Australian
Competition &
Consumer
Commission

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

Draft Decision

April 2006

Contents

Abbreviations

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

PMTS	Public Mobile Telecommunications Service
POI	Point of interconnection
PSTN	Public Switched Telephone Network
RAF	Regulatory Accounting Framework
SAOs	Standard Access Obligations
SIO	Services in operation
Telstra	Telstra Corporation Limited
TSLRIC	Total service long-run incremental cost
TSLRIC+	Total service long-run incremental cost plus a mark-up to account for a proportion of organisational-level common costs based on an EPMU approach
Undertaking	Hutchison's undertakings with respect to its MTAS lodged with the Commission on 7 October 2005.
Vodafone	Vodafone Australia Pty Ltd

1. Introduction

On 7 October 2005, 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). Three of the Undertakings have been submitted on behalf of HTAL and the remaining three on behalf of H3GA. The Undertakings lodged in relation to HTAL are the same as those lodged in relation to H3GA.

The Undertakings specify certain terms and conditions upon which Hutchison undertakes to meet its standard access obligations (SAOs) to supply the domestic digital mobile terminating access service (MTAS), which was declared by the Commission on 30 June 2004.[1]

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

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 Non-PMTS (i.e. fixed-line or overseas) network. Hutchison's three classes of Undertakings are described as:

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

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

The PMTS Dual Rate Undertakings contain an offer by Hutchison to supply the MTAS at the usage charge rate of 12 cpm on a reciprocal basis and at the 'fall back' rate of 21 cpm. The 'fall back' rate applies to access seekers that do not accept Hutchison's 12 cpm reciprocal offer or are not required to supply the MTAS to Hutchison at 12 cpm.

The Non-PMTS Undertakings propose that Hutchison will supply the MTAS for fixed-to-mobile (FTM) and overseas-originated calls at a single usage charge rate of 18 cpm.

Hutchison submits that the Undertakings 'aim to strike an appropriate balance' between MTM and FTM MTAS services, in that the Undertakings distinguish 'the benefits that a reciprocal price of 12 cpm would bring to the MTM market and the limited role that reduced MTAS prices are likely to play in improving competition in the FTM market in the absence of an effective pass-through mechanism'. In this respect, Hutchison submits that while the Single and Dual Rate PMTS Undertakings are submitted as alternatives, the LTIE is 'best' promoted by the Commission accepting the PMTS Dual Rate Undertakings coupled with the Non-PMTS

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

Undertakings. In this regard, Hutchison notes that the PMTS Single Rate Undertakings were submitted in addition to the Dual Rate 'to accommodate the possibility that the Commission may regard the optional rate of 21 cpm as a departure from its MTAS pricing principle which affects the reasonableness of the PMTS Dual Rate Undertaking'. However, Hutchison argues that each Undertaking promotes the LTIE.

As Hutchison has submitted each Undertaking as individual alternatives, the Commission accordingly examines each Undertaking individually. The Commission considers that it must apply the reasonableness test to each of the Undertakings submitted by Hutchison. The Commission considers that where more than one Undertaking has been submitted simultaneously, each of those Undertakings must individually be considered 'reasonable'. That said, the Commission has also assessed the reasonableness of the combined terms and conditions of the Undertakings, as advocated by Hutchison.

Attachment A to the Undertakings 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 the terms set out in Attachment B apply to all three Undertakings lodged by HTAL and H3GA respectively.

Under the Act, the Commission's task is to either 'accept or reject' the Undertakings based on an assessment against the relevant statutory criteria. The Commission has a six-month statutory timeframe to make its decision.

On 18 November 2005, the Commission issued a Discussion Paper seeking the views of interested parties on the Undertakings and the supporting submissions. In response, the Commission received submissions from four interested parties. A list of the submissions (and attachments) received is contained in Appendix 1.

This report details the Commission's draft decision to reject the Undertakings submitted by Hutchison and the reasons for the Commission in reaching this decision.

1.1. Structure of this report

This Draft Report is structured as follows:

- **Chapter 2** provides background on the declaration and the dispute resolution framework set out in the Act. It also contains a summary of the Commission's *MTAS Final Report* and the *MTAS Pricing Principles Determination*;
- **Chapter 3** sets out the relevant legislative framework that the Commission is required to work within when assessing an undertaking;
- **Chapter 4** summarises the price and non-price terms and conditions contained in the Undertakings and the supporting material provided by Hutchison;
- **Chapter 5** assesses the reasonableness of *price* terms and conditions for the PMTS Single Rate Undertakings against the relevant statutory criteria;

- **Chapter 6** assesses the reasonableness of *price* terms and conditions for the PMTS Dual Rate Undertakings against the relevant statutory criteria;
- **Chapter 7** assesses the reasonableness of *price* terms and conditions for the Non-PMTS Undertakings against the relevant statutory criteria;
- **Chapter 8** assesses the reasonableness of *price* terms and conditions for the Undertakings in the combinations proposed by Hutchison against the relevant statutory criteria;
- **Chapter 9** assesses the reasonableness of the *non-price* terms and conditions of the Undertakings against the relevant statutory criteria;
- **Chapter 10** includes the Commission's overall views on the reasonableness of the terms and conditions;
- **Chapter 11** assesses the consistency of the terms and conditions in the Undertakings with the applicable SAOs;
- **Chapter 12** contains the Commission's draft decision on the Undertakings; and
- **Appendix 1** lists the submissions received during this inquiry.

2. Background

2.1. Declaration and the dispute resolution framework

Part XIC of the Act establishes a regime for governing access to certain declared carriage services in the telecommunications industry. Once a service is declared by the Commission, carriers and carriage service providers (CSPs) which supply the declared service to themselves, or others, are subject to the applicable standard access obligations (SAOs). These obligations, which are set out in section 152AR of the Act (and are discussed in section 3.2.2 of this report) constrain the manner in which those carriers and CSPs can conduct themselves in relation to supply of the declared service.

The terms and conditions upon which a carrier or CSP is to comply with these obligations are as agreed between the parties. In the event that they cannot agree, one party can notify the Commission of an access dispute under section 152CM of the Act. Once notified, the Commission can arbitrate and make a determination to resolve the dispute. The Commission's determination need not, however, be limited to the matters specified in the dispute notification. It can deal with any matter relating to access by the service provider to the declared service.[2] The Act enables a carrier or CSP to meet its access obligations and resolve potentially contentious issues outside of the arbitral process. It can do this by providing the Commission with an access undertaking setting out the terms and conditions on which it proposes to comply with the applicable SAOs.

If accepted by the Commission, the undertaking becomes binding on the carrier or CSP. If a carrier or CSP breaches an undertaking, the Federal Court can make an order requiring compliance with the undertaking, the payment of compensation, or any other order that it thinks fit.[3] In accepting an undertaking, however, the Commission limits its ability to arbitrate access disputes. This is because once an undertaking is in operation, the Commission cannot make an arbitral determination that is inconsistent with the undertaking.[4]

2.2. The declared service (MTAS)

On 30 June 2004, the Commission decided to allow the existing GSM and Code Division Multiple Access (CDMA) terminating access service declaration to expire, and replaced it with a new declaration under section 152AL of the Act. The new declaration provided an amended description of the mobile terminating access service (or 'MTAS') by adopting a technology neutral approach that included voice services terminating on all digital mobile telephony networks (i.e. GSM, CDMA and third-generation or '3G' networks).

The MTAS is a wholesale input, used by providers of calls from fixed-line and mobile networks, in order to complete calls to mobile subscribers connected to other networks. When a mobile call is made between consumers (or end-users), it will involve two essential elements – 'origination' and 'termination'. Origination refers to the carriage of a call from the end-user who makes, or originates, the call over the

2 Section 152CP(2) of the Act.
3 Section 152CD(3) of the Act.
4 Section 152CQ(5) of the Act.

network to which this end-user is connected. Termination refers to the carriage of the call to the person receiving the call over the network on which the person receiving the call is connected. Where the person making the call and the person receiving the call are on different networks, a point of interconnection (POI) between these two networks will exist. The main network elements of providing the MTAS are illustrated in Figure 2.1 below.

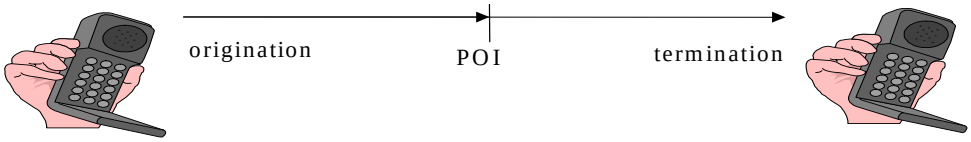

Figure 2.1 – Termination, origination and the POI

Under current commercial arrangements between network owners, the network owner that originates a call to a mobile network will, generally, purchase the MTAS from the network owner that completes the call. The originating network owner will recover these costs, and the costs it incurs from originating the call, through the retail price it charges its directly connected end-user for providing the call. This commercial arrangement is typically referred to as the 'calling party pays' (CPP) model.

An example of how the MTAS is used in the provision of a FTM call is depicted in Figure 2.2 below. In this example, Telstra purchases access to Hutchison's MTAS in order to provide a call from a Telstra fixed-line end-user to a Hutchison mobile end-user. Telstra would then bill its directly-connected consumer for providing a FTM call service.

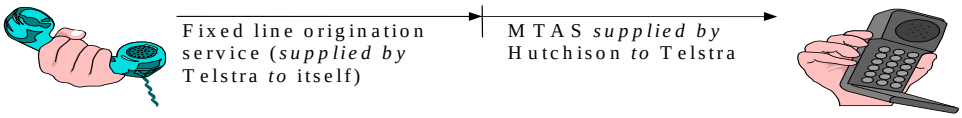

Figure 2.2 - Use of the MTAS to supply a fixed-to-mobile call

The MTAS is therefore an essential input into the provision of calls to mobile phone users where the mobile phone user is on a different network to the individual who originates the call. This is the case irrespective of whether the call terminates on a second generation (2G) GSM or CDMA network, a 2.5G or 3G mobile network.[5]

[5] 2G protocols use digital encoding and include GSM and CDMA. 2G networks support high bit rate voice and limited data communications. They are capable of offering auxiliary services such as data, fax and the short messaging service (SMS). 2.5G protocols extend 2G systems to provide additional features, such as packet-switched connection and enhanced data rates. 3G protocols support much higher data rates, measured in megabits per second, intended for applications such as full-motion video, video conferencing, and full Internet access.

2.3. The MTAS Pricing Principles Determination

On 30 June 2004, as required under section 152AQA of the Act, the Commission also released pricing principles for the MTAS (the *MTAS Pricing Principles Determination*). The *MTAS Pricing Principles Determination* stipulates that the price of the MTAS should follow an adjustment path such that there is a closer association of the price and underlying cost of the service. In this context, the Commission determined that its preferred pricing principle was the 'total service long-run incremental cost' (TSLRIC) of supplying this service plus a mark-up ('+') for the recovery of organisational-level costs based on the equi-proportionate mark-up (EPMU) approach. This was termed a 'TSLRIC+' approach.

Based on the available information at that time, the Commission determined that the TSLRIC+ of supplying the MTAS in Australia was likely to fall in the range of 5 to 12 cpm. As a conservative approach, the Commission selected the upper bound of this range (i.e. 12 cpm) for its *MTAS Pricing Principles Determination*. Moreover, with the legitimate business interests of access providers of the MTAS in mind, the Commission determined a three-year adjustment path to a price of 12 cpm (which reflects the conservative upper-bound of the TSLRIC+ of the MTAS). The Commission's indicative price related terms and conditions for the MTAS are included in Table 2.1 below.

Table 2.1: Price related terms and conditions in the MTAS Pricing Principles Determination

Time period	Price related terms and conditions (cpm)
1 July 2004 – 31 December 2004	21
1 January 2005 – 31 December 2005	18
1 January 2006 – 31 December 2006	15
1 January 2007 – 30 June 2007	12

The Commission noted at the time of its release that the *MTAS Pricing Principles Determination* (and the associated price-related terms and conditions) was not binding in the event of consideration by the Commission of an access undertaking or arbitration of an access dispute. Rather, the Commission indicated that was it required to make an arbitral determination, or consider an undertaking provided to it in relation to the MTAS, a party may argue against the application of the pricing principles and the indicative price-related terms and conditions. In these circumstances, the Commission has indicated that it will have regard to the particular circumstances and the information provided to it at that point in time.

3. Legislation relevant to an access undertaking[6]

This Chapter sets out the form and content that an undertaking should take before it is assessed by the Commission, the criteria the Commission is required to apply in assessing an undertaking and the relevant procedural matters that apply to the Commission's assessment of an undertaking.

3.1. Form and content of an undertaking

Section 152BS of the Act provides that an ordinary access undertaking is a written undertaking given by the relevant carrier or CSP to the Commission under which the carrier or CSP undertakes to comply with the terms and conditions specified in the undertaking in relation to the applicable SAOs. Importantly, however, an undertaking need not specify all the terms and conditions on which the carrier or CSP proposes to supply the declared service.[7] An undertaking may take one of the following forms:

- the terms and conditions specified in the undertaking; or
- the terms and conditions are specified by adopting a set of model terms and conditions set out in the telecommunications access code, as may be in force from time to time.[8]

An access undertaking must not adopt a combination of these methods.

The Commission notes that the Undertakings submitted by Hutchison fall within the first category of undertaking.

3.2. Criteria for assessing an undertaking

Section 152BV(2) of the Act sets out the matters of which the Commission must be satisfied before it can accept an undertaking. This section applies where an access undertaking is given to the Commission that *does not* adopt a set of model terms and conditions set out in the telecommunications access code. As noted above, the Undertakings fall within this category of undertaking.

In this regard, section 152BV(2) of the Act specifies that:

> (2) The Commission must not accept the undertaking unless:
>
> (a) the Commission has:
>
> (i) published the undertaking and invited people to make submissions to the Commission on the undertaking; and
>
> (ii) considered any submissions that were received within the time limit specified by the Commission when it published the undertaking; and
>
> (b) the Commission is satisfied that the undertaking is consistent with the standard access obligations that are applicable to the carrier or provider; and
>
> (c) if the undertaking deals with a price or a method of ascertaining a price – the Commission is satisfied that the undertaking is consistent with any Ministerial pricing determination; and

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6 There are two types of undertaking available under Part XIC – a 'special access undertaking' under section 152CBA and an 'ordinary access undertaking' under section 152BV. Hutchison submitted 'ordinary access undertakings'. The use of the words 'access undertaking' or 'undertaking' in this decision refers to an 'ordinary access undertaking' under section 152BV of the Act.

7 See note to section 152BS and section 152AY(2)(b)(ii) of the Act.

8 Section 152BS(3) and (4) of the Act.

(d) the Commission is satisfied that the terms and conditions specified in the undertaking are reasonable; and

(e) the expiry time of the undertaking occurs within 3 years after the date on which the undertaking comes into operation.

The approach of the Commission to assessing each of these matters is considered in turn below.

3.2.1. Public process

Section 152BV(2)(a)(i) and (ii) of the Act require the Commission to publish the Hutchison Undertakings, invite submissions on them and consider any submissions that were received in response to them.

On 26 October 2005, the Commission published the Undertakings and Hutchison's submission in support of the Undertakings, on its website at www.accc.gov.au.

On 18 November 2005, the Commission released a Discussion Paper in relation to the Undertakings and sought interested parties' views on the Undertakings and the supporting submissions. In response, the Commission has received submissions from four interested parties. A list of the submissions received is contained in Appendix 1 to this report.

3.2.2. Consistency with the standard access obligations (SAOs)

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 SAOs that are applicable to the carrier or provider. The SAOs are set out in section 152AR of the Act. In summary, if requested by a service provider, an access provider is required to:

- supply an active declared service to the service provider in order that the service provider can provide carriage and/or content services;
- take all reasonable steps to ensure that the technical and operational quality of the service supplied to the service provider is equivalent to that which the access provider is supplying to itself;
- take all reasonable steps to ensure that the service provider receives, in relation to the active declared service supplied to the service provider, fault detection, handling and rectification of a technical and operational quality and timing that is equivalent to that which the access provider provides to itself;
- permit interconnection of its facilities with the facilities of the service provider for the purpose of enabling the service provider to be supplied with active declared services in order that the service provider can provide carriage and/or content services;
- take all reasonable steps to ensure that the technical operational quality and timing of the interconnection is equivalent to that which the access provider provides to itself;
- if a standard is in force under section 384 of the *Telecommunications Act 1997*, take all reasonable steps to ensure that the interconnection complies with the standard;

- take all reasonable steps to ensure that the service provider receives interconnection fault detection, handling and rectification of technical and operational quality and timing that is equivalent to that which the access provider provides to itself;
- provide particular billing information to the service provider; and
- supply additional services in circumstances where a declared service is supplied by means of conditional-access customer equipment.

The assessment of whether the Undertaking is consistent with the applicable SAOs is considered in Chapter 11 of this report.

3.2.3. Consistency with Ministerial Pricing Determination

Division 6 of Part XIC of the Act provides that the Minister may make a written determination setting out the principles dealing with price-related terms and conditions relating to the SAOs.[9] Section 152BV(2)(c) of the Act provides that the Commission must not accept an undertaking dealing with price or a method of ascertaining price unless the undertaking is consistent with any Ministerial Pricing Determination.

To date, a Ministerial Pricing Determination has not been made in relation to the MTAS. Accordingly, the Commission is not required to assess the Undertakings against this criterion.

3.2.4. Whether the terms and conditions are reasonable

Section 152BV(2)(d) of the Act provides that the Commission must not accept an undertaking unless it is satisfied that the terms and conditions are reasonable. In determining 'reasonableness' in this context, the Commission must have regard to the range of matters set out in section 152AH(1) of the Act:

- whether the terms and conditions promote the long-term interests of end-users (LTIE) of carriage services or of services supplied by means of carriage services;
- the legitimate business interests of Hutchison, and its investment in facilities used to supply the declared service;
- the interests of all persons who have rights to use the declared service;
- the direct costs of providing access to the declared service;
- the operational and technical requirements necessary for the safe and reliable operation of a carriage service, a telecommunications network or facility; and
- the economically efficient operation of a carriage service, a telecommunications network or a facility.

In addition, the Commission may consider any other relevant matter.[10]

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[9] Under section 152CH of the Act 'price-related terms and conditions' means terms and conditions relating to price or a method of ascertaining price.

[10] Section 152AH of the Act does not use the expression 'any other relevant matter'. Rather, section 152AH(2) of the Act states that the matters listed in section 152AH(1) of the Act do not limit the matters to which the Commission may have regard. Thus, the Commission interprets this to mean that it may consider any other relevant matter.

The reasonableness of the *price* and *non-price* terms and conditions in the Undertakings is considered in Chapters 5-8 and 9 respectively. Set out below is a summary of the key phrases and words used in assessing the above matters. It should be noted that only some of the criteria have been judicially considered, and in other contexts. Accordingly, in taking these matters into account, it is necessary for the Commission to form its own view as to their meaning.

Long-term interests of end-users (LTIE)

The Commission has published a guideline explaining what it understands by the phrase 'long-term interests of end-users' in the context of its declaration responsibilities.[11] The Commission considers that a similar interpretation would seem to be appropriate in the context of assessing an access undertaking.

In the Commission's view, particular terms and conditions promote the interests of end-users if they are likely to contribute towards the provision of goods and services at lower prices, higher quality, or towards the provision of greater diversity of goods and services.[12] To consider the likely impact of particular terms and conditions, the Act requires the Commission to have regard to whether the terms and conditions are likely to result in:

- promoting competition in markets for carriage services and services supplied by means of carriage services;
- achieving any-to-any connectivity; and
- encouraging the economically efficient use of, and economically efficient investment in:
    - the infrastructure by which listed carriage services are supplied; and
    - any other infrastructure by which listed services are, or are likely to become, capable of being supplied.[13]

In the Commission's view, the phrase 'economically efficient use of, and economically efficient investment in, infrastructure' refers to the concept of economic efficiency. This concept consists of three components:

- *Productive efficiency* – This is achieved where individual firms produce the goods and services that they offer at least cost;
- *Allocative efficiency* – This is achieved where the prices of resources reflect their underlying costs so that resources are then allocated to their highest valued uses (i.e. those that provided the greatest benefit relative to costs); and
- *Dynamic efficiency* – This reflects the need for industries to make timely changes to technology and products in response to changes in consumer tastes and in productive opportunities.

The Australian Competition Tribunal, in its decision on access to subscription television services, noted in relation to the terms that make up the LTIE that:

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11 Australian Competition and Consumer Commission, *Telecommunications services — Declaration Provisions: A Guide to the Declaration Provisions of Part XIC of the Trade Practices Act*, July 1999.

12 *Ibid*, pp. 32-33.

13 Section 152AB(2) of the Act.

> Having regard to the legislation, as well as the guidance provided by the Explanatory Memorandum, it is necessary to take the following matters into account when applying the touchstone – the long-term interests of end-users:
>
> End-users: end-users include actual and potential users of the service;
>
> Interests: the interests of end-users lie in obtaining lower prices (than would otherwise be the case), increased quality of service and increased diversity and scope of product offerings. This would include access to innovations … in a quicker timeframe than would otherwise be the case;
>
> Long-term: the long-term will be the period over which the full effects of the … decision will be felt. This means some years, being sufficient time for all players (being existing and potential competitors …) to adjust to the outcome, make investment decisions and implement growth – as well as entry and/or exit – strategies. [14]

Legitimate business interests

The Commission is of the view that the concept of legitimate business interests should be interpreted in a manner consistent with the phrase 'legitimate commercial interests' used elsewhere in Part XIC of the Act. Accordingly, it would cover the carrier/ CSP's interest in earning a normal commercial return on its investment. This does not, however, extend to receiving compensation for loss of any 'above-normal' economic profits that occur as a result of increased competition. In this regard, the Explanatory Memorandum for the *Trade Practices Amendment (Telecommunications) Bill 1996* states:

> ... the references here to the 'legitimate' business interests of the carrier or carriage service provider and to the 'direct' costs of providing access are intended to preclude arguments that the provider should be reimbursed by the third party seeking access for consequential costs which the provider may incur as a result of increased competition in an upstream or downstream market.[15]

When considering the legitimate business interests of the carrier or CSP in question, the Commission may consider what is necessary to maintain those interests. This can provide a basis for assessing whether particular terms and conditions in the undertaking are necessary (or sufficient) to maintain those interests.

Interests of persons who have rights to use the declared service

Persons who have rights to use a declared service will, in general, use that service as an input to supply carriage services, or a service supplied by means of carriage services, to end-users. In the Commission's view, these persons have an interest in being able to compete for the custom of end-users on the basis of their relative merits. Terms and conditions that favour one or more service providers over others and thereby distort the competitive process may prevent this from occurring and consequently harm those interests.

While section 152AH(1)(c) of the Act directs the Commission's attention to those persons who already have rights to use the declared service in question, the Commission can also consider the interests of persons who may wish to use that service. Where appropriate, the interests of these persons may be considered to be 'any other relevant consideration'.

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[14] Application by *C7 Pty Limited & Seven Network Limited re: Foxtel and Telstra* reasons for decision f 23 December 2004 at paragraph 120.

[15] Explanatory Memorandum for the *Trade Practices Amendment (Telecommunications) Bill 1996*, p. 44.

Direct costs

The Commission's *MTAS Pricing Principles Determination* notes that 'direct costs' are those costs necessarily incurred (caused by) the provision of access. As stated in the Explanatory Memorandum:

> … 'direct' costs of providing access are intended to preclude arguments that the provider should be reimbursed by the third party seeking access for consequential costs which the provider may incur as a result of increased competition in an upstream or downstream market.[16]

This requires that the access price should not be inflated to recover any profits the access provider (or any other party) may lose in a dependent market as a result of the provision of access. In particular the Efficient Component Pricing Rule (ECPR) may be inconsistent with this criterion.

At a minimum, an access price should cover the direct incremental costs incurred in providing access and should not exceed the 'stand-alone costs of providing the service', where this is defined to mean:

> … costs an access provider will incur in producing a service assuming the access provider produced no other services.[17]

Economically efficient operation of, and investment in, a carriage service

In the Commission's view, the phrase 'economically efficient operation' embodies the concept of economic efficiency set out above. It would not appear to be limited to the operation of carriage services, networks and facilities by the carrier or CSP supplying the declared service, but would seem to include those operated by others (e.g. service providers using the declared service).

To consider this matter in the context of assessing an undertaking, the Commission may consider whether particular terms and conditions enable a carriage service, telecommunications network or facility to be operated in an efficient manner. This may involve, for example, examining whether they allow for the carrier or CSP supplying the declared service to recover the efficient costs of operating and maintaining the infrastructure used to supply the declared service under consideration.

In general, there is likely to be considerable overlap between the matters that the Commission takes into account in considering the LTIE and its consideration of this matter.[18]

3.2.5. Expiry date and term

Section 152BS(7) of the Act provides that an undertaking must specify the expiry time of the undertaking. Further, section 152BV(2)(e) provides that the expiry time of the undertaking must be within three years after the date on which the undertaking comes into operation.

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16 Explanatory Memorandum for the Trade *Practices Amendment (Telecommunications) Bill 1996*, p. 44.

17 ACCC, *Access Pricing Principles – Telecommunications: A Guide*, July 1997, p. 10.

18 Relevantly, and as noted above, in considering whether particular terms and conditions will promote the LTIE, the Commission must have regard to their likely impact on the economically efficient use of, and the economically efficient investment in, the infrastructure by which listed carriage services are supplied and any other infrastructure by which listed services are, or are likely to become capable of being supplied.

The Commission notes that the Undertakings submitted by Hutchison propose that the terms and conditions would take effect from when the Commission makes a decision to accept one of the alternative Undertakings for the PMTS Calls (either Single rate or Dual rate), it will commence operation from the date of its 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 Undertakings in accordance with the Act.

Should the Commission accept the Non-PMTS Undertakings, it will commence operation from the date of its 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 Undertakings in accordance with the Act.

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

The Commission notes, therefore, that the Undertakings satisfy this criterion.

3.3. Procedural matters

3.3.1. Confidentiality

The Commission recognises that the public consultation and its own decision-making process in relation to the Undertakings should be as transparent as practicable. That said, the Commission is aware of the need to protect certain elements of a provider's information where disclosure of such information may harm that provider's legitimate commercial interests.

The Commission notes, however, that unless it can corroborate commercial-in-confidence information in some way, it is constrained in the weight that it can give to the information. Accordingly, in order to balance the possible harm to a provider from the disclosure of sensitive information and the harm that interested parties may suffer if they are unable to comment on matters affecting their interests, the Commission considers that a more limited form of disclosure of the commercially sensitive information may be appropriate through the use of confidentiality undertakings.

This would allow the confidential information to be disclosed for the purposes of making submissions in this process, but at the same time preserve the confidentiality of the information. On this basis, interested parties should have an opportunity to access confidential information through the use of confidentiality undertakings.

In certain limited circumstances, in order to allow for confidential information to be independently corroborated, the Commission may supply the information to interested parties so as to allow its scrutiny. Conversely, there may be occasions where the

Commission may decide that the disclosure of confidential information is not required.

3.3.2. Statutory decision making period

The Commission has a six-month statutory time frame in which to make a decision to either accept or reject an access undertaking. If the Commission does not make a decision within this six-month statutory timeframe, section 152BU(5) of the Act stipulates that:

> … the Commission is taken to have made, at the end of that 6-month period, a decision under subsection (2) to accept the undertaking.

For the purpose of calculating the six-month time frame, certain periods of time are disregarded. Specifically, section 152BU(6) of the Act states that in calculating the six-month timeframe, the Commission should disregard:

> (a) if the Commission has published the undertaking under paragraph 152BV(2)(a) – a day in the period:
>
> (i) beginning on the date of publication; and
>
> (ii) ending at the end of the time limit specified by the Commission when it published the undertaking; and
>
> (b) if the Commission has requested further information under section 152BT of the Act in relation to the undertaking – a day during any part of which the request, or any part of the request, remains unfulfilled.[19]

Notwithstanding the six-month time limit, and those days which are to be disregarded as outlined above, the Commission notes that section 152BU(7) of the Act states that:

> The Commission may, by written notice given to the carrier or provider, extend or further extend the 6-month period referred to in subsection (5), so long as:
>
> (a) the extension or further extension is for a period of not more than 3 months; and
>
> (b) the notice includes a statement explaining why the Commission has been unable to make a decision on the undertaking within that 6-month period or that 6-month period as previously extended, as the case may be.

The decision-making period in relation to the Undertakings submitted by Hutchison is discussed below.

Calculating the decision-making period for the Undertakings

Public consultation process

On 18 November 2005, the Commission released a Discussion Paper and called for submissions on the Undertakings. In this Discussion Paper, the Commission indicated that the period of time for interested parties to make submissions was by no later than 16 December 2005.

3.3.3. Documents examined by the Commission

Under section 152CGA of the Act, where the Commission:

- makes a decision under section 152BU(2) accepting or rejecting an access undertaking; and

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[19] In relation to information requests about the undertaking, section 152BT(2) of the Act states that 'the Commission may request the carrier or provider to give the Commission further information about the undertaking; while section 152BU(3) states that 'the Commission may refuse to consider the undertaking until the carrier or provider gives the Commission the information'.

- gives a person a written statement setting out the reasons for the decision.

it must specify the documents that the Commission examined in the course of making the decision.

In its assessment of the Undertakings, the Commission has primarily relied upon the supporting submissions provided by Hutchison. The Commission has also relied upon the submissions provided by interested parties in response to the Discussion Paper. Public versions of these reports are available on the Commission's website at www.accc.gov.au. Where relevant, other documents relied upon by the Commission are referenced in the body of this report.

As required under section 152CGA of the Act, a complete list of the documents that the Commission examined in the course of making its final decision will be included in the Commission's final decision on Hutchison's Undertakings.

4. Summary of the Hutchison Undertakings

The Undertakings are provided by Hutchison under Division 5 of Part XIC of the Act, as the access provider of the Hutchison MTAS. The body of the Undertakings themselves comprise terms and conditions which deal with matters of general application such as commencement and duration of each Undertaking and the alternative pricing structures. Attachment A to each Undertaking sets out the price terms and conditions on which Hutchison undertakes to supply the MTAS to access seekers. Attachment B to the Undertakings is titled *'Agreement for the provision of mobile to mobile terminating access service'*, and contains the relevant non-price terms and conditions. Hutchison has advised the Commission that Attachment B applies to all three Undertakings each lodged by HTAL and H3GA.

The Undertakings set out the terms and conditions under which Hutchison will supply the MTAS to access seekers in respect of different types of voice calls from different types of (originating) networks. As noted earlier in this report, 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 Single Rate;
- PMTS Dual Rate; and
- Non-PMTS.

The PMTS Single Rate Undertakings propose the supply of MTAS at a single usage charge rate of 12 cpm for reciprocal arrangements.[20]

The PMTS Dual Rate Undertakings contain an offer by Hutchison to supply the MTAS at the usage charge rate of 12 cpm on a reciprocal basis and at the 'fall back' rate of 21 cpm. The 'fall back' rate applies to access seekers that do not accept Hutchison's 12 cpm reciprocal offer or are not required to supply the MTAS to Hutchison at 12 cpm.

The Non-PMTS Undertakings propose that Hutchison will supply the MTAS for FTM calls at a single usage charge rate of 18 cpm.

Hutchison submits that the Undertakings 'aim to strike an appropriate balance' between MTM and FTM MTAS services in that the Undertakings distinguish 'the benefits that a reciprocal price of 12 cpm would bring to the mobile-to-mobile market and the limited role that reduced MTAS prices are likely to play in improving competition in the fixed-to-mobile market in the absence of an effective pass-through mechanism'. Hutchison submits that while the Single and Dual Rate PMTS Undertakings are submitted as alternatives, the LTIE is 'best' promoted by the Commission accepting the PMTS Dual Rate Undertakings coupled with the Non-PMTS Undertakings. In this regard, Hutchison notes that the PMTS Single Rate Undertakings were submitted in addition to the Dual Rate 'to accommodate the possibility that the Commission may regard the optional rate of 21 cpm as a departure from its MTAS pricing principle which affects the reasonableness of the PMTS Dual

[20] The nature of these proposed reciprocal arrangements is outlined in detail in section 5.1 of this report.

Rate Undertaking'. However, Hutchison argues that each Undertaking promotes the LTIE.

As Hutchison has submitted each Undertaking as individual alternatives, the Commission accordingly examines each Undertaking individually. The Commission considers that it must apply the reasonableness test to each of the Undertakings submitted by Hutchison. The Commission considers that where more than one Undertaking has been submitted simultaneously, each of those Undertakings must individually be considered 'reasonable'.

4.1. Service description

Hutchison offers to supply the MTAS specified in the Undertakings. Hutchison will supply the MTAS to access seekers in respect of different types of voice calls: public mobile telecommunications service calls (*PMTS Calls*) and other telecommunications service calls (*Non-PMTS Calls*).

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

Hutchison defines Non-PMTS Calls 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 Calls Undertakings, namely, domestic FTM traffic and traffic originating on overseas networks.

Hutchison submits that the PMTS Dual Rate Undertakings and PMTS Single Rate Undertakings are alternative pricing structures for access seekers.

4.2. Price terms and conditions

4.2.1. Charges for PMTS Single Rate MTAS

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

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

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

Unlike the PMTS Dual Rate Undertakings (detailed in section 4.2.2 below), under the PMTS Single Rate Undertakings no 'fall back' rate is outlined.

When accepting the PMTS Single Rate Undertakings, the access seeker must acknowledge:[21]

[21] Clauses 2.3 -2.6 of Attachment A of the PMTS Single Rate Undertakings.

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

Both the PMTS Single Rate Undertakings and the PMTS Dual Rate Undertakings will result in different prices for the supply of MTAS for MTM calls if reciprocity and transit traffic conditions are not met.

It is important to draw the distinction between outcomes between the two PMTS Undertakings. The key differentiator between the PMTS Single Rate Undertakings and the PMTS Dual Rate Undertakings is that no alternative MTAS price is detailed in the PMTS Single Rate Undertakings if the conditions of reciprocity and transit traffic conditions are not met.

Conditional aspects of the PMTS Single Rate Undertakings Price Terms and Conditions

As outlined above, Hutchison's PMTS Single Rate Undertakings are subject to a number of conditions which may affect the reasonableness of their price terms and conditions. In particular, the PMTS Single Rate Undertakings seek to impose a condition of reciprocal pricing on access seekers and do not apply to transit traffic.[22] The PMTS Single Rate Undertakings also require the access seeker to acknowledge a number of other conditions relating to Hutchison's rights in the event of specified future outcomes.

Reciprocal Pricing

In this section, the Commission will give its general views on reciprocal pricing arrangements for the supply of the MTAS as well as outlining the views of interested parties.

Hutchison's views

Hutchison submits that reciprocal pricing has long been the industry standard and that its rationale can be summarised as:[23]

- reciprocal pricing is inherent in the TSLRIC approach which is based on the 'efficient operator' concept rather than the actual costs of mobile operators;
- reciprocal pricing enhances consumer welfare. Hutchison referred to a paper by Joshua Gans and Stephen King[24] which found that a lack of transparency in

[22] That is traffic that an access seeker wishes to terminate on Hutchison's network that did not originate on the access seeker's network. This transit traffic may have originated from a third party's fixed or mobile network.

[23] Hutchison submission, October 2005, p. 10.

the pricing of mobile tariffs (whereby consumers are ignorant of the amount paid by the B-Party) is a significant contributing factor to the maintenance of artificially high MTAS prices, which is adverse to the LTIE. Hutchison submits that asymmetric pricing would exacerbate the problem identified by Gans and King; and

- asymmetrical pricing necessarily involves efficient operators subsidising less efficient ones.

Hutchison notes that a number of European countries have introduced delayed reciprocity to enable new entrants to charge a higher termination rate as compensation for market entry disadvantages caused by smaller market share. However, Hutchison considers this to be an interim measure with reciprocity being the goal once entrants have reached adequate economies of scale and scope.

Submitters' views

PowerTel supports a reciprocal pricing structure and believes that there should be a single industry wide MTAS rate based on the TSLRIC of a forward looking and efficient provider of the MTAS. PowerTel considers that reciprocal pricing enhances consumer welfare with the caveat that the price should be applicable to calls originating on mobile and fixed-line networks. PowerTel also considers that reciprocal pricing is consistent with the SAOs.[25]

Telstra acknowledges that reciprocal pricing for MTAS does have some 'currency' in the industry and there are economic arguments that seek to support such pricing. Telstra notes, however, that there is a question whether Part XIC permits an undertaking to include terms and conditions requiring reciprocal pricing. Telstra reiterates that 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.[26]

Vodafone has expressed concern with the level of the proposed reciprocal price (12 cpm) (discussed in Chapter 5 in relation to a number of the 'reasonableness criteria'). However, Vodafone has not commented explicitly on the overall appropriateness of reciprocal pricing for the MTAS

Commission's views

The Commission's 'usual' approach to pricing declared services is to use a TSLRIC pricing methodology, as this methodology would generally best promote the LTIE and the other goals of the statutory criteria.[27] Conceptually, the TSLRIC methodology only refers to those costs that can be attributed to the production of the service. Costs common to more than one service cannot be attributed to a particular service and therefore do not form part of a 'pure' TSLRIC. However, in practice, network common costs would form part of the costs comprising TSLRIC and any contribution to organisational level costs would be accounted for in the mark-up or '+' in the TSLRIC+ measure.

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24 Gans, J and S King, 1999, *Termination Charges for Mobile Phone Networks – Competitive Analysis and Regulatory Options*, 22 December.

25 PowerTel submission, November 2005, p. 10.

26 Telstra submission, December 2005, p. 10.

27 ACCC, *Access Pricing Principles – Telecommunications, A Guide*, 1997 (the Access Pricing Principles), p. 28.

In the *MTAS Final Report*, the Commission found a TSLRIC+ pricing principle to be appropriate for the pricing of the MTAS because it:

- reflects the direct cost of supplying the service;
- ensures equally-efficient access seekers in related markets are able to compete on an equal footing with vertically-integrated access providers as both will face similar input costs for the declared service;
- takes account of the interests of both access providers and access seekers; and
- encourages the economically efficient use of, and economically efficient investment in, the infrastructure used to provide telecommunications services.

As such, the Commission concluded in the *MTAS Final Report*, that it is appropriate for the price of the MTAS reflect the underlying cost (TSLRIC+) of providing the service. The Commission believes that such an approach would best promote the LTIE and satisfy the other statutory criteria under section 152AH(2) of the Act.

The Commission released its *MTAS Pricing Principles Determination* on 30 June 2004, which determines that the price of the MTAS should follow an adjustment path such that there is a closer association of the price and underlying cost of the service. The Commission outlined that MTAS prices should trend toward 12 cpm by 1 January 2007, reflective of the conservative upper-bound of the TSLRIC+ associated with the supply of the MTAS, as outlined in table 2.1. The Commission also made indicative price-related terms and conditions for the MTAS. These indicative prices operate generally in relation to calls that originate on both fixed and mobile networks. Conceptually, the single price adjustment path for the supply of the MTAS over the period 1 January 2007 to 30 June 2007, contained in the *MTAS Pricing Principle Determination*, is a reciprocal pricing arrangement where a single price of the MTAS is expected to prevail.

The Commission has stated that in the absence of regulation, MNOs have both the incentive and ability to set prices for access to the MTAS at monopoly levels, which may distort the efficiency of usage of the service as well as efficiency in markets that depend on access to that service.

The Commission further notes that commercially negotiated reciprocal pricing arrangements are unlikely to result in efficient prices for the MTAS and for telecommunications services that require the MTAS as an input.[28]

A clear consequence of the reciprocal pricing arrangements under the PMTS Single Rate Undertakings is that different price outcomes are likely to emerge (differential pricing). In this respect the MTAS price of 12 cpm does not mean 12 cpm for all MTM calls – only those calls which meet the pricing (reciprocal pricing and transit traffic) conditions imposed on access seekers by Hutchison.

It is an implicit pricing difference, rather than an explicit pricing outcome as that produced in the PMTS Dual Rate Undertakings (see section 4.2.2 below). The MTAS prices that likely to prevail for MTM calls in the event the PMTS Single Rate Undertakings are rejected are discussed in Chapter 5.

As stated, the Commission's preference is that the price of the MTAS reflects the underlying efficient cost of providing the service. The cost of supplying the MTAS

[28] See for example, OECD, 2004, *Access Pricing in Telecommunications*, pp.70-71.

would not seem impacted by where the terminated call originates (which is one of the key pricing consequences of the reciprocal arrangements under both the PMTS Undertakings). This further reinforces the Commission's expectation that a single rate for the MTAS which is consistent with the price discrimination principles that underlie the Commission's *Access Pricing Principles – a guide* (*Access Pricing Principles*) is appropriate. As outlined explicitly in its *Access Pricing Principles*, access prices should not discriminate in a way which reduces efficient competition. In the guide, the Commission acknowledges that commercially negotiated outcomes may differ for a range of reasons, but that differential pricing may reduce competition and discourage investment.

Having stated that the Commission's preference is for a single rate for the MTAS, reflective of the efficient costs of supply, and that the PMTS Single Rate Undertakings may produce different rates or price outcomes for the MTAS, the question is whether different prices adversely impact competition or efficiency in the supply of MTAS.

In the case of differential pricing outcomes under the PMTS Single Rate Undertakings, a fall in price for the MTAS for some MTM calls to 12 cpm will produce favourable pricing outcomes for those access seekers that meet Hutchison's (12 cpm rate) conditions; and other access seekers will be no worse off than they would be had the PMTS Single Rate Undertakings been rejected. Overall the different prices implicit in the reciprocity arrangements will not make any access seeker worse off and, some access seekers may be better off, thereby promoting efficiencies and competition in the relevant markets. These issues are further discussed in Chapter 5 in the context of the LTIE criterion.

Differential Pricing

As noted above, a consequence of the reciprocal pricing arrangements under the PMTS Single Rate Undertakings is that different price outcomes are likely to emerge (implicit differential pricing). In this respect the MTAS price of 12 cpm does not mean 12 cpm for all MTM calls – only those calls which meet the pricing (reciprocal pricing and transit traffic) conditions imposed on access seekers by Hutchison.

Hutchison's view

Hutchison's approach to differential pricing is also outlined in Chapter 5 in relation to reciprocal pricing issues**.** Hutchison's view of the objective of the different prices is outlined below:

> The purpose of the PMTS Dual Rate Undertaking is twofold: it allows access seekers to benefit from a 12 cpm reciprocal rate, a rational price for an efficient mobile operator, while providing certainty of pricing for those access seekers that do not choose the 12 cpm reciprocal offer. The key concept in this alternative pricing approach is choice for the access seeker. The PMTS Dual Rate Undertaking would, if accepted, govern Hutchison's supply of the MTAS to all access seekers; those who choose to comply with the terms and conditions associated with the Rate 2 Usage Charge of 12 cpm and those who do not. Hutchison has lodged the PMTS Single Rate Undertaking as an alternative to the PMTS Dual Rate Undertaking in the event that the Commission is minded not to accept the latter due to the optional rate of 21 cpm, such rate being above the target rate determined by the Commission in the MTAS pricing principle.[29]

Submitters' views

[29] Hutchison submission, p. 4.

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

- 'means by definition that the cost of termination is not based on the TSLRIC of providing that termination and as a result that this is not in the LTIE;
- will exacerbate further the existing gap that already exists between the price of a MTM call compared with the price of a FTM call (which are often more expensive);
- will cause more people to make MTM calls instead of FTM calls when it may be more efficient for them to make a FTM call; and
- will result in greater investment in mobile networks at the expense of fixed networks than would have otherwise been the case.'[30]

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

- are not representative of Hutchison's investment in MTAS facilities;
- are not representative of Hutchison's direct costs of providing the service;
- do not provide for the economically efficient operation of a carriage service; and
- do not encourage the economically efficient use of and investment in infrastructure.[31]

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

Commission's view

The implicit pricing embodied in the PMTS Single Rate Undertakings would seem contrary to the principle of setting a price for the MTAS using a measure reflective of TSLRIC+. As outlined in section 5.2.3, the reasons for the Commission's preference for a price for MTAS aligned to TSLRIC+ include that such a measure reflects the direct costs of supplying a service and creates a supply for service which is less likely to lessen competition in the provision of the services and create a market for the service which encourages dynamic, productive and allocative efficiency.

In the *MTAS Final Report*, the Commission found a more direct mechanism was needed to generate a closer association of the price of the MTAS with its underlying cost of production. In this regard, the Commission found that the cost (TSLRIC+) of providing MTAS, using international cost estimates and data provided to it by MNOs using the RAF, lies in the range 5 to 12 cpm. Given the Commission did not formally model TSLRIC+ for the MTAS, however, for the purposes of its *MTAS Pricing Principles Determination*, the Commission stated that the price of the MTAS should only trend towards the top of the range of reasonable estimates of TSLRIC+ available to it. That is, the Commission believes the LTIE would be promoted by the price of the MTAS trending towards 12 cpm which is considered the conservative upper-bound of the TLSRIC+ of supplying the MTAS.

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30 PowerTel submission, pp. 2 -3.

31 Telstra, submission on the Commission's discussion paper, p.7.

A key outcome of this analysis was that the Commission outlined an adjustment path for prices in the provision of MTAS prices over the period 1 July 2004 to 30 June 2007 in its *MTAS Pricing Principles Determination* and price-related terms and conditions. It was, and remains, the Commission's view that over time it would be expected that the cost of providing the MTAS would better reflect the TSLRIC+, which may be much lower than this rate.

The reciprocal usage charge of 12 cpm is reflective of the Commission's indicative prices for the MTAS for the period 1 January 2007 to 30 June 2007, and is a rate which would be, therefore, *prima facie* acceptable to the Commission for the period for which the PMTS Dual Rate Undertakings apply. It is noted, however, that Hutchison is seeking to apply the 12 cpm for a period to 31 December 2007, which is beyond the time period in which the Commission's indicative prices currently apply. Without attempting to pre-empt the outcome of any future modelling of the cost of providing the MTAS, the Commission anticipates that it is likely that the price of the MTAS (based on the previous empirical work contained in the *MTAS Final Report*) will be lower rather than higher than 12 cpm.

As outlined explicitly in the *MTAS Final Report*, access prices should not discriminate in a way which reduces efficient competition. In the guide, the Commission acknowledges that commercially negotiated outcomes may differ for a range of reasons, but that differential pricing can reduce competition and discourage investment. As a result, the Commission expects that in most undertakings the same menu of offerings would be available to all access seekers on a non-discriminatory basis. Further, if an undertaking provides scope for differential pricing not based on costs, the Commission must be satisfied that such differential pricing will promote competition and will enhance the efficient use of, and investment in, infrastructure.[32]

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

MTAS Pricing for Transit Traffic

Telstra submits that the offer of a 12 cpm Usage Charge subject to the condition that the access seeker only acquires the Hutchison MTM terminating access service for the purpose of terminating a PMTS Call originating in Australia from the access seeker's mobile network may raise concerns under subsections 45(2)(a)(i) and (ii) and (b)(i) and (ii) and subsection 47(3) of the Act. Telstra does not comment on Hutchison's purpose. However, Telstra submits that the effect of this condition on competition may be significant given the Commission's previously articulated view (which Telstra does not necessarily accept) that the relevant markets for the MTAS are narrowly defined as the markets for the wholesale MTAS supplied on each individual mobile network operator's network.[33]

Commission's view

The PMTS Single Rate Undertakings and Non-PMTS Undertakings seek to implement differential pricing for the MTAS on the basis of the network on which a call originates. Differential pricing may only be maintained if a number of factors are present. One of these factors is the ability to prevent arbitrage between different

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32 ACCC, *Access Pricing Principles – Telecommunications – a guide*, July 1997, pp. 15 and 16.

33 Telstra submission, December 2005, p. 10.

customer groups. If arbitrage is possible then price discrimination cannot be sustained.

One of the effects of the restriction on transit traffic is to prevent calls that originate on a fixed-line network from switching in-transit to a third party's mobile network before terminating on Hutchison's mobile network. This removes the potential for fixed-line operators to use transit arrangements so as to route calls via a MNO in order to access the lower MTM MTAS charge rather than the higher FTM MTAS charge. That is, the transit arrangements proposed in the Undertakings will foreclose any arbitrage that might otherwise occur.

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

The question as to whether this pricing differential is reasonable, however, is considered in Chapter 5.

Hutchison's right to cease charging 12 cpm

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

- should not have the right to cease supplying 12 at cpm solely by reference to its reasonable belief; and
- should not have the right to cease supplying at 12 cpm simply because it has a belief that the access seeker is 'unlikely to comply' with the relevant conditions.[34]

Telstra also has concerns with the condition that imposes an obligation on access seekers to provide Hutchison 'on request' with all reasonable assistance, including relevant documents and information, to enable Hutchison to determine whether the access seeker is complying with the conditions attached to the 12 cpm pricing.[35]

In this regard, Telstra submits that an unlimited discretion on the part of Hutchison to trigger this obligation, compliance with which is likely to be onerous and require the divulging of confidential information, is also unreasonable.[36]

The Commission notes that the terms and conditions of the Undertakings are set out in the Undertakings, Attachment A and, where appropriate, Attachment B. Clause 2.4(b) of Attachment A states that, in the event of a dispute, the dispute resolution mechanisms contained in the existing agreement or Schedule 6 of Attachment B are to be used. Clause 14.4 of Attachment B requires the parties to act in good faith. Given regular commercial practice, it is likely that the existing agreements contain a similar provision. Thus, the Commission considers there is an overall obligation on the parties to act both reasonably and in good faith in relation to their contractual activities. At a minimum, Hutchison must act reasonably in invoking clause 2.4 and in good faith during the dispute resolution phase. Therefore, it would not appear open to Hutchison to use clause 2.4 to unreasonably terminate the 12 cpm charge. If Hutchison did act unreasonably, the access seeker would be within its rights to invoke the dispute resolution mechanism and insist on good faith performance.

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34 *Ibid*., p. 11

35 *Ibid*., and Clause 2.5 of Attachment A of PMTS Single Rate Undertakings.

36 Telstra submission, p.11

4.2.2. Charges for PMTS Dual Rate MTAS

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

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

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

In the event this condition is not met the PMTS Dual Rate Undertakings state that Hutchison will supply the Hutchison MTM MTAS at the usage charge of 21 cpm (the 'default rate').

As outlined above, Hutchison's PMTS Dual Rate Undertakings are subject to a number of conditions which may affect the reasonableness of the price terms and conditions of the Undertakings.

In particular, the PMTS Dual Rate Undertakings seek to:

- impose a condition of reciprocal pricing on access seekers;
- exclude transit traffic (that is traffic that an access seeker wishes to terminate on Hutchison's network that did not originate on the access seeker's network. This transit traffic may have originated from a third party's fixed or mobile network.);
- require the access seeker to acknowledge a number of other conditions relating to Hutchison's rights in the event of specified future outcomes, in particular the right to cease charging the lower rate of 12 cpm and applying a rate of 21 cpm if Hutchison reasonably believes the access seeker is not complying or unlikely to comply with the conditions pertinent to the lower rate; and
- implement differential pricing for the same service. Specifically, a 12 cpm rate applies to access seekers that agree, or are otherwise required, to provide MTM MTAS at that same rate for calls originating on Hutchison's network. If this and the other conditions outlined above are not met, a higher price (default rate) of 21 cpm will apply. The potential outcome of these PMTS Dual Rate Undertakings is that two different rates or usage charges apply for the same service.

Conditional aspects of the PMTS Dual Rate Undertakings' Price Terms and Conditions

The Commission's view on the issues of reciprocal pricing, transit traffic and contingencies in relation to ceasing to charge the lower price (reciprocal usage charge) in lieu of a higher price (default usage charge) are contained in detail in section 4.2.1 above. These views apply equally to the PMTS Dual Rate Undertakings and the PMTS Single Rate Undertakings.

While differential pricing is an implicit aspect of the reciprocal pricing arrangements outlined in section 4.2.1 above, the PMTS Dual Rate Undertakings explicitly apply different prices for the identical service. That is, prices of both 12 cpm and 21 cpm may arise in respect of MTM MTAS under the PMTS Dual Rate Undertakings.

Differential Pricing

Hutchison's view

Hutchison's approach to differential pricing is also outlined in Chapter 5 in relation to reciprocal pricing issues**.** Hutchison's view of the objective of the different prices is outlined below:

> The purpose of the PMTS Dual Rate Undertaking is twofold: it allows access seekers to benefit from a 12 cpm reciprocal rate, a rational price for an efficient mobile operator, while providing certainty of pricing for those access seekers that do not choose the 12 cpm reciprocal offer. The key concept in this alternative pricing approach is choice for the access seeker. The PMTS Dual Rate Undertaking would, if accepted, govern Hutchison's supply of the MTAS to all access seekers; those who choose to comply with the terms and conditions associated with the Rate 2 Usage Charge of 12 cpm and those who do not. Hutchison has lodged the PMTS Single Rate Undertaking as an alternative to the PMTS Dual Rate Undertaking in the event that the Commission is minded not to accept the latter due to the optional rate of 21 cpm, such rate being above the target rate determined by the Commission in the MTAS pricing principle.[37]

Submitters' views

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

- 'means by definition that the cost of termination is not based on the TSLRIC of providing that termination and as a result that this is not in the LTIE;
- will exacerbate further the existing gap that already exists between the price of a MTM call compared with the price of a FTM call (which are often more expensive);
- will cause more people to make MTM calls instead of FTM calls when it may be more efficient for them to make a FTM call; and
- will result in greater investment in mobile networks at the expense of fixed networks than would have otherwise been the case.'[38]

Telstra comments about alternative pricing across the three Undertakings but does specifically address the issue of the different prices in the PMTS Dual Rate Undertakings. Its comments in relation to the PMTS Dual Rate Undertakings are that:

> Hutchison eschews any suggestion that 21 cpm "is in any way reflective of the underlying cost of providing the MTAS". 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.[39]

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

Commission's view

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37 Hutchison submission, p. 4.
38 PowerTel submission, pp. 2 to 3.
39 Telstra submission, p. 7.

The issues outlined in section 4.2.1 regarding differential pricing are also relevant to the PMTS Dual Rate Undertakings.

The key difference between the PMTS Single and Dual Rate Undertakings, as outlined in section 4.2.1, is that the PMTS Dual Rate Undertakings provide for an explicit fall back rate of 21 cpm in the absence of the 12 cpm rate applying. The PMTS Single Rate Undertakings are silent on the fall back rate.

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

On this basis, the PMTS Dual Rate Undertakings may yield an outcome where the pricing for the MTAS is above efficient levels, and not consistent with the principles for pricing the MTAS set out in the *MTAS Final Report*. The implications of the PMTS Dual Rate Undertakings against the statutory criteria are considered further in Chapter 6.

4.2.3. Charges for Non-PMTS MTAS

The Non-PMTS Undertakings propose that Hutchison will supply the MTAS at a usage charge rate of 18 cpm. Hutchison submits that the FTM market is not effectively competitive. Hutchison argues that limited competition in the FTM 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 a lower MTAS access charge 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 14 per cent decline over its most recently negotiated price for the MTAS, is therefore appropriate in view of the existing pricing structure of the FTM market. 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 charges to their retail customers. Hutchison submits that when its Non-PMTS Undertakings expire on 30 June 2006 it will be in a position to reassess its pricing structure for the MTAS, in view of the developments in prices for FTM services and revisions to the retail price control scheme.

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

4.3. Non-price 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 Attachment B of the Undertakings.

Hutchison submits that the existing agreement option accommodates the interests its MTAS customers by the existing agreements as their terms and conditions were arrived at through commercial negotiation. 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.

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).

Hutchison submits that 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.

Under the terms of each undertaking, where an access seeker has an existing commercial agreement with Hutchison for the supply of the MTAS, Short Message Service (SMS), Multimedia Message Service (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 to that access seeker.

If an existing agreement governs supply then the terms of the relevant Undertakings prevail to the extent of any inconsistency, under Attachment B to the Undertakings.

4.4. Supporting material to Hutchison's undertaking

Hutchison has provided a single submission in support of all its Undertakings. In this submission, Hutchison provides the commercial and legal reasons it believes the Commission should accept for its Undertakings.

Hutchison also provided an additional submission in response to the Commission's Discussion paper on the Undertakings, which outlines Hutchison's views regarding the consistency of the Undertakings with the SAOs.

5. The reasonableness of the price terms and conditions for PMTS Single Rate Undertakings

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

Hutchison submits that the PMTS Single Rate Undertakings can be considered in isolation or with the Non-PMTS Undertakings, as alternatives to the PMTS Dual Rate Undertakings.

The Commission considers that it cannot accept an undertaking unless it is satisfied that the terms and conditions are 'reasonable' based on the criteria set out in section 152AH(1) of the Act (summarised in section 3.2.4 of this report)[40] and that where more than one undertaking has been submitted simultaneously, each of those undertakings must individually be considered 'reasonable' against this set of criteria.

Consequently, the reasonableness test needs to be applied separately to each of the Undertakings submitted by Hutchison.

5.1. Application of the 'reasonableness' test

5.1.1. Hutchison's view

Hutchison submits that the PMTS Single Rate Undertakings should be assessed in relation to the 'with and without test' applied by the Australian Competition Tribunal (the Tribunal). Hutchison argues that in the *Seven Networks Limited (No.4) (2005)* decision the Tribunal provided 'key principles' that the Commission should apply when determining whether an undertaking is in the LTIE. Hutchison submits that in applying the 'with and without test', the Tribunal concluded 'that generally TSLRIC is the appropriate cost measure to employ' in assessing whether an undertaking is in the LTIE.

5.1.2. Submitters' views

Telstra submits that Hutchison has misapplied the Tribunal's 'with and without' test in several respects. First, Telstra notes that the Tribunal has found the use of the 'with and without test' helpful and is a 'potentially useful aid to consideration'. Telstra submits that the 'with and without' test should 'not be used as a substitute for a comprehensive or objective consideration of whether a particular thing is in the LTIE'. Telstra further submits that the Tribunal's views were not expressed in relation to a decision to accept or reject an undertaking, but in the context of its review of an exemption application.

In addition, Telstra submits that the Commission must ultimately apply section 152BV(2) when assessing an undertaking. Telstra submits that the Commission must also have regard to matters in section 152AH(1), which include 'whether the terms and conditions promote the long-term interests of end-user of carriage services or of services supplied by means of carriage services'.

5.1.3. Commission's application of the 'reasonableness' test

As noted above, the Commission considers that it must apply the reasonableness test to each of the Undertakings submitted by Hutchison. This Chapter considers the

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

reasonableness of the PMTS Single Rate Undertakings, with a view to considering the overall reasonableness of the alternative PMTS Undertakings and the Non-PMTS Undertakings (as submitted by Hutchison) in Chapter 8.

The Commission's approach to the 'reasonableness' test is to have regard to the section 152AH criteria and any other matter considered relevant to this assessment.

The Commission must not accept an undertaking unless it is satisfied that the terms and conditions are 'reasonable' based on, but not limited to, the criteria set out in section 152AH of the Act as outlined in section 3.2.4.

To assist (as opposed to 'determine') this assessment, the Commission will use, where appropriate, the 'with and without' test in relation to particular criteria.

The Commission does not simply form a view as to a specific price that it considers to be the 'reasonable' cost of providing the MTAS and then compare that price with Hutchison's proposed price terms and conditions. The Commission does, however, have in mind what it considers to be a range of reasonable cost estimates of providing the MTAS, and this is relevant when applying the 'future with and without' test in respect of particular section 152AH criteria. Nevertheless, this is not determinative of the matter. The 'reasonableness' assessment encompasses a much broader range of considerations that are detailed in this Chapter.

The Commission believes that it is appropriate to use the future 'with and without' test expressed in the Sydney Airports case.[41] The Commission notes that in the Seven Network Ltd case,[42] the Australian Competition Tribunal (the Tribunal) was of the view that the 'future with and without' approach provides helpful guidance in applying the LTIE test. Similarly, the Commission considers it an appropriate analytical tool in applying the reasonableness criteria set out in section 152AH(1) of the Act (which includes the LTIE test).

Essentially, the test enables the Commission to benchmark an undertaking against other potential outcomes in the absence of the undertaking, in relation to specific criteria. This is particularly important because the Commission must assess an undertaking in terms of its reasonableness over the life of the undertaking and not just according to the present circumstances. The PMTS Single Rate Undertakings, if accepted, would operate until 31 December 2007. Accordingly, the Commission must take a short and longer term view as to the possible effects of the Undertakings through a consideration of the counterfactual circumstances.[43]

Having said that, the Commission notes that the 'future with and without' test lends itself to some, but not all, of the relevant criteria in section 152AH(1) of the Act. Accordingly, in using the 'future with and without' test, the Commission will only use the test in having regard to those criteria where it facilitates the Commission's analysis toward the Commission ultimately determining the overall reasonableness of the Undertakings' terms and conditions.

In using the 'with and without' test, the Commission will compare the following two situations:

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41 *Sydney Airports Corporation Ltd* (2000) 156 FLR 10.
42 *Seven Network Ltd* [2004] ACompT 11 at paragraph 119.
43 *Sydney Airports Corporation* at paras 106-111

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

Each of these alternatives is considered in greater detail below.

The Commission notes, however, that ultimately its task is to assess the reasonableness of the terms and conditions specified in the Undertakings. Section 152BV(2)(d) of the Act requires that in order for the Commission to accept the Undertakings, it must be satisfied as to the reasonableness of the terms and conditions specified in the Undertakings. This would appear to necessitate a balancing and evaluation of the relative weight of the matters to which the Commission must have regard in section 152AH of the Act. In this regard, the 'future with and without' test is therefore not a substitute for a consideration of the reasonableness of the specified terms and conditions.

Pricing options set out in the Undertakings

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

Pricing outcomes in the absence of the Undertakings

In the event that the Commission decided not to accept the PMTS Single Rate Undertakings, a number of alternative pricing outcomes might arise.

In the first instance, in the absence of the Commission accepting the PMTS Single Rate Undertakings, all procedures and protections provided for in Part XIC in respect of declared services will be available to access seekers who wish to acquire the MTAS from Hutchison.

In addition to the rights conferred under section 152AR of the Act, access seekers are able to seek a binding resolution by the Commission to any disputes they may have with Hutchison regarding access to the MTAS on Hutchison's mobile telephony networks. This is available under Division 8 of Part XIC of the Act, which gives the Commission power to arbitrate access disputes. Under Division 8, the Commission must make a final determination on any matter relating to access by the access seeker to the declared service, which binds both parties to the dispute. The Commission has been notified of a number of access disputes in relation to supply of the MTAS by Hutchison. As detailed on the Commission's website (www.accc.gov.au), the Commission is currently arbitrating a number access disputes to which Hutchison is a party.

Alternatively, other access seekers may continue to seek to determine terms and conditions of access via commercial negotiation without recourse to by the Commission. In this regard, the Commission notes that some access seekers have currently not notified the Commission of an access dispute in relation to the supply of the MTAS by Hutchison.

The Commission appreciates that given commercial imperatives for certainty and the costs involved with pursuing a regulatory outcome, there may be some instances where an access seeker will negotiate an access price higher than it believed could be

obtained using regulatory means. Based on the behaviour of some access seekers to date (in availing themselves of their arbitral rights under Part XIC of the Act in respect of Hutchison's supply of the MTAS), however, the Commission believes it likely that in the event the PMTS Single Rate Undertakings were rejected, some parties would continue to avail themselves of their arbitral rights under Part XIC with respect to supply of the MTAS by Hutchison in future periods.

Without seeking to prejudge the outcome of these arbitral disputes, the Commission notes that a number of outcomes could be possible in relation to those access disputes that are ongoing in relation to the supply of the MTAS by Hutchison. In this regard, the Commission notes the indicative price related terms and conditions for the MTAS in its *MTAS Pricing Principles Determination* (detailed in Chapter 2 of this report).

Whilst the Commission does not comment publicly on specific arbitrations, it notes that, under section 152AQA(6) of the Act, it is required to have regard to any pricing principles determination in arbitrating an access dispute in relation to the declared service.

The Commission emphasises that it should not be assumed that it would necessarily set prices at the same level as set out in its *MTAS Pricing Principles Determination* in a final determination in an access dispute. This could be for a number of reasons, including that:

- access disputes are generally bi-lateral in nature, such that it may be appropriate to specify different terms and conditions in final determinations in different disputes; and/or
- new material may be put before the Commission in an arbitration that suggests either the TSLRIC+ principle on which the *MTAS Pricing Principles Determination* is based, or the 12 cpm price contained within it, are not appropriate.

The Commission believes that if it rejected the PMTS Single Rate Undertakings, it would be likely that similar price terms and conditions for the MTAS would emerge for all access seekers (regardless of the originating network of the calls) to those contained in the PMTS Single Rate Undertakings.

That is, in the event of an access dispute, it is likely that the Commission would set a price for the MTAS that would be similar to that specified in the PMTS Single Rate Undertakings – even if it rejected the PMTS Single Rate Undertakings. Further, the Commission expects that similar (although not necessarily exactly the same) pricing outcomes would occur through commercial negotiations undertaken between Hutchison and access seekers within the context of the regulatory framework.

Overall, in having regard to some of the criteria under section 152AH(1) of the Act, the Commission will take into account the pricing options available under the PMTS Single Rate Undertakings with the (similar) pricing outcomes that would be likely to occur if the Undertakings were rejected.

The Commission's assessment of the price terms and conditions contained in the Undertakings against the statutory criteria set out in section 152AH(1) of the Act (and discussed in section 3.2.4 of this report) is considered in turn below.

5.2. The LTIE

As discussed elsewhere in this report, the Commission has published a guideline explaining what it considers is meant by the phrase LTIE as outlined in section 3.2.4 of the report. The following sections assess the PMTS Single Rate Undertakings in relation to this criterion.

5.2.1. Hutchison's view

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

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

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

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

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

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

In relation to dynamic efficiency, Hutchison submits that the PMTS Single Rate Undertakings promote the economically efficient use of and investment in

infrastructure by promoting the expansion of 3G networks (allowing Hutchison to supply termination services at a lower cost than GSM technology)[44] and:

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

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

Hutchison also submits that as the price of 12 cpm offered in the PMTS Single Rate Undertaking is reflective of the efficient, forward looking costs of providing that service, it is consistent with productive efficiency.[45]

In relation to these views on efficiency, Hutchison states that a price of 12 cpm is unlikely to achieve effective competition in the FTM market without an effective pass-through mechanism to ensure any wholesale price reductions for the MTAS are passed-through to FTM retail customers. Instead, Hutchison argues that a 12 cpm price reduction will provide fixed-network operators with a financial 'windfall'.[46]

Hutchison cites submissions from consumer groups, industry participants, and international comparative data to conclude that 'the impact of a reciprocal price of 12 cpm upon mobile network operators would not be so adverse as to outweigh the benefits that such a price would have for the LTIE'. To further validate its argument, Hutchison refers to the *Mobile Service Review 2003*, where the Commission estimated that the underlying cost of supplying the MTAS lies between 5 to 12 cpm.

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[47] 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.

Overall, Hutchison submits that the LTIE is best served by the Commission accepting the PMTS Dual Rate Undertakings coupled with the Non-PMTS Undertakings.

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44 Hutchison, October 2005, p.18.

45 *Ibid*., p.19.

46 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 FTM market. See *Hutchison's Submission to the Australian Competition and Consumer Commission, Mobile Service Review 2003*, pp. 11-14.

47 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

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

Finally, Hutchison submits that each individual Undertaking promotes the LTIE and is consistent with the SAOs applicable to the supply of the MTAS. Acceptance of one or more of the Undertakings submitted by each of HTAL and H3GA would therefore be in the LTIE.[48]

5.2.2. Submitters' views

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

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

As a result, PowerTel considers that all six of the Undertakings should be rejected because the charges specified in each of the Undertakings are not reasonable on the basis that they are not in the LTIE.[49]

Telstra submits that an immediate decrease in the price of supplying the MTAS to 12 cpm is reasonable. However, Telstra submits that the terms and conditions of the PMTS Single Rate Undertakings are unreasonable as they allow Hutchison to cease charging 12 cpm solely by reference to its own belief that the access seeker is not complying, or unlikely to comply, with the reciprocity and transit conditions of the undertaking.[50] In addition, Telstra submits that access seeker obligations provide unlimited discretion on the part of Hutchison to obtain confidential commercial information from access seekers.

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

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

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48 Hutchison submission, December 2005, p. 9.
49 PowerTel, submission , November 2005, p.3.
50 Telstra submission, December, pp. 4 to 5.

Vodafone argues that Hutchison's Undertakings and supporting material is in contrast to Vodafone's detailed economic modelling which, according to Vodafone, demonstrates that a MTAS target rate of 16.15 cpm would promote the LTIE. Vodafone considers that Hutchison's proposed rates would not achieve the objective of promoting competition or the objective of encouraging the economically efficient use of, and the economically efficient investment in, infrastructure.[51] This is because those rates are based on the Commission's target rates, which Vodafone submits are indicative only and not based on a methodology that is consistent with the LTIE. In particular, Vodafone argues that the estimates are not a reliable and robust estimate of the range of TSLRIC+ for MTAS. Thus, Vodafone claims, Hutchison's PMTS Single Rate Undertakings would require Vodafone to price MTAS at 12 cpm, inconsistent with the LTIE.

Vodafone further submits that the use of a 'glide path' to an identified target price is necessary to manage the change in its prices needed to move from an allocation of fixed and common costs on a Ramsey-basis to an allocation based on the equi-proportionate mark-up (EPMU) required under TSLRIC. In this way, Vodafone submits that the use of a 'glide path' is in the LTIE and is consistent with the statutory criteria.[52]

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

Vodafone disagrees with Hutchison's view as to the state of competition in the mobiles market. In particular, Vodafone considers that that market is effectively competitive.[53]

Vodafone considers that the objective of any-to-any connectivity is unlikely to be further promoted by the PMTS Single Rate Undertakings, but did not elaborate on the reasons for this view.[54]

In relation to the objective of encouraging efficient investment in infrastructure, Vodafone notes the Commission's view that in the absence of forward looking efficient prices, a misallocation of resources will occur leading to an under or over investment in the MTAS service depending on the mobile termination rate.[55]

5.2.3. The Commission's view

Under section 152AH(1)(a) of the Act, in determining whether something is in the LTIE, the Commission must consider whether it is likely to promote:

- competition,
- any-to-any connectivity, and

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51 Vodafone submission, December 2005, p. 5.
52 *Ibid*., p.4.
53 *Ibid*., p. 6.
54 *Ibid*., p. 6.
55 *Ibid*. p. 7.

- economically efficient use of, and investment in, infrastructure.

In having regard to the LTIE criteria the Commission will use the 'future with or without test' to considering whether the price terms and conditions would be likely to promote competition, any-to-any connectivity, and the economically efficient use of, and investment in, infrastructure.

Promoting competition

In considering whether Hutchison's proposed price contained in the Single Rate PMTS Undertakings is likely to promote competition, it is first useful to identify the relevant markets in which competition may be affected. In the *MTAS Final Report*, the Commission identified the following markets as being relevant to the question of whether it should declare the MTAS and, if so, the pricing principles it should specify for this service:

- the individual markets for the MTAS on each MNO's network;
- the national market within which FTM services are provided; and
- the national market for retail mobile services.

The Commission continues to believe that these are the most appropriate markets to consider.

Individual markets for MTAS on each MNO's network

The Commission concluded in the *MTAS Final Report* that there was a separate single market for the MTAS on each MNO's network. The Commission reached the view that MNOs are not constrained in their pricing decisions for the MTAS. MNOs also have the ability and incentive to raise the price of this service above its underlying cost of production due to of the presence of weak substitutes for the service.[56] Further, the Commission's position was informed by the view that the MTAS is a wholesale service which is not sold as part of a bundle or cluster of retail mobile services, such that any competition in the retail mobile market would not act as a constraint on the price MNOs would be able to charge for the MTAS.[57]

In the *MTAS Final Report* the Commission stated:

> It is the Commission's view that MNOs have control over access to termination of calls to subscribers on their network. As a result of this, the Commission does not believe that MTASs provided on different mobile networks are substitutable for each other – calls to a consumer connected to one mobile carrier's network cannot be terminated on another carrier's network. Further, there are no adequate demand- or supply-side substitutes that will constrain mobile network operators in their pricing decisions for the mobile termination service. These factors, combined with a lack of consumer awareness (on the part of both the A- and B-party consumers) and the incentives that arise from the CPP principle that governs calls to mobile networks, fails to mitigate the control over access mobile operators have with regard to calls terminating on their networks.[58]

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

[57] *Ibid*., p. 42 to 55.

[58] *Ibid*., p. 54.

The Commission was also of the view that this control over access to calls to subscribers to their network gave MNOs the ability and incentive to set the price for the MTAS above its underlying (TSLRIC+) cost of production. In doing so, MNOs generate 'above-normal' profits from providing the MTAS.

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

Given these circumstances the Commission is of the view that the PMTS Single Rate Undertakings will have no effect in promoting competition in the wholesale market for the MTAS on Hutchison's networks. In this respect, the PMTS Single Rate Undertakings are not likely to adversely impact the LTIE (and specifically competition) in the wholesale markets for MTAS on each MNO's network(s).

The market within which FTM services are provided

In the *MTAS Final Report*, the Commission indicated that it expected that the greatest competitive benefit from regulation of the MTAS was likely to occur in the market within which FTM services are provided. However, it did indicate it expected that a closer association of the price of the MTAS and its TSLRIC+ of production would help promote competition in the retail mobile services.[59] This is discussed in further detail in the following section.

The Commission also found in the *MTAS Final Report* that, based on its market observations, MNOs appeared to be setting charges for the MTAS well above the underlying (TSLRIC+) cost of supplying the service. In general, the Commission believes that the ability to raise the price of the MTAS above its underlying cost of production (in the absence of regulation of this service), enables MNOs to make above normal economic profits when providing this service.

This higher MTAS price, by increasing the cost to providers of FTM calls above the underlying cost of the service, in turn raised the price of FTM calls. The Commission continues to believe that this is the case. At present, the Commission understands that the supply of MTAS is priced between 15 cpm and 18 cpm.

As outlined in section 2.3 of this report, the Commission believes the TSLRIC+ of the MTAS, based on overseas cost estimates and analysis of RAF data, is likely to lie in the range of 5 to 12 cpm, where 12 cpm is reflective of the conservative upper-bound of the TSLRIC+ of the MTAS. The Commission also conservatively estimates that

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

the TSLRIC+ of providing fixed origination and transmission is likely to be approximately 5 cpm. Combined, this gives rise to a likely range of the cost of providing a FTM call of between 10 cpm and 17 cpm.

Hutchison's submission for pricing the MTAS under the PMTS Single Rate Undertakings is consistent with the Commission's broad view that the upper bound of the cost of supplying the MTAS for an efficient MNO is likely to be 12 cpm. However, Hutchison submits that a price of 12 cpm is unlikely to promote competition in the FTM market unless there is a mechanism to require wholesale price reductions are passed-through to FTM retail customers. The concern with a lack of pass-through of the lower MTAS rates for FTM services is that this may advantage integrated competitors who operate in the market for FTM services (because of lower input costs without a requirement to fully pass through savings in the form of reduced FTM retail prices).

Hutchison argues that a price reduction of MTAS to 12 cpm will provide fixed-network operators with a financial 'windfall'.

However, the Commission is of the view that a closer association of price and cost will allow equally or more efficient FTM providers to place more competitive pressure on integrated providers of FTM services to improve their own efficiency and reduce the FTM prices charged to their own subscribers. Therefore, this approach to pricing is likely to provide a stimulus for increased competition between existing FTM providers, and possibly also from new entrants. The Commission notes that this increased competition can manifest itself in many ways, including reduced prices and improvements in the quality and range of product offerings made available by providers of fixed-line services.

The Commission believes that this may be addressed by a price of 12 cpm, as is proposed in the PMTS Single Rate Undertakings in respect of MTM calls.

Putting aside consideration of the legitimate business interests of the access provider – which is considered in Section 5.3 – the Commission believes the competitive benefits would be greater the more immediate and complete are reductions in the price of the MTAS toward its underlying (TSLRIC+) cost of providing the service.

The Commission notes, however, that the PMTS Single Rate Undertakings do not specify a price or prices for the MTAS in respect of FTM calls – that is, the proposed 12 cpm rate does not apply in relation to the supply of the MTAS by Hutchison for calls made from fixed-line networks. Accordingly, the application of the 12 cpm to only MTM MTAS has the potential to give rise to differential pricing of the MTAS according to the originating network. That is, prices for FTM MTAS could be greater than prices MTM MTAS if the PMTS Single Rate Undertakings were accepted.

Such differential pricing may, by reducing the (MTAS) input prices for the supply of MTM services lead to lower retail mobile services prices and, further, due to the emergence of FTM substitution, promote some downward pressure on the pricing of retail FTM services are provided – and possibly at a faster rate than outlined in the *MTAS Pricing Principles Determination* (when a price of 12 cpm applies from 1 January 2007).

Consequently, the Commission considers that the level of competition that is promoted in the market within which FTM services are provided might improve if the PMTS Single Rate Undertakings are accepted rather than rejected.

Retail mobile services

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

- there continued to be a high level of concentration at the carrier network level (where the Commission estimated the combined market shares of Telstra, Optus and Vodafone was greater than 97 per cent);
- barriers to effective entry into the market (associated with national coverage and sunk costs) remain high; and
- established MNOs (and in particular Telstra and Optus) are making profits well in excess of those the Commission would expect in competitive markets for these services.

In addition to this, the Commission noted that reductions in the prices paid for retail mobile services appeared to have slowed in recent years, with some indication that prices increased, on average, during the 2002-03 financial year.[60] While the market share of Hutchison's two mobile networks has increased since June 2004,[61] and there is some anecdotal evidence that the introduction of capped pricing plans has seen a return to price reductions for retail mobile services over the 2004-05 financial year, the Commission believes that the combined market shares of Telstra, Optus and Vodafone still ensure the market is highly concentrated at the carrier network level. Also, it considers that barriers to entry into this market are high due to national coverage and sunk costs as exhibited during 2004 by the decisions of Telstra and Hutchison,[62] and Vodafone and Optus[63] to enter into infrastructure sharing arrangements in relation to the radio access networks associated with the deployment of 3G mobile networks.

Overall, therefore, the Commission continues to believe that structural features of the mobile industry indicate the retail mobile services market is not effectively competitive.

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

In the Commission's view, high termination charges common to a small number of mobile carriers operating in the retail market can be a means by which the carriers can prevent downward pressure on retail prices.[64] In effect, high MTM termination charges are a manifestation of the lack of effective competition in the market for retail mobile services. In this context, a unilateral reduction in any one carrier's termination

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60 See, for instance, ACCC's *MTAS Final Report*, section 4.3.3.

61 A report by Citigroup Smith Barney indicates that Hutchison's subscriber market share increased from 3.8 per cent in 2004 to a forecast 5.4 per cent in 2005, whilst its revenue share over the same period increased from 6 per cent in 2004 to a forecast 8 per cent in 2005. See *Australian Mobile Update: Psst.... want a great mobile deal*?, 19 July 2005, p. 7.

62 See, for instance, ACCC media release, *ACCC Not to Oppose 3G Radio Access Network Sharing Arrangement Between Hutchison and Telstra*, 10 December 2004.

63 See, for instance, ACCC media release, *ACCC Not to Oppose 3G Mobile Radio Access Network Sharing Agreement Between Optus and Vodafone*, 14 December 2004.

64 This issue is considered in OECD, *Access Pricing in Telecommunications*, Paris, 2004, pp. 70-71.

charge is unlikely to occur. Were this reduction in its termination charge to be accompanied by a decrease in its retail price, it is unlikely to be profit maximising behaviour. While this may lead to an increase in its market share it will also lead to a net outflow of termination minutes that continue to be charged at the original high rate, and the latter effect could outweigh the former. In this context, multilateral action may be necessary to perturb the market away from this high-price equilibrium, and any movement towards the multilateral reduction in termination charges is likely to place downward pressure on retail prices, and therefore be an agent for the promotion of competition.

As such, the Commission believes that the immediate reduction of the MTAS rate to 12 cpm, as proposed in the PMTS Single Rate Undertakings, and the likelihood that some (although not necessarily all) MNOs will agree to the reciprocity condition and supply MTAS to Hutchison at 12 cpm, is likely to place downward pressure on retail mobile services prices and thereby promote competition in this market.

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

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

Conclusion in relation to promotion of competition

If the promotion of competition criterion was the only objective when setting MTAS prices, the Commission believes it would be appropriate to reduce the price of the MTAS to the TSLRIC+. As indicated, the Commission has determined indicative rates for the supply of MTAS, based on a conservative upper bound of 12 cpm for the cost of supplying the MTAS. This is the price specified in the PMTS Single Rate Undertakings.

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

- not be adversely impacted in individual markets for the MTAS on each MNO's network;
- may be improved, but at worst would remain the same, in the national market within which FTM services are provided; and
- likely be promoted in the national market for retail mobile services.

Any-to-any connectivity

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

In the *MTAS Final Report*, the Commission concluded that any-to-any connectivity can be promoted through declaration of the MTAS, and this was a key reason for it defining the MTAS in such a way that it applies to termination of both FTM and MTM calls on all types of mobile networks. The Commission reached this conclusion

due to the ability of established MNOs (having control over access to all consumers directly connected to their networks) to frustrate a new entrant's ability to offer a full end-to-end service to its subscribers by hampering supply of the MTAS on reasonable terms and conditions.

The Commission believes that the PMTS Single Rate Undertakings are consistent with the object of achieving any-to-any connectivity. As such, the Commission believes that any-to-any connectivity is likely to be promoted regardless of whether the Commission accepts or rejects the PMTS Single Rate Undertakings.

Efficient use of, and investment in, infrastructure

In the *MTAS Final Report*, the Commission indicated it believed the following pricing structure was likely to emerge across the MTAS, retail mobile, and FTM services:

- above-cost (inclusive of normal profit) pricing of the MTAS;
- consequent above-cost pricing of retail FTM services; and
- subsidised prices of some retail mobile services.

This, the Commission believes, is likely to generate direct efficiency losses in the markets within which FTM and retail mobile services are provided – specifically, less than efficient consumption of retail FTM services and greater than efficient consumption of retail mobile subscription services. The Commission also considered it may give rise to faster than efficient turnover of mobile handsets, as consumers took advantage of highly-subsidised mobile handset offerings.

The Commission also indicated that it believed a reduction in the price of the MTAS towards its TSLRIC+ would promote efficiency in use in the market within which FTM services is provided by lowering the input cost of providing this service toward its underlying cost of production. The Commission also acknowledged reductions in the price of the MTAS might lead to consequent increases in the prices of some retail mobile services. However, the Commission indicated the extent to which this would be likely to occur was unclear. In any case, to the extent that retail mobile services were being priced below their underlying cost of production, and Pareto-relevant externalities were not present, any increases in the prices of these services toward cost recovery levels would be likely to improve the efficiency in use of these services.

The Commission also expressed concern that the cross-subsidised pricing structure that exists with respect to the MTAS, FTM and retail mobile services is likely to create distortions to investment decisions by integrated, mobile and fixed-line only operators. The Commission expressed specific concern that:

- above-cost pricing of the MTAS is reducing demand for mobile terminating access (and therefore FTM) services. In turn, this is likely to distort investment decisions by encouraging operators to under-invest in the mobile and fixed network capacity needed to provide FTM calls; and
- subsidised pricing of retail mobile services is likely to be encouraging excessive investment in the infrastructure used to provide retail mobile services. For instance, subsidised handset prices (such as free handset offers) are likely to have encouraged greater than efficient turn-over of mobile handsets by consumers and excessive investment in the infrastructure used to develop new handsets.

The Commission also notes that in *Seven Network Limited (No 4)*,[65] the Australian Competition Tribunal expressed its general agreement with the Commission's approach to applying the LTIE test established by the Commission's publication, *Access Pricing Principles, Telecommunications – a guide*[66] (the APPs), and the Commission's use of TSLRIC pricing. In the decision, the Tribunal relevantly stated that, in its view, the key pricing principles in applying the LTIE include:

- The price of a service should not exceed the minimum costs that an efficient firm will incur in the long-run in providing the service.
- The costs are the forward-looking costs, including a normal return on efficient investment (which takes into account the risk involved).
- Forward-looking means prospective costs using best-in-use technology. The access provider should only be compensated for the costs it would incur if it were using this technology, not what it actually incurs, for example in using out-of-date technology which is more costly. Of course, a firm may be using older technology because it was the best available at the time the investment was made and replacing it cannot be justified commercially. In a competitive market, however, that firm would only be able to charge on the basis of using the most up-to-date technology because, if it did not (in this hypothetical competitive market) access seekers would simply take the service from an alternative service provider.
- The cost of providing the service should be the cost that would be avoided in the long-run by not having to provide it. Thus, it is the additional or incremental costs necessarily incurred, assuming other production activities remain unchanged.[67]

Further, the Tribunal noted that 'in the general case where access prices need to be regulated, unless pricing is on a TSLRIC basis, efficient investment is unlikely to be encouraged.'[68]

The Commission notes that the Tribunal decision makes it clear that the incentives for investment in new and existing infrastructure and the risks of making such an investment are given due consideration in assessing whether the particular thing promotes the efficient use of and efficient investment limb of the LTIE test. As acknowledged by the Tribunal decision, and cited above, TSLRIC pricing includes a normal return on efficient investment (which takes into account the risk involved).

The Commission also notes that amendments to section 152AB change the way the Commission should assess whether an undertaking promotes the economically efficient use of, and investment in, telecommunications infrastructure. The amended criterion clarifies, *inter alia*, that in considering whether a particular thing promotes the efficient use of and efficient investment in infrastructure, the Commission must consider the incentives for, and the risks involved in, investment in new and existing infrastructure.[69] The Commission notes that the purpose of the amendment was to make it clear that the incentives for investment in new and existing infrastructure, and the risks of making such an investment, are given due consideration in assessing whether the particular thing promotes the efficient use of and efficient investment limb of the LTIE test.

In this respect, Hutchison's PMTS Single Rate Undertakings are likely to promote efficient use of, and investment in, infrastructure by which telecommunications

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65 [2004] ACompT 11.

66 ACCC, *Access Pricing Principles, Telecommunications – a guide*, July 1997.

67 *Seven Network Limited (No 4)* [2004] ACompT 11, paragraph 135.

68 *Ibid.*, paragraph 136.

69 Explanatory Memorandum to *Telecommunications Legislation Amendment (Competition and Consumer Issues) Bill 2005* pp. 4 and 8.

services are provided, to some extent. This is because the proposed 12 cpm MTAS price for PMTS calls is what the Commission considers is a conservative estimate of the TSLRIC+ of supplying the MTAS. To the extent that the lower MTM input prices were passed through in lower MTM retail prices, efficiency would be improved directly in the retail MTM market. This would be as a consequence of moving the price closer to the underlying cost of production, improving efficiency by the difference between the willingness to pay for the newly-created units and their cost of production.[70]

For the reasons outlined above the Commission considers that the economically efficient operation of a carriage service/telecommunications facility would be more likely to be promoted if the Commission accepted the PMTS Single Rate Undertakings than would be the case if the Commission were to reject it.

5.3. Legitimate business interests

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

In having regard to Hutchison's legitimate business interests, the Commission will use the 'future with and without' test.

5.3.1. Hutchison's view

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

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

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

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

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.

5.3.2. Submitters' views

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[70] On the other hand, there could be a reduction in efficiency by the diversion of calls away from relatively low-cost FTM service to the relatively high-cost MTM service; especially considering the large gap between FTM price and underlying cost of production.

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

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

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

5.3.3. Commission's view

The Commission's *Access Undertakings – A Guide to Part IIIA of the Trade Practices Act* (the Access Undertakings Guide) states that:

> The Commission's analysis of legitimate business interests of the service provider will focus on commercial considerations of the service provider. The Commission will take into account the provider's obligations to shareholders and other stakeholders, including the need to earn a commercial return on the facility. It will also aim to ensure that any undertaking provides appropriate incentives for the provider to maintain, improve and invest in the efficient provision of the service.[71]

The *Access Undertakings Guide* also states that:

> The Commission will take an interest in the extent to which competition arising from access to a service generates real benefits to intermediate and final consumers and the community in general. It will not assess business interests as legitimate if they have the purpose or effect of preventing the objectives of the Trade Practices Act being realised, in particular the objective of enhancing the welfare of Australians through the promotion of competition and efficiency. In addition, and in line with the stated intentions of the access regime, the Commission will not allow for reimbursements of forgone monopoly profits which the provider may incur as a result of increased competition in an upstream or downstream market, except insofar as they affect the ability of the firm to discharge CSOs.[72]

In this regard, the Commission noted the *Access Pricing Principles* that:

> As an access price consistent with these principles allows efficient access providers to recover their costs of production it will not violate their legitimate business interests.[73]

That said, the Commission noted in its *MTAS Final Report* that, in the case of the MTAS, an immediate reduction in the price of the service toward its underlying TSLRIC+ cost of production 'would impinge upon the legitimate business interests of

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71 ACCC, *Access Undertakings – A Guide to Part IIIA of the Trade Practices Act*, 30 September 1999, pp. 4-5.

72 *Ibid*., p. 6.

73 ACCC, *Access Pricing Principles, Telecommunications – a guide*, July 1997, p. 18.

access providers who have, to date, based their business plans around existing pricing structures and the previous retail benchmarking pricing principle'.[74]

In recognition of this, the Commission included in its *MTAS Pricing Principles Determination* an adjustment path of 30 months duration for the price to fall from above 21 cpm from 1 July 2004 to the Commission's price of 12 cpm on 1 January 2007. As set out in the *MTAS Final Decision*, (pp. 220-221) the Commission was:

> … mindful that an immediate and significant reduction would give mobile operators little time to adjust their business plans in response … [The] Commission considers that this period allows sufficient time for MNOs to unwind or realise their business decisions made in reliance on the previous regulatory approach …

Underlying this view was a belief that 3 cpm per annum reductions in the MTAS charge, over a three year period, would be achievable without harming a MNO's ability to recover reasonable costs (inclusive of a normal profit), and without placing undue pressure on any pricing plans that an MNO had designed and/or implemented for other services.

Hutchison's PMTS Single Rate Undertakings propose to move to the 12 cpm rate for complying MTM calls at a slightly faster pace than the path specified in the *MTAS Pricing Principles Determination* for MTM Calls. However, given that Hutchison has willingly submitted the Undertakings, the Commission considers that reaching the 12 cpm price before 1 January 2007 would not be inconsistent with Hutchison's legitimate business interests.

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

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

In having regard to this criterion, the Commission will use the 'future with and without' test.

5.4.1. Hutchison's view

Hutchison submits that the 12 cpm price of supplying the MTAS under the PMTS Single Rate Undertakings promotes the interests of access seekers as it reflects economically efficient costs for the provision of the MTAS service. Hutchison submits that the reciprocity conditions under the PMTS Single Rate Undertakings promote the interests of access seekers by providing transparency in mobile tariffs and pricing certainty. Hutchison submits that the 12 cpm price of supplying the MTAS under the PMTS Single Rate Undertakings 'is an appropriate price having regard to the fair and reasonable costs of providing the MTAS and that acceptance of the reciprocal offer would be the rational choice of any efficient mobile operator'. Hutchison cites submissions from consumer groups, industry participants, international comparative data, and the Commission's *MTAS Final Report* as support for the 12 cpm price.

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74 ACCC *MTAS Final Report*, p. 216.

5.4.2. Submitters' views

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

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

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

5.4.3. Commission's view

The Commission believes that, in the absence of regulation, MNOs (such as Hutchison) are not constrained in their pricing decisions for the MTAS. Indeed, the Commission considers that possession of market power over the calls that terminate on their mobile networks means that MNOs (such as Hutchison) have both the ability and incentive to price the MTAS substantially above-cost. This, in turn, raises the costs of access seekers who purchase the declared service.

In some respects, and assuming that MNOs charge each other reciprocal MTAS rates, raising the cost of the MTAS above its underlying cost might be thought to have a competitively-neutral effect. However, the relative impact on each MNO is complicated by the fact that some MNOs only own a mobile network, while others own both a mobile network and fixed-line network. In effect, this means that some MNOs are 'net receivers' of MTAS revenues (i.e. revenue received from its providing the MTAS outweighs what it must pay other MNOs for the MTAS) while some are 'net payers' of MTAS. Moreover, some access seekers for Hutchison's FTM MTAS service will only own a fixed line network, meaning that, in effect, they could always be considered as 'net payers' of the MTAS.

In essence, therefore, there are four different types of access seekers with respect to the PMTS Single Rate Undertakings which are relevant for consideration under section 152AH(1)(c) of the Act:

- Vodafone and other mobile only operators;
- Optus and Telstra as integrated fixed-line and mobile operators;

- MNOs, such as VMA,[75] that purchase wholesale network capacity from a MNO, such as Hutchison, and operate their own switching, billing, voicemail and SMS platforms; and
- PowerTel, AAPT, Primus and other fixed-line only operators.

Given this, it should be acknowledged that a regulated (or otherwise) reduction in MTAS rates is likely to affect different access seekers in different ways, and by different magnitudes, depending on whether they own a mobile or fixed network (or both) and the mix of their incoming and outgoing traffic on those networks. The effect on these access seekers can also be expected to differ over time as traffic levels to and from mobile and fixed networks adjust in response to changes in the MTAS rate. For example, the Commission expects that a uniform reduction in the MTAS rate would likely be passed through to end-users in the form of lower FTM retail rates. This, in turn, is likely to increase demand for FTM services, and consequently, the MTAS. Hence, whilst a uniform reduction in the MTAS rate may initially result in lower MTAS revenues for mobile-only operators and MNOs – and a net revenue reduction – in the longer term such MTAS rate reductions may well give rise to greater MTAS revenues for mobile-only operators and MNOs as a result of increased demand for FTM services.

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

However, the Commission notes that the PMTS Single Rate Undertakings only propose a price of 12 cpm for the MTAS for MTM services

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

Consequently, the Commission is of the view that a price of 12 cpm (which is reflective of the upper bound of the TSLRIC+ of supplying the MTAS) is preferable for some MTM calls, even if it does not apply with respect to all MTM and FTM calls. The Commission notes that the differential pricing impacts that may result in reduced MTAS prices for some users (to 12 cpm) while other users would be no worse off if it accepted the PMTS Single Rate Undertakings. In this way the PMTS Single Rate Undertakings would not adversely affect the interests of persons who already have a right to use the declared service, compared with the situation in which the PMTS Single Rate Undertakings would be rejected.

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

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

[75] The Commission notes that Virgin Mobiles Australia was recently acquired by Optus.

5.5.1. Hutchison's view

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

5.5.2. Submitters' views

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

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

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

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

5.5.3. Commission's views

As already indicated in this report, the concept of the 'direct' costs of providing access to a declared service encompasses those that are necessarily incurred (or caused) by the provision of access. At a minimum, in this context, the phrase 'direct costs' is interpreted to mean that an access price should cover the direct incremental costs incurred in providing access. It does not, however, extend to receiving compensation for loss of any 'monopoly profits' that occurs as a result of increased competition. In this regard, the *Explanatory Memorandum for the Trade Practices Amendment (Telecommunications) Bill 1996* states:

> … the references here to the 'legitimate' business interests of the carrier or carriage service provider and to the 'direct' costs of providing access are intended to preclude arguments that the provider should be reimbursed by the third party seeking access for consequential costs which the provider may incur as a result of increased competition in an upstream or downstream market.[76]

The Commission considers that the TSLRIC+ of providing the MTAS reflects the direct incremental cost of providing access. In addition, the TSLRIC+ does not provide any compensation for foregone monopoly profits.

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

Hutchison states that '12 cpm is an appropriate price having regard to the fair and reasonable costs of providing the MTAS'. As outlined in the *MTAS Final Report*, the Commission considers that 12 cpm is at the conservative upper bound estimate of costs of supplying the MTAS, as set out in the *MTAS Final Report*. As noted in the *Access Pricing Principles* the Commission considers that an access price should not be inflated to recover any profits the access provider (or any other party) may lose in a dependent market as a result of the provision of access.[77]

The Commission remains of the view that the 12 cpm price specified in the *MTAS Final Report* is the best available estimate of the upper-bound of the TSLRIC+ and hence a relevant direct cost of supplying the MTAS at this point in time.[78] Therefore, were the direct costs of providing the service the only criteria to which regard were to be had, the Commission considers that immediate reductions in the price of the MTAS to its TSLRIC+ would be appropriate.

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

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[76] Explanatory Memorandum to the *Trade Practices Amendment (Telecommunications) Bill 1996*, p. 44.

[77] In particular, the Efficient Component Pricing Rule (ECPR) may be inconsistent with this criterion. The ECPR bases price on the incremental cost of providing the access service plus the opportunity cost of foregone profits from losing business in related markets.

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

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

The Commission's view is that an access price should not lead to arrangements between access providers and access seekers that encourage the unsafe or unreliable operation of a carriage service, telecommunications network or facility. This criterion is usually more relevant to consideration of non-price terms and conditions.

Hutchison submits that its PMTS Single Rate Undertakings offers an operationally and technically feasible service.

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

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

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

If the price of the MTAS for MTM calls decreased while the price of the MTAS for FTM calls were held constant, there would be both a positive effect and a negative impact on economic efficiency. To the extent that the lower MTM input prices were passed through in lower MTM retail prices, efficiency would be improved directly in the retail MTM market. This would be as a consequence of moving the price closer to the underlying cost of production, improving efficiency by the difference between the willingness to pay for the newly-created units and their cost of production. On the other hand, there could be a reduction in efficiency by the diversion of calls away from relatively low-cost FTM service to the relatively high-cost MTM service; especially considering the large gap between FTM price and underlying cost of production. In the absence of empirical information, the Commission is unable to be decisive about the relative magnitude of these two dichotomous effects, or of other possible efficiency implications.

For the reasons outlined above and discussed under the 'efficient use of, and investment in, infrastructure' LTIE criterion, the Commission considers that the economically efficient operation of a carriage service/telecommunications facility would be more likely to be promoted if the Commission accepted the PMTS Single Rate Undertakings than would be the case if the Commission were to reject it, in the absence of better information about the net impact on efficiency of the dichotomous effects of the price of MTAS for MTM calls falling but the price of MTAS for FTM calls remaining constant.

However, in reaching this conclusion, the Commission notes that Hutchison has requested that the PMTS Single Rate Undertakings are consider together with the Non-PMTS Undertakings, an assessment of which is contained in Chapter 8.

5.8. Other matters

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

5.9. The overall reasonableness of the price terms and conditions of the PMTS Single Rate Undertakings

Having had regard to the criteria in section 152AH(1) of the Act and where relevant the use of the 'future with or without test' to assist the assessment of the Undertaking price terms and conditions against particular criteria, the Commission has concluded, based on the analysis in sections 5.1 – 5.8, the Commission has concluded as follows.

The Commission believes that acceptance of the PMTS Single Rate Undertakings would be likely to promote the LTIE by promoting competition in relevant markets and efficient use of, and investment in, the infrastructure in these markets.

The Commission considers that the price terms and conditions set out in the PMTS Single Rate Undertakings do not compromise Hutchison's legitimate business interests.

The Commission believes that acceptance of the PMTS Single Rate Undertakings would not adversely impact the interests of persons who have a right to use the MTAS.

The Commission believes that the price of 12 cpm (which reflects the conservative upper-bound conservative estimate of the TSLRIC+) of supply of the MTAS that may result from acceptance of the PMTS Single Rate Undertakings better reflects the direct costs of supplying the MTAS.

The Commission believes that the price terms and conditions in the PMTS Single Rate Undertakings will not lead to arrangements between access providers and access seekers that encourage the unsafe or unreliable operation of a carriage service, telecommunications network or facility.

The Commission believes that acceptance of the PMTS Single Rate Undertakings is likely to promote the economically efficient operation of a carriage service/telecommunications network/facility.

On balance, therefore, the Commission is of the view that the price terms and conditions in the PMTS Single Rate Undertakings are reasonable.

6. The reasonableness of the price terms and conditions for PMTS Dual Rate Undertakings

The Commission must not accept an undertaking unless it is satisfied that the terms and conditions are 'reasonable' based on the criteria set out in section 152AH of the Act. This chapter considers the reasonableness of the *price* terms and conditions in the PMTS Dual Rate Undertakings.

In forming a view about whether the price terms and conditions are reasonable, the Commission must have regard to the range of matters set out in section 152AH(1) of the Act, which are summarised in section 3.2.4 of this report.[79]

6.1 Application of the 'reasonableness' test

The views of Hutchison, the views of interested parties and the Commission's general approach to the application of the reasonableness test (including its use of the 'future with and without' test as an aid in applying the reasonableness test) is outlined in detail in section 5.1 of this report, in respect of the Commission's assessment of the reasonableness of the price terms and conditions of the PMTS Single Rate Undertakings. These views have also been expressed, and the Commission general approach applies, equally in respect of Hutchison's PMTS Dual Rate Undertakings.

Section 6.1.1 below outlines the pricing outcomes that the Commission will have regard to in using the 'future with and without' test as an aid in assessing the reasonableness of the PMTS Dual Rate Undertakings.

6.1.1 Commission's view

Background in relation to the Commission's application of the reasonable test is contained in section 5.1.3.

Pricing options set out in the Undertaking

The price terms and conditions specified in the PMTS Dual Rate Undertakings are described in considerable detail elsewhere in this report. Hutchison proposes a 12 cpm price for the supply of the MTAS under the PMTS Dual Rate Undertakings if certain conditions are met, including reciprocal pricing arrangements by access seekers and the exclusion of transit traffic.

If either of these conditions are not met then a higher price for the MTAS or the rate 1 usage charge of 21 cpm will apply.

Pricing outcomes in the absence of the Undertaking

Section 5.1.3, outlines in detail the pricing outcomes the Commission expects would emerge in the event that it decided to reject the PMTS Single Rate Undertakings. The outcomes outlined for the PMTS Single Rate Undertakings are common to the outcomes that access seekers could expect under the PMTS Dual Rate Undertakings.

Specifically, the Commission notes the following aspects of the regulatory and commercial environments:

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

- The protection embodied in the provisions of Part XIC of the Act, whereby the Commission can arbitrate disputes between the access seeker and access provider in relation to the supply of the MTAS;
- The specific rights conferred under section 152AR of the Act in which access seekers are able to seek a binding resolution by the Commission to any disputes they may have with Hutchison regarding access to the MTAS on Hutchison's mobile telephony networks;
- Given commercial imperatives for certainty and the costs involved with pursuing regulatory outcomes, some access seekers may continue to determine terms and conditions of access via commercial negotiation without recourse to their arbitral rights; and
- The likelihood, based on the conduct of access seekers to date, that some access seekers will continue to avail themselves of their arbitral rights in respect of Hutchison's supply of the MTAS and the influence this market behaviour will have on commercial outcomes in respect of Hutchison's supply of the MTAS to other access seekers.

As discussed in section 5.1.3, it should not be assumed that the Commission would necessarily set prices at the same level as those set out in its *MTAS Pricing Principles Determination* in a final determination in an access dispute.

However, the Commission is of the view that if it were to reject the PMTS Dual Rate Undertakings, it would be likely that price terms and conditions that would emerge (either through commercial negotiation or arbitral proceedings) would be similar to the reciprocal usage charge – and significantly lower than the default usage charge – in the PMTS Dual Rate Undertakings.

The Commission's assessment of the price terms and conditions contained in the Undertaking against the statutory criteria set out in section 152AH(1) of the Act (and discussed in section 3.2.4 of this report) is considered in turn below.

6.2 The LTIE

As discussed elsewhere in this report, the Commission has published a Guideline explaining what it considers is meant by the phrase LTIE. This was outlined in section 3.2.4 of the report.

6.2.1. Hutchison's view

Hutchison submits that the 12 cpm price of supplying the MTAS under the PMTS Dual Rate Undertakings promotes the LTIE as it reflects 'a rational price for an efficient mobile operator' and facilitates competition across mobiles services markets. The rationale for this submission has been summarised earlier in Chapter 5, particularly section 5.2.1.

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

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

> A review of all of the price related terms and conditions *in context* reveals a broader consistency with the principles expressed by the Commission in its MTAS Final Decision and the LTIE…when considered together, the PMTS Dual Rate Undertaking and the Non-PMTS Undertaking provide a rate structure that addresses the different issues arising in relevant markets, promotes competition in those markets and ensures a closer association of the price of the MTAS with its underlying cost in such a way as to promote the LTIE.[80]

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

In addition, Hutchison submits that while the PMTS Dual Rate Undertakings may 'benefit Hutchison commercially', any benefits accrued will be used to further innovation and investment to promote the LTIE. Specifically, Hutchison submits that:

> …any benefit accrued by Hutchison as a result of the access seekers opting for the non-reciprocal price of 21 cpm will be applied to continued innovation which promotes the LTIE.[81]

Hutchison makes no reference about how the 21 cpm rate (default usage charge) proposed as the alternate rate (if conditions underlying the reciprocal usage charge of 12 cpm are not met) addresses the criteria of promoting competition.

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

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

- increasing the incentive for carriers to roll out their own 3G networks, as carriers will no longer be able to protect the profitability of their GSM networks; and
- increasing the incentive for carriers, once they have rolled out 3G networks, to migrate their customers onto that new network.[82]

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80 Hutchison submission, p.6.
81 Hutchison submission, p.17.
82 Hutchison submission, October 2005, p.18.

Hutchison submits that allocative efficiency would be promoted by acceptance of the Undertakings which would ensure a closer association of the price of the MTAS with the underlying cost of providing the MTAS.[83]

Hutchison also submits that by terminating calls on its 3G network, Hutchison provides termination services at the minimum costs. And that the price of 12 cpm offered in the Undertakings is reflective of the efficient, forward looking costs of providing that service, consistent with productive efficiency.[84]

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

Hutchison makes no reference to how the 21 cpm rate (rate 1 usage charge) proposed as the alternate rate (if conditions underlying the rate 2 usage charge of 12 cpm are not met) addresses the criteria of encouraging economically efficient use and investment in infrastructure.

6.2.2 Submitters' views

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

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

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

Telstra submits that an immediate decrease in the price of supplying the MTAS to 12 cpm is reasonable. However, Telstra submits that the PMTS Dual Rate Undertakings are not reasonable and do not promote the LTIE. Telstra submits that the 21 cpm price exceeds the MTAS Pricing Principles stated in the *MTAS Final Report*. Telstra further submits that Hutchison's proposed commitment to apply this economic rent in 'continued innovation which promotes the LTIE' fails to adequately define

83 *Ibid*., p.19.
84 *Ibid*., p.19.

'innovation', demonstrate how this 'innovation' promotes the LTIE, or provide assurance that any innovation will in fact occur.

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

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

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

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

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

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

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

6.2.3 Commission's view

Section 5.2.3 outlines in detail the background to the LTIE criterion and the three main areas the Commission will consider in assessing whether the LTIE has been promoted:

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

In assessing the LTIE, the Commission considers these three issues.

Promoting Competition

In considering the three main markets impacted by the MTAS service as outlined in section 5.2.3, the Commission concludes that:

- *The individual markets for MTAS on each MNO's network:* the PMTS Dual Rate Undertakings proposes a higher rate than 12 cpm which Hutchison considers reflects 'the cost an efficient operator using forward-looking technology would incur in providing the same service',[85] as well as the reciprocal usage rate of 12 cpm. In any case, and for the reasons outlined in the section 5.2.3, the Commission is of the view that the PMTS Dual Rate Undertakings will not (and in fact cannot) promote competition in the wholesale markets for MTAS on each MNO's network.

- *The market within which FTM services are provided:* the differential pricing (the 12 cpm reciprocal usage charge and the 21 cpm default usage charge) as proposed by the PMTS Dual Rate Undertakings would weaken competition in the market in which FTM services are supplied compared to the likely situation if the Undertakings were rejected. The Commission acknowledges that 12 cpm (for complying MTM calls) is a price that it considers is a conservative upper bound estimate of the cost (TSLRIC+) of supplying the MTAS. However, the Commission notes that the PMTS Dual Rate Undertakings could also result in price outcomes (for those access seekers that do not comply with the conditions for the reciprocal rate) for the MTAS of 21 cpm – a rate well above what the Commission considers is the underlying cost of providing the service. As outlined in section 5.2.3, the Commission considers that a reduction in the price of the MTAS toward the underlying TSRLIC+ (cost of production) will most effectively promote competition in the market within which FTM services are provided. The Commission notes that the reciprocal usage charge in the PMTS Dual Rate Undertakings may lead to lower retail mobile services prices and may promote some downward pressure on the pricing of retail FTM services, resulting in the possibility of some marginal competitive benefits.

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

- *Retail mobile services:* the Commission believes that the immediate reduction of the MTAS rate to 12 cpm, as proposed in the PMTS Single Rate Undertakings, and the likelihood that some (although not necessarily all) MNOs will agree to the reciprocity condition and supply MTAS to Hutchison at 12 cpm, is likely to place downward pressure on retail mobile services prices and thereby promote competition in this market. However, the Commission considers that the differential pricing of the MTM MTAS, as provided for by the PMTS Dual Rate Undertakings may have the effect of protecting some of the source of market power of integrated FTM operators

[85] Hutchison submission, October 2005, p.19.

and thus impeding the ability of equally or more efficient operators to compete with integrated operators in both the retail mobile services market (through cross-subsidisation of their retail mobile prices). It is the Commission's view that prices set at the TSRLIC+ of supplying the MTAS provide the best opportunity for promoting competition in the retail mobile services market (among others), as MNO's would then be forced to compete on the basis of their relative efficiencies and relative merits in the market for retail mobile services.

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

Any-to-any connectivity

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

In the *MTAS Final Report*, the Commission concluded that any-to-any connectivity can be promoted through declaration of the MTAS, and this was a key reason for it defining the MTAS in such a way that it applies to termination of both FTM and MTM calls on all types of mobile networks. The Commission reached this conclusion due to the ability of established MNOs (having control over access to all consumers directly connected to their networks) to frustrate a new entrant's ability to offer a full end-to-end service to its subscribers by hampering supply of the MTAS on reasonable terms and conditions.

The Commission believes that the PMTS Dual Rate Undertakings are consistent with the object of achieving any-to-any connectivity. As such, the Commission believes that the object of any-to-any connectivity is likely to be promoted regardless of whether the Commission accepts or rejecting the PMTS Dual Rate Undertakings.

Economically efficient use of and investment in infrastructure

Section 5.2.3 contains substantive detail about the Commission's view on how the LTIE are best promoted in respect of the efficient use of, and investment in, infrastructure.

This section will specifically address the Commission's views on whether Hutchison's PMTS Dual Rate Undertakings are likely to promote efficient use of, and investment in, infrastructure.

As already noted Hutchison submits that '12 cpm is an appropriate price having regard to the fair and reasonable costs of providing the MTAS'.

The PMTS Dual Rate Undertakings propose a rate of 21 cpm default usage charge which is in excess of Hutchison's view of the fair and reasonable costs of providing the MTAS. In addition, it is the Commission's view that the pricing of the MTAS should reflect the TSLRIC+, to effectively promote allocative and dynamic efficiency.

As outlined previously in section 5.2.3, were the promotion of efficient investment in, and efficient use of, the infrastructure by which telecommunications services are provided the only objective when setting prices for the MTAS, the Commission believes it would be appropriate to reduce the price of the service to its optimal level immediately. To the extent that the appropriate price is TSLRIC+, this would imply the price of the service should be reduced to at least 12 cpm (which reflects the conservative upper-bound of the TSLRIC+ of the MTAS).

The differential pricing outcomes for MTM MTAS inherent in the PMTS Dual Rate Undertakings, are likely to have potentially distortionary impacts for investment particularly as the default usage charge is well above the underlying cost of providing the MTAS service.

The Commission considers that the objective of promoting efficient use of, and investment in, telecommunications infrastructure would best be promoted by rejecting the PMTS Dual Rate Undertakings. To the extent that Hutchison might use any revenues it receives in excess of its 12 cpm rate to fund further 'innovation and reductions in retail prices',[86] the Commission considers this would represent over-investment in (and consequently use of) telecommunications infrastructure.

6.3 Legitimate business interests

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

In having regard to Hutchison's legitimate business interests, the Commission will use the 'future with and without' test.

6.3.1. Hutchison's view

Hutchison's submissions regarding its legitimate business interests of supplying the MTAS under the PMTS Dual Rate Undertakings at a price of 12 cpm are outlined in section 5.3.1.

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

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

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.

6.3.2. Submitters' views

PowerTel submits that the 12 cpm MTAS price proposed by Hutchison exceeds the costs of supplying the MTAS and that estimates of TSLRIC for the MTAS service overseas establish estimates in the range of 5 to 12 cpm. PowerTel further submits that the proposed 'fallback' rate of 21 cpm is 'way in excess of the TSLRIC of

[86] Hutchison submission, p. 10.

termination'. PowerTel argues that the 21 cpm is not a legitimate business interest of Hutchison as it exceeds the TSLRIC of termination as determined by the Commission in the *MTAS Final Report* and maintains inefficient MTAS pricing whereby 'fixed line operators have for several years been paying MNOs way above costs'. PowerTel 'rejects the notion' that Hutchison is justified in gaining a 'financial windfall' by charging 21 cpm for the supply of MTAS if reciprocity conditions are not agreed upon.

Telstra submits that the 21 cpm price for the supply of MTAS under the PMTS Dual Rate Undertakings 'represents a price above the efficient costs of providing the MTAS'. Telstra notes that Hutchison acknowledges that the 21 cpm will 'result in it receiving a windfall gain' and submits that this represents an unreasonable business interest. In addition, Telstra submits that the terms and conditions of the PMTS Dual Rate Undertakings are unreasonable as they allow Hutchison to cease charging 12 cpm solely by reference to its own belief that the access seeker is not complying, or unlikely to comply, with the reciprocity and transit conditions of the Undertakings. In addition, Telstra submits that access seeker obligations provide unlimited discretion on the part of Hutchison to obtain confidential commercial information from access seekers. Specifically, Telstra submits that the PMTS Dual Rate Undertakings are unreasonable as they:

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

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

6.3.3 Commission's view

Section 5.3.3 outlines the Commission's view on the meaning of legitimate business interests.

Hutchison's PMTS Dual Rate Undertakings propose to move to the 12 cpm rate for complying MTM calls at a slightly faster pace than the path the Commission set out in the *MTAS Pricing Principles Determination*, to the extent that the reciprocal usage charge applies.

In addition, Hutchison has confirmed that '12 cpm is an appropriate price having regard to the fair and reasonable costs of providing the MTAS'. However, Hutchison has also proposed as part of the PMTS Dual Rate Undertakings a price for the MTAS equivalent to or higher than 12 cpm.

Given that Hutchison has willingly submitted the Undertakings and considers that 12 cpm is an appropriate price reflecting the fair and reasonable costs of providing the MTAS, the Commission is satisfied that reaching the price of 12 cpm (which reflects the conservative upper-bound of the TSLRIC+ of the MTAS) before 1 January 2007 would not be inconsistent with Hutchison's legitimate business interests.

In relation to the default usage charge of 21 cpm, the Commission notes that this price is reflective of the indicative price for MTAS set out in the *MTAS Pricing Principles Determination* for the period 1 July 2004 to 31 December 2004, and is above the price (of 12 cpm) that Hutchison itself considers an appropriate price that reflects the fair and reasonable costs of providing the MTAS. A price for the MTAS of 21 cpm would not be considered in the Commission's view a rate that would compromise Hutchison's legitimate business interests. The Commission believes the default usage charge of 21 cpm is significantly beyond what Hutchison has indicated in its submission represents an appropriate price (i.e. 12 cpm) reflecting the 'fair and reasonable costs' of providing the MTAS. Further, the Commission believes that if the PMTS Dual Rate Undertakings were rejected Hutchison's legitimate business interests would be adequately protected, given the Commission's views as to the likely pricing outcomes that would occur in this event. This is particularly true as the PMTS Single Rate Undertakings (which contain a rate of 12 cpm) are considered as alternatives to the PMTS Dual Rate Undertakings.

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

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

In having regard to this criterion, the Commission will use the 'future with and without test'.

6.4.1. Hutchison's view

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

6.4.2. Submitters' views

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

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

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

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

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

6.4.3. Commission's view

The Commission's general view on the interests of persons who have the right to use the declared service is outlined in section 5.4.3.

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

Consequently, the Commission is of the view that maintaining the price of the MTAS above the TSLRIC+ of production for some access seekers may not be in the best interest of those who have the right to use the MTAS. As the PMTS Dual Rate Undertakings propose differential pricing for the same service (the MTM MTAS) and the default usage charge of 21 cpm is well above what Hutchison considers is an appropriate price (of 12 cpm) that reflects the fair and reasonable costs of providing the MTAS, the Commission is not convinced that the interests of persons who have the right use the declared service are best served by acceptance of the PMTS Dual Rate Undertakings. Further, the Commission notes that the default usage charge of 21 cpm is significantly above what it understands the service is being priced at in the market[87] – and also well above the price the Commission expects would emerge in the event the PMTS Dual Rate Undertakings were rejected.

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

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

6.5.1 Hutchison's view

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

Hutchison further submits that while the 21 cpm price for the MTAS supply under the PMTS Dual Rate Undertakings is not 'in any way reflective of the underlying cost of

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[87] Between 15 and 18 cpm.

providing the MTAS', the price differential will be used to further innovation and investment to promote the LTIE. Hutchison submits that 'any benefit accrued by Hutchison as a result of the access seekers opting for the non-reciprocal price of 21 cpm will be applied to continued innovation which promotes the LTIE'.

6.5.2 Submitters' views

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

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

6.5.3 Commission's view

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

The Commission's view as to what 'direct costs' means is outlined in section 5.5.3 .

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

In the *MTAS Final Report*, the Commission concluded that 12 cpm is at the conservative upper bound estimate of costs of supplying the MTAS.

The Commission remains of the view that the 12 cpm price specified in the *MTAS Pricing Principles Determination* provides an indication of the upper bound of underlying cost, and hence the direct cost, of supplying the MTAS. Therefore, were the direct costs of providing the service the only criteria to which regard were to be had, the Commission considers that immediate reductions in the price of the MTAS to its TSLRIC+ would be appropriate.

The Commission considers that the PMTS Dual Rate Undertakings reflect the direct costs of supplying the MTAS in relation to the reciprocal usage charge of 12 cpm, but the default usage charge of 21 cpm that could apply in certain circumstances does not reflect the direct costs of supplying MTAS.

The Commission considers that were the PMTS Dual Rate Undertakings to be accepted the price of the MTAS would exceed the direct costs of the MTAS under certain circumstances in which the default usage charge of 21 cpm applied.

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

The Commission's view is that an access price should not lead to arrangements between access providers and access seekers that encourage the unsafe or unreliable

operation of a carriage service, telecommunications network or facility. This criterion is usually more relevant to consideration of non-price terms and conditions.

Hutchison submits that its Undertakings offer an operationally and technically feasible service.

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

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

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

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

6.8. Other Matters

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

6.9. Overall reasonableness of price terms and conditions for the PMTS Dual Rate Undertaking

Having had regard to the criteria in section 152AH(1) of the Act and where relevant the use of the 'future with or without test' to assist the assessment of the Undertaking price terms and conditions against particular criteria the Commission has concluded, based on the analysis in sections 6.1 – 6.8 as follows.

The Commission believes that acceptance of the PMTS Dual Rate Undertakings would be unlikely to promote the LTIE, as it is unlikely to promote competition in the market within which FTM services are provided, and the market within which retail mobile services are provided, and is likely to lead to less efficient use of, and investment in, the infrastructure used to provide fixed services, the MTAS and retail mobile services.

The Commission believes that the differential pricing implicit in the PMTS Dual Rate Undertakings will sustain MTAS prices that are greater than what is necessary to protect the legitimate business interests of Hutchison and its investment in facilities used to supply the MTAS. The Commission also believes that Hutchison's legitimate business interests will not be compromised if the PMTS Dual Rate Undertakings were to be rejected.

The Commission believes that acceptance of the PMTS Dual Undertakings would be unlikely to promote the interests of persons who have a right to use the MTAS.

The Commission believes that the differential MTM MTAS pricing that would result from acceptance of the PMTS Dual Rate Undertakings would mean that in some

instances prices would be above what is necessary to recover the direct costs Hutchison faces in providing access to the MTAS in the relevant period.

The Commission believes that the price terms and conditions in the PMTS Dual Rate Undertakings will not lead to arrangements between access providers and access seekers that encourage the unsafe or unreliable operation of a carriage service, telecommunications network or facility.

The Commission believes that acceptance of the PMTS Dual Rate Undertakings would be unlikely to promote the economically efficient operation of a carriage service/telecommunications network/facility.

Overall, therefore, the Commission is of the view that the price terms and conditions in the PMTS Dual Rate Undertakings are not reasonable.

7. The reasonableness of the price terms and conditions for Non-PMTS Undertakings

The Commission must not accept an undertaking unless it is satisfied that the terms and conditions are 'reasonable' based on the criteria set out in section 152AH of the Act. This Chapter considers the reasonableness of the *price* terms and conditions in the Non-PMTS Undertakings.

In forming a view about whether the price terms and conditions are reasonable, the Commission must have regard to the range of matters set out in section 152AH(1) of the Act, which are summarised in section 3.2.4 of this report.[88]

7.1. Application of the 'reasonableness' test

The views of Hutchison, the views of interested parties and the Commission's general approach to the application of the reasonableness test (including its use of the 'future with and without' test as an aid in applying the reasonableness test) is outlined in detail in section 5.1 of this report, in respect of the Commission's assessment of the reasonableness of the price terms and conditions of the PMTS Single Rate Undertakings. These views have also be expressed, and the Commission general approach applies, equally in respect of Hutchison's PMTS Dual Rate Undertakings.

Section 7.1.1 below outlines the pricing outcomes that the Commission will have regard to in using the 'future with and without' test as an aid in assessing the reasonableness of the PMTS Dual Rate Undertakings.

7.1.1 Commission's application of the 'reasonableness' test

Background in relation to the Commission's application of the reasonable test is contained in section 5.1.3.

Pricing options set out in the Undertaking

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

Pricing outcomes in the absence of the Undertaking

Section 5.1.3, outlines in detail the pricing outcomes the Commission expects would emerge in the event that it decided to reject the PMTS Single Rate Undertakings. The outcomes outlined for the PMTS Single Rate Undertakings are common to the outcomes that access seekers could expect under the Non-PMTS Undertakings.

Specifically, the Commission notes the following aspects of the regulatory and commercial environments:

- The protection embodied in the provisions of Part XIC of the Act, whereby the Commission can arbitrate disputes between the access seeker and access provider in relation to the supply of the MTAS;
- The specific rights conferred under section 152AR of the Act in which access seekers are able to seek a binding resolution by the Commission to any

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

disputes they may have with Hutchison regarding access to the MTAS on Hutchison's mobile telephony networks;

- Given commercial imperatives for certainty and the costs involved with pursuing regulatory outcomes, some access seekers may continue to determine terms and conditions of access via commercial negotiation without recourse to their arbitral rights; and
- The likelihood, based on the conduct of access seekers to date, that some access seekers will continue to avail themselves of their arbitral rights in respect of Hutchison's supply of the MTAS and the influence this market behaviour will have on commercial outcomes in respect of Hutchison's supply of the MTAS to other access seekers.

As discussed in section 5.1.3, it should not be assumed that the Commission would necessarily set prices at the same level as those set out in its *MTAS Pricing Principles Determination* in a final determination in an access dispute.

However, the Commission is of the view that if it were to reject the Non-PMTS Undertakings, it would be likely that price terms and conditions that would emerge (either through commercial negotiation or arbitral proceedings) would be significantly lower than the 18 cpm usage charge proposed in the Non-PMTS Undertakings.

The Commission's assessment of the price terms and conditions contained in the Undertaking against the statutory criteria set out in section 152AH(1) of the Act (and discussed in section 3.2.4 of this report) is considered in turn below.

7.2. The LTIE

As discussed elsewhere in this report, the Commission has published a guideline explaining what it considers is meant by the phrase LTIE. This was outlined in section 3.2.4 of the report.

7.2.1. Hutchison's views

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

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

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

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

Hutchison submits that its proposed Non-PMTS Undertakings price of 18 cpm for the supply of the MTAS, which amounts to a 14 per cent decline over its most recently

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

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

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

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

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

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

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

Hutchison addresses the statutory criteria utilising the framework established by the Commission in relation to economic efficiency, which covers the objectives of dynamic efficiency, allocative efficiency, and productive efficiency.[89]

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.

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89 ACCC, *Access Pricing Principles – Telecommunications – a guide*, 1997.

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

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.

7.2.2. Submitters' views

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

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

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

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

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

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

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

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

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

Vodafone further submits that the Non-PMTS differential pricing will not promote the LTIE, as it neither guarantees that reductions in MTAS pricing will be passed-through to FTM originating calls nor adequately explains the impact of the 18 cpm pricing compared with the 12 cpm under the PMTS Single and Dual Rate Undertakings on fixed-line carriers. Vodafone submits that the inclusion of MTAS pricing for calls originating overseas is not substantiated by either cost modelling or evidence that the LTIE will be promoted. Vodafone also submits that the 'cost of providing mobile termination to a mobile call from another carrier should be the same irrespective of the origination of the call inside or outside Australia'.

7.2.3. The Commission's view

Under section 152AH(1)(a) of the Act, in determining whether something is in the LTIE, the Commission must consider whether it is likely to promote competition, any-to-any connectivity, and the economically efficient use of, and investment in, infrastructure.

Section 5.2.3 outlines in detail the background to the LTIE criterion and the three main areas the Commission will consider in assessing whether the LTIE has been promoted:

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

In assessing the LTIE, the Commission considers these three issues.

Promoting competition

In considering the three main markets impacted by the MTAS service as outlined in section 5.2.3, the Commission concludes that:

- *The individual markets for MTAS on each MNO's network:* the Non-PMTS Undertakings proposes a higher rate than 12 cpm which Hutchison considers reflects 'the cost an efficient operator using forward-looking technology would incur in providing the same service.'[90] Further, for the reasons outlined in the section 5.2.3, the Commission is of the view that the Non-PMTS Undertakings will not (and in fact cannot) promote competition in the wholesale market for MTAS on Hutchison's networks;

[90] Hutchison, October 2005, p.19

- *The market within which FTM services are provided:* The Non-PMTS Undertakings would weaken competition in the market within which FTM services are supplied compared to the likely situation if the Non-PMTS Undertakings were rejected. This is because the Non-PMTS Undertakings would price the MTAS above the underlying cost of providing the service. As outlined in section 5.2.3, the Commission considers that a reduction in the price of the MTAS towards the underlying TSRLIC+ (cost of production) will most effectively promote competition in the market within which FTM services are provided. The Commission believes such reduction will encourage pass-through of MTAS cost savings in the form of retail FTM prices. The pricing outcomes that the Commission expects to emerge in the absence of the Non-PMTS Undertakings would be significantly lower than is proposed in the Non-PMTS Undertakings. Hence acceptance of the Non-PMTS Undertakings would result in an adverse impact on competition and would be less likely to promote competition in this market than rejection of the Non-PMTS Undertakings would.
- *Retail mobile services:* It is the Commission's view that prices set at the TSLRIC+ of supplying the MTAS, provide the best opportunity for promoting competition in the relevant markets, as all operators would then be forced to compete on the basis of their relative efficiencies and relative merits. The Commission's view is that reductions in the MTAS towards its TSLRIC+ of supply would be likely to result in pass-through, to some degree, of lower these cost reductions in the form of lower FTM retail prices. Further, the Commission notes that these price reductions may – but will not necessarily, due to the nascent nature of FTM substitution – place some downward pressure on retail mobile services prices. However, the Commission notes that any such competitive benefits are likely to be marginal if they occur at all, given that FTM substitution is in its nascent stages. If these possible improvements in competition in the market within which FTM services are not realised, however, the Commission considers that acceptance of the Non-PMTS Undertakings would be unlikely to negatively impact on the level of competition in that market. That is, at worst, the Commission believes that the level of competition in the retail mobile services market would be no worse than it would be if the Non-PMTS Undertakings were rejected.

Overall, the Commission does not believe that acceptance of the Non-PMTS Undertakings would promote competition in any of the relevant related markets compared with the situation that would arise if the Non-PMTS Undertakings were rejected. This is because the MTAS would be supplied at a rate higher than even a conservative estimate of the underlying cost of providing the service and well above both level the service is currently being priced at in the market and that the Commission expects would emerge (through both arbitral determinations and commercial negotiations) if the Non-PMTS Undertakings were rejected.

Conclusion in relation to promotion of competition

The Commission considers the Non-PMTS Undertakings price and conditions are more likely to inhibit competition in the relevant markets – particularly the market within which FTM services are provided – than if the Non-PMTS Undertakings were rejected. This is even more likely to be the case if one of the PMTS Undertakings was accepted.

Any-to-any connectivity

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

In the *MTAS Final Report*, the Commission concluded that any-to-any connectivity can be promoted through declaration of the MTAS, and this was a key reason for it defining the MTAS in such a way that it applies to termination of both FTM and MTM calls on all types of mobile networks. The Commission reached this conclusion due to the ability of established MNOs (having control over access to all consumers directly connected to their networks) to frustrate a new entrant's ability to offer a full end-to-end service to its subscribers by hampering supply of the MTAS on reasonable terms and conditions.

The Commission believes that the Non-PMTS Undertakings are consistent with the object of achieving any-to-any connectivity. As such, the Commission believes that the object of any-to-any connectivity is likely to be promoted regardless of whether the Commission accepts or rejects the Non-PMTS Undertakings.

Efficient use of, and investment in, infrastructure

Section 5.2.3 contains substantive detail about the Commission's view on how the LTIE are best promoted in respect of the efficient use of, and investment in, infrastructure.

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

As already noted Hutchison submits that '12 cpm is an appropriate price having regard to the fair and reasonable costs of providing the MTAS', and that the Commission views that the upper bound of

In this respect, Hutchison's Non-PMTS Undertakings are unlikely to promote efficient use of, and investment in, infrastructure as its proposed 18 cpm MTAS price for Non-PMTS calls is not based on the TSLRIC of supplying the MTAS. The Commission notes that Hutchison itself submits that '12 cpm is an appropriate price having regard to the fair and reasonable costs of providing the MTAS'. Given this, the Commission does not see how a MTAS price of 18 cpm could in any way be considered reasonable.

Second, the Commission notes that the pricing of MTAS above the underlying cost of production eases competitive pressure over the provision of the FTM services and may contribute to a further mark-up of prices above cost in this market. This in turn may provide further funds (from above normal returns on FTM services) for integrated operators to subsidise retail mobile services – such as through handset subsidies. The Commission notes that, by failing establish a price closer to the TSLRIC of supplying of the MTAS, the Non-PMTS Undertakings will likely have the effect of discouraging efficient investment in, and efficient use of, the infrastructure by which telecommunications services are provided – to some extent. Rather, the Commission believes it is likely that the price of the MTAS will move closer towards its optimal level, and more quickly, if the Non-PMTS Undertakings were to be rejected.

Accordingly, the Commission believes that the efficient investment in, and efficient use of, the infrastructure by which telecommunications services are provided will be more likely to be promoted if the Non-PMTS Undertakings were rejected rather than if they were to be accepted.

7.3. Legitimate business interests

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

In having regard to Hutchison's legitimate business interests, the Commission will use the 'future with and without' test.

7.3.1 Hutchison's view

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

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

7.3.2 Submitters' views

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

- 18 cpm price for the supply of the MTAS is not based on the TSLRIC;
- 18 cpm price exceeds the Commission's price guidelines established in the MSR;[91] and
- issue of pass-through is not relevant to the determination of TSLRIC.

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

Commission's view

Section 5.3.3. outlines the Commission's view on the meaning of legitimate business interests.

The Commission notes that the 18 cpm price for the supply of the MTAS under the Non-PTMAS Undertakings is well above the indicative prices included in the *MTAS Pricing Principles Determination*. Specifically, the Commission notes that, having

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[91] PowerTel submission, 22 December, page 7.

regard to the legitimate business interests of access seekers providers, an MTAS rate of 18 cpm was considered appropriate for the 2005 calendar year and a rate of 15 cpm for the 2006 calendar year. Further, the Commission notes that the 18 cpm price rate proposed by Hutchison is above what Hutchison itself acknowledges is a reasonable price for the MTAS. As noted earlier, Hutchison submits that '12 cpm is an appropriate price having regard to the fair and reasonable costs of providing the MTAS'.

The Commission notes that 18 cpm is more than necessary to meet Hutchison's legitimate business interests, particularly in light of its other submissions that 12 cpm is the appropriate MTAS price. Accordingly, the Commission is of the view that Hutchison's business interests would be met if the Commission accepted the Non-PMTS Undertakings. However, the Commission considers that the prices that are proposed are greater than what are necessary to protect the legitimate business interests of Hutchison and its investment in facilities used to supply the MTAS. In this regard, the Commission is of the view that Hutchison's legitimate business interests could be met through appropriately specified lower prices and as such would be sufficiently met if the Non-PMTS Undertakings were rejected.

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

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

In having regard to this criterion, the Commission will use the 'future with and without test'.

7.4.1 Hutchison's view

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

7.4.2 Submitters' views

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

7.4.3 Commission's view

The Commission's general view on the interests of persons who have the right to use the declared service is outlined in section 5.4.3.

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

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

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

The Commission also notes that the proposed rate of 18 cpm is above what it understands the service is being priced at, on average, in the market[92] – and also well above the price the Commission expects would emerge in the event the Non-PMTS Undertakings were rejected.

The Commission further notes the limited operating period of the Non-PMTS Undertakings. In this respect, the Commission agrees with submission by PowerTel that the Non-PMTS Undertakings fail to provide market certainty for any significant period of time.[93]

Accordingly, the Commission believes the interests of persons that have a right to use the declared service would be better promoted if the Non-PMTS Undertakings were to be rejected as compared to the situation that would likely arise if it were to be accepted.

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

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

Hutchison's view

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

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92 Between 15 and 18 cpm.

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

Submitters' view

PowerTel submits that the 18 cpm price for the supply of the MTAS under the Non-PMTS Undertakings exceeds the TSLRIC and the price guidelines established by the Commission in the *MTAS Final Report*.[94]

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

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

Commission's view

As already indicated in this report, the concept of the 'direct' costs of providing access to a declared service encompasses those that are necessarily incurred (or caused) by the provision of access. At a minimum, in this context, the phrase 'direct costs' is interpreted to mean that an access price should cover the direct incremental costs incurred in providing access. It does not, however, extend to receiving compensation for loss of any 'monopoly profits' that occurs as a result of increased competition. In this regard, the Explanatory Memorandum for the *Trade Practices Amendment (Telecommunications) Bill 1996* states:

> … the references here to the 'legitimate' business interests of the carrier or carriage service provider and to the 'direct' costs of providing access are intended to preclude arguments that the provider should be reimbursed by the third party seeking access for consequential costs which the provider may incur as a result of increased competition in an upstream or downstream market.[95]

This is also set out in the Commission's *Access Pricing Principles* which note that an access price should not be inflated to recover any profits the access provider (or any other party) may lose in a dependent market as a result of the provision of access.[96]

As noted previously in this Chapter, the Commission is of view that the 18 cpm price for the supply of the MTAS under the Non-PMTS Undertakings is above the pricing outcomes of 15 to 18 cpm currently negotiated between access seekers and providers and also in excess of the indicative prices included in the *MTAS Pricing Principles Determination*. Specifically, the Commission notes that an indicative rate for the supply of MTAS rate of 18 cpm was appropriate for the 2005 calendar year and a rate of 15 cpm for the 2006 calendar year in the *MTAS Pricing Principles Determination*, and that by 1 January 2007, a price of 12 cpm reflecting the conservative upper bound estimate of cost of 12 cpm was appropriate.

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

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94 PowerTel submission, 22 December, page 7.

95 Explanatory Memorandum to the *Trade Practices Amendment (Telecommunications) Bill 1996*, p. 44.

96 In particular, the Efficient Component Pricing Rule (ECPR) may be inconsistent with this criterion. The ECPR bases price on the incremental cost of providing the access service plus the opportunity cost of foregone profits from losing business in related markets.

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

The Commission's view is that an access price should not lead to arrangements between access providers and access seekers that encourage the unsafe or unreliable operation of a carriage service, telecommunications network or facility. This criterion is usually more relevant to consideration of non-price terms and conditions.

Hutchison submits that its Non-PMTS Undertakings offer an operationally and technically feasible service.

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

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

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

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

7.8. Other Matters

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

7.9. Overall reasonableness of price terms and conditions for the PMTS Dual Rate Undertaking

Having had regard to the criteria in section 152AH(1) and where relevant the use of the 'future with or without test' to assist the assessment of the Undertaking price terms and conditions against particular criteria, the Commission has concluded, based on the analysis in sections 7.1 – 7.8 as follows.

The Commission believes that acceptance of the Non-PMTS Undertakings would be unlikely to promote the LTIE, as it is unlikely to promote competition in the market within which FTM services are provided, and the market within which retail mobile services are provided, and is likely to lead to less efficient use of, and investment in, the infrastructure used to provide fixed services, and retail mobile services.

The Commission believes that the prices proposed in the Non-PMTS Undertakings are greater than what is necessary to protect the legitimate business interests of Hutchison and its investment in facilities used to supply the MTAS. The Commission also believes that Hutchison's legitimate business interests will not be compromised if the Non-PMTS Undertakings were to be rejected.

The Commission believes that acceptance of the Non-PMTS Undertakings would be unlikely to promote the interests of persons who have a right to use the MTAS.

The Commission believes that the proposed prices set out in the Non-PMTS Undertakings are above what is necessary to recover the direct costs Hutchison faces in providing access to the MTAS in the relevant period.

The Commission believes that the price terms and conditions in the Non-PMTS Undertakings will not lead to arrangements between access providers and access seekers that encourage the unsafe or unreliable operation of a carriage service, telecommunications network or facility.

The Commission believes that acceptance of the Non-PMTS Undertakings would be unlikely to promote the economically efficient operation of a carriage service/telecommunications network/facility.

Overall, therefore, the Commission is of the view that the price terms and conditions in the Non-PMTS Undertakings are not reasonable.

8. The reasonableness of the price terms and conditions for the alternative Undertakings combinations

The Commission must not accept an undertaking unless it is satisfied that the terms and conditions are 'reasonable' based on the criteria set out in section 152AH of the Act. This chapter considers the reasonableness of the *price* terms and conditions in the alternative PMTS Undertakings combined with the Non-PMTS Undertakings.

In forming a view about whether the price terms and conditions are reasonable, the Commission must have regard to the range of matters set out in section 152AH(1) of the Act, which are summarised in section 3.2.4 of this report.[97]

The structure of this Chapter is to provide a brief assessment of the two alternative combinations of the PMTS and Non-PMTS undertakings proposed by Hutchison and the Commission's view on the reasonableness of the price conditions in the alternatives proposed.

8.1. Background of the Undertakings as Alternatives

8.1.1 Hutchison's views

As outlined previously Hutchison as asked that:

> The PMTS Dual Rate Undertakings and the PMTS Single Rate Undertaking are submitted by Hutchison alternatives.
>
> Hutchison submits that the LTIE is best served by the Commission accepting the PMTS Dual Rate Undertaking coupled with the Non-PMTS Undertaking.
>
> Hutchison submits that the LTIE would also be served by the Commission accepting the PMTS Single Rate Undertaking coupled with the Non-PMTS Undertaking. This approach, however, would not be as beneficial to the LTIE as the former approach,
>
> Notwithstanding the views expressed above, Hutchison submits that each individual Undertaking promotes the LTIE. Acceptance of one or more of the Undertakings submitted by each of HTAL and H3GA would therefore be in the LTIE.[98]

8.1.2 Submitters' views

The Submitters' for each of the Undertakings is outlined in Chapters 5 to 7. These are not repeated here.

8.1.3 Commission's application of the reasonableness test

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

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

98 Hutchison submission, p. 5.

undertaking with another reasonable undertaking so that 'on balance' the combined Undertakings are reasonable.

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

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

Background to the statutory criteria and the Commission's approach to applying the reasonableness test has been outlined in Chapter 5 in detail, and assessed against each of the individual Undertakings in Chapters 5 to 7.

This Chapter considers the findings of the reasonableness of the price terms and conditions in the Undertakings outlined in previous sections and briefly assesses the reasonableness of price terms and conditions of the combined Undertakings, as proposed by Hutchison. The Commission's separate assessment of the reasonableness price terms and conditions of each of the combinations is considered below.

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

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

In Chapters 6 and 7, the Commission found that it could not accept the reasonableness of the price terms and conditions of either the PMTS Dual Rate Undertakings and the Non-PMTS Undertakings.

These reasons for this assessment are restated below for convenience.

8.2.1 Reasonableness of the price terms and conditions of the PMTS Dual Rate Undertakings

Specifically, the Commission has found that the:

- PMTS Dual Rate Undertakings are unlikely to promote the LTIE, as they are unlikely to encourage competition in the market within which FTM services are provided, and the market within which retail mobile services are provided, They are un likely to lead to efficient use of, and investment in, the infrastructure used to provide fixed services, the MTAS and retail mobile services. This is because the default usage charge for the MTAS is greater than the cost of supplying the service. The proposed default usage charge of 21 cpm is above what the Commission understands the service is currently being priced at in the market (between 15 and 18 cpm) and well above the prices the Commission expects would emerge if the PMTS Dual Rate Undertakings were rejected.
- differential pricing for MTM MTAS explicit in the PMTS Dual Rate Undertakings will sustain MTAS prices that are greater than are necessary to

protect the legitimate business interests of Hutchison and its investment in facilities used to supply the MTAS. The Commission also believes that Hutchison's legitimate business interests will not be compromised if the PMTS Dual Rate Undertakings were to be rejected.

- acceptance of the PMTS Dual Undertakings would be unlikely to promote the interests of persons who have a right to use the MTAS.
- differential pricing that would result from acceptance of the PMTS Dual Rate Undertakings would mean that, in some instances, prices would be above what is necessary to recover the direct costs Hutchison faces in providing access to the MTAS in the relevant period.
- price terms and conditions in the PMTS Dual Rate Undertakings would not lead to arrangements between access providers and access seekers that encourage the unsafe or unreliable operation of a carriage service, telecommunications network or facility.
- acceptance of the PMTS Dual Rate Undertakings would be unlikely to promote the economically efficient operation of a carriage service/telecommunications network/facility.

Overall, therefore, the Commission is of the view that the price terms and conditions in the PMTS Dual Rate Undertakings are not reasonable.

8.2.2. Reasonableness of the price terms and conditions of the Non-PMTS Undertakings

In respect of the specific statutory criteria the Commission's findings were that the:

- Non-PMTS Undertakings are unlikely to promote the LTIE, as it is unlikely to promote competition in the market within which FTM services are provided, and the market within which retail mobile services are provided. It is also unlikely to lead to efficient use of, and investment in, the infrastructure used to provide fixed services, and retail mobile services. This is because the proposed price of the MTAS is significantly greater than a conservative estimate of the underlying the cost of supplying the service and well above both level the service is currently being priced at in the market and that the Commission expects would emerge if the Non-PMTS Undertakings were rejected.
- prices proposed in the Non-PMTS Undertakings are greater than what is necessary to protect the legitimate business interests of Hutchison and its investment in facilities used to supply the MTAS. The Commission also believes that Hutchison's legitimate business interests will not be compromised if the Non-PMTS Undertakings were to be rejected.
- acceptance of the Non-PMTS Undertakings would be unlikely to promote the interests of persons who have a right to use the MTAS. The proposed price of 18 cpm is above the estimated price agreed between access seekers and providers for the supply of the MTAS (between 15 and 18 cpm) and above both level the service is currently being priced at, on average, in the market and that the Commission expects would emerge if the Non-PMTS Undertakings were rejected.

- proposed prices set out in the Non-PMTS Undertakings are above what is necessary to recover the direct costs Hutchison faces in providing access to the MTAS in the relevant period.
- price terms and conditions in the Non-PMTS Undertakings will not lead to arrangements between access providers and access seekers that encourage the unsafe or unreliable operation of a carriage service, telecommunications network or facility.
- Non-PMTS Undertakings would be unlikely to promote the economically efficient operation of a carriage service/telecommunications network/facility.

Overall, therefore, the Commission is of the view that the price terms and conditions in the Non-PMTS Undertakings are not reasonable.

8.2.3. Conclusion about the reasonableness of the price terms and conditions of the PMTS Single Undertakings and the Non-PMTS Undertakings

As a consequence of finding that the price terms and conditions of the PMTS Dual Rate Undertakings and the Non-PMTS Undertakings were individually unreasonable for the reasons summarised above and outlined in Chapters 6 and 7, the Commission finds that combined the price terms and conditions of these Undertakings are unreasonable. Further, the Commission believes the differential prices that would arise should these two Undertakings be accepted together is likely to exacerbate the distortions that exist as a result of above cost pricing of the MTAS and is therefore likely to promote inefficient use of, and investment in telecommunications infrastructure.

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

Hutchison submits that the LTIE would also be served by the acceptance of the Single Rate Undertakings coupled with the Non-PMTS Undertakings, even though this would not be as beneficial as the coupling of the PMTS Dual Rate Undertakings and the Non-PMTS Undertakings. The PMTS Single Rate Undertakings were submitted as an alternative to the PMTS Dual Rate Undertakings to accommodate the possibility that the Commission may regard the optional rate of 21 cpm as a departure from its MTAS pricing principle which affects the reasonableness of the PMTS Dual Rate Undertakings.[99]

In Chapters 5 and 7, the Commission found that it could not accept the reasonableness of the price terms and conditions of both the PMTS Single Rate Undertakings and the Non-PMTS Undertakings.

These reasons for this assessment are summarised below for convenience.

8.3.1 Reasonableness of the price terms and conditions of the PMTS Single Rate Undertakings

In respect of the specific statutory criteria the Commission's findings were that the:

- acceptance of the PMTS Single Rate Undertakings would be likely to promote the LTIE by promoting (and at worst have no effect on) competition in relevant related markets and lead to efficient use of, and investment in, the infrastructure in these markets. This is because the proposed price of 12 cpm

[99] Hutchison submission p. 6.

acceptance of the Undertakings may result in MTAS prices reaching this expected level in a shorter period of time than might otherwise occur if the PMTS Single Rate Undertakings were rejected.

- price terms and conditions set out in the Single Rate PMTS Undertakings do not compromise Hutchison's legitimate business interests.
- acceptance of the Single Rate PMTS Undertakings would be unlikely to adversely impact the interests of persons who have a right to use the MTAS
- acceptance of the PMTS Single Rate Undertakings would mean that in some instances the supply of MTAS for MTM calls would be priced at 12 cpm. The Commission believes this price point is more reflective of the direct costs of supplying the MTAS.
- price terms and conditions in the PMTS Single Rate Undertakings will not lead to arrangements between access providers and access seekers that encourage the unsafe or unreliable operation of a carriage service, telecommunications network or facility.
- acceptance of the PMTS Single Rate Undertakings would be likely to promote the economically efficient operation of a carriage service/telecommunications network/facility.

Overall, therefore, the Commission is of the view that the price terms and conditions in the PMTS Single Rate Undertakings are reasonable.

8.3.2 Reasonableness of the price terms and conditions of the Non-PMTS Undertakings

The Commission is of the view that the price terms and conditions in the Non-PMTS Undertakings are not reasonable, as outlined in Chapter 7 and section 8.2 above.

8.3.3 Conclusion about the reasonableness of the price terms and conditions of the PMTS Single Undertakings and the Non-PMTS Undertakings

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

8.4. Conclusion

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

9. The 'reasonableness' of the non-price terms and conditions

As noted previously, determining whether the terms and conditions of the Undertakings are reasonable must include an assessment of both the price and non-price terms and conditions taken as a whole. This Chapter considers the reasonableness of the non-price terms and conditions. An overview of the non-price terms and conditions of the Undertakings is provided in 4.3 of this report.

It will be noted that some of the criteria set out in section 152AH(1) of the Act are not particularly directed at the non-price terms and conditions. For instance, the criterion dealing with the 'direct cost' of providing access to the declared service, and the economically efficient operation of a carriage service appear more relevant to considering the price terms and conditions. There are, however, a number of criteria that lend themselves to consideration from a non-price perspective. These, and how they are relevant to the non-price terms and conditions, are discussed more fully below.

9.1. Relevant criteria

9.1.1. Whether the terms and conditions promote the LTIE

As previously discussed, the Act requires the Commission to have regard to whether the terms and conditions promote the LTIE. This is to be assessed against the following objectives:

- promoting competition in markets for a relevant service which includes consideration of whether a thing will remove obstacles to end-users gaining access to those services;
- achieving any-to-any connectivity; and
- encouraging the economically efficient use of, and the economically efficient investment in the infrastructure by which relevant services are provided:
    - the infrastructure by which relevant services are supplied; and
    - any other infrastructure by which listed services are, or are likely to become capable of being supplied.

An important benchmark in assessing whether competition will be promoted is the consistency of the proposed terms of access with the principle of non-discriminatory access between downstream suppliers of end-to-end services which include the Hutchison MTAS. Ultimately, a proposal for access must represent an opportunity for effective access by an access seeker to the particular service. More broadly, an effective form of access should lead to the promotion of competition, lead towards achieving any-to-any connectivity and also contribute toward the efficient use of, and investment in, infrastructure.

9.1.2. Legitimate business interests of the Carrier/CSP and its investment in the facilities used to supply the declared service

This criterion requires the Commission to take into account the legitimate business interests of the access provider. In relation to the non-price terms and conditions, the Commission views this criterion as requiring an assessment of the broader

commercial interests of the access provider in conducting its own business affairs. An access provider, as an owner or controller of particular facilities, should not, simply because it is under an obligation to provide access to its service, be unduly compromised in the conduct of its own legitimate business interests. For instance, an access provider must have the right to make reasonable decisions about modifications and upgrades to its network or the right to set reasonable requirements for billing and the payment of accounts. Generally speaking, an access provider is entitled to have some legitimate control over its relationship with an access seeker to the extent reasonably required to protect its business concerns.

9.1.3. Interests of the persons who have rights to use the declared service

This criterion requires the Commission to take into account the interests of persons who have rights to use the declared service. In this regard, the Commission's focus is not on any one particular access seeker, but all potential access seekers who may seek to use the declared service.

The Commission's approach is to recognise that simply because an access provider is the owner or controller of a facility and provider of the particular service, this does not mean that the provider can dictate the terms of access such that the form of proposed access does not represent a commercially feasible business model for the access seeker. This is about ensuring that the ability of an access seeker to compete in the supply of a service in a dependent market is based on the cost and quality of its service relative to its competitors' rather than about ensuring that an access seeker is able to conduct a profitable business. As noted above in terms of non-discriminatory treatment of downstream users, an access seeker should not be subject to overly onerous commercial terms simply because of its status as an access seeker.

On this basis, from a non-price perspective, the Commission would, for example, expect an access seeker to receive reasonable treatment in relation to payments and creditworthiness matters and not be subject to unjustified intrusion into its business affairs, face unwarranted suspension of services or be compromised in other facets of business where its customer relationship may be impacted.

9.1.4. Operational and technical requirements necessary for the safe and reliable operation of the carriage service, network or facility

Similar to the criterion relating to the legitimate business interests, this criterion requires the Commission to take into account the need for the safe and reliable operation of a network or facility. An access provider will generally seek to have in place operations and procedures designed to ensure the integrity of a network or facility is not harmed. Non-price terms and conditions such as these are considered necessary and essential to safeguard the business interests of both the provider and access seeker, provided they are reasonable. In this regard, the Commission would be concerned to ensure that any non-price terms and conditions, purportedly in relation to the safe operation of a network, are not used as a barrier to effective access.

9.1.5. Other relevant matters

The Commission is not limited in its assessment of reasonableness to these criteria but may consider other matters relevant to the reasonableness of the non-price terms and conditions.

The Commission considers there are some common themes or indicia arising from these statutory criteria that serve as a useful guide to the Commission's assessment of the non-price terms and conditions. They are as follows.

A non-price issue may arise in relation to **timeliness**. That is, the time it takes for an access seeker to obtain access or any other matter related to access. This will include an assessment of the process an access seeker must negotiate to obtain access.

Intertwined with this concept is the issue of **delay** or **potential for delay** in providing access. Unreasonable delay is tantamount to no access. In relation to the above issues, the Commission will look at conditions that specify timeframes and preconditions that may attach to timeframes in the context of what potential obstacles to access may exist.

As the Undertakings will govern the terms and conditions of access and form the basis on which Hutchison will satisfy the applicable SAOs, there should be **certainty** in the terms of the agreement. This certainty should be reflected in the technical and non-technical aspects of the agreement. Silence or lack of clarity in an agreement may deprive an agreement of certainty. The Undertakings have to provide certainty on the face of the proposed agreement. That is, it should not require the Commission to make inquiries to seek clarification as to the intended terms and operation of an agreement.

The Commission is generally concerned to see that Undertakings (if they deal with dispute resolution) have clear and decisive mechanisms for resolving disputes in a timely manner, especially since an access seeker will not be able to avail itself of the arbitration route once an Undertaking is accepted.

Encompassing all of the above matters are the concepts of **fairness** and **balance**. As noted above, the criteria require the Commission to have regard to the interests of both the access provider and seeker. Accordingly, Undertakings should reflect the balanced rights of these parties. In this regard, terms and conditions that tend to unfairly treat an access seeker, in comparison to the rights of an access provider, might be regarded as unreasonable.

In deciding whether particular non-price terms and conditions are reasonable, the Commission will to some extent also be guided by any applicable ACIF Codes relevant to the matters under consideration, as well as having regard to current industry norms and practices.

The reasonableness of the non-price terms and conditions are assessed on this basis.

9.2. Assessment of the non-price terms and conditions

9.2.1. Hutchison's overall view as to reasonableness

Hutchison states that:

> The terms and conditions contained in the Undertakings and their combined effect satisfy the relevant statutory factors. The Undertakings are therefore reasonable and should be accepted by the Commission in the manner proposed by Hutchison.[100]

9.2.2. Submitters' overall views as to reasonableness

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

[100] Hutchison submission, p.19.

considered when applying the statutory criteria.'[101] Telstra further submits that adopting the 'combined effect' approach goes against previous Commission practice whereby the Commission had found that every term and conditions in an undertaking must be reasonable, and, if one term of an undertaking is unreasonable, then the undertaking must be rejected.[102]

In relation to Hutchison's proposed arrangements for dealing with existing or future access agreements, Telstra submits:

- the Undertakings cannot override any existing commercial agreements in the manner set out in clause 4.1 of the Undertakings;[103]
- as the Commission has not been provided with copies of existing agreements, the Commission does not have sufficient information to form a view as to the reasonableness of those terms and conditions;[104]
- given that the definition of 'existing agreements' includes agreements for MTAS or 'any other service such as SMS or MMS', there may be multiple relevant agreements and, if so, the Undertaking does not establish an order of precedence for these agreements nor is there any indication as to which existing agreement is to be incorporated pursuant to clause 5.2;[105] and
- in relation to Hutchison's submission that Attachment B is closely based on Annexure A to the *Telecommunications Access Code 1998*, this is insufficient of itself to establish the reasonableness of the terms and conditions.[106]

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

- clauses 7.7 through 7.9 of Attachment B are unreasonable insofar as they allow Hutchison to demand and set the quantum of security that Hutchison will require to supply MTAS services; and
- clause 13.10 is unreasonable insofar as it provides that the Agreement may be terminated on 5 business days notice if the parties cannot agree on an amendment to the Agreement within 90 days of commencement of negotiations in relation to that proposed amendment.[107]

Finally, Telstra questions the 'alternative Undertakings' approach used by Hutchison, but merely seeks guidance from the Commission as to the validity of this approach.

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

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101 Telstra submission, p.4.
102 *Ibid.*
103 *Ibid*.
104 *Ibid*., pp.5 and 12.
105 *Ibid*., p.12.
106 *Ibid*.
107 *Ibid*., p.5

9.2.3. Commission's assessment of specified non-price terms and conditions

This section contains the Commission's assessment of the non-price terms and conditions provisions. It focuses on those non-price terms and conditions of most significance and concern to the Commission.

Effect of the Undertakings on existing commercial agreements

Clause 4.1 of the Undertakings provides that:

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

The Commission is concerned that there appears to be no statutory or lawful basis on which an Undertaking, even if it has been accepted by the Commission, could override an existing commercial agreement between third parties. Certainly, Hutchison has not indicated the legal basis on which it believes that the Undertakings can override existing commercial agreements in this way. In fact, given the structure and language of section 152AY, the statutory presumption appears to be the opposite – commercial agreements will take precedence over undertakings and not vice versa.

Prima facie, therefore, the legal validity of clause 4.1 is uncertain. As such, it may lead to confusion and argument between the parties as to its effect. Hutchison itself refers to the preference for terms and conditions to protect the interests of access seekers and create certainty regarding the supply of services.[108] In some cases, parties may have to resort to legal proceedings in order to determine the operation of clause 4.1. When the Commission also takes into account that:

- it is in the LTIE that access terms and conditions are clearly established prior to access being undertaken or products being offered; and
- a lack of certainty is likely to have a significant, direct impact on the interests of persons who have rights to use the declared service;
- the Commission is not satisfied that clause 4.1 is reasonable.

In reaching this conclusion, the Commission has also taken into account the possibility that Hutchison's existing agreements contain provisions which reflect clause 4.1, and which specify that the agreements may be overridden on the commencement of an undertaking. However:

- the Commission has not been provided with copies of any such agreements for the purpose of assessment of the Undertakings;
- Hutchison has not indicated in its submissions that the agreements include such provisions; and
- even if the existing agreements do include a relevant provision, the Commission cannot be satisfied that agreements that would come into effect between now and the date of commencement of the Undertakings would all include the relevant provision,

The Commission has also taken into account the relationship between clauses 4.1 and 5. The Commission notes that it might be possible to argue that the combined effect of clauses 4.1 and 5 is that the '"overridden' agreement is in fact 'saved' by virtue of clause 5.2 (i.e. the overridden agreement was 'in effect' on the relevant day).

[108] Hutchison submission, p.12

However, the end result of this argument is by no means certain. It is this uncertainty that leads the Commission to question the reasonableness of the clause.

Hence, based on the information before it, the Commission is not satisfied that clause 4.1 is reasonable.

Terms and Conditions contained in 'existing agreements'

Clause 5 of the Undertakings provides as follows:

> 5.1 [Hutchison] undertakes to the Commission that while this Undertaking is in effect, it will provide Access Seekers with the [relevant Hutchison service]:
>
> (a) on the terms and conditions specified in Attachment A; and
>
> (b) on such other terms (the **Non-price Terms**) as determined in accordance with clause 5.2 or 5.4.
>
> 5.2 Where an Access Seeker has an agreement with [Hutchison] for the supply of the mobile terminating access service or any other service such as SMS or MMS that is in force on the date on which this Undertaking commences (an **Existing Agreement**), the supply of the [relevant Hutchison service] will be governed by all the Non-price Terms in the Existing Agreement.
>
> 5.3 For the avoidance of doubt, if an Existing Agreement governs the supply of the [relevant Hutchison service] by reason of clause 5.2, the terms of this Undertaking will prevail to the extent of the inconsistency.
>
> 5.4 Where an Access Seeker does not have an Existing Agreement, the Non-price Terms contained in Attachment B will govern the supply of the [relevant Hutchison service].

Hutchison submits that this arrangement provides two alternative sources of non-price related terms and conditions on which it will supply the MTAS:

- the access seeker's existing agreement with Hutchison for the supply of the MTAS, SMS, MMS or any other service (the **existing agreement option**); or
- the non-price terms and conditions contained in Attachment B to the Undertakings.[109]

In relation to the **existing agreement option**, Hutchison submits that the interests of access seekers are accommodated by the existing agreements, as the terms and conditions were arrived at through commercial negotiation.

In considering Undertakings, the Commission is obliged to assess all the terms and conditions which are said to form part of the Undertakings. In the present case, the proposed net effect of the 'existing agreement option' is that all 'consistent' terms and conditions are to be read into the Undertaking, while inconsistent clauses are replaced by the relevant clauses set out in Attachment B.[110]

The proposed approach raises a number of practical difficulties for the Commission's assessment of the terms and conditions of the Undertakings, namely:

1. The 'existing agreement option' refers to agreements for the supply of MTAS or any other services (such as SMS or MMS) which are 'in force on the date on which [the] Undertaking commences'. This has the potential to incorporate

[109] Hutchison submission, p.12.

[110] This is different to the situation where a carrier or CSP gives an Undertaking which does not attempt to stipulate all the terms and conditions of access.

a wide range of agreements, any number of which may bear no practical or commercial relevance to MTASs. When negotiating these agreements, the relevant access seekers may have had no knowledge or appreciation that these agreements could or would form part of an MTAS access arrangement. Therefore, and notwithstanding Hutchison's submission, the Commission cannot be satisfied that the interests of MTAS access seekers have in fact been accommodated via commercial negotiation nor that 'commercially negotiated' agreements are therefore reasonable within the meaning of section 152AH of the Act.

2. Because the Commission has not been provided with copies of the existing agreements relied upon, the Commission cannot be satisfied at this time that the terms and conditions of those agreements which would be incorporated into the Undertaking would be reasonable.

3. Even if the Commission was provided with existing agreements, the Commission would still not be able to undertake the necessary assessment, nor be satisfied that the terms and conditions were reasonable. There are several reasons for this:

    a. while clause 5.2 refers to agreements for MTAS or any other service, it does not specify an order of precedence for those agreements. Therefore, neither the Commission nor the access seeker has any way of knowing which existing agreement should be assessed;

    b. even if the Commission could assess each existing agreement and was satisfied that all the various terms and conditions contained in all the existing agreements were prima facie reasonable, this still would not answer the question of which agreement would be incorporated. This is sufficient in itself to find that the level of uncertainty for the Commission and the access seeker is too high to be reasonable; and

    c. clause 5.2 states that agreements which are 'in force place on the date on which the Undertaking commences' are to be considered 'existing agreements'. The Undertaking comes into effect immediately after the Commission provides Hutchison with written notice of the Commission's acceptance of the undertaking (clause 4.2). Therefore, Hutchison could enter into an agreement between the time that the Commission makes its decision and communicates that decision to Hutchison. As such, those terms and conditions would be incorporated into the Undertaking, but would not have been properly assessed by the Commission.

4. Further, while clause 5.3 could bring the existing agreements into line with the Attachment B provisions, this does not assist the Commission in conducting its assessment. Again, there are a number of reasons for this, namely:

    a. clause 5.3 only operates to the extent of an 'inconsistency'. It has no role where the existing agreements may in fact contain additional terms and conditions which are not 'inconsistent' and would therefore survive the incorporation process. For the reasons set out above in (3), the Commission has no effective means of being satisfied that the terms and conditions it might review will be the only terms and conditions that will be incorporated at the relevant time. Therefore, the

Commission cannot even undertake a full assessment of the reasonableness of the potential 'additional' terms and conditions, let alone determine which might or might not be incorporated after the inconsistency clause is applied; and

b. it may be the subject of considerable debate by the parties to the agreements as to whether the 'inconsistency' clause is triggered, and with what effect. This may result in legal action - a decision on which may or may not be handed down prior to the Commission issuing its decision. Again, this leads to a level of uncertainty for the Commission and the access seeker which is not reasonable.

5. Finally, for reasons similar to those set out in relation to clause 4.1, the Commission is not satisfied that is appropriate or reasonable for clause 5.3 to attempt to unilaterally amend existing agreements.

Accordingly, the Commission is not satisfied that clause 5 is reasonable.

Terms and conditions contained in Attachment B

Hutchison submits that Attachment B is 'closely based' on the model terms and conditions in Annexure A to the *Telecommunications Access Code* 1998. Hutchison also submits that the terms and conditions in Attachment B 'protect the interests of access seekers and create certainty regarding Hutchison's supply of the MTAS.'

Telstra submits that it has one general and two specific concerns regarding the reasonableness of Hutchison's proposed terms and conditions set out in Attachment B. The general concern relates to whether or not the fact that Attachment B is closely modelled on Annexure A to the *Telecommunications Access Code* 1988 is sufficient to meet the statutory requirements related to reasonableness. The specific concerns relate to security and termination.

Annexure A of the Telecommunications Access Code 1998

In its *Final Determination – Model Non-price Terms and Conditions (October 2003)* (Model Non-price Terms and Conditions), the Commission stated that parts of the *TAF Code* (officially known as the *Telecommunications Access Code 1998*) were useful in terms of what could be considered fair and reasonable terms and conditions of access. Accordingly, the Commission was itself guided by parts of the *TAF Code* in developing its model terms and conditions where it considered that the provisions represented fair and reasonable terms and conditions of access and were appropriate to address the particular matters in question.[111] Therefore, as early as 2003, the Commission indicated that the terms and conditions specified in the *TAF Code* did not necessarily reflect reasonable terms and conditions in all cases. In part, this recognises that the Commission is obliged to have regard to the statutory considerations, rather than merely confirm that the proposed terms and conditions are consistent with an industry code.

In coming to its decision in this matter, the Commission has assessed the proposed terms and conditions in accordance with section 152AH. In doing so, it has also taken into account the matters raised in the *Model Non-price Terms and Conditions* and the submissions of the parties. Having regard to these matters, the Commission believes that if it was certain the terms and conditions set out in Attachment B would become

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

the terms and conditions of the Undertakings, and the matters set out below could be satisfactorily addressed, it is likely that the terms and conditions would be assessed as reasonable. However, for the reasons set out above, the Commission cannot be satisfied that the Attachment B terms and conditions will be incorporated into the Undertakings. As such the Commission finds that the Undertakings, as submitted to the Commission are not reasonable.

For the sake of completeness, the Commission's specific findings in relation to security and termination arrangements are set out below.

Security

Clauses 7.7 through 7.9 are relevant and provide:

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

Telstra states that this means that Hutchison has an 'unlimited ability…to demand and set the quantum of security' and that this is unreasonable.[112]

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

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

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

[112] Telstra submission, p.5.

While the Commission does have some concerns regarding the potential open-endedness that the expression 'not less than 3 months' implies, the Commission does not agree with Telstra's assertion that Hutchison's ability to set levels of security is *'unlimited'*. The period is still limited to what is 'reasonable' in the circumstances, and the parties have an obligation to act in good faith (clause 14.4).

The Commission does note however, that it is preferable for Undertakings lodged pursuant to section 152BV to provide greater certainty and clarity for all parties from the outset. If the Undertakings did so, it would significantly reduce the likelihood of disputes occurring and arguments arising over what "reasonable" means in the particular circumstances.

Termination

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

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

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

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

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

9.3. Conclusion on non-price terms and conditions

Section 152BV provides that the Commission must not accept an Undertaking unless the Commission is satisfied that the terms and conditions specified in the Undertaking are reasonable. As noted above, Hutchison submits that 'the terms and conditions contained in the Undertakings and their combined effect satisfy the relevant statutory criteria' (presumably sections 152BV and 152BH) and are therefore reasonable and should be accepted by the Commission.

The Commission has previously indicated that reasonableness is assessed both in terms of particular terms and conditions and overall having regard to the relevant criteria.

In the present case, the Commission cannot be satisfied as to the reasonableness of particular clauses (i.e. clauses 4.1, 5.2 and 5.3) nor of the proposed scheme as a whole. At present, the Undertakings seek to incorporate an unknown number of existing agreements and provisions. Those agreements may not be entered into until some time after the Commission has completed its assessment. The Commission cannot therefore be satisfied that it has seen all the relevant terms and conditions and that they are reasonable. Nor is there certainty as to the operation and effect of clauses 4 and 5. This leaves both the Commission and potential access seekers without the necessary clarity and certainty as to the final terms and conditions. Accordingly, the Commission is of the view that, in the proposed model, the non-price terms and conditions are not reasonable.

The Commission does note however, that, had it been certain that Attachment B *would* form the terms and conditions of the Undertakings and the Commission's concerns regarding clauses 7.7 through 7.9 could be overcome, it is likely that the non-price terms and conditions would have been considered reasonable.

10. Overall Reasonableness of the Terms and Conditions of the Undertakings

Accordingly, as the Commission is not satisfied that the terms and conditions in the Undertakings are reasonable, the Commission's decision is that the Undertakings be rejected. The reasons for this decision are restated again for convenience.

10.1. Reasonableness of PMTS Single Rate Undertakings

Having had regard to the criteria in section 152AH(1) of the Act the Commission has concluded as follows.

The Commission believes that acceptance of the PMTS Single Rate Undertakings would, be more likely than less likely to promote the LTIE by at worst not impacting but more likely promoting competition in relevant markets and lead to a more efficient use of, and investment in, the infrastructure in these markets.

The Commission considers that the price terms and conditions set out in the Single Rate PMTS Undertakings do not compromise Hutchison’s legitimate business interests.

The Commission believes that acceptance of the PMTS Single Rate Undertakings would, as compared to the situation likely to occur if it were rejected, would not adversely impact the interests of persons who have a right to use the MTAS.

The Commission considers that acceptance of the PMTS Single Rate Undertakings would mean that in some instances the supply of MTAS for MTM calls would be priced at 12 cpm. This price point would be more in line with the direct costs of supplying the MTAS than higher prices that would likely prevail in the absence of the PMTS Single Rate Undertakings.

The Commission believes that the price terms and conditions in the PMTS Single Rate Undertakings will not lead to arrangements between access providers and access seekers that encourage the unsafe or unreliable operation of a carriage service, telecommunications network or facility.

The Commission believes that acceptance of the PMTS Single Rate Undertakings would, as compared to the situation likely to occur if it were rejected, be more likely to promote the economically efficient operation of a carriage service/telecommunications network/facility.

The Commission considers that the non-price terms and conditions are not reasonable for the PMTS Single Rate Undertakings because they seek to incorporate an unknown number of existing agreements and provisions.

Overall, therefore, the Commission is of the view that even though the price terms and conditions are reasonable, the non-price terms and conditions relevant to the PMTS Single Rate Undertakings are not reasonable. Consequently, the Commission considers that overall the terms and conditions in the PMTS Single Rate Undertakings are not reasonable.

10.2. Reasonableness of PMTS Dual Rate Undertakings

Having had regard to the criteria in section 152AH(1) of the Act the Commission has concluded as follows.

The Commission believes that acceptance of the PMTS Dual Rate Undertakings would, as compared to the situation likely to occur if it were rejected, be less likely to promote the LTIE, as it is less likely to promote competition in the market within which FTM services are provided, and the market within which retail mobile services are provided, and is likely to lead to less efficient use of, and investment in, the infrastructure used to provide fixed services, the MTAS and retail mobile services.

The Commission believes that the differential pricing implicit in the PMTS Dual Rate Undertakings will sustain MTAS prices that are greater than what is necessary to protect the legitimate business interests of Hutchison and its investment in facilities used to supply the MTAS. The Commission also believes that Hutchison's legitimate business interests will not be compromised if the PMTS Dual Rate Undertakings were to be rejected.

The Commission believes that acceptance of the PMTS Dual Undertakings would, as compared to the situation likely to occur if it were rejected, be less likely to promote the interests of persons who have a right to use the MTAS.

The Commission believes that the differential pricing that would result from acceptance of the PMTS Dual Rate Undertakings would mean that in some instances prices would be above what is necessary to recover the direct costs Hutchison faces in providing access to the MTAS in the relevant period.

The Commission believes that the price terms and conditions in the PMTS Dual Rate Undertakings will not lead to arrangements between access providers and access seekers that encourage the unsafe or unreliable operation of a carriage service, telecommunications network or facility.

The Commission believes that acceptance of the PMTS Dual Rate Undertakings would, as compared to the situation likely to occur if it were rejected, be less likely to promote the economically efficient operation of a carriage service/telecommunications network/facility.

The Commission considers that the non-price terms and conditions are not reasonable for the PMTS Dual Rate Undertakings because they seek to incorporate an unknown number of existing agreements and provisions.

Overall, therefore, the Commission is of the view that terms and conditions in the PMTS Dual Rate Undertakings are not reasonable.

10.3. Reasonableness of Non-PMTS Undertakings

Having had regard to the criteria in section 152AH(1) the Commission has concluded as follows.

The Commission believes that acceptance of the Non-PMTS Undertakings would, as compared to the situation likely to occur if it were rejected, be less likely to promote the LTIE, as it is less likely to promote competition in the market within which FTM services are provided, and the market within which retail mobile services are provided, and is likely to lead to less efficient use of, and investment in, the infrastructure used to provide fixed services, and retail mobile services.

The Commission believes that the prices proposed in the Non-PMTS Undertakings are greater than what is necessary to protect the legitimate business interests of Hutchison and its investment in facilities used to supply the MTAS. The Commission also believes that Hutchison's legitimate business interests will not be compromised if the Non-PMTS Undertakings were to be rejected.

The Commission believes that acceptance of the Non-PMTS Undertakings would, as compared to the situation likely to occur if it were rejected, be less likely to promote the interests of persons who have a right to use the MTAS.

The Commission believes that the proposed prices set out in the Non-PMTS Undertakings are above what is necessary to recover the direct costs Hutchison faces in providing access to the MTAS in the relevant period.

The Commission believes that the price terms and conditions in the Non-PMTS Undertakings will not lead to arrangements between access providers and access seekers that encourage the unsafe or unreliable operation of a carriage service, telecommunications network or facility.

The Commission believes that acceptance of the Non-PMTS Undertakings would, as compared to the situation likely to occur if it were rejected, be less likely to promote the economically efficient operation of a carriage service/telecommunications network/facility.

The Commission considers that the non-price terms and conditions are not reasonable for the Non-PMTS Undertakings because they seek to incorporate an unknown number of existing agreements and provisions.

Overall, therefore, the Commission is of the view that the terms and conditions in the Non-PMTS Undertakings are not reasonable.

10.4. Reasonableness of the Undertakings as alternatives

Having had regard to the criteria in section 152AH(1) the Commission has concluded as follows.

As price terms and conditions in the Undertakings are not considered reasonable when viewed individually, the price terms and conditions for the Undertakings when combined in a form as proposed by Hutchison (i.e. PMTS Dual Rate Undertakings coupled with the Non-PMTS Undertakings, and PMTS Single Rate Undertakings coupled with the Non-PMTS Undertakings), are also found to be unreasonable.

The Commission considers that the non-price terms and conditions are not reasonable for the Undertakings when combined because they seek to incorporate an unknown number of existing agreements and provisions.

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

11. Consistency with the standard access obligations (SAOs)

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

This chapter assesses whether Hutchison's Undertakings are consistent with the SAOs applicable to Optus through its proposed supply of MTAS. Section 11.1 outlines the Commission's approach to assessing consistency with the SAOs, while section 11.2 contains the actual assessment.

11.1. Approach to assessing consistency with the SAOs

The Act does not specify any particular approach for assessing whether an undertaking is consistent with the SAOs applicable to an access provider. Notwithstanding this, the Commission finds it useful to adopt the following approach:

- identify those SAOs that are applicable to a particular access provider; and
- assess whether the proposed undertaking is consistent with the applicable SAOs.

This assessment may involve consideration of whether the terms and conditions raise any inconsistencies with the applicable SAOs. If the terms and conditions are not found to be inconsistent with the SAOs, the Commission is likely to regard the undertaking as being consistent with the applicable SAOs.

The Commission's view is that the meaning of the word 'consistent' in section 152BV(2)(b) is that it takes its ordinary and natural meaning. The Commission believes that the ordinary and natural meaning of '*consistent with*' is that there be some uniformity and adherence to the thing in question but that there is no requirement for exact or complete correspondence. The Commission, therefore, in applying this test to the relevant subject matter will not be requiring that a matter be precisely in accordance with the applicable SAOs, but rather, there be at least a reasonable level of conformity with the obligation.

For an obligation to be consistent with the applicable SAOs, it must be consistent with all the obligations imposed on the access provider. The SAOs are aggregated to determine consistency under section 152BV(2)(b). In this context, the Commission is not concerned with the reasonableness of the terms and conditions of the Undertakings as required under section 152BV(2)(d), as this was the subject of a separate consideration in Chapters 5-9 of this report.

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

11.2. Assessment

11.2.1. The applicable SAOs

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

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

> The *applicable standard access obligations* are those obligations set out in proposed s. 152AR that are applicable to the carrier or provider making the access undertaking. A standard access obligation may not be applicable because of an exemption … or because the carrier or carriage service provider does not supply the declared service concerned.[113]

Hutchison submits that the following SAOs apply to the Undertakings:

- the supply of the declared service (section 152AR(3)(a));
- the technical and operational quality of the declared services to be supplied (section 152AR(3)(b));
- fault detection, handling, rectification and timing of the service to be supplied (section 152AR(3)(c));
- the interconnection of facilities required to supply carriage services (section 152AR(5)); and
- the provision of billing information (section 152AR (6) and (7)).[114]

The Commission is satisfied that these are the applicable SAOs.

11.2.2. Service to be supplied

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

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

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

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

The Commission is of the view that an access provider can give an access undertaking in relation to a subset of a declared service. Conversely, an access seeker could seek access to all or a subset of a declared service. If the Undertakings were to be accepted

[113] Parliament of the Cth of Australia – *Trade Practices Amendment (Telecommunications) Bill 1996 Explanatory Memorandum*, p.57.

[114] Hutchison submission in response to ACCC Discussion Paper, p.6.

in their present forms by the Commission, HTAL or H3GA would remain under an obligation to provide access to that part of the declared service not covered by the Undertakings. Access to that part of the service would be subject to commercial agreement or failing that, arbitration by the Commission.

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

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

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

11.2.3. Technical and operational quality of the service to be supplied

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

Clauses 2.2 and 2.3 of Attachment B relevantly provide:

> **2.2 Non-discrimination principles**
>
> In supplying the Service, [Hutchison] must treat the Access Seeker on a non-discriminatory basis, including but not limited to, if requested by the Access Seeker:
>
> (a) taking all reasonable steps to ensure that the technical and operational quality and timing of the Service supplied to the Access Seeker is equivalent to that which [Hutchison] provides to itself;
>
> (b) taking all reasonable steps to ensure that the Access Seeker receives in relation to the Services supplied to the Access Seeker, fault detection, handling and rectification of a technical and operational quality and timing that is equivalent to that which [Hutchison] provides to itself; and
>
> (c) taking all reasonable steps to ensure that if a standard is in force under section 384 of the Act that the Interconnection complies with the standard.
>
> **2.3 Limit on non-discrimination principles**
>
> (a) The non-discrimination principles referred to in clause 2.2 are intended to promote the long term interests of end users of Carriage Services and of services supplied by means of Carriage Services, in accordance with section 152AB of the TPA.
>
> (b) The non-discrimination principles in clause 2.2 are intended to be implemented in a way which will promote competition in markets for Listed Carriage Services having regard to (amongst other things) the extent to which relevant things will remove obstacles to end-users of Listed Carriage Services gaining access to the Listed Carriage Services and to achieve the other objectives contained in section 152AB(2) of the TPA.
>
> (c) The non-discrimination principles contained in clause 2.2 must not limit an Access Seeker's ability to request Services of a superior or inferior quality

> than [Hutchison] provides to itself, provided always that [Hutchison] will not be required to accept such a request.

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

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

However, because the Undertakings are provided on the basis that the terms and conditions might be sourced from an unseen existing agreement *or* Attachment B, the Commission is not satisfied that the Undertakings *will* incorporate terms and conditions similar to clauses 2.2 and 2.3. Therefore, the Commission cannot *be* satisfied that the Undertakings are consistent with the applicable SAO. Clause 5.3 does not remedy the situation, as it applies only where there is an inconsistency. It does not apply in situations where the existing agreement may be silent on the issue.

It is worth noting that, if the Undertakings *all* incorporated clauses 2.2 and 2.3, it is likely that the Commission would be satisfied that the Undertakings were consistent with the applicable SAO. In particular, there is nothing in clause 2.3 which the Commission believes unreasonably limits the operation of clause 2.2.

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

The applicable SAO in respect of fault detection, handling, rectification and timing of

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

Clauses 2.2 Attachment B relevantly provides:

> **2.2 Non-discrimination principles**
>
> In supplying the Service, [Hutchison] must treat the Access Seeker on a non-discriminatory basis, including but not limited to, if requested by the Access Seeker:
>
> …
>
> (b) taking all reasonable steps to ensure that the Access Seeker receives in relation to the Services supplied to the Access Seeker, fault detection, handling and rectification of a technical and operational quality and timing that is equivalent to that which [Hutchison] provides to itself;
>
> …

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

> **5.2 Fault reporting and identification**
>
> 5.2.1 Fault reporting and identification procedures must be non-discriminatory, including (but not limited to) the response time targets.
>
> 5.2.2 As a general principle, priority will be given to faults that have the highest service loss impact in terms of the number of customers affected.
>
> 5.2.3 Initial responsibility for identifying a fault rests with the person who first becomes aware of the fault.

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

For the reasons set out above in relation to the incorporation of existing agreements *or* Attachment B into the Undertaking, the Commission cannot be satisfied that the Undertakings are consistent with this SAO. However, if the Undertakings did incorporate the relevant parts of Attachment B, it is likely that the Commission would conclude that to the extent that section 152AR(3)(c) of the Act imposes an obligation on Hutchison to provide equivalent fault detection, handling, rectification and timing of services to that which it provides itself, the Undertakings are consistent with this SAO.

11.2.5. Interconnection

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

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

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

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

Clause 2.2 of Attachment B relevantly provides:

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

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

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

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

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

However, for the reasons already noted, the Commission cannot be satisfied that the Attachment B provisions *will* be in incorporated. As a result, the Commission cannot be satisfied that the Undertakings are consistent with the SAOs applicable to Hutchison's interconnection of facilities obligations. If the Attachment B provisions were incorporated into all the Undertakings, it is likely that the Commission would be satisfied of the Undertakings' consistency with this SAO.

11.2.6. Provision of billing information

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

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

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

Schedule 3 to Attachment B *(Billing and settlement procedures)* sets out the manner in which Hutchison will undertake billing procedures. Clause 3.2.1 states:

> 3.2.1 [Hutchison] must provide Communication Information to the Access Seeker in connection with matters associated with, or incidental to, the supply of the Service:
>
> (a) at such times or intervals ascertained in accordance with any regulations made under sections 152AR(6) and (7) of the TPA, including any regulations made pursuant to these regulations (collectively ***regulations***);
>
> (b) in a manner and form ascertained in accordance with the regulations; and
>
> (c) with such particularity ascertained in accordance with the regulations.

Clause 8.1 of Schedule 8 to Attachment B *(Communication information)* states:

> **8.1 Billing information**
>
> [Hutchison] will provide the Access Seeker with billing information each month for the preceding calendar month, this information will be sent to the nominated contact at [Hutchison] as specified in paragraph 8.4 within the first 5 Business Days of the month.

Again, if it were known that *all* the Agreements that might be incorporated into the Undertakings had these provisions, it is likely that the Commission would be satisfied that the Undertakings were consistent with the applicable SAOs in respect of Hutchison's billing obligations under the Act. However, in the absence of confirmation that the Attachment B provisions would be incorporated, the Commission cannot be satisfied that the Undertakings are consistent with this SAO.

11.2.7. Conclusion

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

12. Decision on the Hutchison Undertaking

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

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

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

Pursuant to section 152BV(2)(e), the Commission notes that the expiry time of the Undertakings occurs within three years of the date on which the Undertakings comes into operation.

Appendix 1 – List of submissions received

Hutchison Telecommunications (Australia) Pty Ltd and Hutchison 3G Australia Pty Ltd.

Hutchison, PMTS 'Single Rate' Undertaking – 7 October 2005.

Hutchison, PMTS 'Dual Rate' Undertaking – 7 October 2005.

Hutchison, Non-PMTS Undertaking – 7 October 2005.

Hutchison, Attachment B 'Agreement for the provision of mobile to mobile terminating access service – 7 October 2005.

Hutchison, *Submission in response to the Australian Competition and Consumer Commission's discussion paper, Access Undertakings domestic digital mobile terminating access service,* 19 December 2005.

PowerTel Limited

PowerTel, *PowerTel submission to the Australian Competition and Consumer Commission regarding Hutchison's undertakings in relation to the Domestic Digital Mobile Terminating Access Service,* 22 December 2005.

Telstra Corporation Limited

Telstra, *Submission in response to the ACCC's discussion paper, Hutchison's Undertaking in relation to the Domestic Digital Mobile Terminating Access Service,* 23 December 2005.

Vodafone Australia Limited

Vodafone, *Response to Hutchison's Undertaking in relation to the Domestic Digital Mobile Terminating Access Service,* 21 December 2005.