

Attachment B

ACCESS DISPUTE BETWEEN AAPT LIMITED (ACCESS SEEKER) AND VODAFONE NETWORK PTY LIMITED (ACCESS PROVIDER)

DOMESTIC MOBILE TERMINATING ACCESS SERVICE (MTAS)

Access Dispute Notified under Sub-section 152CM(1) of the *Trade Practices Act 1974*
on 27 January 2005

Statement of Reasons for the Interim Determination

BACKGROUND

1. On 27 January 2005, the Australian Competition and Consumer Commission (the Commission) received written notification (the notification) from AAPT Limited (AAPT) that an access dispute exists in relation to the supply, by Vodafone Network Pty Limited (Vodafone) to AAPT, of the Domestic Mobile Terminating Access Service (the MTAS). AAPT's notification was provided to the Commission pursuant to subsection 152CM(1) of the *Trade Practices Act 1974* (the Act).
2. The Commission is conducting an arbitration of this access dispute under Division 8 of Part XIC of the Act. As outlined in the Commission's *Resolution of telecommunications access disputes – a guide, March 2004 (revised)*, (the Guidelines), a preliminary case management meeting was held between Commission staff, AAPT and Vodafone on 21 February 2005.
3. The notification states that AAPT acquires the MTAS under the terms and conditions contained in an access agreement dated 16 December 1998 and effective from 1 July 1998. The notification specifies that the dispute is about the price at which the MTAS is to be supplied, and AAPT's objection to certain other price-related terms and conditions on which Vodafone proposes to supply the service. These include Vodafone's proposed fixed to mobile (FTM) 'pass through obligation', volume-based charging and the linking of charges to regulatory outcomes.
4. The Commission understands that the access agreement between the parties does not contain pricing for the MTAS for the period from 1 January 2005 onwards.
5. The Commission understands that AAPT and Vodafone have agreed on interim arrangements for the supply of the MTAS pending resolution of their dispute, at a rate of 19.83 cpm with no 'pass through obligation' to apply for the period from 1 January 2005 to 31 December 2005.
6. On 20 May 2005, the Commission gave a draft interim determination to the parties in accordance with subsection 152CP(4) of the Act. The Commission also gave the parties a draft supporting statement of reasons.
7. On 20 May 2005, the Commission also requested that the parties provide submissions on the Commission's draft interim determination and the accompanying draft statement of reasons. The Commission decided to extend the time period within which parties

had to prepare written submissions in response to the draft interim determination from one week to two weeks.

8. On 20 June 2005, the Commission held an oral hearing in which an opportunity was provided for parties to make oral submissions on the Commission's draft interim determination. The Commission notes that, in total, parties had approximately six weeks to consider the draft interim determination and accompanying reasons and prepare submissions to the Commission. The Commission also notes that parties had a further one and a half weeks in which to provide comments on the report prepared by the consulting firm Analysys that the Commission had regard to in making its Pricing Principles Determination.

Reasons for Decision

9. Sub-section 152CPA(1) of the Act provides that a determination may be expressed to be an interim determination.
10. Subsection 152CP(5) of the Act provides that, when the Commission makes a determination, it must give the parties to the arbitration its reasons for making the determination. The Commission's reasons for the interim determination are set out below. The reasons address, in turn, the questions of:
 - whether the Commission should make an interim determination in this dispute; and
 - if so, what the content of such an interim determination should be.

SHOULD THE COMMISSION MAKE AN INTERIM DETERMINATION?

11. Part XIC of the Act does not specify matters that the Commission is required to take into account in deciding whether to make an interim determination.⁴ While the Commission is free to have regard to the matters that it would be required to take into account in making a final determination when making an interim determination,⁵ it is not required to take those matters into account, and does not have a duty to consider whether to take those matters into account.⁶
12. In accordance with the matters set out in the Guidelines, in deciding whether to issue an interim determination in this matter, the Commission has considered the following factors:
 - whether the Commission is satisfied that it has sufficient information on which to make an interim determination; and
 - whether the Commission is satisfied that, in all the circumstances, it is appropriate to make an interim determination.
13. As indicated above, the Commission invited parties to provide submissions on these matters. The Commission has had regard to the parties' submissions in this respect. On 21 March 2005 Vodafone wrote to the Commission noting concerns regarding aspects

⁴ Subsection 152AQA(6) provides that the Commission must have regard to any Pricing Principles Determination if it is required to arbitrate an access dispute under Division 8 in relation to the declared service.

⁵ Subsection 152CR(1).

⁶ Subsections 152CR(3) and (4).

of the Commission's decisions about the process for making any interim determination in this dispute and requesting that the Commission inform the parties of what criteria it will have regard to in making its decision regarding the making of any interim determination. Vodafone did not, however, request changes to the Commission's process for this interim determination issue, on the basis of previous correspondence from the Commission in other access disputes in relation to similar concerns. The Commission does not consider it appropriate for the Commission to decide and unduly limit the matters it will have regard to in making an interim determination (if any) until it has given the parties an opportunity to provide submissions on the matters the parties believe the Commission should have regard to. The Commission considers the process it has set down provides each party with the opportunity to include in its submissions its views as to which matters the Commission should have regard to in deciding whether to make an interim determination (and, if so, the content of an interim determination) – and the reasons why the Commission should have regard to each of these considerations.

14. Neither party explicitly enumerated the matters that it considered were relevant for the Commission to take into account in deciding whether to make an interim determination. Rather, each party largely provided submissions on the two matters set out above in paragraph 12. However, Vodafone also submitted that the Commission should have regard to Vodafone's direct costs and that the Commission should defer arbitration of the dispute. Accordingly, as set out in the reasons supporting the draft interim determination, the Commission has had regard to the matters set out above and also further matters raised by Vodafone. These matters are addressed, where relevant, below.
15. In its response to the draft interim determination, however, Vodafone submitted that it had not received adequate notice of the criteria the Commission intended to apply in making its decision so that Vodafone could properly prepare its submissions.⁷ In this regard, as outlined above, the Commission has followed the factors set out in its Guidelines and any further criteria that the parties themselves submitted were relevant to the exercise of the Commission's discretion. It is not apparent to the Commission that it raised any new criteria in the draft interim determination, i.e. any criteria of which Vodafone did not have prior notice. Accordingly, the Commission does not accept that Vodafone was only given notice of the criteria upon receiving the draft. Further, as stated above, the parties have had an opportunity to provide written and oral submissions in response to the draft. Therefore, the Commission is of the view that the parties were given adequate notice and sufficient time to present their submissions on the matter.
16. The Commission has had regard to all submissions made by the parties in relation to the making of any interim determination to date.

Does the Commission have sufficient information on which to make an interim determination?

Parties' submissions

17. Vodafone submits that the Commission has no proper basis for issuing an interim determination in this dispute. Vodafone submits that in making an interim determination, the Commission must have regard to Vodafone's direct costs.

⁷ Vodafone submission, 3 June 2005, para 1.2(e).

18. That said, Vodafone has submitted material which it has requested the Commission take into account in determining what the content of any interim determination should be. This material includes Vodafone's MTAS access Undertaking and supporting material, sections of the Commission's Mobile Services Review MTAS Final Decision (the MTAS Final Report) and certain Vodafone submissions to the Mobile Services Review. The submission of this material rests upon Vodafone's view that, if the Commission makes an interim determination, 'it must have regard to Vodafone's direct costs of supplying the MTAS...' and that this material is 'the best and only evidence currently available to the Commission in relation to Vodafone's direct costs...'⁸. Vodafone notes that the Commission's pricing principle Determination made in June 2004 in relation to the MTAS (the MTAS Pricing Principle Determination) does not contain information on Vodafone's direct costs of supplying the MTAS. AAPT submits that there is no obligation on the Commission to consider Vodafone's direct costs and that 'the Commission does not have a duty to take into account a matter referred to in a paragraph of section 152CR(1)'⁹ of the Act in forming its view on whether to make an interim determination.
19. Vodafone submits that assessment of the undertaking material is a complex process which cannot be undertaken within the timeframes proposed to decide the matter of an interim determination and this is a factor weighing in support of the Commission not making an interim determination.
20. Vodafone notes that in deciding whether to make an interim determination, the Commission is required to have regard to any pricing principles, including price-related terms and conditions, under section 152AQA of the Act. That said, Vodafone notes that the MTAS Pricing Principles Determination, including the price-related terms and conditions, is currently the subject of Federal Court proceedings. Therefore, Vodafone submits that by having regard to the MTAS Pricing Principles Determination, the Commission would not in all likelihood provide any certainty to parties on the likely MTAS price for the period during which any interim determination applied. AAPT has argued that the Commission should not decide not to have regard to the Pricing Principles Determination because of an administrative law or other proceeding, as this could have the effect of encouraging access providers to engage in regulatory gaming. AAPT also noted that the Pricing Principles Determination is currently valid and that Vodafone has not sought an injunction preventing the Commission from having regard to the Pricing Principles Determination.
21. Vodafone notes, in its submission on the draft interim determination, that the statutory provisions upon which it says the Commission relies to apply a lower standard of proof in the making of an interim determination do not relieve the Commission of an obligation to ensure that its decision is based on logically probative evidence.¹⁰
22. Further, Vodafone argues that the consultancy report prepared by Analysys that the Commission had regard to in making its Pricing Principles Determination (the Analysys Report) 'confirms Vodafone's submissions that no Interim Determination should be made. Analysys concluded that anything other than the short term use of adjusted benchmarks should be approached with caution. Vodafone submits that the uncertainty

⁸ Vodafone submission, 29 March 2005, paragraph 1.2(d).

⁹ AAPT submission, 5 April 2005, page 4.

¹⁰ Vodafone submission, 20 May 2005, para 1.2(c).

of the basis of the pricing path supports its submissions that no Interim Determination should be made.’¹¹

23. In this regard, Vodafone argues that Analysys’s ‘expert advice undermines any reliance the Commission has placed on Annexure 2 in its draft Interim Determination because:
 - a) the international benchmarks used by the Commission include cost figures which Analysys regard as unreliable (USA and Korea);
 - b) none of the international benchmarks of which are adjusted for the specific practical cost differences identified by Analysys; and
 - c) the pricing principles outlined in Annexure 1 are not reflected in the pricing path in Annexure 2.’¹²
24. AAPT submits that, as a result of the Commission’s MTAS Final Report, the Commission has sufficient information on which to make an interim determination.
25. AAPT submits that the Commission’s Mobile Services Review considered in detail the issues which are in dispute in this arbitration, and in undertaking the review the Commission received much information which is relevant to the issues in dispute. AAPT notes that, in the course of the review, the Commission received 27 submissions from interested parties (including Vodafone) in response to the Commission’s discussion paper, held two public forums to aid consideration of the main issues in the review, and received a further 28 submissions in response to the draft decision regarding the declaration of the MTAS and the pricing principles for the MTAS (among other things).
26. AAPT further submits that the MTAS Final Report included a detailed consideration of issues directly relevant to the issues in dispute in this arbitration, including consideration of MTAS pricing principles, indicative price-related terms and conditions for the MTAS and consideration of the appropriateness of any fixed-to-mobile ‘pass through’ obligation. Vodafone, however, submits that the Mobile Services Review is not relevant to the two issues in question in this dispute – namely, the price and the pass-through safeguard for the supply of MTAS by Vodafone to AAPT. Vodafone submits that the MTAS Final Report contains no information as to Vodafone’s direct costs and was prepared without reference to or consideration of these costs.
27. AAPT submits that the information submitted by Vodafone in relation to its MTAS access Undertaking material should be given little or no weight by the Commission in considering the making and content of any interim determination because AAPT has not had access to and therefore not had the opportunity to analyse such information.¹³ AAPT further submits that such information can be considered fully by the Commission and the parties in the period (if appropriate) between the making of any interim determination and the making of the final determination. Vodafone submits that the information submitted by Vodafone as to its direct costs obviates the need for reference by the Commission to a proxy for interim benchmark prices.
28. With respect to the Analysys Report, AAPT argues that ‘it is not necessary, or indeed appropriate in the context of the Interim Determination for the Commission to revisit and reassess major parts of the material that it received in the course of the Mobile Services Review. Equally, it is not necessary or appropriate in the context of the

¹¹ Vodafone submission, 8 July 2005, p. 7.

¹² *id.*, p. 8.

¹³ Transcript of oral hearing 20 June 2005, Mr Pattison, p.6.

Interim Determination for the parties to make submissions on material relied on by the Commission in making the MTAS Pricing Principles Determination, such as the Analysys Report. For this reason, the Analysys Report is not relevant to the interim Determination.¹⁴

Commission's view

29. The Commission considers that, in deciding whether it does have sufficient information on which to make an interim determination, the information it relies upon should provide a reasonable basis for the terms and conditions set out in an interim determination.
30. As indicated in the Guidelines, the Commission considers that, for the purpose of making an interim determination, it does not need to have in front of it all of the information that it would need for the purpose of making a final determination. Further, the Commission does not believe it needs to have reached a view on all outstanding issues in an access dispute before it can make an interim determination. To set the information threshold at levels equivalent to those necessary to issue a final determination, or equivalent to that necessary to resolve all matters in a dispute, would unnecessarily restrict the Commission's ability to make an interim determination. Furthermore, requiring the Commission to thoroughly consider all such information could have the potential to unnecessarily delay a decision on the making of an interim determination, and therefore detract from the intention of the regime with respect to the Commission being able to make an interim determination in advance of a final determination.
31. This view is also supported by the intention underlying subsections 152CR(3) and (4) of the Act. These two subsections were introduced in recognition that requiring the Commission to take into account the matters it must consider in making a final determination would be likely to slow considerably the issue of an interim determination, thus detracting from the utility of interim determination arrangements.¹⁵ In addition, subsection 152CR(4) of the Act provides that, in making an interim determination, the Commission does not have a duty to consider whether to take into account a matter specified in subsection 152CR(1) of the Act.¹⁶ Given the Commission does not have a duty to consider whether to take those specified matters into account, and clearly is not obligated to take each of those matters into account, then it follows that a lower information threshold is sufficient for making an interim determination.
32. As indicated in the Guidelines, the Commission's view is that it is able to make an interim determination if it is based on information that provides a reasonable basis for the terms and conditions set out in the determination. Accordingly, the Commission does not consider that it necessarily has to thoroughly assess all the information which may be relevant to the making of a final determination if it has given consideration to information that provides a reasonable basis for the making of an interim determination.¹⁷

¹⁴ AAPT submission, 8 July 2005, p. 3.

¹⁵ Supplementary Explanatory memorandum to the Telecommunications Legislation Amendment Bill 1998, items 36F and 36G, page 30

¹⁶ Section 125CR(1) specifies the matters the Commission must take into account in making a final determination.

¹⁷ There does not appear to be any reason why the Commission would be obligated to take into account one of the criteria set out 152CR(1).

33. The Commission notes that Vodafone has submitted a large volume of material for the purposes of considering the matter of an interim determination. This includes material submitted by Vodafone in support of its MTAS access undertaking. The Commission notes the submissions by Vodafone in this regard. However, given the detail and complexity of much of that material, and given the timely and provisional nature of an interim determination, the Commission believes that it would not be feasible or appropriate for it to conduct a full assessment of all of the material submitted by Vodafone at this stage. This is particularly the case with respect to the material submitted by Vodafone which it has also submitted in support of its MTAS access Undertaking. The assessment of an undertaking is a process that the Act envisages could take six months or longer to complete.¹⁸ Therefore, a full assessment of the undertaking material submitted by Vodafone would be more appropriate and relevant for considering the content of a final, rather than an interim, determination. Accordingly, while the Commission notes the submissions, in the absence of thoroughly assessing all the arguments made in those submissions, the Commission has not given weight to those particular arguments for the purpose of considering an interim determination.
34. As noted by both parties, the Commission is required to have regard to any pricing principles determination, including price-related terms and conditions, made under section 152AQA of the Act. In this regard, the relevance of the MTAS Pricing Principles Determination is discussed further below.
35. The Commission considers that it should afford parties to the dispute the opportunity to provide submissions concerning the relevance of the MTAS Pricing Principles Determination. The Commission notes, however, that it would be unlikely to be able to assess within an appropriate time frame any submissions of a particularly complex or detailed nature for the purposes of considering an interim determination. That said, the Commission notes the current process relates to an interim determination and that a final determination, based on a thorough consideration of all relevant information, could be backdated in the event it was appropriate to do so.
36. The Commission does not agree with Vodafone's submission that it would not be reasonable to place significant weight on the price-related terms and conditions contained in Annexure 2 of the MTAS Pricing Principles Determination. Rather, the Commission is of the view that these price-related terms and conditions are relevant to the question of what the content of any interim determination should be. Further, the MTAS Final Report that accompanied the release of the MTAS Pricing Principles Determination is relevant to the extent that it explains and supports the Commission's decision on this Determination. Relevantly, the Commission noted '[t]he Principles specified in such a determination are indicative of the approach that the Commission would likely take should it be required to arbitrate a dispute relating to the price of access.'¹⁹
37. The Commission also noted '[a]lthough a party may still argue against the application of those principles to its case, determining pricing principles will guide commercial negotiation of access by providing greater certainty as to the Commission's views on reasonable access prices.'²⁰ Accordingly, the Commission considers that it should afford parties the opportunity to argue against the application of the MTAS Pricing

¹⁸ Sections 152BY(7) and (9).

¹⁹ ACCC MTAS Final Report p 185.

²⁰ *ibid.*

Principles Determination – and the Commission has provided this opportunity in this case.

38. That said, the Commission does not agree that the submission of Vodafone's stated direct costs has rendered the MTAS Pricing Principles Determination as inapplicable for considering the content of any interim determination in the current dispute. That is, the Commission is of the view that, on the information currently before it, the MTAS Pricing Principles Determination remains the most reasonable basis upon which to determine an interim price for the MTAS. Having said that, Vodafone's direct costs is one of the matters the Commission would be required to take into account, pursuant to the Act, in making a final determination and the Commission would conduct an assessment of such costs for that purpose. While the Commission has had regard to Vodafone's stated direct costs, the Commission is of the view that the MTAS Pricing Principles Determination is relevant to the current dispute for the purpose of determining what the content of any interim determination should be.
39. As noted by Vodafone, the price-related terms and conditions in the MTAS Pricing Principles Determination is currently the subject of Federal Court proceedings. Notwithstanding Vodafone's view about the uncertainty this might create with regard to the MTAS Pricing Principle Determination, the Commission notes that, at this time, it is valid and continues to have effect unless and until such time as any decision is made by the Federal Court to the contrary. Therefore, the Commission considers that it would not be complying with its obligations under the Act if it failed to have regard to the MTAS Pricing Principles Determination in the course of the arbitration for the reason that Vodafone has challenged the validity of the MTAS Pricing Principles Determination.
40. To the extent that any decision ultimately made by the Court may affect the operation of the MTAS Pricing Principles Determination, it would be open to the Commission to vary or revoke an interim determination if necessary.
41. With respect to the Analysys Report, the Commission agrees with AAPT that it would not be appropriate to revisit and reassess major parts of the material that the Commission received in the context of the Mobile Services Review for the purposes of deciding whether to issue an interim determination.
42. That said, the Commission disagrees with Vodafone's submission that the Analysys Report supports the view that there is sufficient uncertainty surrounding Annexure 2 of the MTAS Pricing Principles Determination to make it prudent for the Commission to refrain from making an interim determination in this dispute.
43. In the first instance, the Commission considers that Vodafone's submissions on those aspects of the Analysys Report which deal with the issues of adjusting international cost estimates for, and the application of specific LRIC estimates to, Australian circumstances do not raise any new issues that the Commission has not already considered in the context of the MTAS Final Report (and the specification of the target price in Annexure 2 of the Pricing Principles Determination).
44. That is, the Commission notes that it had regard to the Analysys Report and the views expressed in that report – including those views referred to and cited in Vodafone's submission of 8 July 2005– in making the Pricing Principles Determination (and in preparing the Final MTAS Report).

45. Relevantly, the Commission does not accept that the Analysys Report can be read as concluding that cost estimates from overseas jurisdictions ‘could only have utility if they were adjusted’. Whilst Analysys did state that ‘simplified adjustments to costs using transformation proxies developed from simple measures such as traffic and coverage are ... useful as a short-term measure, they are unlikely to achieve the level of accuracy and certainty developed from a country-specific model based on actual operator data.’²¹ However, this is not the same as stating that a range of unadjusted cost benchmarks is necessarily an unreliable estimate of the TSLRIC+ of the MTAS. Rather, the Commission considers that the Analysys Report indicates that there are many factors that can affect the TSLRIC+ of providing the MTAS in different jurisdictions (as outlined in chapters 2 and 4 of the report). Analysys was also of the view that while some of these factors (such as traffic and coverage) could be adjusted in a model developed in one jurisdiction to determine a TSLRIC-proxy in another jurisdiction, many factors could not.²² Despite this, Analysys Report suggests that even when adjustments to one jurisdiction’s model are made for those factors that can be adjusted, such adjustments can derive a useful estimate that can be used in the short-term.
46. The Commission had regard to this advice when using overseas cost benchmarks to help it derive estimates of TSLRIC+ for the purposes of Annexure 2 of the Pricing Principles Determination. However, the Commission believed it would be more appropriate not to adjust for any factors that could influence cost, than to only adjust for a small subset of those factors that could. In this regard, the Commission indicated in the MTAS Final Report that:

Adjusting overseas cost estimates for each of these factors individually will push the TSLRIC+ of providing the MTAS in different directions and by different amounts. Hence, it is unclear in which direction (and by what amount) an overseas estimate of TSLRIC would change if it were adjusted for Australian conditions to account for all of these factors in combination. Accordingly, the Commission believes it would be inappropriate to adjust for only a small subset of these factors in isolation of other possible adjustment factors. Doing so may be more misleading than making no adjustments at all. While the Commission believes it would be possible to adjust for some of these factors, it would not be possible to adjust for others without first conducting a full TSLRIC model in Australia.

The Commission has therefore chosen to make no adjustments (other than to account for currency differences) to overseas cost estimates in order to inform its estimation of an appropriate target price for the MTAS. By considering as broad a range of cost estimates from overseas jurisdictions as possible, the Commission believes it is able to account for differences in cost factors between different jurisdictions.²³

47. Further, the Commission considers it followed Analysys’s advice that ‘cost benchmarks are only used with caution until such time as the ACCC has cost model results available to it that are specific to Australia.’²⁴ In this regard, the Commission noted in its MTAS Final Report that not specifically modelling TSLRIC+ in Australia for the purposes of the Pricing Principle determination introduced some risk into its assessment of an appropriate target price for the MTAS in its Pricing Principle Determination.²⁵ Accordingly, the Commission chose a conservative target price for the MTAS by:

²¹ Analysys, *Examination of mobile termination costs – Final Report*, 30 June 2004, p. ii.

²² *id.*, p.i.

²³ ACCC, MTAS Final Report, p. 215

²⁴ Analysys, *op. cit.*, p. ii.

²⁵ *ibid.*

- considering as broad a range of cost estimates of the TSLRIC+ of providing the service as was available to it at the time of making the Pricing Principles Determination (which included unadjusted cost benchmarks from overseas jurisdictions and estimates of the TSLRIC+ of providing the MTAS derived from the RAF data of two mobile network operators (Optus and Telstra) that fell well within the range of 6 to 12 cpm.²⁶); and
 - choosing a target price that was at the top-end of the best estimates available to the Commission at that time.²⁷
48. With respect to the comment by Analysys that cost estimates from the United States were ‘probably too out of date’, Analysys also indicated that ‘since this calculation was performed, the market has grown significantly, both in terms of demand and coverage.’²⁸ The Commission is of the view that such changes would be more likely to reduce the TSLRIC+ of providing the MTAS in the United States models than increase it. In this regard, the Commission notes that cost estimates for the UK and Sweden show a reduction in the cost of supplying the MTAS over time – even in nominal terms.
49. Accordingly, the Commission continues to believe that it had before it a range of reasonable estimates of the TSLRIC+ of providing the MTAS at the time it made its Pricing Principle Determination, and that this information is supported by the release of more recent cost estimates referred to in the Analysys Report. Hence, it does not agree with Vodafone’s contention that the pricing principle in Annexure 1 was not reflected in the pricing path in Annexure 2.
50. The Commission, therefore, is not dissuaded from the view that the MTAS Pricing Principles Determination and the supporting MTAS Final Report are relevant factors the Commission should have regard to in determining whether it has sufficient information on which to make an interim determination.
51. Accordingly, having regard to the timely and provisional nature of an interim determination, the MTAS Pricing Principles Determination, the supporting MTAS Final Report and the submissions by Vodafone and AAPT, the Commission is of the view that it has sufficient information on which to make an interim determination. In particular, the Commission is of the view that the MTAS Pricing Principles Determination provides a reasonable basis for making an interim determination.
52. The Commission also notes the Analysys Report indicates that ‘the Swedish model results present a more accurate cost estimate than the UK and are also suitable for high-level transformation to Australia.’²⁹ The Swedish regulator’s final decision was released in July 2004, subsequent to release of the Pricing Principles Determination.³⁰ The Commission notes that that decision sets out an adjustment path where the price for mobile termination will transition to a LRIC-based price of SEK0.51 on 1 July 2007, which converts to 9.56 cpm at the ten-year average exchange rate of 1 SEK = AUS\$0.188.

²⁶ *id.*, p. 237

²⁷ *ibid.*

²⁸ Analysys Report, p. 22.

²⁹ *id.*, p. 25.

³⁰ Post & Telestyrelsen, ‘LRIC Prismetod for terminering av rostsamtal I mobilnat’, Ref: 03-2332/23, 5 July 2004.

53. The Commission also notes that since the release of the Pricing Principles Determination in June 2004, regulators in South Korea and Israel have set prices for the MTAS based on the cost modelling described by Analysys in its report to the Commission in June 2004. The prices set by these authorities equate to 4.1 – 7.6 cpm and 4.7 cpm respectively.³¹
54. The Commission acknowledges that Analysys did have some reservations about the extent to which the models conducted in South Korea and Israel might have direct relevance to Australian conditions. However, these concerns were outlined within the context of whether the Commission could rely upon benchmarking that only adjusted for a small subset (in particular coverage and traffic volumes) of the factors that influence the TSLRIC+ of providing mobile termination in different countries. The Commission notes these concerns. However, as outlined above and in the MTAS Final Report, the Commission's approach seeks to accommodate these concerns by:
- a) not adjusting for only a subset of the factors that could influence cost,
 - b) having regard to a broad range of estimates of TSLRIC+ that includes estimates from jurisdictions with varying cost influences; and
 - c) choosing to set a target price for the purposes of Annexure 2 of the Pricing Principle Determination from the upper-end of this range.
55. The Commission notes it is instructive that despite there being different cost influences in the UK, Malaysia, Sweden, South Korea, the United States and Israel, no regulator in any of these jurisdictions has estimated TSLRIC+ at a level greater than 12 cpm when adjusted to Australian currency. The Commission also re-iterates that the Australia-specific data it did have available to it at the time of making the Pricing Principles Determination from the RAF enabled it to derive a TSLRIC+-proxy for the MTAS of well below 12 cpm.

Whether the Commission is satisfied that, in all the circumstances, it is appropriate to make an interim determination

56. The Guidelines note that in considering if an interim determination is appropriate, in all the circumstances, the Commission considers a range of matters including:
- the nature of any contractual arrangements between parties;
 - whether backdating a final determination would provide an adequate alternative to making an interim determination;
 - the likely impact of an interim arrangement on end-users;
 - the timing of the final determination;
 - international treaty obligations; and
 - other matters.

These are considered in turn below.

³¹ Converted at the (approximate) 10-year exchange rate of 1 Won = AUS\$0.00130 and the rate of AUS\$1.00 = Shekels 3.2, the approximate average rate over the year to 30 September 2004. This has been accessed from <http://www.bankisrael.gov.il/firsteng.htm> The Commission notes, however, that if it takes a 10-year average exchange rate, this is likely to reveal a higher value of the shekel at around \$1AUS=2.5 Shekels.

Nature of any contractual arrangements

Parties' submissions

57. Vodafone submits that there is no basis for an interim determination as there is no risk that the MTAS will not be supplied.
58. Vodafone submits that it currently continues to supply the MTAS to AAPT at a rate of 19.38 cpm pursuant to a formal agreement entered into by the parties on 10 March 2005.
59. AAPT submits that, whilst it confirms that an interim agreement for the supply of MTAS for the period 1 January to 31 December 2005 was finalised by the parties, it does not accept that the price stated in the interim agreement represents an appropriate price for the supply of the service. This is confirmed, according to AAPT, by the terms of the interim agreement, which records that the parties are unable to agree on the terms of supply of the MTAS and provides that the terms of an interim determination made by the Commission will override the parties' interim agreement.
60. Further, AAPT submits that an interim determination will provide it with significantly more certainty than exists under the current interim arrangement with Vodafone.

Commission's view

61. In accordance with the Guidelines, the Commission has considered the nature of any contractual arrangements between AAPT and Vodafone. In this regard, an important objective of the regime outlined in Part XIC of the Act is to encourage commercial negotiation between the parties where possible. Accordingly, when the parties have entered into a contractual arrangement specifically in lieu of an interim determination, the Commission is likely to be reluctant to override such an arrangement.
62. However, there may be a case for making an interim determination varying an arrangement made between the parties where it is shown that there has been a material change of circumstances since the arrangement was made. Also, in some instances, there may be a case for making an interim determination if the terms of the arrangement reflect a significant disparity in the bargaining position of the parties which is unlikely to be ameliorated through the making of a final determination in the near future. In this regard, the Commission considers that when the parties to a dispute have entered into a contractual arrangement for the declared service, the making of an interim determination may override that arrangement if necessary.
63. The Commission notes that in the current dispute, the parties have reached an agreement with respect to an interim price that should be charged for the MTAS for the period 1 January to 31 December 2005 while the parties are in dispute.
64. As noted above, the Commission is generally reluctant to override any interim arrangements entered into specifically in lieu of an interim determination. In the current case, however, AAPT contends that the terms of the interim agreement between itself and Vodafone provide that the terms of an interim determination made by the Commission will override the parties' interim agreement.
65. In this regard, the interim agreement between the parties dated 10 March 2005, a copy of which was provided to the Commission by the parties, states that 'the arrangements set out in this agreement are an interim measure only, pending the resolution of the rate for the period 1 January 2005 to 31 December 2005 via either agreement between the parties, or as determined by the Australian Competition and Consumer Commission

(the Commission) pursuant to an access dispute under Part XIC of the Trade Practices Act 1974 (Cth) (Access Dispute) between the parties'. Accordingly, the interim agreement was not made in lieu of an interim determination.

66. The Commission has concluded that, although the parties have entered into an interim arrangement for supply at a rate of 19.38 cpm, it would still be appropriate for the Commission to make an interim determination. This is because the Commission believes, based on the information available to it at this point in time, that a price of 18 cpm would be appropriate for this service for the remainder of the 2005 calendar year, and that 15 cpm would be appropriate for the 2006 calendar year.
67. The Commission also notes Vodafone's submission that there is no risk that the service will not be supplied.³² Given that the main issue in dispute between the parties is the price of access, rather than supply *per se*, the Commission is of the view that Vodafone's intention to continue to provide the MTAS does not sufficiently weigh against making an interim determination.

Whether backdating a final determination would provide an adequate alternative to making an interim determination

Parties' submissions

68. Vodafone submits that the Commission has the power to backdate a final determination with interest and that this would provide a complete substitute to the Commission making an interim determination in this case. It therefore submits there is little or no risk of material detriment to AAPT in the event the Commission does not make an interim determination.
69. Vodafone notes that the Commission has indicated in its Guidelines that it would only consider backdating to be an inadequate alternative to an interim determination where an interim determination would allow price reductions to flow to end users in a way which backdating would not. Vodafone submits that it does not consider that an interim determination would result in a reduction in the price of FTM calls for end-users (unless it includes a pass through safeguard). This is discussed in more detail in paragraphs 206 to 217 below.
70. AAPT submits that the backdating of a final determination would be a 'poor substitute' for the making of an interim determination because Vodafone's interim pricing for the MTAS is 'materially above' the Commission's indicative prices. AAPT submits that an interim determination would enable the MTAS price to be reduced towards the actual cost of the service, thereby helping improve conditions for competition.
71. AAPT further submits that the interim arrangement between the parties create 'significant uncertainty' regarding the MTAS input costs to be incurred by AAPT. In turn, this uncertainty restricts AAPT's ability to deal with the revenues it derives from services to which the MTAS is an input, and affects its ability to invest in new infrastructure, make improvements in the range and quality of products and services it provides, and its ability to reduce prices of telecommunications services provided to customers.
72. Vodafone submits that any such uncertainty will not be alleviated by an interim determination by the Commission mainly because (i) access seekers are unlikely to re-calibrate retail rates on the basis of an interim determination in the face of 'substantial

³² Vodafone submission, 29 March 2005, paragraph 1.2(a) at p 1.

uncertainty' as to whether the rate will be retrospectively adjusted by the Commission when it makes a final determination and (ii) generally accepted accounting principles would lead firms to accrue costs and revenues conservatively when there is a significant risk that those costs and revenues may be reversed by subsequent regulatory action.

73. The Commission notes that Vodafone also made submissions that the FTM safeguard it proposes could not be imposed retrospectively, and therefore must be considered in the context of making any interim determination. This matter is discussed in paragraph 214 below.

Commission's view

74. The Commission notes in its Guidelines that, in some instances, backdating may provide an alternative to making an interim determination. The provisions allowing for backdating a final determination, as outlined in the Explanatory Memorandum to the *Telecommunications Legislation Amendment Bill 1998*, are intended to:

...encourage commercial agreement and co-operation during access arbitrations by removing incentives for delay and to ensure a considered and reasonable outcome is ultimately applied to the interim period which may otherwise be covered by an interim determination or a commercial agreement which one or more parties may be disputing.³³

75. In its Guidelines, the Commission also notes that in some instances backdating may be a poor substitute for an interim determination. In this regard, the Guidelines refer, as an example, to the situation where an interim determination enables the access price to be reduced towards that which the Commission is likely to set in a final determination. In this example, the Guidelines suggest that an interim determination:

...can help improve the conditions for competition. If these price changes flow through to end-users, the benefits can be realised more quickly than otherwise. Although backdating a final determination could compensate a party that has paid higher prices during the period until a final determination is made, it would not have the effect of promoting outcomes in the long-term interests of end-users during that period.³⁴

76. Importantly, however, the Commission notes that this particular example should not be interpreted as the *only* instance in which the Commission would consider backdating to be a poor substitute for an interim determination, as Vodafone appears to conclude. Rather, this example represents one particular set of circumstances where the Commission is likely to more strongly favour issuing an interim determination.
77. Further, it should be noted that the Commission does not consider an interim determination and the backdating mechanism to be necessarily substitutes for each other. That is, the Commission may still backdate a final determination in circumstances where it has issued an interim determination in an access dispute.
78. The Commission is of the view, based on the available information at this time, that the appropriate price of the MTAS is likely to be lower than that currently charged by Vodafone to AAPT. In this regard, the Commission notes that, in the MTAS Final Report that accompanied release of the MTAS Pricing Principles Determination, the Commission considered a price that was more closely associated with the total service long-run incremental cost (inclusive of a mark-up to account for some contribution to common organisational-level costs – so-called TSLRIC+) of providing the service

³³ Supplementary explanatory memorandum for the *Telecommunications Legislation Amendment Bill 1998*, Item 39B – Insertion of new section 152DNA of the TPA (Backdating of final determinations), p. 33.

³⁴ ACCC, *The Guidelines*, p. 52.

would best promote the long-term interests of end-users (LTIE). Further, the Commission found that, based on information available to it at that time, the TSLRIC+ of providing the MTAS was likely to lie somewhere in the range of 5 to 12 cents per minute. The Commission further considered that pricing principles that provided an adjustment path towards such a closer association of the price of the MTAS and its TSLRIC+ would best promote the LTIE. Based on a range of reasonable estimates of the TSLRIC+ of providing the MTAS available to the Commission at the time of making the MTAS Pricing Principles Determination, the Commission believed a price of 18 cpm would best promote the LTIE during the 2005 calendar year, and 15 cpm for the 2006 calendar year.

79. While the Commission may ultimately find that the prices proposed by Vodafone in its MTAS access Undertaking would, alternatively, better promote the LTIE, the Commission believes the material provided by Vodafone in support of its MTAS access Undertaking has not been subject to a full assessment process such that, the Commission can have confidence this would be the case. Accordingly, based on the information before it at this point in time (as discussed further in paragraph 185 below), the Commission believes it likely that a significant differential exists between the access price it considers would best promote the LTIE and the access price currently paid by AAPT to Vodafone.
80. The Commission believes that if it were to set a price for the MTAS in an interim determination that ensured a closer association of the price of the service and its TSLRIC+ than that currently charged by Vodafone to AAPT, this would likely generate benefits for end-users that would otherwise not arise. For instance, by lowering the input cost to AAPT of providing FTM call services, it can be expected that this will enable it to better compete in the market within which FTM call services are provided. The particular nature of these benefits – and the reasons why the Commission believes they would be likely to occur – are specified in more detail in paragraphs 91 to 105 below.
81. In contrast, while backdating can compensate a party to an access dispute for any cash-flow losses it incurs during the period from when commercial negotiations commenced to the issuing of a final determination,³⁵ it would not have the effect of creating the conditions for promoting the LTIE that would be expected from issuing an interim determination.
82. Consequently, the Commission does not believe that backdating will be an adequate or complete substitute for it issuing an interim determination in this particular dispute.

The likely impact of an interim arrangement on end-users

Parties' submissions

83. Vodafone submits that it does not consider AAPT would 'pass through' MTAS price reductions to any substantial extent since FTM pass through has historically been only partial and has not occurred consistently. Vodafone submits that the low prospect of FTM pass through is further evidenced by AAPT's objection to the concept of a pass through safeguard in Vodafone's proposed Undertaking and the fact it has not suggested alternative retail price paths or other proposals.

³⁵ Including the repayment of an 'interest component' and an allowance for the opportunity cost of funds being employed elsewhere.

84. Vodafone further argues that AAPT is highly unlikely to recalibrate retail rates on the basis of any interim determination given uncertainty as to retrospective adjustment that may arise from a final determination and that general accounting principles lead firms to accrue costs and revenues in a conservative manner when there is a significant risk that those revenues and/or costs may be increased and/or decreased by subsequent regulatory action. Vodafone also notes that AAPT has not indicated that it intends to pass through any cost savings in this regard.
85. Therefore, Vodafone submits that the Commission does not have a sufficient basis upon which to conclude that there are likely to be implications for end-user pricing if an interim determination is issued, as opposed to a backdated final determination.
86. In its submission in response to the draft interim determination, Vodafone submits that there is no logically probative evidence that supports a conclusion that the making of an interim determination is likely to have a 'material positive impact' on the LTIE.³⁶
87. In its submission on the draft interim determination, Vodafone submits that the Commission has no basis on which to conclude that 'The expected price assumed by both parties to this dispute would be one that is lower the 19.38 cpm', and that there is no evidence before the Commission to support such a conclusion.³⁷
88. AAPT submits that an interim determination that results in an immediate reduction in the price of the MTAS to a price in line with the Commission's estimate of the best cost measures for the MTAS would enable it to consider various outcomes in the interest of end-users, such as investing in new infrastructure, making quality and range improvements in products and services, and reducing end-user prices of telecommunications services.
89. Further, AAPT submits that an interim determination will provide it with significantly more certainty than exists under the current interim arrangement with Vodafone. AAPT argues the rate under the interim arrangements creates uncertainty regarding the input costs AAPT will ultimately incur – which restricts its ability to deal with revenues it derives from services of which the MTAS is a component, and its ability to consider outcomes in the interests of end users. While an interim determination provides less certainty than a final determination, AAPT argues an interim determination will enable the access price to be set toward a price the Commission is likely to set in a final determination.
90. Also, AAPT submits that the Commission is able to consider various means by which an interim determination may improve competition, and not merely whether there is a direct pass through of a reduction in prices to end-users of fixed-to-mobile services.

Commission's view

91. The Commission considers that an interim determination which contains a lower price for the MTAS than is currently charged by Vodafone will be likely to promote the LTIE. As indicated in paragraph 247 below, the Commission believes, based on the information available to it at this time, that a price of 18 cpm would be an appropriate interim price for this service for the remainder of the 2005 calendar year, and that a price of 15 cpm would be appropriate for the period from 1 January 2006 until 12 months from the date of commencement of the interim determination (14 July 2005).

³⁶ Vodafone submission 3 June 2005, paragraph 1.2(c)(i).

³⁷ Vodafone submission 3 June 2005, paragraph 2.5(a).

92. Based on the information available to it at this point in time, the Commission believes that AAPT faces prices for the MTAS in excess of its vertically-integrated rivals in the market within which FTM services are provided, as a result of the above-cost prices for this service. By lowering the price of the MTAS towards its underlying cost of production, the Commission believes this will help to put in place conditions for improved competition in the market within which FTM services are provided. In turn, this should increase the likelihood of lower prices for fixed-line telephony services (including FTM services). The Commission notes that greater competition in this market may also translate into non-price benefits for end-users such as enhanced quality of service. Further, the Commission believes that an interim determination will improve the prospects for greater allocative efficiency (both in the wholesale market for the MTAS and the retail markets within which mobile and fixed-line services are provided) since there is likely to be a closer association of prices with the underlying costs of providing these services.
93. The Commission notes the concerns raised by Vodafone that lower prices for the MTAS will not be passed through into lower prices for FTM call services. The Commission does not believe, however, that the extent of FTM pass-through should be seen as the only measure of the extent to which a lower price for the MTAS promotes competition in the market within which FTM services are provided, or the LTIE more generally. In the first instance, the LTIE test under section 152AB of the Act requires consideration of the extent to which an action, *inter alia*, promotes competition and encourages efficiency. An interim determination might put in place necessary preconditions for improved competition and efficient use of and investment in infrastructure. Putting into place those preconditions can itself be in the LTIE, even if the necessary preconditions are not taken advantage of.
94. Secondly, and as outlined in paragraph 97 below, to the extent that such preconditions are taken advantage of, improved competition can manifest itself in many forms other than just price reductions. In particular, improved competition may be associated with improvements in the quality of services provided (which may increase the cost of providing FTM call services). Further, lower input costs may be passed-through in the form of reductions in the price of other services provided in the bundle of pre-selected fixed line services. Hence, while FTM call prices may not fall by the same amount as the price of the MTAS in the short-term, the LTIE can still be promoted if there are reductions in the price of STD and IDD call services as a result of lowering input costs for competitors in the market within which FTM services are provided.
95. That said, the Commission notes that the extent of any 'price' benefits to consumers of FTM call services will depend, in part, on the level/extent of pass-through to the market within which FTM services (and other fixed-line services) are provided. During the Mobile Services Review, the Commission considered the issues of 'pass-through' both in principle and empirically and, based on available information at the time, reached the following conclusions:
- partial pass-through has occurred when considered over the whole period (i.e. 1997-98 to 2002-03) under analysis. This appears to be in accord with economic theory which suggests that only partial pass-through is likely to occur where there is less than effective competition in downstream markets;
 - FTM pass-through appears to have declined in the most recent period of analysis. However, this coincides with a period of only minor reductions in the price of the mobile termination service; and

- while Telstra's average per-minute retail price for FTM calls has partially decreased in line with reductions in termination charges, there is some evidence that not all categories of end-users have enjoyed the same extent of pass-through. In particular, price reductions have been more pronounced for on-net FTM calls in the corporate segment of the market.³⁸
96. These empirical observations suggest that when access seekers are faced with lower prices for the MTAS, this leads to some pass-through of these cost-savings to end-users – even if the extent of pass through is partial or not evenly distributed across all end-users. Hence, even though the Commission does not believe it necessary to be satisfied that FTM pass-through will occur as a result of an interim determination in order to demonstrate that it would promote the LTIE, the Commission, nonetheless, expects some level of FTM pass-through will be likely to occur as a result of the lower prices for the MTAS generated by the interim determination.
 97. Further, as the Commission noted in its MTAS Final Report, reducing the price of the MTAS towards its underlying cost of production should, by improving the state of competition in the market within which FTM services are provided, help to ensure the level of FTM pass-through increases over time. In this regard, the Commission notes that as competition in the market within which FTM services are provided improves, it is possible that reductions in the price of the MTAS could lead to even greater absolute reductions in the price of FTM (and other fixed-line services) call minutes.³⁹
 98. In reaching this view, the Commission notes Vodafone's view that access seekers are unlikely to recalibrate their price offerings in light of a reduced charge for the MTAS in an interim determination because there will be continuing uncertainty as to whether this rate will be retrospectively adjusted by the Commission when it makes its final determination. In this regard, Vodafone argued that:

...generally accepted accounting practices would lead AAPT to accrue costs and revenues which are the subject of regulatory uncertainty in a conservative manner.⁴⁰
 99. The Commission recognises that setting an access price in an interim determination does not remove uncertainty about the price the Commission will eventually set in a final determination. In light of this, the Commission expects both AAPT and Vodafone will perform some risk assessment when determining how to respond to reduced prices for the MTAS.
 100. However, it need not be assumed that AAPT will not utilise *any* of the lower cost savings it would experience as a result of lower charges set out in an interim determination for the MTAS in ways that would be likely to promote the LTIE. Partly, this is because there should be no presumption, at this point, that the Commission will necessarily set a price for the MTAS in a final determination that is higher than that which is contained in an interim determination. That is, it should not be assumed that the Commission could only revise upwards a price for the MTAS in a backdated final determination for the period covered by an interim determination. In this regard, the Commission notes that there is nothing to prevent it from setting a lower price for the MTAS in a backdated final determination for the period covered by an interim determination if it considered that the information before it suggested a lower price was more likely to meet the criteria under section 152CR(1) of the Act.

³⁸ ACCC, MTAS Final Report, p. 104-105.

³⁹ ACCC, *op. cit.*, p. xii.

⁴⁰ Vodafone submission, 29 March 2005, paragraph 1.2(c)(C), p. 2.

101. The Commission also notes that when determining an appropriate price for the MTAS for the purposes of a final determination, it would not simply be assessing whether it should set a final price of 18 cpm in accordance with its proposed adjustment path in the MTAS Pricing Principles Determination, or 19.38 cpm as proposed by Vodafone in its MTAS access Undertaking. Rather, the Commission will properly consider the appropriate price for the MTAS based on all the available and relevant information it has before it.
102. That said, the Commission notes that, based on the information currently before it, it is unlikely that it would set a price for the MTAS in an interim determination that is above 19.38 cpm. Clearly, this would depend on the further information that is submitted during the course of the arbitration and the assessment of such information.
103. The Commission would expect that both parties will proceed with their business cases, balancing the appropriate risks that the final determination could contain a price that is either above or below that set in an interim determination.
104. In light of these possibilities, the Commission expects AAPT will form a risk-adjusted view of the ‘expected’ price it will pay over the period covered by an interim determination (in light of the possibility of a backdated final determination that is set at a level inconsistent with the interim determination). The Commission considers it likely that a risk adjusted view of the ‘expected’ price for the MTAS over the period to which the interim determination applied would be lower than 19.38 cpm in this particular instance.⁴¹
105. Based on the information available to it at this point in time, the Commission believes this ‘expected’ price would be one that is more closely associated with the TSLRIC+ of providing the MTAS. In turn, the Commission believes this will be likely to better promote the LTIE than if the Commission did not issue an interim determination in this matter.

The timing of the final determination

Parties’ submissions

106. AAPT submits that the period of time between the making of an interim determination and the making of a final determination is likely to be substantial. AAPT refers to:
 - (i) the ‘significant scrutiny’ that will be required to examine Vodafone’s cost model (by both the Commission and interested parties);
 - (ii) the existence of many MTAS access disputes that are likely to restrict the Commission’s ability to resolve this particular AAPT/Vodafone dispute in a timely manner;
 - (iii) the Commission’s consideration of Optus’ MTAS undertaking material and various access disputes with Optus; and
 - (iv) proceedings in the Federal Court filed by Vodafone against the Commission to the extent that issues in those proceedings relate to issues in this arbitration.

⁴¹ That is, with a small (or zero) probability of a price being set greater than 19.38cpm (as discussed in paragraph 102) and higher probabilities of pricing at or below 19.38cpm, the expected price for the MTAS in a Final Determination will likely be below 19.38cpm.

107. Hence, AAPT argues, it is appropriate for the Commission to make an interim determination in the meantime.
108. Vodafone submits that there is no reason to prefer making an interim determination since consideration of the undertaking is likely to be completed in a shorter period of time than the arbitration. This is because the issues are complex and Vodafone's cost of supplying the MTAS must be considered and answered prior to making an interim determination. In this regard, Vodafone submits it would be appropriate for the Commission to defer making a final determination until it has assessed Vodafone's MTAS access Undertaking in a public, transparent process. This is discussed in further detail in paragraphs 89 to 102.
109. Vodafone also submits that, based upon the information available to it in a Productivity Commission Report, past experience indicates that the conduct of an arbitration to either an interim or final determination is unlikely to proceed faster than assessment of the proposed undertaking. In its submission in response to the draft interim determination, Vodafone submitted that to the extent that the Commission relies on other matters to support its views in relation to past experience, Vodafone should be told what they are.⁴²
110. Further, Vodafone argues that if the Commission is having difficulty applying its Pricing Principle Determination in an Interim Determination (based upon Vodafone's contention that to apply the Pricing Principle Determination regard must be had to Vodafone's direct costs) then this is a powerful reason for the Commission to decide not to make an interim determination.⁴³

Commission's view

111. In the Guidelines, the Commission indicates that the timing of an interim determination is relevant in two ways. First, if the period of time between notification of the dispute and making the final determination is likely to be substantial, then an interim determination may be appropriate. Second, the period of time between the interim determination and final determination should be considered. If a final determination is to be made within a relatively short period of time (say two to three months), then the case for making an interim determination is likely to be weaker. It is also noted in the Guidelines that making an interim determination uses resources that could otherwise be used to finalise the arbitration, potentially delaying finalisation of the arbitration.
112. In this case, the issue of deferral is relevant to the question of how long it is likely to be until a final determination is made. This is because, as discussed in paragraphs 129 - 136 below, the Commission is of the view that it would not be appropriate to defer further consideration of this dispute while it assesses Vodafone's MTAS access Undertaking.
113. In turn, the length of time it will take the Commission to assess Vodafone's MTAS access Undertaking is an important consideration with respect to how long it will take the Commission to make a final determination in this dispute. In this regard, it is expected that the Commission's assessment of Vodafone's material in support of its

⁴² Vodafone submission, 3 June 2005, para 2.6(b).

⁴³ *id.*, paragraph 1.2(f).

MTAS access Undertaking will be a complex exercise. The Commission considers the complexity of this material is likely to mean that a full and proper consideration of Vodafone's MTAS access Undertaking will take a substantial period of time.

114. Further, the Commission notes that Vodafone has recently withdrawn its Undertaking submitted on 26 November 2004, and provided the Commission with a second Undertaking which it submitted on 23 March 2005. While subsection 152BU(5) of the Act provides the Commission with a six month time frame within which to make a decision in relation to an undertaking, subsection 152BU(6) of the Act provides for instances where time periods used to calculate this six-month period are to be disregarded and subsection 152BU(7) allows for extension of the decision-making period. While the Commission will endeavour to conduct its public inquiry into Vodafone's second MTAS access Undertaking as expeditiously as possible, it notes that it only recently released a Discussion Paper in relation to this Undertaking in April 2005 and that the closing date for submissions has only recently been set at 17 August 2005.
115. Following consideration of these issues, the Commission does not expect that it will be in a position to make a final determination in relation to this dispute until late in 2005 at the earliest. Hence, the Commission is of the view that the likely timing of a final determination weighs in favour of it making an interim determination at this stage of the arbitration.
116. The Commission notes Vodafone's reference to the Productivity Commission Report regarding the average time from notification to interim determination in previous disputes arbitrated by the Commission.⁴⁴ Vodafone refers to these past experiences in the conduct of arbitrations to support its argument that consideration of its MTAS access Undertaking is likely to be completed in a shorter period of time than the arbitration. In this regard, the Commission considers that references to the time taken to make interim determinations in previous disputes ought to be treated with caution. This is because, in a number of cases, the circumstances of those disputes were substantially different to the current dispute, including but not limited to the fact that express provision for the making of an interim determination was not introduced until 1999 and also that the Commission did not always have sufficient information early in a dispute on which to make an interim determination. Further, as noted above, the Commission is of the view that it is not relevant to consider merely the time taken to make an interim determination, but rather how it relates to the likely timing of the final determination.
117. With respect to Vodafone's submission in relation to the above discussion, the Commission notes that, of the 17 interim determinations described in the Productivity Commission Report to which Vodafone referred, four disputes were notified prior to the enactment of section 152CPA of the Act.⁴⁵ Further, that the Commission did not always have sufficient information early in a dispute on which to base an interim determination has been a matter of industry knowledge for some years. In particular, in submissions to the Productivity Commission review that has been cited, the Commission stated:

⁴⁴ Vodafone submission, 29 March 2005, paragraph 2.2(e) at p 6.

⁴⁵ Productivity Commission, Final Report, Telecommunications-Specific Competition Regulation, pages 237-238.

There have been a range of factors impacting upon the length of arbitrations. ...

The issues for resolution ... have also involved fundamental decisions of general importance to the industry, including such basic issues as appropriate pricing principles as well as the desirable level of regulation.

...

The Commission has to date made interim determinations in arbitrations relating to price in circumstances where it has established a conceptual framework from which it can ultimately derive a set of prices, but further information is required before it can finalise those prices.⁴⁶

118. Finally, as discussed in more detail in paragraphs 190 to 193 below, the Commission does not accept Vodafone's contentions that:

- The Commission has found it difficult to apply the Pricing Principles Determination in the context of an interim determination; and
- The Commission must assess Vodafone's cost information for the purposes of applying the Pricing Principles Determination.

International treaty obligations

Parties submissions

119. Neither party made arguments on this issue.

Commission view

120. The Commission does not consider this matter relevant in this arbitration.

Other matters - deferral

121. Subsection 152CLA(2) of the Act provides the Commission with a discretion to defer consideration of an access dispute (in whole or in part) while it considers a related access undertaking. Subsection 152CLA(4) of the Act sets out matters the Commission must have regard to in exercising the power to defer consideration of an access dispute, namely:

- the fact that the access undertaking will, if accepted, apply generally to access seekers whereas a determination relating to the access dispute will only apply to the parties to the determination (152CLA(4)(a));
- any applicable Guidelines in force (deferral Guidelines)⁴⁷ (152CLA(4)(b)), and
- such other matters as the Commission considers relevant (152CLA(4)(c)).

⁴⁶ ACCC, Supplementary Submission to the Productivity Commission Review of the Telecommunications Specific Competition Regulation, November 2000, pages 27-28.

⁴⁷ The Commission has formulated guidelines and these are contained in chapter 9 of the Commission's publication, *Resolution of telecommunications access disputes – a guide, March 2004 (revised)* (the Guidelines).

Parties' submissions

122. Vodafone has submitted that the Commission should defer consideration of the arbitration while it considers its MTAS access Undertaking.
123. In support of its view, Vodafone submits that the Commission's resources would be better directed towards considering its MTAS access Undertaking rather than the arbitration, further noting that the current access dispute was submitted over a month after the first access undertaking was lodged. Vodafone also submits that a public and transparent process relating to the consideration of the access undertaking is preferable to the private nature of arbitrations, noting that other access seekers that may have a substantial interest in the pricing of the MTAS are not privy to arbitration proceedings. In its submission in response to the draft interim determination, Vodafone refers to its request to the Commission of 10 February 2005 for a timetable for consideration of the MTAS access undertaking.⁴⁸
124. Vodafone also notes the Commission's deferral Guidelines and suggests there is no reason to prefer the making of an interim determination in the current circumstances, since consideration of the undertaking is likely to be completed in a shorter period of time than the arbitration. In support of this claim, Vodafone submits that its costs of supplying the MTAS must be considered prior to making an interim determination and that past experience with arbitrations suggests that the conduct of an arbitration to either an interim or final determination is unlikely to proceed more quickly than the assessment of a proposed undertaking. Vodafone submits that consideration of an access undertaking should generally take no more than 6 months.
125. Vodafone also submits that section 152CLA of the Act gives rise to a (rebuttable) presumption that arbitrations should be deferred unless a compelling countervailing factor can be identified. Vodafone submits that no circumstances exist in this case that make it appropriate to deal with the arbitration in advance of dealing with the access undertaking. Vodafone further submits that an interim determination is not required in order to ensure the smooth supply of the MTAS since there is no risk that Vodafone will not supply the MTAS to AAPT.
126. In response to the draft interim determination, Vodafone submits that any inherent uncertainties associated with relying on the access undertaking process to resolve access pricing disputes do not outweigh the benefits of deferring the dispute to consider Vodafone's MTAS undertaking, Vodafone further submits that the best way to overcome any such uncertainties is to deploy the maximum resources possible towards considering the Undertaking. In this regard, Vodafone submits that its withdrawal of its first MTAS undertaking demonstrates the inherent uncertainties of the undertaking process because this was only done on Commission request and the replacement undertaking submitted by Vodafone was the same as the first except in relation to one specific input to the PwC model resulting in a price change in the undertaking. Vodafone also suggests that it believes the Commission has already undertaken considerable analysis of Vodafone's MTAS access undertaking material and notes that, as Vodafone is close to finalising arrangements for interested parties to access its confidential MTAS access undertaking material, interested parties will have only six weeks to provide comments on the material to the Commission.⁴⁹

⁴⁸ Vodafone submission 3 June 2005, paragraph 3.1(a).

⁴⁹ Vodafone submission 3 June 2005, paragraphs 6.1-6.3.

127. Vodafone also states that the Commission has not put forward any evidence in relation to its view that the Undertaking and access dispute are not competing priorities at this time.⁵⁰
128. AAPT notes Vodafone's submission that the Commission should defer the arbitration of the dispute while the Commission considers Vodafone's MTAS access Undertaking. However, AAPT submits that, as the Commission has not requested submissions from the parties on whether the arbitration should be deferred, it has not responded to Vodafone's submissions on the issue. It further states that, if the Commission does propose a deferral, AAPT would request the opportunity to make submissions in support of the arbitration continuing in parallel with the consideration of Vodafone's Undertaking.

Commission's view

129. The Commission acknowledges that Vodafone's MTAS access Undertaking will, if accepted, apply generally to access seekers, whereas a determination relating to the access dispute will only apply to the parties to the determination. In this respect, the Commission recognises that the arbitration is a private process and that the consideration of an access undertaking is a public process. The Commission is mindful of the benefits of progressing consideration of Vodafone's MTAS access Undertaking.
130. As noted at paragraph 114 above, while the Act provides for a six month time frame within which to make a decision in relation to an undertaking, this decision period may be extended in certain circumstances. The Commission considers that based on the process it typically follows in considering access undertakings, and given the complex and detailed nature of submissions filed in support of Vodafone's MTAS access Undertaking, it is unlikely to reach a decision with respect to the MTAS access Undertaking until late 2005 at the earliest. In this regard, the Commission notes it released Discussion Papers for both of Vodafone's MTAS access undertakings (in February and April 2005) which outlined the process the Commission would take in assessing the undertakings and provides information that should enable Vodafone to form a view of likely timeframes for the assessment of Vodafone's undertaking. The Commission also notes that Vodafone has still not made the confidential cost information submitted in support of its MTAS access undertaking reasonably available to interested parties. Therefore, the Commission is not yet in a position to assess the validity of the undertaking or specifically determine when finalisation of its assessment of Vodafone's undertaking will occur.
131. As recognised in the deferral Guidelines, in cases where access undertakings could take some time to complete, it may be appropriate to make an interim determination, particularly where this would enable the benefits from improved access conditions to be realised in a timely manner. The access undertaking framework does not provide any such opportunity to enable benefits from improved access conditions to be addressed in a timely manner. This suggests to the Commission that it is appropriate to continue the arbitration at this time and proceed with considering whether to make an interim determination.

⁵⁰ *id* at paragraph 3.1(c).

132. The Commission acknowledges that the arbitration is largely a private process. In this regard, any access seeker may notify a dispute where the parties fail to agree on the terms and conditions of access to the MTAS. The Commission notes it has a number of other such arbitrations on foot. The Commission also notes it may publish an arbitration determination pursuant to section 152CRA of the Act, which may serve to publicise arbitration outcomes. However, the Commission considers that, even with the possibility of publishing an arbitration determination, there are benefits associated with a public access undertaking process.
133. As noted elsewhere in this statement of reasons, in considering an interim determination, the Commission is not required to take into account the matters it must explicitly take into account in making a final determination. Further, the Commission notes that in making a decision on the access undertaking, it is required to take into account matters that would require a more thorough and detailed consideration than that required in the context of considering and making an interim determination.
134. The Commission recognises there is some inherent uncertainty in relying to a large extent on the access undertaking process to resolve access pricing disputes. The Commission notes that an access undertaking can be withdrawn at any time, and that Vodafone did in fact withdraw its initial MTAS access undertaking. The Commission notes that establishing a binding access price in the context of the access undertaking process is also dependant on acceptance of the undertaking. Accordingly, the Commission notes there is no certainty that the undertaking process will necessarily be able to resolve pricing disputes in a binding way. The Commission does not agree that devoting the maximum resources possible to assessing the MTAS access undertaking in any way mitigates these inherent uncertainties, including those surrounding the possible withdrawal of an access undertaking at any stage.
135. The Commission is mindful, however, of not delaying consideration of Vodafone's MTAS access Undertaking. The Commission notes that it does not consider the MTAS access Undertaking and access dispute processes to be competing priorities at this time and that it does not envisage delays occurring with consideration of the access undertaking as a consequence of making an interim determination, and progressing with the arbitration at this time.
136. The Commission is of the view that in considering whether to defer an arbitration it must have regard to matters as relevant pursuant to section 152CLA(4) of the Act, and that in making a decision to defer an arbitration it must first consider and balance its findings in respect to those matters. Having had regard to matters relevant under section 152CLA(4) of the Act, and the arguments presented by Vodafone, the Commission has decided to not exercise its discretion to defer consideration of this access dispute at this time. The Commission considers it appropriate to proceed with making an interim determination and considers this to be in the LTIE. The Commission notes it may revisit the question of deferral of the access dispute at a later time.

Conclusion – whether the Commission should issue an interim determination

137. Having regard to paragraphs 11 to 116 above, the Commission considers that it has sufficient information to make an interim determination and that it is satisfied in all the

circumstances that it is appropriate to make an interim determination in this access dispute.

CONTENT OF THE INTERIM DETERMINATION

138. In determining the matters that the Commission should have regard to in deciding on the content of this interim determination, it has considered its Guidelines and the relevant legislative provisions, namely subsections 152CR(3) and (4) of the Act. Based on the submissions received to this access dispute, the Commission has given consideration to the following factors in determining the content of this interim determination:

- Whether to take into account matters identified under section 152CR(1) and other provisions of Part XIC of the Act;
- Vodafone's direct costs;
- The model prepared by Frontier Economics (the Frontier model) on behalf of Vodafone;
- The Commission's MTAS Pricing Principle Determination;
- Whether an interim determination should include an adjustment path;
- Whether an interim determination should include a FTM pass-through safeguard; and
- The time period over which an interim determination should apply.

Each of these is considered in turn below.

Matters identified under subsection 152CR(1) and other provisions of Part XIC of the Act

Parties' submissions

139. In summary, Vodafone submitted that the Commission is required to take into account the following factors in deciding the content of any interim determination:

- any pricing principles and price related terms and conditions issued under section 152AQA;
- the requirement in subsection 152CP(4) to give the parties a draft determination; and
- whether the Commission will exercise its discretion under subsection 152CR(3) to have regard to the factors in subsection 152CR(1).

140. Vodafone's submission also addressed each of the following criteria specified under subsection 152CR(1) of the Act:

- whether the determination will promote the LTIE (152CR(1)(a));
- the legitimate business interests of the carrier or provider, and the carrier's or provider's investment in facilities used to supply the MTAS (152CR(1)(b));
- the interests of all persons who have rights to use the declared service (152CR(1)(c));

- the direct cost of providing access to the declared service (152CR(1)(d));
 - the value to a party of extensions, or enhancement of capability, whose cost is borne by someone else (152CR(1)(e)). Vodafone submitted that this criterion is not relevant to this dispute; and
 - the economically efficient operation of a carriage service, a telecommunication network or a facility (152CR(1)(f)) – Vodafone submitted that this criterion is not relevant to this dispute.
141. Vodafone’s submission also addressed the following other provisions of Part XIC:
- the matters set out in subsection 152AH(1)(d) including the ‘direct costs of providing access to the declared service concerned’;
 - the long-term interests of end-users pursuant to section 152AH(1)(a); and
 - other relevant matters pursuant to subsection 152CR(3)(b).
142. AAPT did not specifically address whether the Commission should have regard to particular criteria in considering the content of an interim determination. However, it did argue that to address each of the issues in s152CR(1) of the Act would in effect require the Commission to have made all considerations necessary for making a final determination. AAPT argued that, instead, the Commission needs only to have sufficient information on the issues in dispute to provide a reasonable basis for making the terms and conditions of the interim determination. AAPT also agreed with Vodafone that the Commission is obliged to consider the pricing principles and indicative price related terms and conditions which it has made in relation to the MTAS.

Commission’s view

143. The Commission agrees that it is required to take into account its MTAS Pricing Principles Determination, including price-related terms and conditions, made under section 152AQA of the Act. The Commission’s consideration of this is discussed in detail in paragraphs 132 to 145 below.
144. The Commission notes that it is giving the parties a draft interim determination pursuant to the requirement in subsection 152CP(4) of the Act.
145. The Commission does not agree that it is required to consider whether to have regard to the factors set out in subsection 152CR(1) of the Act. Rather, subsection 152CR(4) of the Act provides that, in making an interim determination, *the Commission does not have a duty to consider whether to taking into account* a matter referred to in a paragraph of subsection (1) (emphasis added). Nevertheless, the Commission has considered whether it would take into account any or all of the matters referred to in subsection 152CR(1) of the Act.
146. The Commission has decided not to explicitly take into account the matters listed in subsection 152CR(1) of the Act in determining the content of the interim determination. The Commission is of the view that a proper assessment of all of the material before the Commission, including Vodafone’s submitted Undertaking material, against those matters would be an unreasonable approach to determining the content of an interim determination. Such an assessment is more appropriate for a final determination. That said, the Commission notes that the content of the MTAS Pricing Principles Determination to which the Commission must have regard was arrived at taking into account those matters. Further, in determining the content of an interim determination,

the Commission is cognisant that the object of Part XIC of the Act is to promote the LTIE.

147. The Commission does not agree that the criteria in section 152AH of the Act are relevant to determining the content of an interim determination. In any event, the Commission notes that they largely overlap with the criteria in section 152CR of the Act.

Vodafone's direct costs

Parties' submissions

148. Vodafone submits that if the Commission elects to make an interim determination, it must have regard to Vodafone's direct costs of supplying the MTAS, including the constraints on Vodafone's ability to re-allocate fixed common costs between its wholesale and retail businesses, which constraints are reflected in the proposed glide path. Further, Vodafone notes that the 'best and only' evidence in this regard is the information it provided to the Commission on 29 March 2005 as supporting material to its MTAS access Undertaking. Vodafone notes that a cost model, developed on its behalf by PricewaterhouseCoopers (PwC), estimates that the forward-looking efficient economic cost to Vodafone of supplying the MTAS on its GSM network is 16.15 cpm.
149. Vodafone submits that the Commission's indicative prices [as contained in its MTAS Pricing Principles Determination] are likely to produce prices which are substantially lower than Vodafone's direct costs indicate. Vodafone also submits that if the Commission was to issue an interim determination on the basis of the draft it would make an interim determination that was not consistent with the pricing principle because the Commission is required to consider Vodafone's direct costs in identifying 'the upper end of the range of reasonable estimates of the TSLRIC+ of supplying the service that are currently available'.⁵¹ Vodafone also appears to suggest that the Commission should consider whether Optus's publicly available Access Undertaking represents a reasonable estimate of the TSLRIC+ of supply the MTAS.⁵²
150. Vodafone submits that the assessment of its MTAS access Undertaking material is a complex exercise which cannot and should not be undertaken within the timeframes the Commission proposes to determine whether or not, and if so, what interim determination should be made. Vodafone notes that the complexity of the task (and the consequential time necessary to effectively and properly carry it out) is a factor which weighs in support of no interim determination being made.
151. That said, Vodafone notes in its response to the Commission's draft interim determination that the 'cost information has been available to the Commission for over 5 months'. Vodafone argues that the fact that the Commission has not pursued or substantially advanced the opportunity to interrogate and verify the cost information does not entitle the Commission to give it no weight, nor does the fact that AAPT has not yet had access to that information.⁵³
152. AAPT submits that the Commission should give little or no consideration to Vodafone's direct costs as the information which Vodafone submitted to the Commission in support of its costs has not yet been subjected to scrutiny and Vodafone is yet to make available to AAPT materials which it considers confidential. AAPT cites

⁵¹ Vodafone submission 3 June 2005, paragraph 1.2(f)(i).

⁵² *bid.*, paragraph 4.11(a).

⁵³ *id.*, paragraph 1.2(d).

page 37 of the Guidelines, which states that the Commission indicates where one party has not had the opportunity to comment on information which the Commission has received from the other party, this may affect the weight the Commission ought to give to that information.

153. AAPT argues that if the Commission is inclined to consider Vodafone's submissions in this regard, AAPT considers Vodafone's (non-confidential) submissions support an interim determination that sets a price of 18 cpm for the MTAS. AAPT notes that Vodafone's cost modelling results yield a figure of 17.5 cpm and argues that this suggests 17.5 cpm is the absolute top of the range of any reasonable estimate of the TSLRIC+ of Vodafone providing the MTAS. Therefore, AAPT argues, it appears that both AAPT and Vodafone agree that the cost of the MTAS is no higher than the rate of 18 cpm for the 2005 calendar year'.
154. AAPT submits that if the Commission were to have regard to Vodafone's direct costs this:

would effectively conflate the interim determination with the process required for a final determination to be made, and we would submit that that would require inconsistency with the clear scheme in respect of - as set out in section 152CR(3) and (4), that a lesser informational standard should apply for interim determinations, as opposed to final determinations.⁵⁴

Commission's view

155. In determining the content of this interim determination, the Commission has had regard to the material supplied by Vodafone on its direct costs of supplying the MTAS.⁵⁵ In this regard, the Commission has decided not to conduct a full assessment of this material for the purposes of making an interim determination in this dispute and has formed a view to not rely on this material in determining the content of the interim determination.
156. In the first instance, the Commission considers that under the relevant statutory criteria, it does not have a duty to consider Vodafone's direct costs when considering what the content of an interim determination should be. While this is a matter that the Commission is obliged to take into account under subsection 152CR(1)(d) of the Act in making a final determination, it is not obliged to do so in making an interim determination. The Commission considers that when determining what the content of an interim determination should be, it has discretion to consider a range of information available to it.
157. Further, the Commission notes Vodafone's view that the assessment of the material submitted by Vodafone on its direct costs of supplying the MTAS is a complex exercise which cannot and should not be undertaken within the timeframes the Commission proposed to determine whether or not an interim determination should be made and, if so, what the content of the interim determination should be.⁵⁶
158. The Commission notes that it would not be feasible or appropriate for it to conduct a full assessment of Vodafone's MTAS access Undertaking material at this stage. The assessment of an undertaking is a process that the Act envisages could take six months or longer to complete. Therefore, a full and proper assessment of Vodafone's MTAS

⁵⁴ Transcript oral hearing 20 June 2005, Mr Pattison, pages 6-7.

⁵⁵ As noted above, this material was submitted as supporting material to Vodafone's Undertaking with respect to the MTAS, a revised version of which was lodged with the Commission on 23 March 2005.

⁵⁶ Vodafone submission, 29 March 2005, paragraph 1.2(d), p. 3.

access Undertaking material, including the PwC cost model, would be more appropriate and relevant for considering the content of a final, rather than an interim, determination.

159. Accordingly, the Commission does not propose to rely on this material for the purpose of deciding on the content of this interim determination.
160. The Commission notes Vodafone's submission in response to the draft interim determination that the Commission has not explained why it could not perform a sufficient investigation of Vodafone's cost information within the time available to ascertain whether or not it could be relied upon, at least in part, in determining the content of any interim determination. In this regard, and as indicated above, the Commission notes that, upon submission of this material, Vodafone commented that an assessment of Vodafone's stated direct costs 'is a complex exercise which cannot and should not be undertaken within the timeframes the Commission proposes to determine whether or not, and if so, what interim determination should be made'. In addition, the Commission notes that not only has AAPT not had the opportunity to conduct its assessment of Vodafone's confidential cost information for the purposes of this dispute, that same cost information has not, at the time of releasing this interim determination, been made reasonably available to other interested parties for interrogation within the Commission's broader public inquiry process in relation to Vodafone's MTAS access undertaking.
161. In order for the Commission to be convinced that the cost information submitted by Vodafone represents a reasonable basis for the purposes of setting an access price for the MTAS, the Commission believes this information needs to have gone through a full process to independently test and verify its reasonableness. The Commission notes that this has not occurred with respect to the information submitted by Vodafone at this point in time. Accordingly, the Commission does not believe it has sufficient evidence before it to enable it to rely on Vodafone's stated direct costs for the purposes of this interim determination.
162. For these reasons, the Commission does not consider it appropriate to have rely on Vodafone's cost information for the purposes of determining the content of the interim determination. For similar reasons, the Commission also considers it would not be appropriate to rely on the information submitted by Optus with respect to its MTAS access undertaking (as part of the undertaking process).
163. That said, the Commission notes that the model developed by Charles River Associates (CRA) in support of Optus's MTAS access Undertaking does not purport to model the TSLRIC+ of providing the MTAS. Rather, this model attempts to estimate the TSLRIC of providing the MTAS *augmented* by mark-ups to account for Ramsey pricing principles and a network externality surcharge. On this basis, CRA estimates the welfare maximising price of the MTAS to be 17 cpm for the 2004-05 financial year. As indicated in the MTAS Final Report, however, such mark-ups are not considered to fall within the definition of TSLRIC+. Accordingly, if these figures were adjusted to estimate the TSLRIC+ of the MTAS, the Commission believes it likely that this estimate would be substantially less than the 16.15 cpm figure proposed by PwC on behalf of Vodafone.

The Frontier model

Parties' submissions

164. Vodafone submits that while it does not rely on the Frontier model as a basis for its Proposed Usage Charge in its MTAS access Undertaking, it does rely on the Frontier model and outputs as material and analysis to which the Commission should have regard in issuing any interim determination.⁵⁷
165. Vodafone submits that the Frontier model and its outputs demonstrate that the MTAS usage charges, proposed in its MTAS access Undertaking, are conservative and therefore reasonable. It submits that the Frontier model adopts widely recognised economic principles, the application of which make the case that much higher MTAS usage charges are likely to be more efficient, and better promote the LTIE, than Vodafone's Proposed Usage Charge in its MTAS access Undertaking.
166. AAPT did not make any direct comments on the Frontier model.

Commission's view

167. In determining the content of this interim determination, the Commission has not placed any weight on the Frontier model which was submitted by Vodafone as supporting material to its revised MTAS access Undertaking.
168. The Commission again notes Vodafone's view that the assessment of the material it supplied in relation to its Undertaking is a complex exercise which cannot and should not be undertaken within the timeframes the Commission proposed to determine whether or not an interim determination should be made and, if so, what the content of the interim determination should be.⁵⁸ The Commission also notes AAPT's view that a full and proper examination and analysis of that information (i.e. the information which is the subject of Vodafone's request for orders under sections 152DC and 152DK of the Act) can be made by the Commission and the parties in the period (if appropriate) between the making of any interim determination and the making of the final determination.⁵⁹
169. As with the PwC cost model, the Commission will undertake an assessment of the Frontier model for the purposes of assessing Vodafone's MTAS access Undertaking. This includes seeking comments from interested parties on aspects of the Frontier model. As such, the Commission considers that it would not be feasible or appropriate for it to conduct a full assessment of the Frontier model at this stage. A full and proper assessment of the undertaking material submitted by Vodafone, including the Frontier model, would be more appropriate and relevant for considering the content of a final, rather than an interim, determination.
170. Further, the Commission notes that Vodafone has explicitly stated that 'it has not included the outputs of the Frontier analysis in the target Usage charge (16.15 cpm)' in its MTAS access Undertaking. Vodafone indicated that this was because it:

...wishes to ensure an orderly and timely assessment of the Undertaking by the Commission. In response to previous submissions on these issues, the Commission appears to be vigorously

⁵⁷ Vodafone submission, 29 March 2005, paragraph 3.10(a)

⁵⁸ Vodafone submission, 29 March 2005, paragraph 1.2(d), p. 3.

⁵⁹ AAPT submission, 29 March 2005 (third letter), paragraph 4, p. 5.

opposed to considering welfare-maximising prices for the MTAS to the point of having pre-determined its position...⁶⁰

171. Notwithstanding this explanation from Vodafone, the fact that the Frontier model outputs do not constitute an input into Vodafone's proposed target price is a factor leading to the Commission's decision not to place any weight on this material in the context of determining the content of this interim determination.

The Commission's MTAS Pricing Principles Determination

Parties' submissions

172. Vodafone notes that the Commission is also required to have regard to its Pricing Principles contained in Annexure 1 of the Pricing Principles Determination.
173. That said, Vodafone submits that it would not be reasonable for the Commission to place significant weight upon the 'price related terms and conditions' contained in Annexure 2 to its Pricing Principles Determination in determining the content of this interim determination, given that it is the subject of Federal Court proceedings.⁶¹
174. Vodafone further submits that the Mobile Services Review, the Determination dated 30 June 2004 and the Price Related Terms and Conditions in Annexure 2 to the Determination do not provide a sound basis upon which the Commission can form a view about Vodafone's direct costs of providing access to the declared service, as the Commission did not take into account any data regarding Vodafone's direct costs.⁶²
175. Vodafone also submits that the Commission has not addressed Vodafone's submission that the price related terms and conditions do not reflect the Pricing Principle Determination and that 12 cpm is not the upper end of the range of reasonable estimates of TSLRIC+.⁶³
176. In this regard, Vodafone considers that the process adopted by the Commission to determine the target price of 12 cpm does not constitute a reasonable or robust derivation, or estimate of a range of reasonable estimates of TSLRIC+ of the forward-looking efficient economic cost of providing the MTAS for Australia on Vodafone's network. Consequently, the Commission's indicative price for the 2005 calendar year which is set out in the Commission glide path in Annexure 2 of the Pricing Principles Determination should not be the basis for any interim determination made in relation to this dispute.⁶⁴ Vodafone further argues in response to the draft interim determination that '...there is no logically probative evidence upon which to make an interim determination at 18 cpm. The Commission's 'Price Related Terms and Conditions [as specified in its Pricing Principle Determination] do not reflect the Commission's pricing principle'.⁶⁵
177. Further, Vodafone submits that if the Commission has regard to its Price Related Terms and Conditions in the current arbitration proceedings, it must provide to the parties the evidentiary material relied on to support the conclusions in the Pricing Principle

⁶⁰ Vodafone, Submission to the ACCC: Access Undertaking Mobile Terminating Access MTAS, 26 November 2004, p. iv.

⁶¹ Vodafone submission, 29 March 2005, paragraph 1(a)(i), p. 1.

⁶² *ibid.*

⁶³ *id* at paragraph 4.10.

⁶⁴ Vodafone submission, 29 March 2005, paragraph 1(a)(iv), p. 2.

⁶⁵ Vodafone submission, 3 June 2005, paragraph 4.11.

Determination so that Vodafone may interrogate and test this material.⁶⁶ Vodafone reiterated this point in its submission in response to the draft interim determination and made specific reference to the consultancy report prepared by Analysys for the Commission during the course of the Mobile Services Review.

178. Vodafone submits, in response to the draft interim determination, that because the Pricing Principles Determination is a cost-based pricing principle determination which requires the Commission to have regard to the 'upper end of the range of reasonable estimates of TSLRIC+ of supplying the MTAS that are currently available' the Commission must have regard to Vodafone's cost information. Further, Vodafone argues that the Commission must have regard to that information in order to provide Vodafone with procedural fairness in order to allow it to put its arguments against the application of the indicative prices set out in the Pricing Principles Determination in the interim determination.⁶⁷
179. In its submission on the Analysys Report, Vodafone also argued that the Analysys Report 'provides substantial independent expert evidence to support Vodafone's submissions that...establishes the unsuitability of the benchmark figures the Commission relied upon and states that specific cost modelling of Australian costs would be preferable to reliance upon the limited number of overseas LRIC figures available.'⁶⁸ Vodafone also argues that 'there is sufficient uncertainty surrounding Annexure 2 that it would not be prudent for the Commission to make an interim determination.'⁶⁹
180. AAPT agrees with Vodafone that the Commission should give consideration to the Pricing Principles Determination and indicative price-related terms and conditions it has made in relation to the MTAS under section 152AQA of the Act.
181. AAPT disagrees, however, with Vodafone's argument that the Commission should not place significant weight on the Pricing Principles Determination because of the current Federal Court proceedings. AAPT notes that the Pricing Principles Determination remains valid and that, to date, Vodafone has not sought an injunction restraining the Commission from having regard to the Pricing Principles Determination. Further, AAPT submits that to not have regard to the Pricing Principles Determination on the basis of such proceedings would encourage access providers to engage in regulatory gaming.
182. AAPT disagrees with Vodafone's submission that the Mobile Services Review and its findings do not provide a sound basis upon which the Commission can make a decision on the content of an interim determination. AAPT submits that the Commission's Pricing Principles Determination (including the price-related terms and conditions) for the MTAS are currently the best estimate of the cost of providing the MTAS which has been subject to scrutiny by interested parties (including Vodafone) AAPT notes that the price of the MTAS was directly examined by the Commission in its Mobile Services Review and its MTAS Final Report.
183. In the oral hearing of 20 June 2005, AAPT noted that the Commission had had regard to Vodafone's direct costs but decided not to rely on them in the context of making the interim determination, and submitted that that is consistent with the scheme of section

⁶⁶ Vodafone submission, 3 June 2005, paragraph 4.13.

⁶⁷ *id* at paragraph 4.11(c) and (d).

⁶⁸ Vodafone submission, 8 July 2005, p. 2.

⁶⁹ *id.* p. 1.

152CR(4), which expressly states that the Commission is not required to have regard to the direct costs when making an interim determination.

184. AAPT also noted that the Commission's statement in the Mobile Services Review that it would have regard to a party's direct costs in an arbitration was in the context of an arbitration as a whole and that to have regard to Vodafone's direct costs for the purposes of making an interim determination would be to 'conflate the interim determination with the process required for a final determination'.⁷⁰

Commission's view

185. In determining the content of this interim determination the Commission has had regard to the Pricing Principles Determination (including the price related terms and conditions contained within it). Further, the Commission notes that it has also had regard to the MTAS Final Report that accompanies the Pricing Principles Determination to the extent that it explains and supports the Commission's decision on the Pricing Principles Determination.
186. The Commission notes that, under the Act, it is required to have regard to the Pricing Principles Determination when arbitrating an access dispute (subsection 152AQA(6) of the Act).
187. In this regard, the Commission notes that it does not believe Annexes 1 and 2 of its Pricing Principle Determination should be treated as being fully independent, as Vodafone's submission appears to imply. That is, the Commission believes that both Annexes form inter-related parts of a single determination. Accordingly, the Commission believes it is bound, under subsection 152AQA(6) of the Act, to have regard to the Pricing Principle Determination in its entirety when arbitrating an access dispute.
188. Moreover, the Commission considers that the Pricing Principles Determination, and the supporting MTAS Final Report represent the best available information for it to consider when determining what the price of the MTAS should be in an interim determination. As set out in the Commission's Final Report, the price related terms and conditions outlined in the Pricing Principles Determination were informed by cost modelling exercises undertaken in a number of overseas jurisdictions, cost information provided by Telstra and Optus under the Regulatory Accounting Framework (RAF), extensive submissions from interested parties (including Vodafone and AAPT) provided to the Commission in the course of the Mobile Services Review (particularly in response to the Draft Report), and expert advice the Commission sought from Analysys. The manner and extent to which the Commission relied on these sources of information is set out in detail in the Final Report. Consideration of all this evidence led the Commission to conclude in its Final Report that:

... the best cost measures of the MTAS indicate a range of between 5 and 12 cpm. Accordingly, the Commission continues to believe a target price of 12 cpm is appropriate for this pricing principle.⁷¹

189. For the purposes of determining the content of the interim determination, the Commission has relied on the Pricing Principles Determination and Supporting Final Report. The Commission considers that, given the timely and provisional nature of an interim determination, it would not be appropriate to revisit and reassess all, or major

⁷⁰ Oral hearing transcript 20 June 2005, Mr Pattison, p.6.

⁷¹ MTAS Final Report, p. 215.

parts, of the material that the Commission received in the course of the Mobile Services Inquiry. However, the Commission notes that, to the extent that the price-related terms and conditions in the Pricing Principles Determination will be relied upon for the purpose of a final determination, it may be appropriate to perform such a reassessment for that purpose.

190. Contrary to the views of Vodafone (as set out in paragraph 150 and 175), the Commission continues to believe that this material supports the Commission's view that 12 cpm is at the upper end of the range of reasonable estimates of TSLRIC+ such that Annexure 2 is consistent with Annexure 2 of the Pricing Principle Determination.
191. In the MTAS Final Report that accompanied release of the Pricing Principle Determination, the Commission also noted that these indicative price related terms and conditions are not binding. Were the Commission required to make an arbitral determination, or consider an undertaking provided to it, relating to the MTAS, a party may argue against the application of the pricing principles and indicative price related terms and conditions (including by making submissions in relation to the consultancy report prepared for the Commission by Analysys).⁷² The Commission has provided the parties with an opportunity to argue against the application of the Pricing Principles Determination in this case.
192. For the reasons discussed in paragraphs 155 - 163 above, the Commission does not consider it appropriate to have regard to Vodafone's cost information for the purposes of considering the Pricing Principles Determination. The Commission remains of the view that the Pricing Principles Determination, and the supporting Final Decision, represent the best available information for it to consider when determining what the price of the MTAS should be in an interim determination. In this regard, the Commission notes that the Pricing Principle Determination was the outcome of a full public inquiry that lasted 15 months and involved critical analysis and comments from interested parties. In contrast, the public inquiry process being undertaken in relation to Vodafone's MTAS undertaking (that includes assessment of its contentions as to its direct costs) has only progressed to the stage where the Commission has released a Discussion Paper (in April 2005) and has only recently set the closing date for submissions at 17 August 2005.
193. The Commission is cognisant of the fact that its Pricing Principles Determination was not based on evidence of Vodafone's direct costs. The Commission does not, however, agree with Vodafone that this fact and Vodafone's subsequent submission of the PwC cost model, has rendered the Commission's Pricing Principles Determination as inapplicable for the purposes of making an interim determination in this dispute. As previously noted, the Commission is not under a duty to consider Vodafone's direct costs when considering what the content of an interim determination should be.
194. Further, for the reasons outlined in paragraphs 41 to 55 above, the Commission does not agree that the Analysys report demonstrates there is sufficient uncertainty surrounding Annexure 2 of the Pricing Principles Determination such that it would be prudent for the Commission not to rely upon the Pricing Principles Determination for the purposes of making an interim determination. As noted in the MTAS Final Report:

As the Commission is not specifically modelling TSLRIC+ in Australia for the purposes of determining this pricing principle, it is therefore introducing some risk into

⁷² *ibid.*

its assessment of an appropriate target price for this service. The Commission believes this risk is balanced over the period of this pricing principle, by choosing a conservative target price for this service.⁷³

195. The Commission is also cognisant that the Pricing Principles Determination is currently the subject of Federal Court proceedings. However, the Commission disagrees with Vodafone's view that 'it would not be reasonable for the Commission to place significant weight upon the 'price related terms and conditions' contained in Annexure 2 of the Commission's determination ... given that ... [it] ... is the subject of Federal Court proceedings'.⁷⁴ As indicated in paragraph 39 above, the Commission notes that the Pricing Principles Determination is valid and continues to have effect unless and until such time as any decision is made by the Court to the contrary. Therefore, the Commission considers that it would not be complying with its obligations under the Act if it failed to have regard to the Pricing Principles Determination in the course of the arbitration for the reason that it is currently under review.

Whether the interim should contain a 'glide' or 'adjustment' path to an MTAS target price

Parties' submissions

196. Vodafone submits that an interim determination should contain a 'glide path' from the current market price of approximately 21 cpm down to its Target Usage Charge of 16.15 cpm using annual decrements of equal absolute value over the three year Undertaking period. Accordingly, Vodafone submits that if the Commission decides to make an interim determination in this matter, it should contain a price of 19.38 cpm for the MTAS for the period 1 January 2005 to 31 December 2005.
197. Vodafone submits that the application of this glide path takes into account the fact that:
- it must perform a fundamental re-allocation of costs and re-pricing of a range of services in order to move from the current price in the market of 21 cpm down to the Target Usage Charge of 16.15 cpm;
 - sudden price rises for subscription and outgoing calls would not be in the LTIE;
 - price changes impact and disrupt long-term business planning, investments in infrastructure, commercial and marketing projects; and
 - customers and shareholders rely on predictability and certainty in the regulatory regime given that the markets within which subscription and outgoing calls are provided are highly competitive, and sudden price movements could reduce Vodafone's relative market share.
198. Vodafone further submits that its proposed Usage Charge for 2005 of 19.38 cpm is likely to be the closest approximation available of the forward-looking efficient economic costs of providing the MTAS. Vodafone also submits that the calculation of the proposed Usage Charge for 2005 is robust and conservative for the reasons outlined in the Undertaking submission and also in Appendix 1 to the Undertaking submission.⁷⁵
199. AAPT submits that it does not accept Vodafone's position that it requires a three year 'glide path' to trend toward its estimation of the current costs of the MTAS. AAPT supports the Commission's MTAS Final Decision, where the Commission concluded

⁷³ *ibid.*, p. 215.

⁷⁴ Vodafone submission, 29 March 2005, paragraph 1(a)(i), p. 1.

⁷⁵ Vodafone submission, 29 March 2005, paragraph 3.4(c), p. 7.

that a steady 3 cpm per annum reduction in the price of the MTAS would appropriately balance the promotion of the LTIE that would be made by faster reductions in the MTAS price with the detriment that could result from disruption to mobile operators' business plans that may be caused by rapid decreases in the price of the service. On the basis of the conclusion in the MTAS Final Report, AAPT considers an immediate reduction in the price of the MTAS to 18 cpm (in line with the Pricing Principles Determination) is appropriate.

Commission's view

200. In determining the content of this interim determination, the Commission has had regard to the adjustment path outlined in its Pricing Principles Determination. This has formed the basis for the Commission's interim price for the MTAS of 18 cpm for the remainder of the 2005 calendar year, and 15 cpm from 1 January 2006 until 12 months after the commencement of the interim determination.
201. The Commission notes Vodafone's submission that the adjustment or 'glide' path should be based on a target price of 16.15 cpm instead of 12 cpm and that consequently an interim price for the MTAS should be set at 19.38 cpm for the 2005 calendar year.
202. However, as discussed above, Vodafone's target price for the MTAS of 16.15 cpm is based on a cost model developed by PwC which is a supporting submission to Vodafone's MTAS access Undertaking. The Commission considers that it would not be feasible or appropriate for it to conduct a full assessment of the undertaking material submitted by Vodafone, including the PwC cost model, at this stage. The Commission also considers that a full and proper assessment of the undertaking material submitted by Vodafone would be more appropriate and relevant for considering the content of a final, rather than an interim, determination. In light of this, the Commission considers it would not be appropriate to place significant emphasis on Vodafone's proposed 'glide' path given that it has not conducted a full and proper assessment of the material upon which this glide path is premised.
203. Moreover, the Commission notes Vodafone's claim that:

...its Proposed Usage Charge for 2005 of 19.38 cpm is likely to be the closest approximation available of the forward-looking efficient economic costs of providing the MTAS'.⁷⁶
204. The Commission disagrees with such claims given that 19.38 cpm is a price point on Vodafone's proposed adjustment path towards its estimate of the 'forward looking efficient economic costs of supplying the MTAS on its network' rather than an estimate of this cost in its own right. The Commission also considers that it should not be assumed that the time period over which adjustments to MTAS prices are made in a final determination would necessarily be independent of the target price at the end of the adjustment path, as Vodafone's submissions appears to imply.
205. The Commission considers that, based on the information currently before it, the adjustment path specified in its Pricing Principles Determination would be appropriate for the interim determination and that the resulting prices for the MTAS would be likely to promote the LTIE. That is, the Commission considers that an interim determination should include reduced prices for the MTAS of 18 cpm from the date of commencement to 31 December 2005, and 15 cpm from 1 January 2006 until the completion of the 12 month period from the commencement date of the interim determination.

⁷⁶ *ibid.*

FTM pass-through safeguard

Parties' submissions

206. Vodafone submits that, should the Commission make an interim determination, the access seeker should be obliged to comply with Part C of the draft Agreement for the Provision of the MTAS (as part of Vodafone's proposed MTAS access Undertaking) to reduce its average retail price (excluding GST) for calls which terminate on the Vodafone network so that it is equal to or less than 32.72 cpm for the 2005 calendar year.
207. Vodafone submits that absent a FTM pass-through safeguard or an undertaking by AAPT that it will pass through cost savings to consumers (which does not appear to have been offered), there is no safe basis on which the Commission may conclude that an interim determination would benefit consumers.⁷⁷
208. In its submission on the draft Interim Determination, Vodafone argued that the fact that the pass-through safeguard forms part of Vodafone's MTAS access undertaking does not mean the Commission is not required to consider it in relation to the current dispute.⁷⁸
209. Vodafone also argued that the pass-through safeguard should be assessed in the context of the interim determination, as this is not an obligation that can be retrospectively imposed.⁷⁹
210. Vodafone further submits that the Commission is applying different standards to the question of whether the pass-through safeguard should be included in an interim determination and the question of whether a backdated final determination would provide an adequate or complete substitute for an interim determination.⁸⁰
211. AAPT submits that the pricing in an interim determination should not be subject to a pass through obligation, as the Mobile Services Review also considered whether a pass through obligation was appropriate, and the Commission concluded that it does not recommend the inclusion of such an obligation.
212. AAPT states that it considers the pass-through obligation is inappropriate because it is based on Vodafone's flawed principles that 'if mobile terminating rates were to be regulated downwards, the Commission must ensure that those reductions end up benefiting consumers in the form of lower prices for making FTM calls'. AAPT argues that a reduction in the cost of MTAS would enable AAPT to consider various outcomes which would be in the interests of end users – including investing in new infrastructure, making improvements in the range and quality of products and services provided by AAPT or making reductions in the price of any of the telecommunications products and services which AAPT provides (of which FTM calls is only one). AAPT submits that it is inappropriate that any reductions in the price of the MTAS be required to be directed solely at reductions in the price of FTM calls.

Commission's view

213. In considering the content of the interim determination, the Commission has decided not to impose a FTM pass-through obligation as envisaged by Vodafone. The

⁷⁷ Vodafone submission, 16 March 2005, paragraph 20, p. 6.

⁷⁸ Vodafone submission 3 June 2005, paragraph 4.14.

⁷⁹ *ibid.*

⁸⁰ *id.*, at paragraph 4.15.

Commission notes that the pass-through obligation proposed by Vodafone was part of its MTAS access Undertaking. The Commission believes that the specifics of the pass-through obligation proposed by Vodafone in its submissions are intimately related to the results of the PwC model. As, with the PwC model submitted as part of Vodafone's undertaking, the Commission believes it would not be appropriate to consider the specifics of this obligation for the purposes of making an interim determination

214. While the Commission is yet to form a view as to whether or not it should impose the 'FTM pass-through safeguard' in a final determination, the Commission notes that it is not entirely clear that a 'FTM pass-through safeguard' could not be imposed retrospectively in a backdated final determination. If, as Vodafone argues, the safeguard does not force AAPT to set specific price levels for FTM calls, but rather requires it to pay a rebate when FTM calls are not set at a certain level, it is arguable that a rebate could not be stipulated in a backdated final determination were AAPT not to pass through reductions in the price of the MTAS in an interim determination.
215. That said, the Commission notes that it did consider the appropriateness of a range of mechanisms that might ensure FTM pass-through in the context of making its Pricing Principle Determination.⁸¹ The Commission also noted in the MTAS Final Report that:
- improved competition can manifest itself in many forms other than just price reductions. In particular, improved competition may be associated with incomplete pass-through if it is also associated with improvements in the quality of services provided (which may increase the cost of providing FTM call services). Further, lower input costs may be passed-through in the form of reductions in the price of other services provided in the bundle of pre-selected fixed line services. Hence, while FTM call prices may not fall by the same amount as the price of the MTAS in the short-term, the LTIE can still be promoted if there are reductions in the price of STD and IDD call services as a result of lowering input costs for competitors in the market within which FTM services are provided.
216. Accordingly, it is not entirely clear to the Commission, at this point in time, that implementation of a pass-through obligation would be in the LTIE.
217. Further, the Commission continues to believe that there may be some doubt as to whether it has the relevant statutory power to legitimately enforce a FTM pass-through safeguard as envisaged by Vodafone. The Commission notes that it has an advisory role in relation to the price control arrangements that apply to Telstra, and was recently asked by the Minister to conduct an inquiry into what form future price control arrangements that apply to Telstra from 1 July 2005 should take.⁸² However, this advisory role does not extend to setting retail pricing levels for providers of FTM services.

The time period over which an interim determination should apply

Parties' submissions

218. Vodafone and AAPT did not appear to provide a direct comment on this issue in their submissions. However, both parties' submissions were based on any interim determination made by the Commission setting a price for the MTAS for the period 1 January 2005 to 31 December 2005.

⁸¹ See, for instance, section 9.3 of the MTAS Final Report.

⁸² The Commission released its final view on 30 March 2005, and this recommended, among other things, that a basket containing line rental, local, domestic and international long-distance, and fixed-to-mobile calls should decrease in price by 4 per cent per year in real terms.

219. AAPT amended its dispute notification of 27 January 2005 on 1 February 2005 to explicitly state that 'AAPT seeks a determination in relation to the period commencing 1 January 2005 and expiring on 31 December 2005'. However, in the case management meeting of 21 February 2005, AAPT stated that if, at some point in time, it seeks amendment to the dispute notification, both parties can make submissions as to whether that would be appropriate, and whether there is a need for additional information to be made available to the Commission. AAPT stated that it was flagging this possibility now because the parties may be in further dispute in the future after attempting commercial negotiation regarding MTAS supply after 31 December 2005, and may want to have the arbitration extended to a subsequent period. Vodafone stated it is not sure whether, if the future dispute occurs, it would be appropriate to extend the current dispute or if that would be a separate dispute.
220. In its submission on the Commission's draft interim determination, Vodafone argues that the Commission does not have the power to make an interim determination that specifies a price for the MTAS for a period after 31 December 2005 (2006) for the reasons discussed below, and may be proceeding on the basis of an error of law.
221. Vodafone submits that the Commission's power to make an interim determination is confined to the dispute – that is, the issues in relation to which the parties have negotiated and been 'unable to agree'.⁸³
222. Vodafone also argues that whilst subsection 152CP(2) allows the Commission to make a determination which deals with any matter related to access by the access seeker to the declared service, including matters that were not the basis for notification, this subsection does not allow the Commission to make a determination with respect to the period of time about which there is no evidence before the Commission that an access seeker has been unable to agree. Further, Vodafone argues, to interpret subsection 152CP(2) as giving the Commission such a power would entitle the Commission to make a determination without the parties engaging in any level of negotiation.
223. Vodafone submits that because there is no time limit on when a final determination must be made and the Commission has the power to make sequential interim determinations, a broad interpretation of subsection 152CP(2) would allow the Commission to determine the terms and conditions of access in perpetuity. Vodafone submits that this approach would be contrary to the clear policy intent that, as much as possible, both the determination of access rights and terms and conditions of access be the result of commercial processes and industry self-regulation.
224. Vodafone further submits that the Commission is only entitled to make an interim determination for a period commencing on the date the determination is made up to 31 December 2005. Vodafone also submits that the Commission may make a final determination for the full 2005 calendar year only.
225. Vodafone argues that because there is no dispute between the parties for any period other than the 2005 calendar year, the Commission does not have the power to make any determination in respect of any other period.
226. Vodafone also submits that even though there is no evidence that the parties will be in dispute with respect to the price of the MTAS for periods beyond 2005, the question of

⁸³ In particular, Vodafone noted that paragraph 152CM(1)(c) requires that an access seeker must be unable to agree with the access provider about the terms and conditions of access to the declared service in order to be able to notify an access dispute to the Commission.

whether they are likely to be in dispute is irrelevant to whether the Commission has power to make an interim determination for those periods.

227. In the alternative, Vodafone argues that if the Commission does have the power to make a determination with respect to a period other than the 2005 calendar year, it should not do so because procedural fairness requires that a party be given adequate notice of the scope of issues being considered in a proposed decision. Vodafone submits that it has not had adequate notice that the Commission was considering making a determination for a period other than the 2005 calendar year because:
- The Commission was silent on the questions raised in the report on the case management meeting in relation to whether the time period for which a determination is sought is an issue in dispute; and
 - (in Vodafone's view) the likely scope of determination was only indicated to Vodafone when the draft interim determination and statement of reasons was provided to the parties on 20 May 2005, so Vodafone has not had an adequate opportunity to comment on the operation of a determination beyond the 2005 calendar year.
228. Vodafone also argues that to make an interim determination relating to a period on which the parties are not yet unable to agree would be contrary to the objective of the regime to encourage commercial negotiation between the parties where possible. Vodafone submits that to make an interim determination for the period beyond 31 December 2005 would forestall possible commercial negotiations between the parties for this period and would invite access seekers to engineer access disputes. In this regard, Vodafone indicates that whilst the full form of its MTAS access undertaking (which contains prices for calendar years 2006 and 2007) was provided to AAPT, it was provided simply to show AAPT its initial offer as to the terms and conditions it was prepared to supply the MTAS for the 2005 calendar year only.
229. AAPT states that it believes the parties will be in dispute as to the charges that Vodafone should supply the MTAS in subsequent periods beyond the 2005 calendar year.
230. In the oral hearing of 20 June 2005, AAPT referred the Commission to subsection 152CP(2) of the Act, submitting that that subsection specifically confers a right for a determination to deal with matters that are not the basis for notification of the dispute, and shows a clear intention by the Parliament that the Commission is to make as broad findings as possible, necessary to be consistent and to advance the objects of this part of the Act.⁸⁴
231. In this case, AAPT submits, '...there is a clear nexus between what has been notified by AAPT and the orders that AAPT is seeking to be made'. AAPT further submits that it is possible that more than half the permitted 12 month term of the interim determination will fall into 2006, and that there is a reasonable inference that the parties will be unable to agree on the price for 2006.⁸⁵ Hence, AAPT argues, in the interests of

⁸⁴ Oral hearing transcript 20 June 2005, Mr Pattison p.8.

⁸⁵ AAPT further stated in the oral hearing of 20 June 2005 that that if Vodafone had thought that the parties were likely to agree on a price for 2006 then it is something that Vodafone was likely to have raised at the time of the negotiations on the pricing. AAPT indicates that this was not done and negotiations were restricted to 2005. AAPT indicates that it was only after much difficulty that the parties were able to agree on a price for 2005, and submits that it is a reasonable inference, given that difficulty, that there is not going to be agreement between the parties on a price to apply for 2006.

minimising the multiplicity of proceedings necessary to deal with the MTAS, that it is in the interests of the LTIE that a determination be made now and a price of 15 cents per minute apply in 2006.

232. However, AAPT did suggest that the Commission change its determination in this by prefacing in front of the relevant order in brackets the words: '(unless the parties have been unable to agree on a different figure by 1 January 2006)'.
233. AAPT also submits that the opportunity which the Commission has afforded for the parties to make written and oral submissions in respect of the draft interim determination have more than adequately disposed of the obligation to afford natural justice. AAPT further notes that Vodafone has not provided details as to how its submissions in evidence would be different had it known that the Commission was considering the determination in relation to 2006.

Commission's view

234. The Commission notes that there is no express provision in the Act stating that the Commission cannot backdate an interim determination. In this regard, subsection 152CPA(4) of the Act states that:

An interim determination has effect on the date specified in the determination.

235. However, the Commission also notes that although there is no express provision stating that an interim determination can be backdated, there is express provision for backdating a final determination (subsection 152DNA(1)). In these circumstances, the Commission remains of the view that, as it is open for the Commission to backdate a final determination, it would not be necessary in this instance to backdate an interim determination.
236. With regard to the duration of this interim determination going forward, the Commission notes that subsection 152CPA(5) of the Act states that:
- Unless sooner revoked, an interim determination remains in force until the end of the period specified in the determination. The period must not be longer than 12 months.
237. Further, the Commission is of the view that it is not limited to only making an interim determination for a period from the date the determination is made to 31 December 2005, and a final determination for the period 1 January 2005 to 31 December 2005.
238. The Commission notes that section 152CP(2) provides that a determination may deal with any matter relating to access by the access seeker, including matters that were not the basis for notification of the dispute. This is a broad provision which, in the Commission's view, is intended to ensure that the Commission is capable of making a determination that will deal with all matters relating to access by an access seeker to the declared service as the Commission considers appropriate in the circumstances. This approach appears to be underlined by the range of examples as to the matters that a determination may address in section 152CP of the Act.
239. In the present case, the Commission considers that it is appropriate in the circumstances to make an interim determination that operates for 12 months into 2006. Relevantly, it appears that the parties are likely to be in dispute with respect to the price for the MTAS for the 2006 calendar year. In this regard, the Commission has placed weight on AAPT's submission that there is a reasonable inference that the parties will be unable to agree on the price for 2006. Further, the Commission notes that even if the entire MTAS access undertaking was only provided to AAPT in private commercial negotiations in the context of the supply of the MTAS for 2005, Vodafone submitted

the entirety of its MTAS access undertaking material – which relates to the prices for supply of the MTAS for the 2005 – 2007 period (inclusive) – as part of its submissions on the making of an interim determination. .

240. Further, the Commission does not agree that Vodafone did not have notice of the possibility that an interim determination may be made for a period beyond 31 December 2005 and was therefore unable to prepare submissions in relation to the making of any interim determination having regard to this possibility.
241. In this regard, the Commission notes that, in its submission of 18 February 2005, AAPT indicated it may seek to amend its notification to include a later period (beyond the 2005 calendar year). It reiterated this position in the case management meeting of 21 February 2005. Vodafone was provided with an opportunity to address this matter in its submission of 18 March 2005 (which it did).
242. Even if the Commission was prepared to accept the view that Vodafone was unaware of this possibility prior to the Commission providing parties with the draft interim determination and draft statement of reasons, the Commission considers procedural fairness has been afforded to the parties in relation to comment on this matter by virtue of:
 - The extended two week time from within which parties had to prepare written submissions on the draft Interim Determination (extended from the original one week timeframe); and
 - The additional period in which parties were able to prepare submissions to present to the Commission in the oral hearing of 20 June 2005 (which gave parties a total period of 4 weeks to consider and prepare submissions in response to the draft Interim Determination).
243. The Commission's notes Vodafone's statement that its submissions would have been substantially different had the Commission previously indicated that it was considering making an interim determination for a period of time other than the 2005 calendar year. In this regard, the Commission notes that, as part of its submission of 3 June 2005, Vodafone submitted a considerable amount of information related to its MTAS undertaking which went beyond the 2005 calendar year. In addition, as outlined above, Vodafone was provided with the opportunities to comment on the issue whereby it was able to provide any new or different submissions.
244. Finally, the Commission believes it is possible that it will not be in a position to make a final determination in relation to this access dispute prior to the end of the 2005 calendar year. As already noted above, the Commission also believes that the parties to this arbitration will likely be in dispute as to the charges that Vodafone should supply the MTAS to AAPT in subsequent periods. The Commission notes the possibility that a final determination in this dispute may be made that extends in duration beyond 2005. The Commission considers it desirable to safeguard improved conditions for competition in the market that results as a consequence of making this interim determination until such time as it is in a position to make a final determination with respect to this dispute. Accordingly, given the real possibility of a final determination not being made before the end of 2005 the Commission considers it appropriate in this case to extend the interim determination duration beyond the 2005 calendar year.
245. On the basis of the matters discussed above, the Commission's view, as outlined in paragraph 12 of this draft statement of reasons, is that this interim determination should take effect from 14 July 2005, and will remain in force for 12 months, or until:

- ii. the date a final determination comes into effect; or
- iii. this interim determination is revoked.

246. The Commission also notes that it is open to parties to a dispute to undertake contemporaneous negotiations for supply of the declared services at any time during a dispute. In this regard, the Commission refers parties to paragraph 8 of the interim determination which provides that except where the parties otherwise agree, the price for the MTAS is as set out in the Interim Determination. Therefore, if Vodafone believes the parties can reach agreement for the 2006 calendar year, it should seek to initiate negotiations with AAPT with a view to doing so – an opportunity that has been available to it since AAPT notified the dispute.

Conclusion – Content of the interim determination

247. The Commission considers that, after having regard to the factors outlined above, the interim determination should include a price for the MTAS of:

- 18 cents per minute (cpm) for the period from 14 July 2005 until 31 December 2005; and
- 15 cpm for the period from 1 January 2006 to the period ending 12 months after 14 July 2005.

248. Further, the Commission does not consider that the interim determination should include a FTM pass-through safeguard.