TELSTRA CORPORATION LIMITED

Submission in response to the ACCC's Discussion Paper

Hutchison's Undertaking in relation to the Domestic Digital Mobile Terminating Access Service

December 2005

1. Introduction

1.1 Background

On 7 October 2005, Hutchison Telecommunications (Australia) Limited ("**HTAL**") and Hutchison 3G Australia Pty Limited ("**H3GA**") (collectively "**Hutchison**") provided the Australian Competition and Consumer Commission ("**Commission**") with six ordinary access undertakings specifying the terms and conditions on which Hutchison will comply with its standard access obligations ("**SAOs**") in respect of the domestic digital mobile terminating access service ("**the Undertakings**"). Hutchison provided the Undertakings following the Commission's declaration of the Domestic Digital Mobile Terminating Access Service ("**MTAS**") with effect from 1 July 2004.

The Undertakings seek to distinguish between 'public mobile telecommunications service calls' ("**PMTS Calls**") and other telecommunications service calls ("**Non-PMTS Calls**") which make use of MTAS. PMTS Calls relate to domestic mobile-to-mobile ("**M2M**") traffic. Non-PMTS Calls relate to domestic fixed-to-mobile ("**F2M**") traffic and traffic originating on overseas networks. The Undertakings are structured in the following way:

- HTAL - PMTS 'Dual Rate' Undertaking
- HTAL - PMTS 'Single Rate' Undertaking
- HTAL - Non-PMTS Undertaking
- H3GA - PMTS 'Dual Rate' Undertaking
- H3GA - PMTS 'Single Rate' Undertaking
- H3GA - Non-PMTS Undertaking

Telstra understands that the Undertakings lodged in relation to H3GA are the same as those lodged in relation to HTAL.[1]

The Commission issued a discussion paper regarding the Undertakings on 18 November 2005 ("**Discussion Paper**") and called for submissions from the public. Telstra provides this submission in response to the Discussion Paper.

1.2 Statutory criteria

Where an ordinary access undertaking is provided to the Commission under Part XIC of the *Trade Practices Act (Cth)* 1974 ("**TPA**"), the Commission must either accept the undertaking or

[1] Accordingly, throughout this submission references to the "PMTS 'Dual Rate' Undertaking", "PMTS 'Single Rate' Undertaking" and "Non-PMTS Undertaking" include a reference to the respective undertakings lodged by both HTAL and H3GA.

reject it. As the Commission has previously acknowledged, it is unable to accept an undertaking in part.

However, section 152BV(2) of the TPA provides that the Commission must not accept the undertaking unless:

- a public consultation process has been undertaken by the Commission;
- the Commission is satisfied that the undertaking is consistent with the applicable SAOs;
- the price, or method of calculating price, if specified in the undertaking, is consistent with any Ministerial pricing determination;
- the Commission is satisfied that the terms and conditions in the undertaking are reasonable; and
- the undertaking expires within 3 years of it coming into operation.

In determining whether the terms and conditions are reasonable, the Commission must have regard to the following matters set out in section 152AH of the TPA:

- 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.

The LTIE is defined in section 152AB(2) of the TPA in terms of the following three objectives[2]:

- the promotion of competition in the markets for carriage services and services supplied by users of carriage services;

[2] These objectives are further defined in subsections 152AB(3),(6),(7A) and (8) of the TPA.

- achieving any-to-any connectivity in relation to services that involve communication between end-users; and
- encouraging the economically efficient use of and investment in infrastructure by which listed services are supplied and any other infrastructure by which listed services are, or are likely to become, capable of being supplied.

1.3 Hutchison's approach to the statutory criteria

Hutchison has provided the Commission with a submission dated 13 October 2005 in support of the Undertakings ("**Hutchison Submission**"). However the Hutchison Submission seems to adopt an unusual view of the way in which the statutory criteria must be applied by the Commission when considering whether to accept or reject an undertaking. At various points Hutchison suggests that the reasonableness of various terms should not be considered in isolation. Rather, that the combined effect of all terms and conditions in a given undertaking should be considered when applying the statutory criteria.[3] Hutchison also goes so far as to suggest that the PMTS Dual Rate Undertaking and the Non-PMTS Undertaking should be considered together in relation to the LTIE.[4]

These approaches are inconsistent with that which the Commission has previously adopted when considering the reasonableness of the terms of undertakings. The Commission has previously taken the view that every term and condition in an undertaking must be reasonable and that if one term of an undertaking is unreasonable, then it is required to reject the undertaking. Telstra has previously accepted the Commission's view. If the Commission now adopts a different view, Telstra requests guidance from the Commission in relation to a matter of fundamental importance regarding the Commission's assessment of undertakings under Part XIC of the TPA.

2. Summary of Telstra's submissions

2.1 The Commission should reject the Undertakings

Two of the Undertakings - the PMTS 'Dual Rate' Undertaking and PMTS 'Single Rate' Undertaking - provide for an immediate decrease in the MTAS price to 12 cpm (subject to certain conditions). Telstra accepts that a price for the supply of MTAS of 12 cpm is reasonable. Telstra also accepts that an immediate decrease in the price for the supply of MTAS to 12 cpm without any adjustment path is reasonable. In this regard, Telstra agrees with Hutchison that the Commission's adjustment path set out in its MTAS Pricing Principles could be steeper without compromising the LTIE.

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[3] See for example Hutchison Submission, pp. 6 and 13.
[4] See id, p. 6.

However, Telstra submits that the alternative pricing of 21 cpm adopted in the PMTS 'Dual Rate' Undertaking and the 18 cpm pricing adopted in the Non-PMTS Undertaking is not reasonable. 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. Telstra also submits that Hutchison's right to cease charging 12 cpm is unreasonable.

In Telstra's view, various non-price terms and conditions submitted by Hutchison are also unreasonable. In particular Telstra submits that:

- the unlimited ability of Hutchison to demand and set the quantum of security is unreasonable; and
- the ability of Hutchison to terminate supply of MTAS pursuant to the Undertakings on 5 days notice where negotiations to amend the agreement based on the undertaking have failed after 90 days is unreasonable.

Telstra also believes that, in light of the so-called "existing agreement option", the Commission does not have sufficient information available at its disposal to be satisfied that all relevant terms and conditions incorporated into the Undertakings are reasonable.

The Undertakings are also said to override any commercial agreement for the supply of MTAS. Telstra submits that this is not permitted by section 152AY of the TPA.

Accordingly, Telstra submits that the terms and conditions set out in the Undertakings are not reasonable and that the Commission is therefore required to reject all of the Undertakings.

3. Price terms and conditions of the Undertakings

3.1 Introduction

The pricing for the supply of MTAS provided for in the Undertakings is as follows:

Undertaking	**MTAS price**
PMTS 'Single Rate' Undertaking	12 cpm (subject to reciprocity and prohibitions on transit traffic)
PMTS 'Dual Rate' Undertaking	12 cpm (subject to reciprocity and prohibitions on transit traffic)
	21 cpm (where conditions for 12 cpm are not satisfied)
Non-PMTS Undertaking	18 cpm

As discussed below, Telstra supports the introduction of 12 cpm pricing for the supply of MTAS for the 2006 calendar year. However, Telstra does not support the other charges proposed in the Undertakings which it submits are unrelated to the efficient costs of supplying MTAS and are therefore unreasonable.

Rather than providing any independent information or reports to support the pricing adopted in the Undertakings, Hutchison seeks to justify the pricing primarily by reference to the 'future with or without test' and the approach to that test adopted in the decision of the Australian Competition Tribunal ("**Tribunal**") in *Seven Networks Limited (No 4)* (2005) ATPR ¶42-056.[5] However, Telstra submits that Hutchison misapplies this test in several respects. It also submits that the test should not be conclusive in determining the reasonableness of undertakings. Telstra comments more particularly on this matter in section 6.1 below.

3.2 Pricing for the MTAS

(a) 12 cpm is reasonable

Telstra accepts that 12 cpm is a reasonable price for the supply of MTAS. Telstra notes that this is in accordance with the Commission's conclusions as to the upper end of its estimate of the efficient costs of supplying MTAS. In its *Mobile Service Review: Mobile Terminating Access Service Final Decision*, the Commission concluded that "*the best cost measures of the MTAS indicate a range of between 5 and 12 cpm*".[6] Further, that the "*Commission continues to believe a target price of 12 cpm is appropriate for this pricing principle*" on the basis that - in accordance with its pricing principles - it represented "*the upper range of reasonable estimates of the TSLRIC+ of supplying the service that are currently available*".[7]

Telstra also supports Hutchison's view that this price should be introduced immediately and that the Commission's adjustment path is unnecessary.

(b) Alternative pricing is not reasonable

Hutchison states that 12 cpm is a "*rational price for an efficient mobile operator*" that reflects "*a conservative estimate of [Hutchison's] underlying cost and strikes an appropriate balance between the legitimate interests of access seekers and the LTIE*".[8] Notwithstanding that concession, the Undertakings provide for pricing well above that which Hutchison says is a rational price for an efficient mobile operator. The PMTS 'Dual Rate' Undertaking provides for

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[5] See Hutchison Submission p. 15. The Tribunal's decision is referred to in the Hutchison Submission at the "FOXTEL decision".
[6] ACCC, *Mobile Service Review: Mobile Terminating Access Service Final Decision,* (June 2004), ("**MTAS Final Decision"**), p. 221.
[7] MTAS Final Decision, p. 221 and 244.
[8] Hutchison Submission, pp. 6 and 9.

an alternative price of 21 cpm. The Non-PMTS Undertaking provides for a price of 18 cpm. Telstra submits that both these prices 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 a carriage service, a telecommunications network or a facility; and
- do not encourage the economically efficient use of and investment in infrastructure by which listed services are supplied.

Telstra also notes that the proposed 18 cpm and 21 cpm charges are in excess of those prices stipulated in the MTAS Pricing Principles. As discussed below, when proper regard is had to the MTAS Pricing Principles and the Commission's ability to backdate final arbitral determinations, it is also clear that these proposed prices fail the future with or without test.

PMTS 'Dual Rate' Undertaking

Hutchison eschews any suggestion that 21 cpm "*is in any way reflective of the underlying cost of providing the MTAS*".[9] Given that, by Hutchison's own concession, 21 cpm represents a price above the efficient costs of providing MTAS, Hutchison accepts that the 21 cpm price will result in it receiving a windfall gain.[10] However, Hutchison seeks to justify the receipt of this windfall by stating that it has shown a commitment to innovation in the mobile services market and 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*".[11]

Telstra submits that this does not justify the Commission accepting an undertaking with pricing significantly higher than the underlying costs of supplying the declared service. To accept the contrary view would involve a departure from the statutory criteria against which the Commission is obliged to assess the reasonableness of an undertaking. Moreover, Hutchison provides no further detail as to the "innovation" in which it intends to engage to promote the LTIE as a result of its windfall gain. Nor is there any assurance given that this "innovation" will in fact take place.

The non-reciprocal price of 21 cpm also 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

[9] Id, p. 6.
[10] See id, pp. 6, 10 and 17.
[11] Id, pp. 10 and 17.

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 than 21 cpm. The PMTS 'Dual Rate' Undertaking, if accepted, will most likely continue until 31 December 2007. By that time, according to the Commission's adjustment path, the MTAS price should be 12 cpm. Accordingly, there can be little doubt that the MTAS price in the "future without" scenario is likely to be significantly less than the proposed 21 cpm.

Hutchison suggests that, when considering the reasonableness of the 21 cpm rate, that rate "*should not be viewed in isolation*".[12] Rather, that regard should be had to the "interplay between all of the price related terms and conditions contained in the Undertakings".[13] Hutchison submits that:[14]

> *"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. Hutchison submits that, when considered together, the PMTS Dual Rate Undertaking and the Non-PMTS Undertaking provide a rate structure that addresses the different issues arising in the 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."*

As noted above, Telstra submits that this represents an approach that is inconsistent with that adopted by the Commission previously when applying the statutory criteria.

Non-PMTS Undertaking

Many of the considerations noted above in relation to the proposed 21 cpm charge in the PMTS 'Dual Rate' Undertaking apply equally to the proposed 18 cpm charge in the Non-PMTS Undertaking. That charge also represents a price above the efficient costs of supplying MTAS and provides an unjustifiable windfall to Hutchison.

Hutchison seeks to justify the 18 cpm pricing in the Non-PMTS Undertaking on the basis that it:[15]

- constitutes a significant reduction in MTAS charges;
- is referable to the Commission's adjustment path; and
- is appropriate given the time period for which the Non-PMTS Undertaking will operate.

[12] Id, p. 6.
[13] Ibid.
[14] Ibid.
[15] Id, p. 17.

Telstra rejects each of these contentions. In the Commission's adjustment path, the price stipulated for what will be the effective life of the Non-PMTS Undertaking is 15 cpm. This is important in assessing Hutchison's two other reasons supporting the 18 cpm pricing. It is also important to remember that the Commission has the power to backdate a determination made in an access dispute to the date when negotiations for the supply of the declared service were first entered into.[16]

When considering the future with or without the Undertaking, Hutchison accepts that the price of the MTAS will be determined (at least in part) by the MTAS Pricing Principles.[17] As noted above, this would represent a 'future without' price of 15 cpm. It is clear then that Hutchison's argument that the 18 cpm price "*constitutes a significant reduction in MTAS charges*" takes no account of the MTAS Pricing Principles. This is made clear in Hutchison's submission that 18 cpm "*reflects a 14% reduction on the last commercially negotiated price that Hutchison has offered and paid for the MTAS*".[18] The error underlying these submissions is that they fail to consider the correct counterfactual demanded by the 'future with or without' test.

Similarly, the argument that 18 cpm is appropriate given that the Non-PMTS Undertaking will only operate for a short time period is irrelevant.

3.3 Adjustment path is unnecessary

In the MTAS Pricing Principles, the Commission adopted an adjustment path commencing on 1 July 2004 and concluding on 1 January 2007 which the price for supplying MTAS would decrease in a number of decrements to an eventual target price of 12 cpm. Hutchison, in adopting a price of 12 cpm in its PMTS 'Dual Rate' Undertaking and PMTS 'Single Rate' Undertaking, argues that the Commission's adjustment path is unnecessary. Hutchison states:[19]

> "*Hutchison maintains the view that the Commission's adjustment path is unnecessary, and 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.*"

Telstra agrees with this view.

3.4 Reciprocity requirement

The 12 cpm pricing for MTAS offered in the PMTS 'Dual Rate' Undertaking and PMTS 'Single Rate' Undertaking is subject to a reciprocity requirement. That is, the 12 cpm price is only available to an access seeker if the access seeker agrees to charge Hutchison, or is required to

[16] Section 152DNA of the TPA.
[17] Hutchison Submission, p. 16.
[18] Id, p. 11.
[19] Id, p. 8.

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. The Commission has specifically sought submissions on the reasonableness of this pricing structure.[20]

Telstra notes that there is a question whether Part XIC permits an undertaking to include terms and conditions requiring reciprocal pricing. As Telstra noted in its submission in respect of Vodafone's MTAS undertaking, the purpose of an access undertaking is to set out the terms and conditions upon which the access provider, not the access seeker, supplies services. However, Telstra expresses no final view on this matter.

Telstra acknowledges that, as Hutchison submits,[21] reciprocal pricing for MTAS does have some currency in the industry and there are economic arguments that seek to support such pricing. In that light, Telstra believes it would be helpful if the Commission gave the market some indication of its view as to whether Part XIC permits an undertaking to include terms and conditions providing for reciprocal pricing.

3.5 MTAS pricing for transit traffic

The 12 cpm pricing for MTAS offered in the PMTS 'Dual Rate' Undertaking and PMTS 'Single Rate' Undertaking is also subject to a condition that 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.

Telstra believes that this requirement may raise concerns under subsections 45(2)(a)(i) and (ii) and (b)(i) and (ii) and subsection 47(3) of the TPA. In respect of subsections 45(2)(a)(ii) and (b)(ii) and subsection 47(3) and the substantial lessening of competition element, Telstra does not comment on Hutchison's purpose. However, as regards the effect on competition, Telstra submits that the Commission's previously articulated view (which Telstra does not necessarily accept) that the relevant markets for MTAS are narrowly defined as the markets for the wholesale MTAS provided on each individual mobile network operator's network, would suggest that the effect may be significant.[22]

3.6 Hutchison's right to cease charging 12 cpm

The 12 cpm pricing for MTAS offered in the PMTS 'Dual Rate' Undertaking and PMTS 'Single Rate' Undertaking is subject to Hutchison's right to cease charging 12 cpm if Hutchison

[20] Discussion Paper, p. 24.
[21] See Hutchison Submission, pp. 9-10.
[22] See section 4 of the MTAS Final Decision; and section 2 of Telstra's *Submission in Response to Draft Decision on Mobile Terminating Access Service*, (June 2004).

"*reasonably believes that the access seeker is not complying, or is unlikely to comply*" with the conditions in relation to reciprocity and transit traffic.[23]

Telstra submits that this is unreasonable because Hutchison:

- should not have the right to cease supplying at 12 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 an access seeker is "unlikely to comply" with the relevant conditions.

The PMTS 'Dual Rate' Undertaking and PMTS 'Single Rate' Undertaking also impose an obligation on access seekers to provide Hutchison "on request" all reasonable assistance (including all relevant information or documents) to enable Hutchison to determine whether the access seeker is complying with the conditions attaching to the 12 cpm pricing.[24] 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.

4. Non-price terms and conditions of the Undertakings

4.1 Introduction

The Commission has invited comments in relation to the non-price terms and conditions provided for by the Undertakings. Telstra has not undertaken a comprehensive review of the non-price terms and conditions of the Undertakings. However, it makes the following comments in relation to matters of particular concern.

4.2 "*Existing agreement option*"

The Undertakings provide for two alternative sources for the non-price terms and conditions on which Hutchison will supply the MTAS:[25]

- the access seeker's existing agreement with Hutchison for the supply of the MTAS, SMS, MMS or any other service (referred to by Hutchison as "the existing agreement option"); and
- the non-price terms and conditions contained in Attachment B to the Undertakings.

[23] See PMTS 'Dual Rate' Undertaking, Attachment A clause 2.4; and PMTS 'Single Rate' Undertaking, Attachment A clause 2.3.
[24] See PMTS 'Dual Rate' Undertaking, Attachment A clause 2.6; and PMTS 'Single Rate' Undertaking, Attachment A clause 2.5.
[25] See clauses 5.2 and 5.4 of the various Undertakings.

However, the description of the first source of non-price terms as an "option" is misleading. As Hutchison notes: "[t]*he existing agreement option applies to access seekers who have a commercial agreement directly with Hutchison as at the date the Undertakings come into force. In this scenario, the non-price terms and conditions contained in the existing agreement will govern Hutchison's supply of the MTAS."*[26] In other words, there is no choice or 'option' for the access seeker.

As a result, the Undertaking necessarily incorporates the non-price terms and conditions of Hutchison's existing agreements for the supply of the MTAS, SMS, MMS or any other service. Therefore, in order to assess the reasonableness of the Undertakings the Commission would be required to consider the non-price terms and conditions contained in all of Hutchison's existing agreements for the supply of those services. As far as Telstra is aware, Hutchison has not submitted this information for the consideration of the Commission or interested parties in connection with its Undertakings. Accordingly, Telstra submits that the Commission cannot be satisfied that the non-price terms and conditions are reasonable.

The scope of the existing agreements which may be incorporated into the Undertakings also extends to agreements for the supply of "any other service ". These agreements may not have any relevance to the supply of MTAS. Furthermore, no hierarchy is provided in relation to the various agreements potentially falling within the scope of the clause. Consequently, where an access seeker has a number of agreements with Hutchison, the non-price terms and conditions that are said to apply to the supply of MTAS by Hutchison could be uncertain and potentially contradictory. This confusion is compounded by the provision that "*if an Existing Agreement governs the supply of the* [Hutchison] *Mobile to Mobile Terminating Access Service by reason of clause 5.2, the terms of this Undertaking prevail to the extent of any inconsistency*".[27]

4.3 Attachment B and the relevance of the TAF Code

Hutchison submits that Attachment B to the Undertakings (which contains the non-price terms and conditions) "*is closely based on the model terms and conditions at Annexure A of the Telecommunications Access Code 1998.*"[28]

Telstra submits that the mere fact that terms and conditions are based on the TAF Code is no guide as to their reasonableness and no substitute for the Commission applying the relevant statutory criteria in considering the terms of the Undertakings. The Commission has provided its views as to the relevance of the TAF Code in its *Model Non-price Terms and Conditions: Final*

[26] Hutchison Submission, p. 12.
[27] See clause 5.3 of the various Undertakings. This clause also suffers from the same problem as that which provides that the Undertakings prevail over any commercial agreement.
[28] Hutchison Submission, p. 12.

Determination, (October 2003). There it noted that the TAF Code has no statutory basis or recognition and stated:[29]

> *"…the Commission considers parts of the TAF code to be useful in terms of what may be considered fair and reasonable terms and conditions of access. Accordingly, the Commission has to some extent used and/or been guided by the TAF code provisions in developing the model terms and condition in relation to specific issues raised by industry.*
>
> *The Commission, however, has not used the TAF code in the same way as its approach to ACIF codes. As mentioned above, where an ACIF code applies, the Commission's approach is that the model terms and conditions should accord with the ACIF provisions or should otherwise be improved through this process, as appropriate. The Commission has only used or been guided by the TAF code provisions where it considers that the TAF code provisions represent fair and reasonable terms and conditions of access and are appropriate to address the particular matter raised."*

4.4 Security

Telstra agrees that Hutchison should be entitled to assess the creditworthiness of, and demand security from, those to whom it supplies access. However, Telstra submits that the provisions in the Undertakings go beyond what is required to protect Hutchison's legitimate commercial interests.

For example, clause 7.7 of Attachment B to the Undertakings provides:

> *"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."*

Telstra submits that two aspects of the security arrangements are unreasonable.

First, the circumstances in which Hutchison can demand security from an access seeker are unlimited.

Secondly, there is no limit to the amount of the security that can be demanded by Hutchison. While clause 7.9 establishes a "general principle" that the amount of security should be calculated by reference to the value of the service likely to be provided, this is itself unclear and open-ended as to the period over which this calculation should be derived. In this regard, the clause establishes that this period should be not less than 3 months but provides for no maximum period.

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[29] ACCC, *Model Non-price Terms and Conditions: Final Determination*, (October 2003), p. 12 and see also p. 3.

4.5 Termination

Telstra accepts that an access provider should be entitled to terminate the supply of services in certain circumstances. However, some of the circumstances in which Hutchison is entitled to terminate the supply of MTAS pursuant to Attachment B to the Undertakings go beyond what is required to protect Hutchison's legitimate interests.

In this regard, clause 13.10(h) of Attachment B enables Hutchison to terminate the Agreement on 5 business days notice if "*amendments to [the] Agreement as described in clause 14.10 are not agreed within 90 days after the commencement of the negotiations described in that clause.*" In point of fact, clause 14.10 makes no reference to negotiations. The full terms of that clause provide:

> "*No amendments to this Agreement are effective unless in writing signed by both Parties, or required by a determination which takes effect under section 152DN of the TPA.*"

When coupled with clause 13.10(h), it seems that Hutchison would be able to request a variation to any of the terms of the Undertakings and, where the parties do not agree to a variation within 90 days, Hutchison could terminate the agreement for the supply of MTAS on 5 days notice. Telstra submits that this is unreasonable.

5. Structure of undertakings

5.1 Alternative undertakings

Hutchison states that the PMTS 'Dual Rate' Undertaking and PMTS 'Single Rate' Undertaking are submitted as alternatives.[30] Telstra submits that there is a question whether Part XIC permits a carrier or carriage service provider to lodge alternative undertakings. However, Telstra expresses no final view on this matter.

Telstra accepts that the ability to submit alternative undertakings may enhance the utility of the undertaking process in Division 5 of Part XIC. Accordingly, it may be helpful if the Commission gave the market some indication of its view as to whether Part XIC permits a carrier or carriage service provider to lodge alternative undertakings.

5.2 Undertaking cannot override commercial agreement

Each of the Undertakings contain a provision which provides that the given undertaking "overrides any commercial agreement" for the supply of Hutchison's MTAS between Hutchison and any other party.[31] This provision, in effect, seeks to ensure that the Undertakings (in the event they are accepted) immediately override any existing commercial

[30] Hutchison Submission, p. 5.
[31] See clause 4.1 of the various Undertakings.

arrangements for the supply of MTAS from Hutchison. Telstra submits that it is not possible to include such a provision in an undertaking under Part XIC.

Section 152AY provides that a carrier or carriage service provider must comply with the SAOs:

- on such terms as are agreed between the parties; or,
- "failing agreement", on such terms and conditions as are set out in an undertaking.

Obviously where the parties have an ongoing commercial agreement they have not failed to reach agreement. Accordingly, the condition precedent to paragraph 152AY(2)(b) is not satisfied and section 152AY demands that the SAOs be complied with pursuant to the commercial arrangement in place. It would be an odd result if Part XIC allowed an access seeker's contractual rights to be unilaterally extinguished by an access provider lodging an undertaking and the Commission accepting it.

6. Criteria for assessing long-term interests of end-users

In its Discussion Paper the Commission has sought submissions from interested parties in relation to the effect of the recent amendments to section 152AB(2)(e) and the application of the 'future with or without' test in relation to the LTIE.[32]

6.1 Use of the "future with or without test" as the criterion for determining LTIE

As set out above, Hutchison seeks to justify the pricing adopted in the Undertakings primarily by reference to the 'future with or without test' and seeks to justify this approach by reference to the decision of the Australian Competition Tribunal ("**Tribunal**") in *Seven Networks Limited (No 4)* (2005) ATPR ¶42-056.[33] However, in so doing Hutchison misrepresents the approach of the Tribunal.

Hutchison states in its Submission:[34]

> "*In the FOXTEL decision, the Tribunal stated that the appropriate way to test if a particular thing was in the LTIE was to use the 'future with and without' test.*"

That is not what the Tribunal said. Rather, the Tribunal pointed out that: "*the `future with and without' approach provides* ***helpful guidance*** *in applying the LTIE test*" (emphasis added).[35] In accepting that the 'future with or without' provides helpful guidance in relation to the LTIE, the Tribunal also went on to add the following cautionary note:[36]

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[32] Discussion Paper, p. 31.
[33] See Hutchison Submission p. 15. The Tribunal's decision is referred to in the Hutchison Submission at the "FOXTEL decision".
[34] Ibid.
[35] *Seven Networks Limited (No 4)* (2005) ATPR ¶42-056 at [119].
[36] Ibid.

> "*...it should be noted that the "future with and without" test requires the forecasting of future market behaviour, competitive activity and market conduct in a particular area or region and the development of an investment. But the answer to the application of that two-fold enquiry (the future with and without the exemption) is not the ultimate or final answer to the issues posed*."

Furthermore, the Tribunal's views were expressed in the context of its review of an exemption application rather than a decision to accept or reject an access undertaking. Telstra submits that the future 'with or without' test, while being a potentially useful aid to consideration, should not be used as a substitute for a comprehensive and objective consideration of whether a particular thing is in the LTIE.

Ultimately, the test which the Commission is obliged to apply is that set out in section 152BV(2). That section provides that the Commission must not accept an undertaking unless, amongst other things, the Commission is satisfied that the terms and conditions specified in the undertaking are reasonable. In determining whether terms and conditions are reasonable, the Commission must have regard to the matters set out in section 152AH(1), which include "*whether the terms and conditions promote the long-term interests of end-users of carriage services or of services supplied by means of carriage services*".

6.2 Commission's request for further submissions on recent amendments to section 152AB(2)(e)

Telstra commented on the amendments to section 152AB made by the recently enacted *Telecommunications Legislation Amendment (Competition and Consumer Issues) Act* 2005 (Cth) in its *Submission in response to the ACCC's Draft Decision on Optus' Undertaking in respect of the Domestic Digital Mobile Terminating Access Service*.[37] Telstra repeats its previous comments for the purposes of this submission.

Telstra Corporation Limited

23 December 2005

[37] Telstra, *Submission in response to the ACCC's Draft Decision on Optus' Undertaking in respect of the Domestic Digital Mobile Terminating Access Service*, (December 2005) at pp. 4-5.