of the Undertakings. The Commission also notes that the 'clock' was stopped during the request for information under section 152BT for a period of 36 days. Therefore the 'clock' will expire on or around 12 September 2006.

Appendix 2. Background Information

Declaration and the dispute resolution framework

Part XIC of the Act establishes a regime for governing access to certain declared carriage services in the telecommunications industry. Once a service is declared by the Commission, carriers and carriage service providers (CSPs) which supply the declared service to themselves, or others, are subject to the applicable standard access obligations (SAOs). These obligations, which are set out in section 152AR of the Act, constrain the manner in which those carriers and CSPs can conduct themselves in relation to supply of the declared service.

The terms and conditions upon which a carrier or CSP is to comply with these obligations are as agreed between the parties. In the event that they cannot agree, one party can notify the Commission of an access dispute under section 152CM of the Act. Once notified, the Commission can arbitrate and make a determination to resolve the dispute. The Commission's determination need not, however, be limited to the matters specified in the dispute notification. It can deal with any matter relating to access by the service provider to the declared service.[230] The Act enables a carrier or CSP to meet its access obligations and resolve potentially contentious issues outside of the arbitral process. It can do this by providing the Commission with an access undertaking setting out the terms and conditions on which it proposes to comply with the applicable SAOs.

If accepted by the Commission, the undertaking becomes binding on the carrier or CSP. If a carrier or CSP breaches an undertaking, the Federal Court can make an order requiring compliance with the undertaking, the payment of compensation, or any other order that it thinks fit.[231] In accepting an undertaking, however, the Commission limits its ability to arbitrate access disputes. This is because once an undertaking is in operation, the Commission cannot make an arbitral determination that is inconsistent with the undertaking.[232]

The declared service (MTAS)

On 30 June 2004, the Commission decided to allow the existing GSM and Code Division Multiple Access (CDMA) terminating access service declaration to expire, and replaced it with a new declaration under section 152AL of the Act. The new declaration provided an amended description of the mobile terminating access service (or 'MTAS') by adopting a technology neutral approach that included voice services terminating on all digital mobile telephony networks (i.e. GSM, CDMA and third-generation or '3G' networks).

The MTAS is a wholesale input, used by providers of calls from fixed-line and mobile networks, in order to complete calls to mobile subscribers connected to other networks. When a mobile call is made between consumers (or end-users), it will involve two essential elements – 'origination' and 'termination'. Origination refers to

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230 *Trade Practices Act 1974*, Section 152CP(2).

231 ibid., Section 152CD(3).

232 ibid., Section 152CQ(5).

the carriage of a call from the end-user who makes, or originates, the call over the network to which this end-user is connected. Termination refers to the carriage of the call to the person receiving the call over the network on which the person receiving the call is connected. Where the person making the call and the person receiving the call are on different networks, a point of interconnection (POI) between these two networks will exist. The main network elements of providing the MTAS are illustrated in Figure 2.1 below.

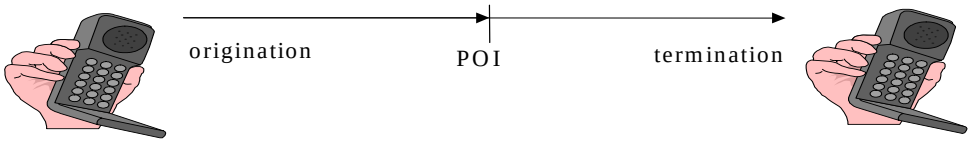

Figure 2.1 – Termination, origination and the POI

Under current commercial arrangements between network owners, the network owner that originates a call to a mobile network will, generally, purchase the MTAS from the network owner that completes the call. The originating network owner will recover these costs, and the costs it incurs from originating the call, through the retail price it charges its directly connected end-user for providing the call. This commercial arrangement is typically referred to as the 'calling party pays' (CPP) model.

An example of how the MTAS is used in the provision of a FTM call is depicted in Figure 2.2 below. In this example, Telstra purchases access to Hutchison's MTAS in order to provide a call from a Telstra fixed-line end-user to a Hutchison mobile end-user. Telstra would then bill its directly-connected consumer for providing a FTM call service.

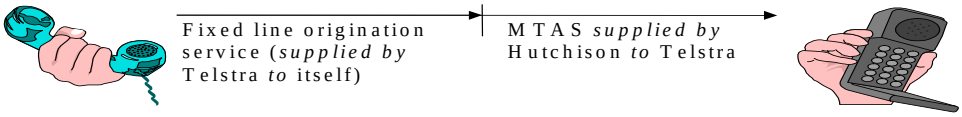

Figure 2.2 - Use of the MTAS to supply a fixed-to-mobile call

The MTAS is therefore an essential input into the provision of calls to mobile phone users where the mobile phone user is on a different network to the individual who originates the call. This is the case irrespective of whether the call terminates on a second generation (2G) GSM or CDMA network, a 2.5G or 3G mobile network.[233]

[233] 2G protocols use digital encoding and include GSM and CDMA. 2G networks support high bit rate voice and limited data communications. They are capable of offering auxiliary services such as data, fax and the short messaging service (SMS). 2.5G protocols extend 2G systems to provide additional features, such as packet-switched connection and enhanced data rates. 3G protocols support much higher data rates, measured in megabits per second, intended for applications such as full-motion video, video conferencing, and full Internet access.

The MTAS Pricing Principles Determination

On 30 June 2004, as required under section 152AQA of the Act, the Commission also released pricing principles for the MTAS (the *MTAS Pricing Principles Determination*). The *MTAS Pricing Principles Determination* stipulates that the price of the MTAS should follow an adjustment path such that there is a closer association of the price and underlying cost of the service. In this context, the Commission determined that its preferred pricing principle was the 'total service long-run incremental cost' (TSLRIC) of supplying this service plus a mark-up ('+') for the recovery of organisational-level costs based on the equi-proportionate mark-up (EPMU) approach. This was termed a 'TSLRIC+' approach.[234]

Based on the available information at that time, the Commission determined that the TSLRIC+ of supplying the MTAS in Australia was likely to fall in the range of 5 to 12 cpm. As a conservative approach, the Commission selected the upper bound of this range (i.e. 12 cpm) for its *MTAS Pricing Principles Determination*. Moreover, with the legitimate business interests of access providers of the MTAS in mind, the Commission determined a three-year adjustment path to a price of 12 cpm (which reflects the conservative upper-bound of the TSLRIC+ of the MTAS). The Commission's indicative price related terms and conditions for the MTAS are included in Table 2.1 below.[235]

Table 2.1: Price related terms and conditions in the MTAS Pricing Principles Determination

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

The Commission noted at the time of its release that the *MTAS Pricing Principles Determination* (and the associated price-related terms and conditions) was not binding in the event of consideration by the Commission of an access undertaking or arbitration of an access dispute. Rather, the Commission indicated that was it required to make an arbitral determination, or consider an undertaking provided to it in relation to the MTAS, a party may argue against the application of the pricing principles and the indicative price-related terms and conditions. In these circumstances, the Commission has indicated that it will have regard to the particular circumstances and the information provided to it at that point in time.

234 ACCC, *MTAS Final Report*, pp. 202-206.

235 ibid., pp. 206-210 and Annexure p. 245.

Appendix 3 List of documents the Commission examined in reaching its final decision

HUTCHISON MOBILE TERMINATING ACCESS SERVICE UNDERTAKING
SECTION 152CGA STATEMENT

DOC NO	***DATE***	***TYPE***	***TITLE***	***FROM***	***TO***
1	1996	Explanatory Memorandum	Explanatory Memorandum for the Trade Practices Amendment (Telecommunications) Bill 1996		
2	July 1997	Report	Access Pricing Principles – Telecommunications	ACCC	
3	July 1999	Report	Telecommunications Services - Declaration Provisions: A Guide to the Declaration Provisions of Part XIC of the Trade Practices Act	ACCC	
4	30/09/1999	Report	ACCC, Access Undertakings – A Guide to Part IIIA of the Trade Practices Act	ACCC	
5	2000	Legal Decision	Sydney Airports Corporation Ltd (2000) 156 FLR 10		
6	October 2003	Final Determination	ACCC, Model Non-price terms and conditions	ACCC	
7	June 2004	Report	Mobile Service Review: Mobile Terminating Access Service – Final Decision on whether or not the Commission should extend, vary or revoke its existing declaration of the mobile terminating access service, (MTAS Final Report)	ACCC	
8	23/12/2004	Legal decision	Application by C7 Pty Ltd & Seven Network Ltd re Foxtel and Telstra	Australian Competition Tribunal	

DOC NO	DATE	TYPE	TITLE	FROM	TO
9	20/07/2005	Email and Attachment	Attaching Equity Research – Telecommunications Services – Australian Mobile Update dated 19/07/2005	Citigroup	ACCC
10	7/10/2005	Email [five attachments printed at document 12]	Re H3GA MTAS undertakings, and attaching: • H3GA Covering Letter dated 7/10/2005 • H3GA PMTS 'Dual Rate' Undertaking dated 7/10/2005 • H3GA PMTS Calls 'Single Rate' Undertaking dated 7/10/2005 • H3GA 'Non-PMTS Calls' Undertaking dated 7/10/2005 • Attachment B – Agreement for the provision of mobile to mobile terminating access service dated 7/10/2005	H3GA	ACCC
11	7/10/2005	Email [five attachments printed at document 13]	Re HTAL MTAS undertakings, and attaching: • HTAL Covering Letter dated 7/10/2005 • HTAL PMTS 'Dual Rate' Undertaking dated 7/10/2005 • HTAL PMTS Calls 'Single Rate' Undertaking dated 7/10/2005 • HTAL Non-PMTS Calls Undertaking dated 7/10/2005 • Attachment B – Agreement for the provision of mobile to mobile terminating access service dated 7/10/2005	HTAL	ACCC

DOC NO	***DATE***	***TYPE***	***TITLE***	***FROM***	***TO***
12	7/10/2005	Letter and four attachments	Re undertakings in relation to mobile terminating access service; attaching ***public versions*** of: • H3GA PMTS 'Dual Rate' Undertaking dated 7/10/2005 • H3GA PMTS Calls 'Single Rate' Undertaking dated 7/10/2005 • H3GAP 'Non-PMTS Calls' Undertaking dated 7/10/ 2005 • Attachment B – Agreement for the provision of mobile to mobile terminating access service dated 7/10/2005	H3GA	ACCC
13	7/10/2005	Letter and four attachments	Re undertakings in relation to mobile terminating access service; attaching ***public versions*** of: • HTAL PMTS 'Dual Rate' Undertaking dated 7/10/2005 • HTAL PMTS Calls 'Single Rate' Undertaking dated 7/10/2005 • HTAL Non-PMTS Calls Undertaking dated 7/10/2005 • Attachment B – Agreement for the provision of mobile to mobile terminating access service dated 7/10/2005	HTAL	ACCC
14	13/10/2005	Email [two attachments printed at document 15]	Attaching letter and submission regarding the undertakings lodged by Hutchison	Allens Arthur Robinson for HTAL and H3GA	**ACCC**

DOC NO	***DATE***	***TYPE***	***TITLE***	***FROM***	***TO***
15	13/10/2005	Two letters and one attachment [two sets of these documents received at ACCC]	Letter attaching ***public version*** of Hutchison Telecommunication (Australia) Limited and Hutchison 3G Australia Pty Limited submission dated October 2005 in relation to Access Undertakings domestic digital mobile terminating access service	Allens Arthur Robinson for HTAL and H3GA	ACCC
16	25/10/2005	Email	[Confirming neither undertakings nor submission in support of undertakings contain confidential information]	Allens Arthur Robinson for HTAL and H3GA	ACCC
17	11/2005	Discussion Paper	Hutchison's Undertakings in relation to the Domestic Digital Mobile Terminating Access Service	ACCC	
18	18/11/2005	Media Release	ACCC issues Discussion Paper on Access Undertakings lodged by Hutchison for Mobile Terminating Access Service	ACCC	
19	13/12/2005	Email	[Indicating Commission is likely to have regard to Telstra's submission on the Hutchison's MTAS Access Undertakings if provided by 23/12/2005]	ACCC	Telstra
20	19/10/2005	Email and one attachment	Attaching ***public version*** of submission dated December 2005 in response to ACCC's discussion paper on Hutchison's MTAS access undertakings	Allens Arthur Robinson for HTAL and H3GA	ACCC
21	19/10/2005	Email	Request for extension of time in which to lodge submission in response to ACCC's discussion paper on Hutchison's MTAS access undertakings	Vodafone	ACCC
22	21/12/2005	Email and one attachment	Attaching ***public version*** of submission dated December 2005 in response to ACCC's discussion paper on Hutchison's MTAS access undertakings	Vodafone	ACCC
23	22/12/2005	Email	Confirming submission in response to ACCC's discussion paper on Hutchison's MTAS access undertakings is a public version	Vodafone	ACCC
24	22/12/2005	Email and one attachment	Attaching ***public version*** of submission in response to ACCC's discussion paper on Hutchison's MTAS access undertakings	PowerTel	ACCC

DOC NO	***DATE***	***TYPE***	***TITLE***	***FROM***	***TO***
25	23/12/2005	Email and one attachment	Attaching submission dated December 2005 in response to ACCC's discussion paper on Hutchison's MTAS access undertakings	Telstra	ACCC
26	04/01/2006	Email and one attachment	Attaching second copy of submission at 25	Telstra	ACCC
27	February 2006	Final Decision	Optus' undertaking with respect to the supply of its Domestic GSM Terminating Access Service (DGTAS): Final Decision	ACCC	
28	14/02/2006	Email	Confirming submission in response to ACCC's discussion paper on Hutchison's MTAS access undertakings is a public submission (document 25 above)	PowerTel	ACCC
29	March 2006	Final Decision	ACCC, Assessment of Vodafone's mobile terminating access (MTAS) undertaking: Final Decision, (Vodafone Undertaking Final Decision)	ACCC	
30	23/03/2006	Facsimile letter	Commission giving notice under section 152BU(7) that it intents to extend the six-month decision making period for a period of three months	ACCC	HTAL and H3GA
31	30/03/2006	Email and one attachment	Attaching letter responding to Commission's decision to extend decision making period	Allens Arthur Robinson for HTAL and H3GA	ACCC
32	04/2006	Draft Decision	***Public version*** – Hutchison's undertakings with respect to the supply of its Mobile Terminating Access Service	ACCC	
33	24/04/2006	Media Release	ACCC Draft Decision to reject Hutchison's Undertaking for Mobile Terminating Access Service	ACCC	Telecommunication writers
34	24/04/2006	Revised Media Release	ACCC Draft Decision to reject Hutchison's Undertakings for Mobile Terminating Access Service	ACCC	Telecommunications writers
35	10/05/2006	Facsimile letter	Response to Hutchison letter (at document 31) and requesting all relevant 'existing agreements'	ACCC	Allens Arthur Robinson for HTAL and H3GA

DOC NO	***DATE***	***TYPE***	***TITLE***	***FROM***	***TO***
36	12/05/2006	Email and one attachment	Attaching submission in response to Commission's draft decision (at document 32) rejecting Hutchison's Undertaking	Telstra	ACCC
37	12/05/2006	Email and two attachments	Attachments comprise: • Letter agreeing with Commission's decision to review all relevant material and advising requested information will be forwarded to the Commission. • ***Confidential version*** of submission in response to Commission's draft decision (at document 32)	HTAL and H3GA	ACCC
38	12/05/2006	Email and one attachment	***Public version*** – of submission in response to Commission's draft decision (at document 32)	Vodafone	ACCC
39	16/05/2006	Email	Confirming receipt of email and attachments at documents 37 and 38 above	ACCC	Allens Arthur Robinson (for HTAL & H3GA)
40	16/05/2006	Email	Confirming: • hard copies of submissions (at documents 37 and 38 above) have been forwarded to the ACCC's Sydney office • 'existing agreements' requested by the Commission are collated and will be provided within next two days	Allens Arthur Robinson	ACCC
41	16/05/2006	Email	Confirming receipt of submissions at documents 37 and 38 above, and suggesting that, if easier, 'existing agreements' can be forwarded electronically	ACCC	Allens Arthur Robinson (for HTAL & H3GA)
42	24/05/2006	Email	Advising 'existing agreements' have not yet been received at the ACCC	ACCC	Allens Arthur Robinson (for HTAL & H3GA)

DOC NO	DATE	TYPE	TITLE	FROM	TO
43	25/05/2006	Email	Confirming hard copy of 'existing agreements' were dispatched by courier to the ACCC's Sydney office this day	Allens Arthur Robinson (for HTAL & H3GA)	ACCC
44	25/05/2006	Email	Confirming hard copy of 'existing agreements' have been received at the ACCC's Sydney office this day	ACCC	Allens Arthur Robinson (for HTAL & H3GA)
45	25/05/2006	Letter and 5 attachments	Attachments comprise of copies of existing commercial agreements entered into by Hutchison.	Allens Arthur Robinson (for HTAL & H3GA)	ACCC
46	15/06/2006	Email and one attachment	One further commercial agreement entered into by Hutchison	Allens Arthur Robinson (for HTAL & H3GA)	ACCC