



# **Hutchison's Undertakings in relation to the Domestic Digital Mobile Terminating Access Service**

## **Discussion Paper**

November 2005

## Table of Contents

1.	Preface.....	3
2.	Introduction.....	5
2.1	Declaration of the Domestic Digital Mobile Terminating Access Service (MTAS) .....	5
2.2	Lodgement of Hutchison’s Access Undertakings.....	6
2.3	Lodgement of Vodafone’s Access Undertaking .....	7
2.4	Lodgement of Optus’s Access Undertaking .....	7
2.5	Access disputes in relation to the MTAS.....	7
3.	The role of undertakings, and the legislative criteria for the assessment of undertakings.....	9
3.1	Legislative criteria .....	9
3.2	Publication of undertakings and invitation to make submissions.....	10
3.3	Consideration of submissions from interested parties .....	10
3.4	Consistency with standard access obligations .....	10
3.5	Consistency with Ministerial pricing determination.....	11
3.6	Reasonable terms and conditions.....	11
3.7	Expiry date and the term of the Undertakings .....	13
4.	The Commission’s process for assessing the Undertakings .....	14
4.1	Time limit for final assessment.....	15
5.	Summary of the Undertakings and key issues that submissions should address.	16
5.1	The Undertakings.....	16
5.1.1	Price-related terms and conditions .....	16
5.1.2	Non-price terms and conditions .....	18
5.2	Submission in support of the Undertakings.....	20
5.2.1	The Undertakings: structure and interrelationship .....	20
5.2.2	The Undertakings: terms and conditions.....	22
5.2.3	Hutchison’s views on why the Undertakings satisfy the statutory criteria.....	26
6.	Summary of Questions.....	33
6.1	The Undertakings.....	33
6.2	Submissions in support of the Undertakings .....	33

# 1. Preface

Hutchison Telecommunications (Australia) Limited (HTAL) and Hutchison 3G Australia Pty Ltd (H3GA) (together Hutchison), lodged six ordinary access undertakings (the Undertakings) pursuant to Division 5 Part XIC of the *Trade Practices Act 1974* (the Act) with the Australian Competition and Consumer Commission (the Commission) on 7 October 2005. Three of the Undertakings have been submitted on behalf of HTAL and the remaining three on behalf of H3GA. On 13 October 2005, Hutchison lodged a submission in support of the Undertakings. The Undertakings and submission are currently displayed on the Commission's website.

The Undertakings specify certain terms and conditions upon which Hutchison undertakes to meet its standard access obligations to supply the domestic digital mobile terminating access service (MTAS).

Under Part XIC of the Act, the Commission must accept or reject the Undertakings. The process the Commission will follow to assess the Undertaking will be open and public, allowing parties to express their views and provide relevant information to the Commission.

The Commission seeks submissions from interested parties on the Undertakings by no later than four weeks from the date that this Discussion Paper is released. The Commission will consider these submissions in deciding whether to accept or reject the Undertaking.

Please forward submissions to:

Nicole Hardy  
Acting Director – Regulatory  
Telecommunications  
Australian Competition and Consumer Commission  
GPO Box 520  
MELBOURNE VIC 3000

Email: [nicole.hardy@acc.gov.au](mailto:nicole.hardy@acc.gov.au)  
Fax: 03 9663 3699

Interested parties who make written submissions should also provide submissions in electronic format.

The Commission will treat all submissions it receives as public, and will place written submissions on its website, unless an interested party specifically indicates to the Commission that it wishes to claim confidentiality in relation to all or part of a submission.

Parties who wish to claim confidentiality in relation to part of a submission should provide the Commission with both a confidential and public version of their submission. The public version should clearly indicate which parts are confidential.

Any queries in relation to this discussion paper should be directed to Nicole Hardy on 03 9290 1957 or via the contact details provided earlier in this discussion paper.

## 2. Introduction

### 2.1 Declaration of the Domestic Digital Mobile Terminating Access Service (MTAS)

Part XIC of the Act establishes a regime for governing access to certain services in the telecommunications industry. Under Part XIC, providers of an active declared service (access providers) have an obligation to supply that service.

On 30 June 2004, the Commission decided to allow the existing GSM and 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 MTAS that included voice services terminating on all digital mobile telephony networks.

On the same date, the Commission also determined pricing principles for the MTAS (the Pricing Principles Determination), as it is required to under the Act. These Pricing Principles stipulate that the price of the MTAS should follow an adjustment path such that there is a closer association of the price and underlying cost (i.e. TSLRIC+) of the service.

As part of these Pricing Principles, the Commission also specified price-related terms and conditions of access. These can be found at Annexure 2 to the Pricing Principles Determination. These price-related terms and conditions set out indicative prices that the Commission believes should apply with respect to the MTAS. The price of access to the MTAS for the periods specified in column 1 of Table 2.1, below, are specified in column 2.

**Table 2.1: Price-related terms and conditions relating to access to the MTAS**

<b>Period</b>	<b>Price</b>
1 July 2004 – 31 December 2004	21 cpm
1 January 2005 - 31 December 2005	18 cpm
1 January 2006 - 31 December 2006	15 cpm
1 January 2007 – 30 June 2007	12 cpm

The Commission noted at the time of making its Pricing Principles Determination that the Pricing Principles (and the price-related terms and conditions contained within it) are not binding. Where the Commission is 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 prices set out in the price-

related terms and conditions. In these circumstances, the Commission will have regard to the particular circumstances and the information before it at that time in deciding whether or not to apply the Pricing Principles and the price-related terms and conditions.

## **2.2 Lodgement of Hutchison's Access Undertakings**

Hutchison lodged six ordinary access undertakings with the Commission on 7 October 2005 and a submission in support of the Undertakings on 13 October 2005. The Undertakings specify the terms and conditions on which Hutchison undertakes to meet its standard access obligations (SAOs) to supply the MTAS service.

Specifically, the Undertakings include two sets of undertakings in relation to HTAL and H3GA.

The undertakings lodged in relation to HTAL include three undertakings which set out the terms and conditions on which HTAL agrees to supply the MTAS to access seekers. Two of the undertakings, the PMTS 'Dual Rate' Undertakings and the PMTS 'Single Rate' Undertakings relate to the supply of the MTAS service in relation to mobile to mobile calls (MTM).<sup>1</sup> The third undertaking, for non-PMTS calls, applies to all calls which are excluded from the PMTS Calls undertakings, namely, fixed to mobile calls (FTM) and calls originating on overseas networks. Along with the Undertakings themselves, Hutchison has lodged an agreement for the provision of the MTAS as Attachment B to each of the Undertakings, setting out the non-price terms and conditions of access.

The Undertakings lodged in relation to H3GA are the same as those lodged in relation to HTAL.

A full description of the means by which HTAL and H3GA propose to provide the MTAS service are provided in Schedules 2-7 of Attachment B of their respective undertakings.

The purpose of this discussion paper is to:

- inform parties of the matters the Commission must take into consideration in making the decision to accept or reject an undertaking;
- specify a number of issues the Commission would particularly like addressed in submissions; and
- outline the process the Commission will follow in assessing the Undertakings lodged by Hutchison.

For the purposes of assessing these Undertakings, reference to the PMTS 'Dual Rate' and PMTS 'Single Rate' Undertakings should be taken to be references to both the

- HTAL and H3GA PMTS 'Dual Rate'; and
- HTAL and H3GA PMTS 'Single Rate';

respectively.

---

<sup>1</sup> Hutchison has defined PMTS as, ' a public mobile telecommunications service as defined by section 32 of the *Telecommunications Act 1997* (Cth)

Similarly, references to the Non-PMTS Undertakings are to the Non-PMTS Undertakings of both the HTAL Non-PMTS and the H3GA Non-PMTS Undertakings.

### **2.3 Lodgement of Vodafone's Access Undertaking**

Vodafone Network Pty Ltd and Vodafone Australia Limited (together Vodafone) lodged a separate ordinary access undertaking with the Commission on 26 November 2004. The Commission released a Discussion Paper on this Undertaking in February 2005.

After lodging an undertaking on 26 November 2004, Vodafone discovered that it had failed to provide one of its consultants (PriceWaterhouseCoopers) with certain input data with respect to its cost estimation model for the MTAS. Exclusion of the data had the impact of over-estimating the cost of providing the service.

Consequently, Vodafone decided to withdraw the first undertaking which it submitted on 26 November 2004 and to submit a revised undertaking on 23 March 2005.

The Commission's discussion papers in relation to the initial and subsequent undertakings lodged by Vodafone can be accessed from the Commission's website.

The Commission released a Discussion Paper in relation to Vodafone's second Undertaking on 13 April 2005. The Commission expects to make a draft decision in relation to this Undertaking in late November/early December 2005.

### **2.4 Lodgement of Optus's Access Undertaking**

SingTel Optus Pty Limited (Optus) lodged an ordinary access undertaking with the Commission on 24 December 2004. The Undertaking specifies certain terms and conditions upon which Optus undertakes to meet its standard access obligations to supply what it describes as the GSM terminating access (DGTA) service

The Commission released a Discussion Paper in relation to this undertaking in February 2005, and recently released a draft decision to reject the Optus Undertaking on 8 November 2005. The Commission expects to complete its assessment of the Optus Undertaking in December 2005.

### **2.5 Access disputes in relation to the MTAS**

Since December 2004, eleven MTAS access disputes have been notified to the Commission under Part XIC of the *Trade Practices Act 1974* (the Act). Following withdrawal of Telstra's MTAS access disputes with Vodafone and Optus, there are currently nine MTAS access disputes on foot. Vodafone is a party to five of these disputes; Optus is a party to four. HTAL is a party to two of these disputes – one with Optus and one with Vodafone. Similarly, H3GA is also a party to (separate) disputes with both Optus and Vodafone

On 14 July 2005, the Commission made interim determinations in the access disputes between Vodafone and PowerTel, H3GA, HTAL and AAPT. On 2 August 2005, the Commission made an interim determination in the Primus/Vodafone dispute.

On 14 July 2005, the Commission also made an interim determination in the access dispute between Optus and PowerTel. Subsequently, the Commission made Interim Determinations in the access disputes between Optus and HTAL and H3GA (on 5 August 2005) and the dispute between Optus and AAPT (on 28 October 2005).

Public details of these access dispute – including Interim Determinations and redacted versions of the accompanying Statements of Reasons – can be found on the Commission’s website.

The resolution of access disputes is dealt with by Division 8 of Part XIC of the Act. Section 152CLA of the Act provides that if the Commission receives an access undertaking that relates, in whole or in part, to a matter that is the subject of an access dispute that has been notified to the Commission, the Commission may defer consideration of the access dispute, in whole or in part, while the Commission considers the access undertaking.

Furthermore, section 152CGB of the Act provides that a determination made by the Commission under Division 8 has no effect to the extent to which it is inconsistent with an access undertaking that is in operation.

Similarly, if an access undertaking given by a carrier or provider is in operation, the Commission must not (in arbitrating an access dispute) make a determination that is inconsistent with the undertaking.

Given that the legislation contemplates that arbitrations be conducted in private, the ACCC will not be making any further public comment about the specific MTAS access disputes before it at this stage.



### **3. The role of undertakings, and the legislative criteria for the assessment of undertakings**

Under Part XIC of the Act, the Commission may declare carriage services and related services to be declared services. Carriers and carriage service providers who provide declared services are required to comply with standard access obligations (SAOs) in relation to those services. The SAOs facilitate the supply of declared services by access providers to access seekers, in order that access seekers can provide carriage services and/or content services.

Section 152AY(2) of the Act (detailed below) specifies the way the terms and conditions upon which the access provider must comply with the SAOs are determined.

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
  - (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).

#### **3.1 Legislative criteria**

Section 152BV of the Act (detailed below) sets out the obligations of the Commission in assessing an undertaking.

- (1) This section applies if:
  - (a) an ordinary access undertaking is given to the Commission by a carrier or a carriage service provider; and
  - (b) the undertaking does not adopt a set of model terms and conditions set out in an approved telecommunications access code.
- (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.

### **3.2 Publication of undertakings and invitation to make submissions**

The Commission published the Undertakings and Hutchison's submission in support of the Undertakings, on its website at [www.accc.gov.au](http://www.accc.gov.au), on 26 October 2005.

The Commission now invites submissions on any aspect of the Undertakings and/or the submissions in support of it.

### **3.3 Consideration of submissions from interested parties**

The time limit specified by the Commission for the receipt of submissions on the undertakings is no later than four weeks from the date of publication of this Discussion Paper, that is, 16 December 2005. The Commission will consider these submissions in deciding whether to accept or reject the Undertakings.

Parties are required to provide any submissions that they intend to make to the Commission by no later than that date. As discussed below, parties are encouraged to provide their submissions at the earliest possible opportunity.

The Commission notes that all information provided by Hutchison in support of the Undertakings is publicly available on the Commission's website.

### **3.4 Consistency with standard access obligations**

The standard access obligations (SAOs) are set out in section 152AR of the Act. Subject to class or individual exemptions made by the Commission, a carrier or carriage service provider must comply with the SAOs in regard to declared services it supplies either to itself or to other persons.<sup>2</sup> In particular, section 152AR requires access providers to, among other things:

- supply an active declared service if requested to do so by a service provider (subject to certain limitations) and to take all reasonable steps to ensure that the technical and operational quality of the active declared service supplied to the service provider is equivalent to that which the access provider provides to itself;

---

<sup>2</sup> Refer to ss.152AS and 152AT of the Act.

- permit the interconnection of the facilities an access provider either owns, controls or is responsible for, with the facilities of a service provider for the purpose of enabling the service provider to be supplied with active declared 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 is compliant with any technical standards in force under section 384 of the *Telecommunications Act 1997*; and
- provide billing information (if requested by the service provider) at certain intervals and in a certain manner and form.

The Commission will assess whether the Undertakings, including the service descriptions, are consistent with the SAOs.

### **3.5 Consistency with Ministerial pricing determination**

Division 6 of Part XIC provides that the Minister can make a written determination setting out principles dealing with price or a method of ascertaining price relating to the SAOs. Section 152CI(1) of the Act provides that if a provision of an access undertaking is inconsistent with any Ministerial pricing determination, the provision will have no effect to the extent of the inconsistency.

The Minister has not made a pricing determination in relation to the MTAS.

### **3.6 Reasonable terms and conditions**

An important part of the access regime is the terms and conditions of access (including the price or a method for ascertaining the price). Under Part XIC of the Act, the Commission cannot accept an undertaking unless it is satisfied that the terms and conditions specified are reasonable. In determining whether terms and conditions are reasonable, the Commission must have regard to the following matters:

- whether the terms and conditions promote the long-term interests of end-users (the LTIE);
- the legitimate business interests of the carrier or carriage service provider concerned, and the carrier's or carriage service provider's investment in facilities used to supply the declared service concerned;
- the interests of persons who have rights to use the declared service concerned;
- the direct costs of providing access to the declared service concerned;
- the operational and technical requirements necessary for the safe and reliable operation of a carriage service, a telecommunications network or a facility; and
- the economically efficient operation of a carriage service, a telecommunications network or a facility.<sup>3</sup>

---

<sup>3</sup> Sub-section 152AH(1) of the Act.

This does not, by implication, limit the matters to which regard may be had.<sup>4</sup>

In considering whether the terms of an access undertaking promote the LTIE, the Commission must consider the achievement of the following objectives:

- promoting competition in markets for listed services;
- achieving any-to-any connectivity in relation to carriage services that involve communication between end-users; and
- encouraging the economically efficient use of, and the economically efficient investment in:
  - (i) the infrastructure by which listed services are supplied; and
  - (ii) any other infrastructure by which listed services are, or are likely to become, capable of being supplied.<sup>5</sup>

Section 152AB(6) of the Act clarifies what is meant by economically efficient use of and investment in infrastructure, as outlined below.

*Encouraging efficient use of infrastructure etc.*

(6) In determining the extent to which a particular thing is likely to result in the achievement of the objective referred to in paragraph (2)(e), regard must be had to the following matters:

(a) whether it is, or is likely to become, technically feasible for the services to be supplied and charged for, having regard to:

(i) the technology that is in use, available or likely to become available; and

(ii) whether the costs that would be involved in supplying, and charging for, the services are reasonable or likely to become reasonable; and

(iii) the effects, or likely effects, that supplying, and charging for, the services would have on the operation or performance of telecommunications networks;

(b) the legitimate commercial interests of the supplier or suppliers of the services, including the ability of the supplier or suppliers to exploit economies of scale and scope;

(c) the incentives for investment in:

(i) the infrastructure by which the services are supplied; and

(ii) any other infrastructure by which the services are, or are likely to become, capable of being supplied.

Further, (new) section 152AB(7A) provides that for the purposes of paragraph (6)(c) of the Act, in determining incentives for investment, regard must be had to the risks

---

<sup>4</sup> Section 152AH(2) of the Act.

<sup>5</sup> Section 152AB(2) of the Act.

involved in making the investment. Under the (new) section 152AB(7B), the Commission may, in determining incentives for investment, consider any other relevant matter.

### **3.7 Expiry date and the term of the Undertakings**

#### **3.7.1 Expiry date and the term of the PMTS Undertakings ('Dual Rate' and 'Single Rate')**

Should the Commission accept one of the alternative PMTS Undertakings (either 'Single Rate' or 'Dual Rate'), it will commence operation from the date of acceptance by the Commission, and will continue until the earlier of:

- 31 December 2007; or
- a decision by the Commission to revoke the declaration of the MTAS; or
- termination, withdrawal or replacement of the Undertaking in accordance with the Act.

#### **3.7.2 Expiry date and the term of the Non-PMTS Undertakings**

Should the Commission accept the Non-PMTS Undertakings, they will commence operation from the date of acceptance by the Commission, and will continue until the earlier of:

- 30 June 2006; or
- a decision by the Commission to revoke the declaration of the MTAS; or
- termination, withdrawal or replacement of the Undertaking in accordance with the Act.

The Commission notes that the Undertakings have no effect in respect of the period that precedes any acceptance by the Commission, and may be withdrawn by Hutchison before its expiry date.

## **4. The Commission's process for assessing the Undertakings**

The process the Commission will follow to assess the Undertakings will be as open and public as practicable, allowing parties to express their views on the Undertakings and to provide relevant information to assist the Commission. The process will also allow comment on preliminary views formed by the Commission and its analysis of the Undertaking.

The Commission intends to adopt the following process in assessing Hutchison's Undertakings.

### **Stage 1: Publish the undertakings and seek submissions**

As stated above, the Commission has published the Undertakings, and Hutchison's submission in support of them.

This Discussion Paper aims to inform parties of the matters the Commission must take into consideration in assessing the undertakings, and the issues which the Commission would particularly like addressed in submissions. This discussion paper is available on the Commission's web site at [www.accc.gov.au](http://www.accc.gov.au).

As indicated in Section Three, the time period for interested parties to make submissions to the Commission in relation to the Undertakings to be no later than four weeks from the date of publication of this Discussion Paper. That is, submissions should be made by no later than 16 December 2005. The Commission will consider these submissions in deciding whether to accept or reject the Undertakings.

The Commission has set the consultation period on this basis to ensure that interested parties are able to assess the Undertakings and make submissions on them.

While the Commission will, as required, have regard to all submissions that are made to it on or before the closing date for submissions, the Commission strongly encourages all interested parties to make their submissions as soon as they are in a position to do so. In particular, the Commission requests that should a party intend to make a submission on any matter not addressed in this Discussion Paper, it notify the Commission of its intentions as soon as possible.

The Commission also encourages parties to make their submissions in a way that facilitates the efficient assessment of their various contentions, including the verification of any facts or data upon which those contentions are based. In this regard, parties are encouraged to restrict confidentiality claims to a minimum and to establish appropriate confidentiality regimes for the disclosure of any information that is claimed to be confidential, to allow a critical assessment of their submissions. Accordingly, the Commission recommends that a party intending to provide confidential material in support of a submission put in place pro forma documentation to facilitate the prompt disclosure of that material to appropriate third parties.

Should the Commission not be in a position to efficiently assess a party's contentions, including by receiving the results of independent critical assessments of the contentions, it will be necessarily constrained in the weight to which it will be able to attach to those contentions. This will particularly be the case where conflicting material that has been critically assessed is before the Commission.

## **Stage 2: Publish draft assessment and seek further submissions**

Following its analysis of the Undertakings and the submissions of interested parties, the Commission intends to publish the findings of its initial analysis and its draft decision within a reasonable period after submissions close. The Commission will invite further submissions on its draft decision for a specified period, which will likely be considerably shorter than this initial Stage 1 consultation period.

The Commission expects that these submissions will respond to the draft decision, and does not expect a party to raise any further issues that were not addressed in the party's submission made during Stage 1, as discussed above. Parties are advised that, due to the statutory-imposed timetable within which the Commission must make its decision, the period within which these 'responsive submissions' can be made will be comparatively brief.

## **Stage 3: Publish final assessment**

Taking into account the submissions made by Hutchison and other interested parties, the Commission will form a view on whether to accept or reject each of the Undertakings, and publish the reasons for its decisions.

The Commission will have a clearer idea of this timeframe once the period of this initial consultation has expired.

### **4.1 Time limit for final assessment**

The Act imposes a time limit for the Commission's assessment of undertakings. While the Commission intends to make its decision as soon as is practicable to do so, the Commission must in any event make a decision within six months of lodgement of an undertaking with the Commission. If the Commission does not do so, it is deemed to have accepted the undertaking. The Commission may also extend the decision making period by an additional three months but must provide a written notice to the carrier or service provider which includes a statement explaining why the Commission has been unable to make a decision on the undertaking within the six-month period. In addition, if the Commission requests further information in relation to the undertaking, the time taken for the Commission to receive the information is excluded from the six-month period. Similarly, the consultation period specified by the Commission is excluded from this timeframe.<sup>6</sup>

---

<sup>6</sup> See the revised section 152BU (5), (6) & (7).

## **5. Summary of the Undertakings and key issues that submissions should address**

This section summarises the terms and conditions contained in the Undertakings submitted by Hutchison. It also outlines the key issues that the Commission considers that submissions should address.

### **5.1 The Undertakings**

The Undertakings specify certain terms and conditions on which Hutchison undertakes to supply the MTAS for voice calls on its 2G/2.5G and 3G mobile networks.

Hutchison lodged six Undertakings, three for HTAL (which operates a 2G/2.5G CDMA network) and three for H3GA (which operates a 3G W-CDMA network). For each party, two of the three Undertakings relate to the provision of the MTAS for mobile to mobile calls (MTM), while the other undertaking relates to the provision of the MTAS for fixed-to-mobile calls (FTM) and calls originating on overseas networks.

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

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 Attachment B applies to all three undertakings lodged by HTAL and H3GA respectively.

Further, Hutchison has provided a submission to the Commission *'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'* (the Submission), in support of all six MTAS Undertakings.'

The terms and conditions of the Undertakings may be broadly divided into:

- (a) Price-related terms and conditions; and
- (b) Non-price related terms and conditions.

#### **5.1.1 Price-related terms and conditions**

The Undertakings set out the terms and conditions on which Hutchison will supply the MTAS to access seekers in respect of voice calls from different types of (originating) networks. As noted earlier in this Discussion Paper, the prices proposed by Hutchison in its Undertakings differ depending on whether a call is made from a Public Mobile Telecommunications Service (PMTS) network or a fixed-line or overseas (non-PMTS) network. Hutchison's three classes of Undertakings are



described as:

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

Both the PMTS 'Dual Rate' and 'Single Rate' Undertakings contain an offer by Hutchison to supply the MTAS at the usage charge rate of 12 cpm on a reciprocal basis.

The PMTS 'Dual Rate' and PMTS 'Single Rate' two Undertakings are provided in the alternative. The PMTS 'Dual Rate' Undertaking differs from the PMTS 'Single Rate' Undertaking in one respect – the PMTS 'Dual Rate' Undertaking provides that Hutchison will supply the MTAS at the 'fall back' rate of 21 cpm to access seekers who do not accept Hutchison's 12 cpm reciprocal offer or who are not required to supply the MTAS to Hutchison at 12 cpm.

Hutchison defines a PMTS Call 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. The Undertakings which relate to PMTS Calls apply exclusively to domestic MTM traffic.

Hutchison defines a Non-PMTS Call as a voice call other than a PMTS Call. The Undertakings which relate to Non-PMTS Calls apply to all traffic which is excluded from the 'PMTS Undertakings' – namely, domestic FTM traffic and traffic originating on overseas networks.

### **Charges for PMTS 'Dual Rate' MTAS**

Attachment A to the PMTS Calls 'Dual Rate' Undertaking states that Hutchison will supply the Hutchison MTM terminating access service at the 12cpm 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 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; and
- (b) the access seeker only acquires the Hutchison MTM terminating access service for the purpose of terminating, on Hutchison's mobile network, 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.

In the event this condition is not met the PMTS 'Dual Rate' Undertaking states that Hutchison will supply the Hutchison MTM terminating access service at the usage charge of 21 cpm to access seekers.

## **Charges for PMTS ‘Single Rate’ MTAS**

Attachment A to the PMTS ‘Single Rate’ Undertaking 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 HTAL’s mobile network; and
- (b) the access seeker only acquires the Hutchison MTM terminating access service for the purpose of terminating, on Hutchison’s mobile network, 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.

A ‘fall back’ rate is to apply in the event this condition is not met, is not specified in the Undertakings.

## **Charges for Non-PMTS MTAS**

The Non-PMTS Undertaking proposes that Hutchison will supply the MTAS at a usage charge rate of 18 cpm.

### **5.1.2 Non-price terms and conditions**

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 schedules 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).

This document can be accessed on the Commission's website.

Attachment B to the Undertakings only applies to access seekers who do not have an existing agreement with Hutchison as at the date the Undertakings come into force. If an access seeker has an existing commercial agreement with Hutchison for the supply of the MTAS, SMS, MMS or any other service, as at the date the Undertakings come into force, then the non-price terms and conditions contained in the existing agreement will govern Hutchison's supply of the MTAS.

If an existing agreement governs the supply of the Hutchison mobile to mobile terminating access service, the terms of the relevant Undertaking prevail to the extent of any inconsistency.

The Commission also notes that under the terms of the Undertakings, the PMTS Undertakings have an expiry date of 31 December 2007, whilst the Non-PMTS Undertakings have an expiry date of 30 June 2006.

The Commission seeks the views of interested parties as to the reasonableness of the proposed respective usage charges. Parties should address the reasonableness of:

- 12 cpm for MTM MTAS;
- 21 cpm for MTM MTAS; and
- 18 cpm for termination of all Non-PMTS originated calls.

The Commission invites interested parties to comment on the reasonableness of any of the non-price related terms and conditions associated with the Undertakings.

Specifically, the Commission is interested in parties' views of the reasonableness of the continued application of non-price terms and conditions in existing agreements until 31 December 2007, for PMTS calls, and up until 30 June 2006 for Non-PMTS calls.

## 5.2 Submission in support of the Undertakings

Hutchison has provided a single submission in support of all its Undertakings. In this submission, Hutchison provides the reasons why it believes the Commission should accept its Undertakings. The details of this submission are discussed under the following sections (taken from the submission itself):

*The Undertakings: structure and interrelationship:*

- An overview of the Undertakings
- How the Undertakings relate

*The Undertakings: terms and conditions*

Price-related terms and conditions

- The proposed price of the MTAS in respect of PMTS calls
- The proposed price of the MTAS in respect of Non-PMTS calls

Non-price related terms and conditions

- The 'existing agreement' option
- The model terms and conditions

*Analysis of the statutory criteria*

- The 'reasonableness' test
- The decision of the Australian Competition Tribunal in Foxtel
- Consistency of the Undertakings with the statutory factors

### 5.2.1 The Undertakings: structure and interrelationship

*Overview*

Hutchison submits that, as a whole, the pricing structure proposed by it in its Undertakings:

- reflects the different market dynamics in the FTM and mobile services markets;
- leads to greater competition in these markets;
- enables a closer association of the access charge for MTAS and its underlying cost, thus promoting the long-term interests of end-users (LTIE).

Hutchison submits that, it is appropriate to implement immediately a price of 12 cpm for the MTAS in order to promote competition in the mobile services market.<sup>7</sup>

---

<sup>7</sup> In this regard, the Commission notes that in the Mobile Services Review 2003, Hutchison submitted that the mobile services market was not competitive. This, Hutchison submitted, was evidenced by the fact that retail FTM prices had not declined despite the reduction in the MTAS. Further, some vertically-integrated carriers were using their MTAS revenues to compete in the mobile services market by offering lower subscription prices or handset subsidies. See *Hutchison's Submission to the Australian Competition and Consumer Commission, Mobile Service Review 2003*, p. 9.

However, Hutchison submits 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’.<sup>8</sup>

Overall, Hutchison submits that its Undertakings aim to provide a balance through the benefits conferred by the reciprocal 12cpm pricing structure which promotes competition in the mobile services market, against the limited benefits provided by any reduction in MTAS prices in promoting competition in the FTM market, without in the absence of an effective pass-through mechanism.

#### *Interrelationship between PMTS Undertakings and Non-PMTS Undertaking*

Hutchison submits that, the PMTS ‘Dual Rate’ Undertaking and the PMTS ‘Single Rate’ Undertaking are alternatives; either of which can be accepted by the Commission, in combination with the Non-PMTS Undertaking.

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

Finally, Hutchison submits that each Undertaking promotes the LTIE in its own right. Hence acceptance of a single undertaking or any combination of the Undertakings would also promote the LTIE.

---

<sup>8</sup> Hutchison Submission, 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 fixed-to-mobile market. See *Hutchison’s Submission to the Australian Competition and Consumer Commission, Mobile Service Review 2003*, pp. 11-14. The Commission notes that it has previously expressed the view that the relevant markets in relation to the MTAS are:

- the individual markets for termination on each mobile operator’s network;
- the market within which FTM services are provided; and
- the market for retail mobile services. .

The Commission seeks the views of interested parties as to whether the LTIE would be promoted if the proposed PMTS 'Dual Rate' Undertaking or PMTS 'Single Rate' Undertaking were accepted in combination with the Non-PMTS Undertaking rather than without the Non-PMTS Undertaking.

The Commission seeks views on whether the LTIE would be best served if the Commission accepted the PMTS 'Dual Rate' Undertaking in combination with the Non-PMTS Undertaking.

The Commission seeks views on whether the LTIE would be best served if the Commission accepted the PMTS 'Single Rate' Undertaking in combination with the Non-PMTS Undertaking.

The Commission seeks views on whether the LTIE would be promoted by acceptance of each Undertaking in its own right.

## **5.2.2 The Undertakings: terms and conditions**

### **Price-related terms and conditions**

#### ***PMTS Undertakings***

Hutchison's PMTS 'Dual Rate' Undertaking and 'Single Rate' Undertaking both offer to supply the MTAS at 12 cpm on a reciprocal basis with other access seekers operating mobile networks ('mobile access seekers'). However, the PMTS 'Dual Rate' Undertaking includes an alternative access charge of 21 cpm for those mobile access seekers who do not enter into a reciprocal arrangement with Hutchison.<sup>9</sup> The PMTS 'Single Rate' Undertaking, however, only provides for a reciprocal access charge of 12cpm without specifying a default or 'fallback' MTAS rate.

Hutchison submits that the reciprocal access charge of 12 cpm should be considered appropriate when considered against the 'fair and reasonable' cost of providing the MTAS. On these grounds, Hutchison argues that it would be a commercially-rational decision for an efficient operator to accept this access charge. To further validate its argument, Hutchison refers to the *Mobile Service Review 2003*, where the Commission estimated that the underlying cost of supplying the MTAS lies between 5 to 12 cpm.

Hutchison submits that, the PMTS 'Single Rate' Undertaking was lodged in the event that the Commission rejected the PMTS 'Dual Rate' Undertaking, on the grounds that its proposed 21 cpm access charge for the MTAS is not compatible with the Commission's MTAS pricing principles and hence is not reasonable. Hutchison submits that the PMTS 'Dual Rate' Undertaking permits mobile access seekers to avail themselves of a mutually beneficial commercial relationship in accepting the

---

<sup>9</sup> Either voluntarily or as otherwise required?

‘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 21cpm. Hutchison submits that 21 cpm represents its most recent commercially-negotiated access charge and hence does not diverge from the prevailing pricing structure for access seekers. Hutchison acknowledges that, although the non-reciprocal price of 21 cpm might confer commercial benefits on it, these gains are likely to be invested by it in additional ‘product innovation and reductions in retail prices’. Any such developments, Hutchison argues, will promote the LTIE.

Hutchison notes that its proposed price of 12 cpm is not in line with the Commission’s adjustment path for a reduction in the price of the MTAS but argues that the Commission’s path is unnecessary. Hutchison submits that any detrimental impact on mobile network operators would be outweighed by the positive impact of a lower MTAS price on the LTIE.

Hutchison believes that, given the length of time since the *Mobile Services Review 2003*, mobile network operators have been aware of the need to lower their access charges for the MTAS and hence have had ample time to adjust their pricing and business strategies accordingly. Further, Hutchison argues, the Commission’s regulation of access charges for the MTAS since 2001, and the reduction in access charges for MTAS-equivalent services in other jurisdictions, has provided mobile network operators in Australia with sufficient indication of the price trends that need to be adopted in this industry. Finally, Hutchison argues that, given the economic profits accruing to some mobile network operators, they are financially well placed to accommodate lower access charges for the MTAS.

Hutchison believes that:

To the extent that the Undertakings represent a departure from the adjustment path, ... the target price of 12 cpm for the MTAS is a conservative estimate of its underlying cost and strikes an appropriate balance between the legitimate interests of access seekers and LTIE.<sup>10</sup>

---

<sup>10</sup> Hutchison, *Submission to the Australian Competition and Consumer Commission, Access Undertakings Domestic Digital Mobile terminating Access Service, Hutchison Telecommunications (Australia) and Hutchison 3G Australia Pty Ltd, October 2005*, p 9

The Commission seeks views regarding whether an immediate decline in the MTAS price to 12 cpm would be likely to generate significant and potentially harmful disruption to the operations of a number of telecommunications carriers (who may have business plans based on the Commission's adjustment path for a decline in the price of the MTAS).

The Commission seeks views regarding whether an immediate decline in the MTAS price to 12 cpm will be in the LTIE.

The Commission seeks views from interested parties as to whether they consider the proposed reciprocal price of 12 cpm in the PMTS Undertakings to be a fair and reasonable cost of providing the MTAS and whether accepting this pricing structure would be the rational choice of an efficient operator.

The Commission seeks views about whether the 21cpm 'fallback' price is beneficial for access seekers in terms of providing pricing certainty.

### *Advantages of reciprocal pricing*

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<sup>11</sup> which states that consumers' inability to determine the network on which their calls terminate is instrumental in maintaining high access charges for the MTAS. Finally, Hutchison notes the gradual move by regulators, in particular in European jurisdictions, to a reciprocal pricing structure.

The Commission seeks the views of interested parties as to whether Hutchison's use of a reciprocal pricing structure is appropriate in the PMTS Undertakings?

The Commission seeks the views of interested parties as to whether reciprocal pricing enhances consumer welfare.

The Commission seeks views from interested whether they believe that the reciprocal pricing structures in the PMTS Undertakings are consistent with the standard access obligations in relation to the provision of the MTAS.

---

<sup>11</sup> J Gans and S King, *Termination Charges for Mobile Phone Networks – Competitive Analysis and Regulatory Options*, 1999, <http://www.mbs.edu/home/jgans/papers/GSM-Research.pdf>



### *Non-PMTS Undertaking*

Hutchison submits that the FTM market is not effectively competitive. Hutchison argues that this limited competition in the FTM market is demonstrated by the anti-competitive activities of vertically-integrated fixed and mobile network operators. Hutchison believes that this lack of competition is likely to preclude lower MTAS access charges being passed-through to FTM customers. Hutchison further argues that, without pass through, any reductions in access charges for the MTAS may reduce price competition in the mobile services market.

Hutchison believes that its proposed Non-PMTS price of 18 cpm for the MTAS, which amounts to a fourteen 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. Further, Hutchison argues that this price decline would provide 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 Undertaking expires 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.

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

The Commission seeks the views of interested parties as to the reasonableness of Hutchison's proposed price of 18 cpm for the Non-PMTS Undertaking.

The Commission seeks views on the about the appropriateness of the differential pricing structures proposed by Hutchison in its PMTS and Non-PMTS Undertakings.

The Commission seeks parties' views on the extent to which (if at all) Hutchison's arguments with respect to the lack of pass-through in the FTM market are equally applicable in relation to traffic that originates on overseas networks.

### **Non-price related terms and conditions**

Hutchison's Undertakings provide access seekers with two options for the non-price terms and conditions on which the MTAS will be supplied. Access seekers can either:

- continue with their existing contractual arrangements with Hutchison in relation to the supply of the MTAS (the 'existing agreement option'); or
- commit to the non-price terms and conditions contained in the Attachment B of the Undertakings.

Hutchison submits that the existing agreement option offers its MTAS customers the opportunity to continue with their commercially-negotiated access charges. However, Hutchison states that, the non-price terms and conditions in Attachment B have been

drawn from Annexure A of the *Telecommunications Access Code 1998* and therefore offer commercial and technical certainty to access seekers.

### **5.2.3 Hutchison's views on why the Undertakings satisfy the statutory criteria**

As mentioned in section 3.7 of this Discussion Paper, section 152BV of the Act sets out the obligations of the Commission in assessing an undertaking.

Section 152BV(2)(e) of the Act provides that the Commission must not accept an undertaking unless the expiry time of the undertaking occurs within 3 years after the date on which the undertaking comes into operation. Hutchison's Undertakings meet this statutory requirement. The PMTS Undertakings have an expiry date of 31 December 2007. The Non-PMTS Undertakings have an expiry date of 30 June 2006.

Section 152BV(2)(b) of the Act provides that the Commission must not accept an undertaking, unless the Commission is satisfied that the undertaking is consistent with the standard access obligations (SAOs) that are applicable to the access provider. The SAOs are set out in section 152AR of the Act. Hutchison's Submission does not explicitly address whether the Undertakings fulfil this statutory criterion.

Section 152BV(2)(d) of the Act 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. In determining whether the terms and conditions are reasonable, the Commission must have regard to the range of matters set out in section 152AH(1) of the Act. Section 152AH(2) of the Act, however, states that the matters listed in s152AH(1) of the Act do not limit the matters to which the Commission may have regard. The Commission interprets this to mean that it may consider any other relevant matter.

Hutchison's submission argues that its Undertakings as a whole satisfy the reasonableness criteria and should be accepted in the form lodged. Hutchison's submissions against these criteria are detailed below.

The Commission seeks the views of interested parties on the reasonableness of the proposed duration of:

- the PMTS Undertakings;
- the Non-PMTS Undertakings.

### **Whether the terms and conditions promote the long-term interests of end-users (LTIE)**

Hutchison draws upon the reasoning of the Australian Competition Tribunal (the Tribunal) in the *Seven Network Ltd*<sup>12</sup> case in addressing, whether its Undertakings meet the LTIE.

---

<sup>12</sup> *Seven Network Limited (No 4)* (No. 4) [2004] ACompT 11

Hutchison cites the Tribunal's view that the 'future with and without' approach provided helpful guidance in applying the LTIE.<sup>13</sup> Hutchison submits that the Tribunal established in that case that the application of the 'future with and without test' required a comparison of a future situation with the proposed exemption orders being made as opposed to one without them being made, and went on to address the question of which of these situations was more likely to promote the LTIE. Hutchison states that the Tribunal provided further clarification of its approach in identifying TSLRIC as the appropriate measure of the efficient forward-looking costs which would provide a normal return on investment, taking account of the risks involved.<sup>14</sup> Finally Hutchison cites the Tribunal's view that the appropriate access price would provide the correct signal for efficient investment in network infrastructure which, in turn, would provide an optimal outcome for end users in terms of the prices, product quality and product substitutability.<sup>15</sup>

Hutchison submits that it has applied the Tribunal's 'future with and without test' to establish that its Undertakings are in the LTIE. This, Hutchison argues, involves a consideration of two alternative scenarios. If the Commission accepts the Undertakings, Hutchison submits, they will govern the pricing arrangements for the MTAS between Hutchison and other carriers. If the Commission rejects the Undertakings, Hutchison argues, then pricing arrangements for the MTAS will be based on the Commission's Pricing Principles Determination for the MTAS, commercial negotiations or, in the event of access disputes, arbitrations. Hutchison argues 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.

The Commission seeks the views of interested parties as to the appropriate 'without scenarios' to use in applying the 'future with and without test'.

Hutchison submits that the end-users of mobile services and FTM services include both existing and future subscribers. Hutchison believes that these end-users have three interests which need to be satisfied:

- lower prices;
- improved quality of service; and
- innovative product offerings.

Hutchison argues that although the statutory 'long term' is likely to exceed the time period in the Undertakings, acceptance of the Undertakings by the Commission will serve the purpose of providing all existing and potential market participants with vital information about the importance of not maintaining or further investing in obsolete network infrastructure. Further, Hutchison argues the future with the Undertakings

---

<sup>13</sup> Ibid at [119]

<sup>14</sup> Ibid at [135-136]

<sup>15</sup> Ibid at [130]

will lead to a more competitive commercial environment from one which would prevail without the Undertakings.

As noted in section 3.6 of this Discussion Paper, in considering whether the terms and conditions of an access undertaking promote the LTIE, the Commission must consider the achievement of the following objectives:

- promoting competition in markets for telecommunications services;
- achieving any-to-any connectivity in relation to carriage services that involve communication between end-users; and
- encouraging the economically efficient use of, and the economically efficient investment in, the infrastructure by which telecommunications services are supplied.<sup>16</sup>

To establish that its Undertakings promote the LTIE, Hutchison has submitted arguments addressing two elements of these statutory criteria.

*1. The objective of promoting competition in the markets for listed services: s152AB(2)(c)*

Hutchison argues that in assessing whether the LTIE criteria are met by its Undertakings, the Commission should consider two separate markets:

- The national market for mobile services; and
- The national market for retail FTM services.

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 it has proposed a tiered structure of access charges for the MTAS is appropriate.

Hutchison argues that in the absence of an effective pass-through mechanism, a 12 cpm access charge for the MTAS, would provide a 'windfall' for fixed-line operators. The 12 cpm price offered to mobile network operators, on the contrary, will provide them with a competitive advantage in relation to the fixed-line operators and have a positive effect on competition in the mobile services market.

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

- an improvement over previous commercially-negotiated MTAS charges;
- is within the Commission's adjustment path in the Pricing Principles; and
- should be acceptable in view of the fact that the Non-PMTS Undertaking will expire in June 2006.

---

<sup>16</sup> Sub-section 152AB(2) of the Act.

The Commission seeks views on whether Hutchison's market definitions are appropriate, and on the level of competition in the relevant markets.

The Commission seeks views on whether the Undertakings will promote competition in the markets for the relevant services.

The Commission seeks views on whether competition in the relevant markets will be best improved, with or without the Undertakings.

The Commission seeks views on whether the reciprocal 12 cpm offered to mobile network operators, will place competitive pressures on fixed network operators. If so, will this promote the LTIE?

2. *The objective of encouraging the economically efficient use of, and the economically efficient investment in, the infrastructure by which listed services are supplied: s152AB(2)(e)*

Hutchison addresses these 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.<sup>17</sup>

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

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

In respect of the objective of productive efficiency, Hutchison argues that the PMTS reciprocal access charge of 12 cpm, reflects the cost structure of an efficient, forward-looking operator. 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, Hutchison submits.

---

<sup>17</sup> ACCC, *Access Pricing Principles – Telecommunications – a guide*, 1997.

The Commission seeks views on whether current and potential market participants will be provided with correct signals regarding investing in network infrastructure in the future, with or without the Undertakings.

The Commission seeks views on whether the Undertakings will promote dynamic, allocative and productive efficiency, as argued by Hutchison.

The Commission notes that under the recently enacted *Telecommunications Legislation Amendment (Competition and Consumer Issues) Act 2005*, section 152AB(e) of the Act has been amended to change the third arm of the LTIE test so that the Commission is required to have regard to:

(e) the objective of encouraging the economically efficient use of, and the economically efficient investment in:

(i) the infrastructure by which listed services are supplied; and

(ii) any other infrastructure by which listed services are, or are likely to become, capable of being supplied.

Further clarification of these changes was also provided in amendments to section 152AB(6) which now provides the following:

*Encouraging efficient use of infrastructure etc.*

(6) In determining the extent to which a particular thing is likely to result in the achievement of the objective referred to in paragraph (2)(e), regard must be had to the following matters:

(a) whether it is, or is likely to become, technically feasible for the services to be supplied and charged for, having regard to:

(i) the technology that is in use, available or likely to become available; and

(ii) whether the costs that would be involved in supplying, and charging for, the services are reasonable or likely to become reasonable; and

(iii) the effects, or likely effects, that supplying, and charging for, the services would have on the operation or performance of telecommunications networks;

(b) the legitimate commercial interests of the supplier or suppliers of the services, including the ability of the supplier or suppliers to exploit economies of scale and scope;

(c) the incentives for investment in:

(i) the infrastructure by which the services are supplied; and

(ii) any other infrastructure by which the services are, or are likely to become, capable of being supplied.

Further, (new) section 152AB(7A) provides that, for the purposes of section (6)(c) of the Act, in determining incentives for investment, regard must be had to the risks involved in making the investment. Under the (new) section 152AB(7B), the

Commission may, in determining incentives for investment, consider any other relevant matter.

To the extent that the amendments to section 152AB change the way the Commission should assess whether an undertaking promotes the economically efficient use of, and the economically efficient investment in telecommunications infrastructure, the Commission seeks further submissions from interested parties.

The Commission seeks the views of interested parties, as to whether a future with, as opposed to without, the Undertakings is more likely to promote the LTIE.

### **Legitimate business interests of the supplier**

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.

The Commission invites interested parties to comment on the reasonableness of the Undertakings in relation to the business interests of the supplier.

### **The interests of the persons who have rights to use the declared service**

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 fixed-to-mobile calls will preclude fixed-line operators from benefiting from a ‘windfall’ and maintain a closer association of price and cost.

The Commission invites interested parties to comment on the reasonableness of the Undertakings in relation to the interests of persons who have rights to use the declared service.

### **The direct costs of providing access to the declared service**

Hutchison submits that the access charge of 12 cpm proposed in its PMTS Undertakings is reasonable and a reflection of its direct costs, in view of the fact that the Commission has already endorsed this as a target price in its Pricing Principles Determination.

The Commission seeks the views of interested parties as to whether the 12 cpm is a reasonable reflection of the direct costs of providing access to the MTAS.

**The economically efficient operation of a carriage service, a telecommunications network or a facility**

Hutchison submits similar reasoning in relation to this statutory criterion, as in relation to encouraging economically efficient use of and investment in telecommunications infrastructure.



## **6. Summary of Questions**

In summary, this Discussion Paper seeks the views of interested parties in relation to the following aspects of the Undertaking, and the submissions in support of it lodged with the Commission by Hutchison:

### **6.1 The Undertakings**

The Commission seeks the views of interested parties as to the reasonableness of the proposed respective usage charges. Parties should address the reasonableness of:

- 12 cpm for MTM MTAS;
- 21 cpm for MTM MTAS; and
- 18 cpm for termination of all Non-PMTS originated calls.

The Commission invites interested parties to comment on the reasonableness of any of the non-price related terms and conditions associated with the Undertakings.

Specifically, the Commission is interested in parties' views of the reasonableness of the continued application of non-price terms and conditions in existing agreements until 31 December 2007, for PMTS calls, and up until 30 June 2006 for Non-PMTS calls.

### **6.2 Submissions in support of the Undertakings**

#### **6.2.1 The Undertakings: structure and interrelationship**

The Commission seeks the views of interested parties as to whether the LTIE would be promoted if the proposed PMTS 'Dual Rate' Undertaking or PMTS 'Single Rate' Undertaking were accepted in combination with the Non-PMTS Undertaking rather than without the Non-PMTS Undertaking.

The Commission seeks views on whether the LTIE would be best served if the Commission accepted the PMTS 'Dual Rate' Undertaking in combination with the Non-PMTS Undertaking.

The Commission seeks views on whether the LTIE would be best served if the Commission accepted the PMTS 'Single Rate' Undertaking in combination with the Non-PMTS Undertaking.

The Commission seeks views on whether the LTIE would be promoted by acceptance of each Undertaking in its own right.

### **6.2.2 The Undertakings: terms and conditions**

The Commission seeks views regarding whether an immediate decline in the MTAS price to 12 cpm would be likely to generate significant and potentially harmful disruption to the operations of a number of telecommunications carriers (who may have business plans based on the Commission's adjustment path for a decline in the price of the MTAS).

The Commission seeks views regarding whether an immediate decline in the MTAS price to 12 cpm will be in the LTIE.

The Commission seeks views from interested parties as to whether they consider the proposed reciprocal price of 12 cpm in the PMTS Undertakings to be a fair and reasonable cost of providing the MTAS and whether accepting this pricing structure would be the rational choice of an efficient operator.

The Commission seeks views about whether the 21cpm 'fallback' price is beneficial for access seekers in terms of providing pricing certainty.

The Commission seeks the views of interested parties as to whether Hutchison's use of a reciprocal pricing structure is appropriate in the PMTS Undertakings?

The Commission seeks the views of interested parties as to whether reciprocal pricing enhances consumer welfare.

The Commission seeks views from interested parties whether they believe that the reciprocal pricing structures in the PMTS Undertakings are consistent with the standard access obligations in relation to the provision of the MTAS.

The Commission seeks the views of interested parties as to the reasonableness of Hutchison's proposed price of 18 cpm for the Non-PMTS Undertaking.

The Commission seeks views on the about the appropriateness of the differential pricing structures proposed by Hutchison in its PMTS and Non-PMTS Undertakings.

The Commission seeks parties' views on the extent to which (if at all) Hutchison's arguments with respect to the lack of pass-through in the FTM market are equally applicable in relation to traffic that originates on overseas networks.

### **6.2.3 Hutchison's views on why the Undertakings satisfy the statutory criteria**

The Commission seeks the views of interested parties on the reasonableness of the proposed duration of:

- the PMTS Undertakings;
- the Non-PMTS Undertakings.

The Commission seeks the views of interested parties as to the appropriate ‘without scenarios’ to use in applying the ‘future with and without test’.

The Commission seeks views on whether Hutchison’s market definitions are appropriate, and on the level of competition in the relevant markets.

The Commission seeks views on whether the Undertakings will promote competition in the markets for the relevant services.

The Commission seeks views on whether competition in the relevant markets will be best improved, with or without the Undertakings.

The Commission seeks views on whether the reciprocal 12 cpm offered to mobile network operators, will place competitive pressures on fixed network operators. If so, will this promote the LTIE?

The Commission seeks views on whether current and potential market participants will be provided with correct signals regarding investing in network infrastructure in the future, with or without the Undertakings?

The Commission seeks views on whether the Undertakings will promote dynamic, allocative and productive efficiency, as argued by Hutchison?

To the extent that the amendments to section 152AB change the way the Commission should assess whether an undertaking promotes the economically efficient use of, and the economically efficient investment in telecommunications infrastructure, the Commission seeks further submissions from interested parties.

The Commission seeks the views of interested parties, as to whether a future with, as opposed to without, the Undertakings is more likely to promote the LTIE.

The Commission invites interested parties to comment on the reasonableness of the Undertakings in relation to the business interests of the supplier.

The Commission invites interested parties to comment on the reasonableness of the Undertakings in relation to the interests of persons who have rights to use the declared service.

The Commission seeks the views of interested parties as to whether the 12 cpm is a reasonable reflection of the direct costs of providing access to the MTAS.