ADDENDUM

Appendix E Implementation of the retail benchmarking approach

This addendum to Appendix E of the final report on the *Pricing Methodology for GSM Termination Services* (the final report) is issued to provide further guidance on the likely approach to implementation of a retail benchmarking approach in any future access disputes and for the purposes of ongoing monitoring of retail and wholesale price movements. It follows from additional consultation with the industry, in August and September 2001, on a variety of implementation issues. Submissions from the carriers are referred to below and are available from the Commission's website (www.accc.gov.au). Broadly the issues considered were:

- the determination of the starting access price; and
- the calculation of retail price movements.

In the final report the Commission was of the view that the most appropriate pricing methodology was a retail benchmarking approach. Under this approach there was slight distinction in how the approach would be applied to access disputes that were current at the time and access disputes that may arise in the future. In particular, it was considered that:

- for current access disputes, the starting access price would likely be the lowest access price in the market and the retail price movements of the relevant mobile carrier should be deducted from that initial starting point; and
- for future access disputes, the starting access price (applying a yield methodology and period-on-period approach) would likely be the most recent agreed access price between the access seeker and the access provider and the retail price movements of the relevant mobile carrier should be deducted from that initial starting point.

It is noted that since the final report was released all access disputes that were current at the time have been withdrawn. Accordingly, this addendum does not focus on implementation details for 'current access disputes'. Rather, guidance is provided on the likely approach regarding implementation for any future access disputes and for the purposes of ongoing monitoring.

Further, there is one additional section in this addendum that was not in Appendix E of the final report. This relates to the backdating of final determinations in access disputes and is addressed in section E.3. Industry specifically raised this issue and the Commission felt it would be useful to provide some guidance.

E.1 Determination of the starting access price

As noted above, the final report proposed that for future access disputes (applying a yield methodology and period-on-period approach) the starting access price would likely be the most recent access price agreed between the access seeker and access provider.

Some carriers submitted that, applying a yield methodology and period-on-period approach, the most recent agreed access prices were an appropriate starting point for future access disputes. In particular, Vodafone[1] submitted that the correct starting point should be the most recent access price between the access seeker and access provider and RSL COM[2] considered that after the first six-month period for implementing the retail benchmarking approach such an access price would be appropriate.

That said, some carriers did not agree that for future access disputes the most recent agreed access price would be appropriate. Telstra considered that the price prevailing at 1 July 2001, adjusted cumulatively, would be the appropriate price.[3] In this respect it was not supportive of a period-on period approach and considered that a cumulative approach would provide the most appropriate incentives for commercial negotiations and would minimise access disputes. The issue of a period-on-period versus cumulative approach is discussed below in section E.2.5 and, as the Commission considers a period-on-period approach is preferable, it does not affect the conclusions made in this section.

Optus submitted that future access disputes should not use the most recent access price agreed between the access seeker and access provider. Rather it considered the access price which prevailed just before the pricing periods that are being used to determine the retail price movements should be used.[4] It considered that selecting a start date towards the end of the pricing period would give access seekers some sort of retrospective price reduction from this price. As a result the access prices would only ever be arbitrated access prices as there would be no incentive for access providers to commercially negotiate.

The Commission understands Optus is concerned that using the most recent agreed access price between the access seeker and access provider would potentially allow access seekers to reap lower access prices than would otherwise occur. This is because access seekers could commercially negotiate an access price taking into account the retail benchmarking approach and then have that price further reduced via arbitration (for example, by the retail price movements in the previous two six-monthly periods). The Commission considers the possibility of such regulatory gaming does exist. It, therefore, proposes that where the parties cannot agree on the starting point, the most recent agreed access price that did not take the retail benchmarking approach into account in commercial negotiations should be used.[5]

Where a dispute is notified and parties have not previously taken the retail benchmarking approach into account in commercial negotiations, the competitive discipline of retail price movements will not have been applied. The opportunities for gaming as described above would, therefore, be limited. In circumstances where parties have previously taken the retail

[1] Vodafone submission on implementation issues, p. 3.

[2] RSL COM submission on implementation issues, p. 1.

[3] Telstra submission on implementation issues, p. 2, 4, 5.

[4] Optus submission on implementation issues, p. 5-8.

[5] The Commission notes an access dispute may be notified on the basis that the parties are unable to agree on the extent of retail price movements. In such a case the Commission would likely use the starting price agreed by the parties (most likely the access price carried over from the previous agreement).

benchmarking approach into account in commercial negotiations, the competitive discipline of retail price movements will have been applied in some manner. The Commission considers that using the most recent agreed access price that did not take into account the retail benchmarking approach in commercial negotiations should act as a disincentive for gaming. This is because the Commission prefers a period-on-period application of retail price movements (discussed in section E.2.5) and as such would only apply the retail price movements over the previous two six-month periods. Accordingly, access seekers may find themselves in a worse position if they attempt to game the situation.

Approach

For future access disputes the starting access price would likely be the most recent agreed access price between the access seeker and access provider that did not take the retail benchmarking approach into account in commercial negotiations.

E.2 Calculation of retail price changes

In the final report it was noted that the retail benchmarking approach provides that access prices for GSM termination will fall at the same rate as retail prices for mobile services provided by a mobile carrier. That is, access prices in the current time period are dependent on a mobile carrier's past retail price movements (the change in average retail prices between, say, time period 1 and time period 2).

In its submission Telstra raised the issue of the retail price movement index that will be used to determine access prices for GSM termination (in access disputes) and for disclosure purposes (to facilitate commercial negotiations).[6] Telstra was of the understanding that a single composite weighted index would be developed for the industry and applied in these situations. It sought clarification on this issue.

As noted above, under the retail benchmarking approach each mobile carrier's access prices are linked to its own retail price movements. In this respect a retail price movement index for each mobile carrier would likely be developed for the purpose of making determinations in access disputes. Further, if the Commission considers that releasing carrier-specific retail price movement indexes would facilitate commercial negotiations then it would likely make such indexes publicly available.

There are two practical issues which need to be considered in regard to how the retail price movements will be determined:

- the time period for assessing retail price movements (i.e. between time period 1 and time period 2); and

[6] Telstra submission on implementation issues, p.4.

- how to determine the average price per minute and price change for each time period, in particular whether to use a yield or retail basket approach, the services for inclusion in such calculations and the issue of adjusting for quality.

E.2.1 Time period for assessing retail price movements

In the final report the Commission proposed to use calendar six-month periods – that is, 1 January to 30 June, and 1 July to 31 December – to determine the retail price movements. While it noted that there were several possible time periods for determining retail price movements, ranging from a monthly basis to an annual basis, it considered calendar six-month periods to be preferable. This is because such a timeframe is not so short so as to be administratively burdensome (for either the carriers or the Commission) and at the same time is not so long as to provide limited scope for regular downward pressure on access prices over the next two years.

Many carriers considered that six-monthly assessments of retail price movements were appropriate for reasons outlined by the Commission. That said, both AAPT[7] and PowerTel[8] proposed that retail price movements be assessed quarterly. AAPT submitted that six-monthly assessments may prove to be too long a period in practice. It was concerned that at the conclusion of each six-month period, some time must be allowed for the collection and analysis of data and that this could lead to a significant lag beyond the end of the six-month period. PowerTel submitted that commercial negotiations may be necessary to implement the adjustments which would create delays in implementation.

The Commission does not consider that moving to quarterly assessments would remove the delays associated with collecting information and notes that determining quarterly retail price movements may be administratively more burdensome. It is noted that under the new Regulatory Accounting Framework (RAF)[9] the mobile carriers supplying GSM services will provide the Commission with six-monthly and annual reports which include much of the information necessary to determine retail price movements (under the yield approach). Specifically, information on retail revenues and minutes of use for services. In the sense that this information is already provided to the Commission, the associated delays should be minimised.

In contrast, Optus proposed that retail price movements be assessed on an annual basis.[10] Optus submitted that it should not have to bear the administrative cost of gathering data more regularly than required ‘given that the Commission would likely only ever set mobile termination prices annually’. In this regard the Commission notes that it would only become explicitly involved in setting access prices only if an access dispute is notified. Otherwise, the Commission anticipates its involvement may only be through publishing information on

[7] AAPT submission on implementation issues, p. 3.

[8] PowerTel submission on implementation issues, p. 2.

[9] The Commission notes that under the Chart of Accounts Cost Allocation Manual the mobile carriers were reporting on a quarterly basis.

[10] Optus submission on implementation issues, p. 9.

retail price movements (which may feed into commercial negotiations). It would not be involved in setting annual access prices.

In relation to the provision of information by mobile carriers who do not report on a traditional financial year basis, Optus submitted that it would have difficulties providing audited pricing information for periods outside of its financial reporting period of 1 April to 31 March.

On balance, the Commission considers that six-month periods are an appropriate time period for determining retail price movements. As such, for the purpose of resolving any future access disputes, and ongoing monitoring of retail price movements, the Commission considers that retail price movements would likely be determined either according to the calendar six-month periods noted above or the six-month periods within the financial reporting period of 1 April to 31 March. This should provide mobile carriers with sufficient flexibility depending on their reporting periods (as also provided under the RAF) and minimise the compliance costs for mobile carriers.

Approach

Retail price movements would likely be determined on a six-month basis.

For the purpose resolving any future access disputes, and ongoing monitoring of retail price movements, the calendar six-month periods of 1 January to 30 June and 1 July to 31 December or the six-month periods within the financial reporting period of 1 April to 31 March would likely be used to determine retail price movements.

E.2.2 A yield methodology versus a retail basket approach

In the final report the Commission noted that a yield method of calculating retail price movements appeared to be the most appropriate approach for arbitration of access disputes. This involves determining average retail prices by dividing a mobile carrier's total mobile revenue from retail activities by the total number of its mobile minutes from origination services in a given period. In this way a revenue per minute figure (a proxy for average prices) for a mobile carrier is derived that can be compared between periods in order to determine the retail price movements.

The necessary calculations are shown below.

(1) $$\frac{\text{Revenue from retail mobile services}}{\text{Mobile minutes from originating services}} = \text{revenue per minute} = \text{average price}$$

(2) $$\frac{\text{Revenue per minute}_2 - \text{Revenue per minute}_1}{\text{Revenue per minute}_1} = \text{\% change in average price}_{1\Rightarrow 2}$$

That said, it noted that a 'retail basket' type approach, similar to that adopted by the Communications Research Unit (CRU), could also be used to determine average prices. This approach involves constructing representative bundles to determine average prices for given usage profiles. A mobile carrier price index is formed from these baskets/profiles and is compared over time to determine the retail price movements.

The final report noted that the yield approach has advantages in that the information required under a yield approach is relatively easier to obtain than the information that would be required under a 'retail basket' type approach and it takes into account free minutes provided as a part of the overall retail package. Therefore, it is relatively easier to update on a regular basis, and in a more timely fashion. Further, and importantly, it does not enable mobile carriers to substitute free minutes for lower call prices.

In general carriers were supportive of a yield approach and preferred it to a 'retail basket' approach. It was noted that a yield approach is administratively more simple and likely to reduce the regulatory costs (particularly for the mobile carriers) associated with implementing a retail benchmarking approach.

Vodafone considered that a 'retail basket' approach was a first best solution but noted that there were a number of problems that could possibly arise.[11] In particular, it stated that the complexity of a 'retail basket' approach means there are opportunities for access seekers and providers to game the approach to their own commercial advantage. Vodafone is supportive of a retail benchmarking approach that is more of a guideline than a rule[12] and in this respect submitted that it would be preferable to use the simpler yield approach. That said, it noted that the yield approach would need to make some allowance for the existence of innovative pricing in the retail market that takes advantage of excess capacity (off peak and on-net pricing).

To address this potential distortion Vodafone recommended that carriers should have the flexibility to deliver regulated prices falls in wholesale markets in ways that reflect the context of the retail price change. For example, if retail prices declined by 5 per cent because of discounted call minutes in off-peak times then a mobile carrier should be able to deliver a 5 per cent fall in wholesale rates by offering discounted off-peak wholesale minutes.

Optus also expressed concerns about a yield approach not allowing for innovative pricing and submitted that this would likely create distortions.[13] In this sense Optus did not support a yield methodology as it was of the view these distortions were likely to be less under a 'retail basket' approach. In particular it noted that under a yield approach there were likely to be distortions because:

- peak and off-peak minutes are treated the same, diminishing the incentive of mobile carriers to price off-peak minute in an efficient way; and

[11] Vodafone submission on implementation issues, p. 4.

[12] Vodafone noted that using a rule rather than a guideline or principle may chill commercial negotiations and mire the industry in complex, costly and a drawn-out set of regulatory debates. It considered that where commercially negotiated outcomes are the norm the Commission should use a more market-orientated approach to regulation. Using a guideline or principle would also provide the Commission with the flexibility to take account of other relevant factors in access disputes.

[13] Optus submission on implementation issues, p. 10.

- on-net pricing, that is free on-net minutes and capped pricing, is penalised when this is really only a mechanism designed to effectively utilise existing network capacity.

It submitted that as a ‘retail basket’ approach does not take into account minutes of use then mobile carrier’s pricing decisions are less likely to be affected, although it does acknowledge that the distortions will not be totally eliminated just minimised.

It is noted that Vodafone’s and Optus’ arguments are, at a broad level, about whether the retail benchmarking approach will reduce the extent of retail price competition. In the final report the Commission was of the view that there are sufficient competitive forces in the retail element of the mobile services market to continue to drive retail price competition, despite the linking of retail price movements to access prices for GSM termination. The recent price increases for some mobile services by both Telstra and Optus are noted. While the reason(s) for these price increases are not totally clear it is acknowledged they may be, to some extent, a strategic response to the final report. However, given other mobile carriers and re-sellers have not announced similar price increases to date and subscribers are able to churn between providers more easily in light of mobile number portability, the Commission considers the competitive dynamics in the market remain to be played out.

Further, as noted in the final report the Commission considers that the benefits of greater precision (that may result under a retail basket approach) are unlikely to outweigh the higher implementation costs.

The Commission also understands that a retail basket approach, as modelled by the CRU, does include minutes of use. Specifically, minutes of use are used in defining the bundle or user profile and therefore the number of calls that an end-user makes. Additionally, any free minutes which constitute discounted pricing for the end-user are also included in determining average prices. In this respect the Commission considers that average prices determined under a yield method are unlikely to be significantly different from those determined under a retail basket approach.

Off-peak and on-net calls are a form of outgoing calls that mobile carriers receive revenue from and/or which contribute to minutes of use. Not including these calls could distort the average price figures, as such calls would appear to be an important form of discounting for the mobile carriers. That is, by not including off-peak and on-net call revenues and minutes of use, the measure of average price is likely to be higher than what end-users effectively face. These call types and the pricing of them effectively lower the average price faced by end-users. That said, the Commission will consider using peak/off-peak revenue weights in the revenue calculations. In any event, as most mobile carriers already have off-peak and on-net pricing initiatives in place any distortions under a yield methodology would not be as large as if such pricing initiatives did not exist.

Vodafone suggested that carriers should have the flexibility to deliver regulated prices falls in wholesale markets in ways that reflect the context of the retail price change. While the Commission does not propose to determine retail price movements of mobile carriers for different call types (for example, peak/off-peak calls and on-net/off-net calls) this should not preclude commercial negotiations in relation to access prices incorporating such considerations where relevant.

In the final report the Commission proposed that under the yield method it would use revenue per minute as a proxy for average price. Such an approach means that mobile carriers cannot substitute free mobile minutes for retail price reductions in order to avoid lower access prices for GSM termination. Most carriers were of the view that revenue per minute is the best proxy for average price under a yield approach. In particular, AAPT submitted that presently access seekers acquire the GSM termination service at a per minute usage charge and, therefore, it would be appropriate to use revenue per minute.[14] Vodafone submitted that it would not be appropriate to use revenue per subscriber as a proxy for average prices as per subscriber figures may reflect consumer spending rather than retail price movements.[15]

Approach

A yield method would likely be used to determine retail price movements using revenue per minute as a proxy for average prices.

E.2.3 Services for inclusion

In the final report the Commission provided its preliminary views as to services which should be included in the revenue calculations under a yield approach. It indicated that, while revenues from wholesale sources should be excluded from the revenue calculations under a yield approach, revenues (and minutes of use where relevant[16]) from the following GSM-related retail services should be included:

- outgoing calls;
- subscription (access) fees;
- sales of handsets;
- initial connection charges; and
- charges for SMS and voicemail services.

It noted that outgoing calls and access fees (which incorporate handset subsidies) are the primary source of retail revenue for carriers.[17] Further, SMS messaging and voicemail were seen as increasingly important sources of revenue for mobile carriers and with strong take-up rates to date for these services it was considered that including them in revenue calculations

[14] AAPT submission on implementation issues, p. 3.

[15] Vodafone submission on implementation issues, p. 5.

[16] In regards to minutes of use, the Commission proposed that this would need to encompass the number of minutes of outgoing calls and voicemail messages, and the number of SMS messages.

[17] The Commission also noted that Telstra earns revenues from mobile phones that are provided to customers as a substitute for landlines, in accordance with meeting its Customer Service Guarantee and Universal Service Obligation. The Commission's view is that such revenue should not be included in the calculation of the average price.

would ensure that retail price reductions can not be transferred between core call services and value added services so as to avoid reductions in access prices for GSM termination.

Optus[18] and Vodafone[19] both raised concerns about the treatment of handset subsidies in the revenue calculations. In particular, they noted that as mobile carriers begin to move towards ‘SIM-only’ plans that do not include handset subsidies this will appear as a reduction in average prices when it really reflects a re-balance in payments by the end-user. It was noted that at the moment many end-users purchase a subsidised handset (at little or no charge) and that this subsidy is then recouped through access fees and outgoing call charges. Increasingly, however, as the market becomes more heavily penetrated and end-users retain their handsets from previous plans, mobile carriers will reduce the amount of subsidies paid and become less reliant on higher access fees and outgoing call charges to recoup these subsidies.

Optus suggested that in implementing a retail benchmarking approach the Commission could exclude ‘SIM-only’ plans or make an adjustment to its data to reflect their impact. Vodafone suggested that a net cost figure be derived for handsets and connections (taking into account both revenues and costs)[20] and that this figure then be deducted from the other revenues included in the revenue calculations. It noted that any net cost figure for connection would need to be spread over the average length of a contract, which would involve the Commission accessing the information necessary to determine net connection costs as far back as the average length of a contract. Vodafone submitted that this would involve relatively simple calculations and would have the benefit of ensuring that the changing market conditions are accurately reflected in the retail benchmarking approach.

The Commission considers that there is a need to take into account the ‘SIM-only’ plans, particularly given the likelihood of expanding uptake over the implementation period for the approach. Further, if the ‘SIM-only’ plans were excluded from the revenue calculations then it would enable mobile carriers to transfer price decreases to these plans and avoid reductions in access prices for GSM termination. The framework proposed by Vodafone appears to be an adequate means of taking into account the handset subsidy and the new ‘SIM-only’ plans. By incorporating these net connection costs in the revenue calculations the extent of the handset subsidy that is recouped from the access fees and outgoing call charges will be taken into account.

In its submission AAPT considered that because SMS is not supplied on a timed basis an increase in SMS traffic would increase revenue but would not be reflected in retail minutes, thereby distorting the glide path.[21] It also argued that SMS is not delivered using the same network elements as voice services and therefore should not be included. AAPT considered similar concerns apply to voicemail services.

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[18] Optus submission on implementation issues, p. 16.

[19] Vodafone submission on implementation issues, p. 9.

[20] This would take into account any revenues from sales of handsets plus connection fees, less any costs such as the purchase of the handset from the manufacturer or the subsidy paid to dealers.

[21] AAPT submission on implementation issues, p. 4.

The final report noted that the Commission had considered a number of different methods to incorporate SMS services under the yield method. In this respect it proposed to apply a yield method (in terms of average price for a message) to derive a price change, which is then revenue-weighted and combined with the other retail services to derive an overall retail price change. It was also proposed that voicemail services be included in revenue calculations, taking into account relevant revenues and call minutes associated with voicemail services. In this way the Commission does not consider that inclusion of SMS or voicemail services in the revenue calculations will distort the glide path.

Optus submitted that (wholesale) incoming call revenues should be included in the revenue calculations as they are ‘an integral part of the total mobile service offering’.[22] It argued that not including incoming call revenues would mean price reductions are understated for end-users who use their phones predominantly for incoming calls and who are a part of closed user groups.

The Commission does not intend to include these revenues in the revenue calculations as they are derived in the wholesale element of the mobile market. It is this element of the market, and indeed this revenue stream, which the Commission expressed concern about in the final report. In particular, it noted that control over access, and to an extent consumer ignorance, result in mobile carriers sustaining above-cost access prices for GSM termination. A retail benchmarking approach places a relevant competitive discipline (competition in the retail element of the mobile market) on the wholesale incoming call revenue steam of carriers. Including these revenues in the revenue calculations would diminish the impact of this competitive discipline.

Inclusion of revenues from the resale of mobile services was also raised. All responses on this issue did not consider their inclusion in the revenue calculations to be appropriate as revenue from resale belongs to the wholesale category. Telstra also submitted that because resellers set the retail prices of resale services, revenue from resale services would not reflect retail price movements of access providers.[23] Vodafone did not support the inclusion of revenue from resale because it anticipates having difficulties collecting and collating the information due to contractual obligations.[24]

In terms of providing the revenue and minutes of use information outlined above, both Optus[25] and Telstra[26] submitted that they did not envisage any difficulties.

[22] Optus submission on implementation issues, p. 15.

[23] Telstra submission on implementation issues, p. 4.

[24] Vodafone submission on implementation issues, p. 8.

[25] Optus submission on implementation issues, p. 15.

[26] Telstra submission on implementation issues, p. 4.

Approach

Revenues and minutes of use from the following services would likely be used in the revenue calculations:

- outgoing calls;
- subscription (access) fees;
- sales of handsets;
- initial connection charges; and
- charges for SMS and voicemail services.

Revenues would likely be adjusted for 'SIM-only' plans, but revenues from resale and wholesale services would likely be excluded from the calculations.

E.2.4 Adjusting for quality change

In the final report the Commission noted that it would be unlikely to adjust retail price movements for changes in quality unless there is compelling evidence of an impact on the retail price changes that has occurred during a six-month period. This followed comments from Optus that, if the Commission did not correctly implement retail benchmarking, changes in the quality of mobile services may be mistaken for changes in real prices of outputs.[27] In particular, Optus submitted that over the last three years there has been a decrease in mobile subscription prices in absolute terms (caused by the rapid take-up of pre-paid services) but that this decrease mainly reflects the lower quality and costs of handsets in the pre-paid market. Optus suggested the development of a mobile subscription quality index to enable the separation of price and quality changes to mobile subscribers.

The Commission was of the view that attempting to calculate quality changes would be problematic. Further it noted that it may be the case that decreases in the quality of the overall retail package are offset by the increases in quality of the overall retail package (e.g improved handsets being provided at existing subscription prices). In such circumstances there would be little or no change in average quality and as a result there may be little benefit from price adjustments.

Most carriers did not believe that retail price movements should be adjusted for quality given the complexity of such calculations. Optus, however, submitted that adjusting for quality is necessary and reiterated its concerns, suggesting the use of a mobile subscription quality index.[28]

[27] Optus submission to the Draft Report, p. 35-36.

[28] Optus submission on implementation issues, p. 15-16.

The Commission continues to be of the view that unless there is compelling evidence of an impact on the retail price changes that have occurred during a six-month period retail price movements should not be adjusted for quality.

Approach

Retail price movements would not likely be adjusted to account for changes in quality of mobile services.

E.2.5 Possibility of 'credits'

In the final report the Commission noted its initial view that the use of a period-on-period approach may be preferred in determining retail price movements. A period-on-period approach involves a reduction in access prices by the percentage change in the average retail price for each six-month period. In contrast the use of a cumulative approach would involve ensuring access prices reflect the total percentage change in average retail prices since the setting of the initial access price.

The Commission considered that while the use of period-on-period or cumulative approaches would generally not lead to substantial differences in access prices, this issue may become important if disputes over access prices re-emerge during the two-year implementation period. In particular, if parties negotiated access prices on the basis of forecasted retail price changes, which were different from the actual retail price changes that eventuate, under a cumulative approach the Commission would need to take that difference into account in an access dispute (i.e. allow for 'credits'). The risk that the forecast retail price changes are incorrect could have rested with one party – a cumulative approach may mean that any risk is subsequently mitigated by the Commission by allowing for credits. A period-on-period approach does not allow for mobile carriers to build up 'credits' for reductions in access prices which are greater than retail price movements and may promote commercial negotiations as mobile carriers may be more willing to negotiate longer-term arrangements.

Several carriers were supportive of a period-on-period approach noting that the administrative difficulties associated with a cumulative approach did not lend it support. Further, Vodafone noted that under a cumulative approach arbitrated outcomes would become the rule rather than the exception because there would be incentives for all parties to seek arbitrated outcomes in the event that commercially negotiated prices did not align with expectations for retail price changes.[29]

That said, both Telstra[30] and the Centre for Telecommunications Information Networking (CTIN)[31] were supportive of a cumulative approach. Telstra submitted that it would be simpler and more likely to provide incentives for commercial negotiation (as compared to a

[29] Vodafone submission on implementation issues, p. 10.

[30] Telstra submission on implementation issues, p. 4.

[31] CTIN submission on implementation issues, p. 3.

period-on-period approach).[32] In this respect it stated that the Commission's assessed lowest access price in the market would be transparent and therefore negotiations would be encouraged. It was of the view that superimposing adjustments on the most recently agreed access prices would overly complicate the calculation of access prices and limit transparency. CTIN considered that a period-on-period approach would tempt distortions with mobile carriers either holding back or bringing forward price declines.

The Commission considers that a period-on-period approach is to be preferred for the reasons outlined above. In relation to Telstra's arguments, the Commission notes that as long as each mobile carrier's retail price movements are transparent (either because of the Commission publishing such information or mobile carriers making it available to access seekers) then commercial negotiations should not be hampered under a period-on-period approach. In addition, and as noted above, commercial negotiations may be hampered under a cumulative approach where the Commission would be required to make adjustments if forecasted retail price movements differed from actual movements.

Approach

Under a yield methodology, retail price movements would likely be implemented on a period-on-period basis.

E.3 Backdating of final determinations in access disputes

The Commission did not raise the issue of backdating in the final report as it considers that this issue is generally raised and resolved in the context of particular access disputes. However, both AAPT and Vodafone raised the issue in their submissions. In particular, they were concerned with the backdating of final determinations for access disputes that were current at that time.

AAPT stated that the need for a reasonable outcome on backdating is particularly acute in these matters as the public consultation on pricing principles had taken over 18 months.[33] It was of the view that failure by the Commission to address backdating would result in unregulated access prices during this period, which would be inconsistent with the objectives of Part XIC of the *Trade Practices Act 1974*. Vodafone considered that with the large number of commercially negotiated access prices, backdating prior to 1 July 2001 should only be considered where:

[32] In particular Telstra noted that if access seekers can obtain a rate equal to the most recent price between **any** access seeker and access provider then access providers will have little incentive to negotiate commercially below the maximum rate they could obtain under the Commission's proposed approach. The Commission notes that for the purposes of resolving future access disputes (under a yield method and a period-on-period approach) it proposed to use of the most recent agreed access price between **the** access seeker and the access provider. Therefore the Commission does not consider that such a disincentive exists.

[33] AAPT submission on implementation issues, p. 1-2.

- access prices offered to the access seeker in the earlier period were not consistent with the market rates that existed at the time; or
- the access seeker can show that the access provider did not provide reasonable commercial offers to the access seeker during the period.[34]

The legislative framework of Part XIC provides the Commission with the discretion to backdate final determinations in access disputes. These provisions were introduced to encourage commercial agreement and co-operation during access disputes by removing incentives for delay and to ensure a considered and reasonable outcome is ultimately applied to the interim period which may otherwise be covered by an interim determination or a commercial agreement which one or more parties may be disputing.[35] There is, however, no explicit guidance as to those instances when the Commission should backdate final determinations.

While final determinations are no longer required for the access disputes current at the time the final report was released (as they have been withdrawn) it is noted that the Commission has a general presumption towards backdating final determinations made in access disputes. That said, in resolving access disputes the issue of backdating will be considered on a case-by-case basis, depending on the circumstances relevant to a particular access dispute. Further, it is noted that the Commission is currently developing arbitration guidelines for the purpose of facilitating access disputes and that the issue of backdating is being considered, more broadly, in that context.

E.4 Monitoring and publication of information

In the final report it was noted that the Commission expected access prices should at least move in line with retail price movements of each mobile carrier for the next two years. Further, it noted that the retail benchmarking approach will be reviewed in two years time. Therefore, ongoing monitoring of the mobile market and publication of information will be important for two purposes:

- to ensure that sufficient information is available to inform parties of the retail price movements; and
- to assess the ongoing case for regulation of access prices for GSM termination at the end of the two year period.

E.4.1 Monitoring to enhance implementation

As noted above, the Commission will likely collect information on retail revenues and minutes of use for GSM services via the RAF (possibly supplemented to some extent). While in principle the collection of this information could be left to situations where there are particular access disputes, the Commission's view is that collating this information on a

[34] Vodafone submission on implementation issues, p. 4.

[35] Explanatory memorandum, p.33.

consistent basis for all mobile carriers is preferable. As noted in section E.2 this will allow the Commission to publicly release carrier-specific retail price movement indexes if it believes this will encourage commercial negotiation, subject to any confidentiality arrangements.[36]

E.5.2 Monitoring to assess on-going need for regulation

The Commission will also undertake monitoring activities to determine whether there is a need to extend the benchmarking approach past the two year implementation period, and, if not, whether the GSM originating and terminating service declaration should be revoked or to consider other forms of regulation.

As noted in Chapter 7 of the final report, the Commission considers that one of the issues industry should give further consideration to is the benefits of structural changes to improve consumer awareness of (a) access prices for GSM termination; and (b) which network the consumer has called. Industry should consider discussing such changes in a formal context, such as through ACIF. As noted, this will be one of the actions that the Commission will consider favourably in its review of GSM termination in two years, as it is likely to increase competitive pressure on access prices for GSM termination.

The Commission also noted in Chapter 5 of the final report that the overall mobile market appeared increasingly competitive. The Commission intends to undertake further monitoring of carrier conduct and performance in this market, and its implications for the fixed-to-mobile market. This will likely take the form of the Commission requesting information on fixed-to-mobile prices (to compare against access prices) from fixed and integrated carriers, and cost and revenue data from mobile carriers. A specific Record Keeping Rule may also be appropriate for this purpose.

[36] The Commission recently released a Discussion Paper on *Regulatory Principles for Public Disclosure of Record-Keeping Rule Information*.