

ATTACHMENT D

ACCESS DISPUTE BETWEEN HUTCHISON TELECOMMUNICATIONS (AUSTRALIA) 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 24 February 2005

Statement of Reasons for the Interim Determination

BACKGROUND

1. On 24 February 2005, the Australian Competition and Consumer Commission (the Commission) received written notification (the notification) from Hutchison Telecommunications (Australia) Limited (HTAL) that an access dispute exists in relation to the supply by Vodafone Network Pty Limited (Vodafone) to HTAL of the Domestic Mobile Terminating Access Service (the MTAS). HTAL'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 letter to the parties of 9 March 2005, a case management meeting was held 'on the papers'.
3. On 27 April 2005, the Commission requested that the parties to this dispute provide submissions on whether an interim determination should be made in this arbitration and what such a determination (if any) should be.
4. On 20 May 2005, the Commission requested that the parties to this dispute provide submissions on the Commission's draft interim determination for this dispute 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 these drafts from one week to two weeks.
5. 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 for this dispute¹ and the accompanying statement of reasons. The Commission notes that, in total, parties had approximately six weeks to assess the drafts 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.
6. The notification specifies that the dispute is about the price at which the MTAS is to be supplied by Vodafone to HTAL. The notification states that the access agreement

¹ This hearing was a joint hearing for this dispute and the Hutchison 3G Australia Pty Limited dispute with Vodafone.

between Vodafone and HTAL was most recently amended on 29 July 2004. This agreement ended on 31 December 2004 and provided that Vodafone would supply the MTAS to HTAL at a price of 21 cpm until that date. HTAL and Vodafone are unable to agree on the price at which Vodafone will supply the MTAS to HTAL from 1 January 2005.

7. The Commission understands that there is currently no agreement, or interim payment arrangement in place (pending an interim or final determination by the Commission), for the price at which Vodafone will supply the MTAS to HTAL from 1 January 2005 onwards.

Reasons for Decision

8. Subsection 152CPA(1) of the Act provides that a determination may be expressed to be an interim determination.
9. 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 proposed 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?

10. 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.² 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,³ 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.⁴
11. 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.
12. As indicated above, the Commission invited parties to provide submissions on these matters.
13. In its letter of 27 April 2005 to the parties on the making and content of an interim determination (if any), the Commission noted that in the parties' submissions in relation to the case management meeting agenda, each party sought to rely *inter alia* on the (relevant) submissions made in the H3GA/Vodafone dispute in relation to the issue of an interim determination.

² Subsection 152AQA(6) of the Act 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.

³ Subsection 152CR(1) of the Act.

⁴ Subsections 152CR(3) and (4) of the Act.

14. Accordingly, the Commission requested the parties to provide submissions in this dispute on any matters additional or separate to those they previously submitted in the context of the H3GA/Vodafone dispute relating to whether an interim determination should be made and what such a determination (if any) should be.
15. HTAL submitted on 3 May 2005 that it did not wish to raise any additional or separate matters to those submitted by H3GA in its access dispute with Vodafone. Accordingly, HTAL requested that H3GA's submissions in the H3GA/Vodafone dispute be accepted as HTAL's submissions in this HTAL/Vodafone dispute on the making and content of any interim determination.
16. Similarly, Vodafone submitted on 3 May 2005 that it primarily relied on its previous submissions in the H3GA/Vodafone dispute to respond to the Commission's letter of 27 April 2005 on the making and content of an interim determination (if any). (Vodafone, however, made additional submissions relating to 'changes in factual circumstances' relating to whether the dispute is a billing dispute and to Vodafone having facilitated HTAL's access to information on which Vodafone seeks to rely in these proceedings.)
17. Accordingly, based on the process discussed above in paragraphs 10 to 14, the Commission has adopted the submissions made by H3GA and Vodafone relating to the H3GA/Vodafone dispute and on the issue of the making and content of an interim determination (if any), as the submissions of HTAL and Vodafone relating to this HTAL/Vodafone dispute. In this draft statement of reasons, the views expressed by H3GA and Vodafone in their submissions for the H3GA/Vodafone dispute are referenced/footnoted as the same views of HTAL and Vodafone in this dispute, unless indicated otherwise.
18. The Commission therefore notes the interrelation of submissions by HTAL, H3GA and Vodafone relating to the separate disputes, HTAL/Vodafone and H3GA/Vodafone.
19. Further, in the context of the H3GA/Vodafone dispute, the Commission wrote to the parties on 9 March 2005, indicating that it did not consider it appropriate to decide and unduly limit the matters it will have regard to in making an interim determination (if any) until it has the opportunity to consider parties' submissions on the matters the parties believe the Commission should have regard to. In that letter, the Commission also made it explicit that each party may include in its submission to the Commission on whether it should issue an interim determination (and, if so, on what basis) its views as to which matters it considers the Commission should have regard to in making its decisions on these matters – and the reasons why the Commission should have regard to each of these considerations. The Commission has had regard to the parties' submissions in this respect. Neither party specifically enumerated the matters that it considered were relevant for the Commission to take into account in this matter in deciding whether to make an interim determination. Rather, each party largely provided submissions on the two matters set out above in paragraph 9. 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. These matters are addressed, where relevant, below.
20. 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 on particular terms and conditions?

Parties' submissions

21. Vodafone submits that the Commission has no proper basis in 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.
22. 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 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 available evidence currently available to the Commission in relation to Vodafone's direct costs ...'.⁵
23. 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.
24. 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.
25. 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.⁶
26. 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 of the basis of the pricing path supports its submissions that no Interim Determination should be made.'⁷
27. 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:
 - the international benchmarks used by the Commission include cost figures which Analysys regard as unreliable (USA and [REDACTED]);

⁵ Vodafone submission, 10 March 2005, paragraph 1.2(d).

⁶ Vodafone submission, 3 June 2005, para 1.2(c).

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

- none of the international benchmarks of which are adjusted for the specific practical cost differences identified by Analysys; and
 - the pricing principles outlined in Annexure 1 are not reflected in the pricing path in Annexure 2.’⁸
28. HTAL submits that to make an interim determination, the Commission does not require all of the information necessary to resolve the overall dispute. It also argues that the only express limitation on the Commission’s discretion to make an interim determination is that it must have regard to any published pricing principle under subsection 152AQA(2) of the Act.
 29. HTAL submits that the Commission has sufficient information currently before it with which to make an interim determination, including material on which the Commission based its MTAS Final Decision, Vodafone’s offer to provide the terminating roaming service (TRS) to H3GA and Vodafone’s modelled costs of providing the MTAS submitted in support of its MTAS access Undertaking. HTAL submits that only the first two classes of information can be considered with the degree of expedition necessary for the making of an interim determination.
 30. HTAL submits that in recent commercial negotiations Vodafone offered to supply the TRS to H3GA for approximately [REDACTED] and that this is a relevant factor for the Commission to consider in making an interim determination given that this service is similar to the MTAS. HTAL notes that Vodafone’s offer is a strong indication that the price it charges to supply the MTAS should be [REDACTED] and while it may not be determinative of the Commission’s final determination, it should take such information into account for the interim determination given the speed with which it can be assessed and the fact it is corroborative of the MTAS Final Decision.
 31. HTAL submits that the Commission should not use Vodafone’s MTAS access Undertaking material in making the interim determination as it is not yet available to HTAL and has not been audited or analysed by any independent or other party. HTAL further submits that it is not possible for the Commission to consider expeditiously this information.
 32. In relation to the Analysys Report, HTAL retained Marsden Jacob Associates to assess the report, who noted that the report was ‘reliable and in-line with international best practice’. HTAL, therefore, submits that the report was relevant to the Commission’s final decision in relation to the MTAS and so is relevant to the Commission’s interim determinations.⁹

Commission’s view

33. 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.
34. 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

⁸ *id.*, p. 8.

⁹ HTAL submission, 8 July 2005.

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.

35. 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.¹⁰ 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 s 152CR(1) of the Act.¹¹ 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.
36. 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.¹²
37. 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 is 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.¹³ 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 those particular arguments weight on it for the purpose of considering

¹⁰ Supplementary Explanatory memorandum to the Telecommunications Legislation Amendment Bill 1998, items 36F and 36G, page 30

¹¹ Section 125CR(1) of the Act specifies the matters the Commission must take into account in making a final determination.

¹² 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) of the Act.

¹³ Sections 152BY(7) and (9) of the Act.

whether to make an interim determination, and the content of any interim determination.

38. 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.
39. The Commission considers that it should afford parties to the dispute the opportunity to argue against the relevance and application 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.
40. 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.'¹⁴
41. 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.'¹⁵ Accordingly, the Commission considers that it should afford parties the opportunity to argue against the application of the MTAS Pricing Principles Determination – and the Commission has provided this opportunity in this case.
42. 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 an 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.

¹⁴ ACCC, MTAS Final Report, p. 185.

¹⁵ *ibid.*

43. 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 Principles 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.
44. 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.
45. With respect to the Analysys Report, the Commission is of the view 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.
46. 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.
47. 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).
48. 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).
49. 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'. 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'¹⁶. 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,

¹⁶ Analysys, *Examination of mobile termination costs – Final Report*, 30 June 2004, p. ii.

many factors could not.¹⁷ Despite this, the 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.¹⁸

50. 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, 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.¹⁹

51. 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.'²⁰ 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.²¹ Accordingly, the Commission chose a conservative target price for the MTAS by:

- 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.²²); and
- choosing a target price that was at the top-end of the best estimates available to the Commission at that time.²³

52. 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

¹⁷ *id.*, p.i.

¹⁸ *id.*, p.ii.

¹⁹ ACCC, MTAS Final Report, p. 215

²⁰ Analysys, *op. cit.*, p. ii.

²¹ *ibid.*

²² *ibid.*, p. 237

²³ *ibid.*

- coverage.²⁴ 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.
53. 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.
 54. 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.
 55. 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 PowerTel, 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.
 56. 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.'²⁵ The Swedish regulator's final decision was released in July 2004, subsequent to release of the Pricing Principles Determination.²⁶ 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.
 57. 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.²⁷
 58. The Commission acknowledges that Analysys did have some reservations about the extent to which the models conducted in [redacted] 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

²⁴Analysys Report, p. 22.

²⁵ *ibid.*, p. 25.

²⁶ Post & Telestyrelsen, 'LRIC Prismetod for terminering av rotsamtal i mobilnat', Ref: 03-2332/23, 5 July 2004.

²⁷ 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.

Commission notes these concerns. However, as outlined above and in the MTAS Final Report, the Commission's approach seeks to accommodate these concerns by:

- not adjusting for only a subset of the factors that could influence cost,
- having regard to a broad range of estimates of TSLRIC+ that includes estimates from jurisdictions with varying cost influences; and
- choosing to set a target price for the purposes of Annexure 2 of the Pricing Principle Determination from the upper-end of this range.

59. 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

60. The Guidelines note that in considering if an interim determination is appropriate, 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.

Nature of any contractual arrangements

Parties' submissions

61. Vodafone submits that there is no basis for an interim determination as there is no risk that the MTAS will not be supplied.
62. Vodafone submits that it currently continues to supply the MTAS to HTAL at a rate of 19.38 cpm, and notified HTAL on 23 February 2005 that it would continue to supply the MTAS at 19.38 cpm.
63. Also in its submission on the draft interim determination, Vodafone submitted that the bargaining positions of HTAL and Vodafone are likely to be similar, given neither party operates a significant fixed network or have any other network or services which the Commission is likely to consider a source of market power, other than the fact both parties supply the MTAS. In this regard, Vodafone submits that the reciprocal supply of MTAS will result in a similar bargaining position.²⁸

²⁸ Vodafone submission 3 June 2005, paragraph 5.1(b).

64. HTAL submits that the fact that Vodafone will continue to supply the MTAS to HTAL is a factor to which the Commission should accord little weight given this arbitration is about the access price to be charged by Vodafone rather than access *per se*.

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²⁹ HTAL, Notification of an access dispute under Part XIC of the Trade Practices Act 1974, paragraph 5, p. 2.

³⁰ H3GA submission, 16 March 2005, paragraph 1, p. 2.

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Commission's view

75. In accordance with the Guidelines, the Commission has considered the nature of any contractual arrangements between the parties. 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.

76. 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, for example, 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, making of an interim determination may override that arrangement if necessary.


77. In the current dispute, the Commission considers the arrangements for interim payment are particularly uncertain given the parties' differing views as to the appropriate price, for Vodafone supplying the MTAS to HTAL for the period 1 January 2005 until the present day. Accordingly, the Commission believes that an interim determination will provide certainty to the parties as to the contractual arrangements going forward until the Commission issues a final determination, or the arbitration is otherwise resolved.

78.

³¹ Oral hearing 20 June 2005 transcript, p.11.

³² *id* at 12.

³³ *ibid*.

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79. As indicated above, the Commission considers that an interim determination will remove the uncertainty as to the price that Vodafone will charge HTAL for the MTAS for the 12 month period from the date of commencement.
80. The Commission also notes Vodafone's submission that there is no risk that the service will not be supplied.³⁴ HTAL submits that this is a factor to which the Commission should accord little weight given this arbitration is about the access price to be charged by Vodafone rather than access *per se*. The Commission considers that, 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

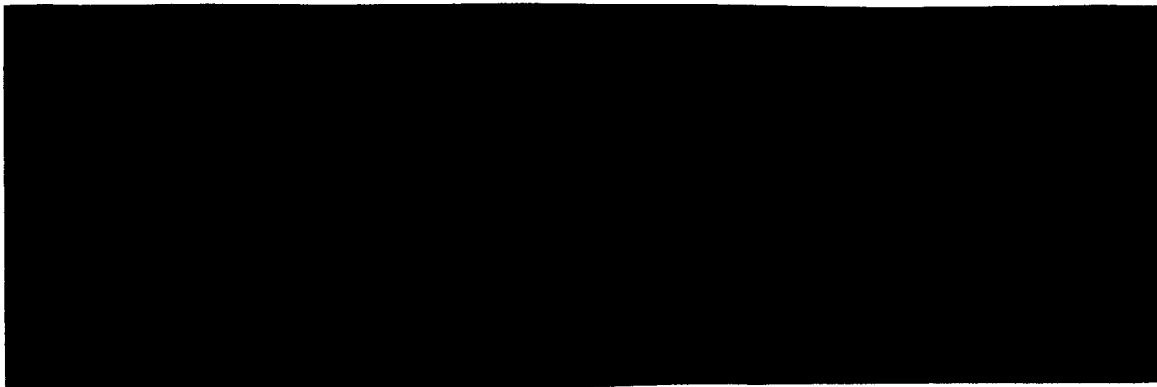
81. Vodafone submits that the Commission has the power to backdate a final determination with interest and that this would provide a complete substitute to the Commission making an interim determination in this case.
82. Vodafone notes that the Commission has indicated in its Guidelines that it would only consider backdating 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 mobile-to-mobile calls. This is discussed in more detail in paragraph 110 below.
83. In its submission on the draft interim determination, Vodafone submits that the Commission has not specified any other factor to which it has had regard in the current dispute other than the likelihood of some form of pass-through to end users. Vodafone submits that even if the Commission were able to establish that HTAL could pass-through cost reductions, the Commission would need to satisfy itself that HTAL was likely to do so to a significant extent and a corresponding reduction in HTAL's MTAS is not likely to occur (because if it did, this would result merely in a re-allocation of costs from termination to retail rates). Vodafone submits that the Commission has not sought to do this, and is not able to so, on the basis of the evidence before it.³⁵
84. Vodafone also submits that it is not clear to Vodafone how the Commission could form the view that a 'significant differential' exists between the access price it considers would best promote the LTIE and the access price currently paid by HTAL to Vodafone, given the Commission has not assessed Vodafone's cost information when that cost information indicates a price of 19.38 cpm – which is that currently charged by Vodafone to HTAL. Further, Vodafone considers this differential will not have a material effect on the LTIE, given the Commission's views on the likelihood of pass-

³⁴ Vodafone submission, 10 March 2005, paragraph 1.2(a) at p 1.

³⁵ Vodafone submission 3 June 2005, paragraph 2.3.

through and the risk adjustments that HTAL would make with respect to any interim determination.

85.



86. HTAL submits that backdating a final determination would not provide a satisfactory alternative to an interim determination, as it would not clarify the parties' current obligations.

87. HTAL also submits that declining to make an interim determination eliminates the possibility that any reduction in the MTAS will be passed through to end-users. HTAL notes that while it is unable to give the Commission a guarantee that an interim determination would lead to further reductions in its retail prices, it remains a possibility that this will occur.

88. Further, HTAL submits that it is likely that the final determination will reflect the Commission's MTAS Pricing Principles Determination, and therefore, that any loss incurred by HTAL in the event an interim determination was not made is likely to exceed any loss incurred by Vodafone in the event an interim determination is made for a lower price than the final determination. In this regard, HTAL notes that backdating with interest can never compensate totally a party for the loss of the opportunity to use the funds during the period.

Commission's view

89. 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.³⁶

90. 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

³⁶ 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.

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.³⁷

91. 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.
92. 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.
93. 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 offered by Vodafone to HTAL. 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 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.
94. 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 time (as discussed further in paragraph 196 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 HTAL to Vodafone.
95. 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 HTAL, this would likely generate benefits for end-users that would otherwise not arise. 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 106 to 118 below.
96. 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

³⁷ ACCC, *Resolution of telecommunications access disputes: a guide*, March 2004 (revised), p. 52.

to the issuing of a final determination,³⁸ it would not have the effect of creating the conditions for promoting the LTIE that would be expected from issuing an interim determination.

97. 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.
98. The Commission considers that there is no certainty, at this point, that a final determination will necessarily reflect the MTAS Pricing Principles Determination, although this is likely to be one of the factors that the Commission will have regard to in a final determination. Consequently, the Commission considers that it has no basis on which to conclude that those cash-flow losses incurred by HTAL if no interim is made would outweigh cash-flow losses to Vodafone if a final determination contains a higher price than the interim determination. (These matters are discussed in more detail in paragraphs 220 to 231 below). Moreover, the Commission considers that the backdating mechanism enables parties to be compensated for the 'opportunity cost' of funds being used elsewhere during an access dispute.

The likely impact of an interim arrangement on end-users

Parties' submissions

99. Vodafone submits that it does not consider that an interim determination would result in HTAL reducing its prices for mobile-to-mobile calls, particularly as HTAL is highly unlikely to recalibrate retail rates on the basis of any interim determination in the face of substantial uncertainty as to whether the rate will be retrospectively adjusted in a final determination. In this regard, Vodafone notes that there is no reason to believe that HTAL would not accrue costs and/or revenues in a conservative manner when there is significant risk that those revenues and/or costs may be increased and/or decreased by subsequent regulatory action.
100. 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.
101. In its response to the draft interim determination, Vodafone argues that there is no logically probative evidence before the Commission which can reasonably support a conclusion that the making of an interim determination would be likely to generate benefits for end-users that would not otherwise arise'. Vodafone also notes that HTAL has acknowledged that there is only the possibility that any reduction in the MTAS will be passed through to end users and that 'it is unable to give the Commission a guarantee that an interim determination would lead to further reductions in its retail prices' likely to have a material positive impact on the LTIE.
102. Vodafone argues that there is no basis on which the Commission could conclude that a reduction in the MTAS price from 19.38 cpm to 18 cpm is likely to have a material impact on the LTIE. Vodafone submits that the Commission has not assessed the likely extent of pass through and whether this amount is likely to have a material impact on the LTIE. Vodafone further submits that even if the Commission were to establish that HTAL could pass-through cost reductions, the Commission would need to satisfy itself that HTAL was likely to do so to a significant extent and a corresponding reduction in HTAL's MTAS is not likely to occur (as this would result in a mere re-allocation of

³⁸ Including the repayment of an 'interest component' and an allowance for the opportunity cost of funds being employed elsewhere.

costs from termination to retail rates, given the dispute relates to mobile to mobile interconnection not fixed to mobile interconnection).

103. HTAL acknowledges that specific evidence that an access seeker would pass through the benefits of an interim determination to end-users is likely to be determinative of the Commission's decision to make an interim determination. That said, HTAL submits that it simply cannot follow that the absence of such a specific assurance militates against the Commission making an interim determination. Rather, it merely renders the existence of the backdating power neutral to the Commission's consideration of whether to make an interim determination.
104. HTAL further submits that declining to make an interim determination eliminates the possibility that any reduction in the MTAS will be passed through to end-users. In the context of the H3GA/Vodafone MTAS access dispute, H3GA notes that since it launched its "3" brand, it has often been a price leader and while it is unable to give the Commission a guarantee that an interim determination would lead to further reductions in its retail prices, it remains a possibility that this will occur.
105. The Commission notes (as indicated in paragraphs XX to XX below) that both parties have submitted to the Commission data showing the terminating traffic volumes on the mobile networks owned by Vodafone and HTAL (and Hutchison 3G Australia Pty Ltd). The Commission notes that most of the parties' data is contradictory.

Commission's view

106. The Commission considers that an interim determination which contains a lower price for the MTAS that is more reflective of the TSLRIC+ of supplying the service will be likely to be in the LTIE. As indicated in paragraph 266 below, the Commission believes, based on the information available to it at this point in 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).
107. Based on the information available to it at this point in time, the Commission believes that H3GA faces prices for the MTAS in excess of the TSLRIC+ of providing this service. To the extent that there are asymmetries in the volume of minutes HTAL and Vodafone terminate on each other's mobile networks, this will enable one party to raise the input costs of its rival in the market for retail mobile services. This will occur irrespective of whether there are reciprocal arrangements in place between the two parties in relation to the prices they charge each other for the MTAS.
108. By lowering the price of the MTAS towards its underlying (TSLRIC+) cost of production, the Commission believes this will help to put in place necessary preconditions for improved competition in the market within which retail mobile services are provided, by enabling the parties to compete on the basis of their underlying costs of production.
109. Further, the Commission notes that a price for the MTAS which is above underlying cost is likely to be associated with a structure of prices for retail mobile services that are allocatively efficient, and therefore not in the LTIE. In this regard, the Commission considers that an interim determination which sets out prices for the MTAS which are more reflective of the TSLRIC+ of providing the service will be likely to promote the economically efficient use of the infrastructure used to provide mobile services. As noted in the Commission's MTAS Final Report, the Commission believes that a pricing

structure has emerged across mobile services that involves above-cost pricing of the MTAS and subsidised pricing of some retail mobile services. The Commission expects that this pricing structure will generate greater than efficient consumption of retail mobile subscription services and, in turn, may be encouraging excessive investment in the infrastructure used to provide retail mobile services. For example, the Commission noted in its MTAS Final Report that such a pricing structure may be leading to a greater than efficient turnover of mobile handsets by consumers in the face of subsidised handset prices, as well as excessive investment in the infrastructure used to develop new handsets.

110. The Commission notes the concerns raised by Vodafone that lower prices for the MTAS will not be passed through into lower prices for mobile-to-mobile (MTM) call services. The Commission does not believe, however, that the extent of price reductions for MTM call services should be seen as the measure of the extent to which a lower price for the MTAS promotes competition in the market within which retail mobile 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 there is no certainty that the necessary preconditions will be taken advantage of.
111. Secondly, and as outlined in paragraph 114 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. Further, lower input costs may lead to a pricing structure across all retail mobile services (including services other than MTM call services) that would promote the LTIE. Hence, while MTM call prices may not fall by the same amount as the price of the MTAS as a result of this interim determination, the LTIE can still be promoted if there is a closer association of prices and costs for other retail mobile services (such as SMS, mobile-to-fixed, mobile subscription etc).
112. Overall, therefore, the Commission believes that an interim determination that contains a price for the MTAS that is more reflective of the underlying cost of providing this service will promote the LTIE.
113. 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 HTAL and Vodafone will perform some risk assessment when determining how to respond to reduced prices for the MTAS in an interim determination.
114. However, it need not be assumed that HTAL will not utilise any of the lower cost savings they 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. When determining an appropriate price for the MTAS for the purposes of a final determination, the Commission 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 Principle 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.

115. 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 a final 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.
116. 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.
117. In light of these possibilities, the Commission expects HTAL 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 was set at a level inconsistent with the interim determination).³⁹ 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.⁴⁰
118. 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 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

119. HTAL submits that there is likely to be a considerable delay before the Commission is able to make a final determination. In this regard, HTAL notes that the Commission is currently arbitrating several other access disputes and is considering access undertakings lodged by both Vodafone and Optus. Further, HTAL notes that it is possible that the final determination will be deferred until the Commission completes its consideration of the access undertakings under subsection 152CLA(2) of the Act.
120. In the context of its submission on deferral, 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.

³⁹ In this context, 'expected' price refers to the economic concept of an expected price. That is, the sum of all possible prices that could be set in a final determination multiplied by the probability of their occurrence.

⁴⁰ That is, with a small (or zero) probability of a price being set greater than 19.38cpm (see, for reasoning, paragraph 115 above) 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.

121. Vodafone also submits that past experience, based upon the information available to it in a Productivity Commission Report, indicates that the conduct of an arbitration to either an interim or final determination is unlikely to proceed quicker 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.⁴¹
122. Further, Vodafone argues that if the Commission is having difficulty applying its Pricing Principle Determination in an interim determination timeframe (based upon Vodafone's contention that to apply the Pricing Principle Determination regard must be had to Vodafone's direct costs information) then this is a powerful reason for the Commission to decide not to make an interim determination.⁴²

Commission's view

123. 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 the 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.
124. 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 141 to 148 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.
125. 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 provided in support of its 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.
126. Further, the Commission notes that Vodafone has recently withdrawn its MTAS access Undertaking submitted on 26 November 2004 and provided the Commission with a second MTAS access 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

⁴¹ Vodafone submission, 3 June 2005, para 2.5(b).

⁴² *id.*, paragraph 4.12.

inquiry into Vodafone's second Undertaking as expeditiously as possible, it only 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.

127. 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 this arbitration.
128. 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.⁴³ 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 a final determination.
129. 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.⁴⁴ 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:

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.

...

⁴³ Vodafone submission, 10 March 2005, paragraph 2.2(d)(ii) at p 6.

⁴⁴ Productivity Commission, Final Report, Telecommunications-Specific Competition Regulation, pages 237-238.

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.⁴⁵

130. Finally, as discussed in more detail in paragraphs 201 to 204 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

131. Neither party made arguments on this issue

Commission view

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

Other matters – deferral

133. 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)⁴⁶ (152CLA(4)(b)), and
- such other matters as the Commission considers relevant (152CLA(4)(c)).

Parties' views

134. Vodafone has submitted that the Commission should defer consideration of the arbitration while it considers its MTAS access Undertaking.

135. 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 its first MTAS 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

⁴⁵ ACCC, Supplementary Submission to the Productivity Commission Review of the Telecommunications Specific Competition Regulation, November 2000, pages 27-28.

⁴⁶ 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).

have a substantial interest in the pricing of the MTAS are not privy to the arbitration proceedings. In its response submission Vodafone refers to its request for a timetable for the Commission's consideration of the MTAS access Undertaking.

136. 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 six months.
137. 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 its MTAS 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 HTAL.
138. In response to the draft interim determination, Vodafone submits that any inherent uncertainties do not outweigh the benefits of deferring the dispute to consider Vodafone's MTAS undertaking and that, in fact, the best way to overcome these 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.
139. 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.
140. HTAL submits that the Commission has not sought submissions on whether it should defer consideration of the arbitration while it considers the access undertaking lodged by Vodafone dated 26 November 2004. HTAL, therefore, did not respond to Vodafone's submission on this aspect of Vodafone's interim determination submission.

Commission's view

141. 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.

142. As noted at paragraph 126 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.
143. 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.
144. 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.
145. 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.
146. 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 dependent on acceptance of the undertaking. Accordingly, the

Commission notes there is no certainty that the undertaking process will necessarily be completed. The Commission does not agree that devoting the maximum resources possible to assessing the MTAS access undertaking in any way mitigates these uncertainties, including those surrounding the possible withdrawal of an access undertaking at any stage.

147. 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.
148. 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 argument 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

149. Having regard to paragraphs 10 to 148 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.

THE CONTENT OF THE INTERIM DETERMINATION

150. 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 subsection 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

151. 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 of the Act;
 - the requirement in subsection 152CP(4) of the Act 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) of the Act.
152. 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.
153. Vodafone's submission also addressed the following other provisions of Part XIC of the Act:
- 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).
154. HTAL did not specifically address whether the Commission should have regard to particular criteria in considering the content of an interim determination. HTAL did, however, address what the content of an interim determination should be and these are discussed further below.

Commission's view

155. 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 140 to 146 below.

156. The Commission notes that it is giving the parties a draft interim determination pursuant to the requirement in subsection 152CP(4) of the Act.
157. 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 take 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.
158. 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 MTAS access 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.
159. 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

160. 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 10 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.
161. Vodafone submits that the Commission's indicative prices [as contained in its 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'.⁴⁷
162. 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

⁴⁷ Vodafone submission 3 June 2005, paragraph 4.11(a).

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.

163. That said, Vodafone argues in its response to the Commission's draft interim determination that the 'cost information has been available to the Commission for over 5 months, and available to HTAL in relation to this dispute since 27 April 2005. The fact that both the Commission and HTAL have not pursued or substantially advanced the opportunity to interrogate and verify the cost information does not entitle the Commission to give it no weight'.⁴⁸
164. HTAL submits that the Commission should not use Vodafone's modelled costs and the supporting material to its MTAS access Undertaking in determining the content of the interim determination. In this regard, HTAL notes that this information is not yet available to it and has not been audited or analysed by any independent or other party. HTAL also notes that it is not possible for the Commission to consider expeditiously the Vodafone MTAS access Undertaking information.
165. HTAL also submits that the only express limitation on the Commission's discretion to make an interim determination is that the Commission must have regard to any published pricing principle made under subsection 152AQA(2) of the Act, and that the Commission is not required to take into account any other matter – including Vodafone's direct costs. HTAL further submits that Vodafone's direct costs are relevant only if Vodafone is an efficient service provider, and that Vodafone has not provided any evidence that this is the case.
166. In reply to HTAL's submission, Vodafone submits that it has informed the Commission that it is willing to provide copies of its confidential cost information to HTAL on the condition that the appropriate confidentiality orders are made in accordance with section 152DK of the Act. Vodafone submits that HTAL has been aware for some time that Vodafone intends to rely on information as to its direct costs of supplying the MTAS in the arbitral proceedings, and that complete non-confidential versions of the MTAS access Undertaking and supporting submissions were published on the Commission's website on 1 December 2004.

Commission's view

167. 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.⁴⁹ 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.
168. 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

⁴⁸ *id.*, paragraph 1.2(d).

⁴⁹ 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.

an interim determination should be, it has discretion to consider a range of information available to it.

169. 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.⁵⁰ The Commission also notes HTAL's view that that it is not possible for the Commission to consider expeditiously the Vodafone MTAS access Undertaking information.⁵¹
170. The Commission agrees 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 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.
171. Accordingly, the Commission does not propose to rely on this material for the purpose of deciding on the content of this interim determination.
172. 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 Vodafone's confidential 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.
173. 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 to rely upon it for the purposes of this interim determination.
174. For these reasons, the Commission does not consider it appropriate to 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).

⁵⁰ Vodafone submission, 10 March 2005, paragraph 1.2(d), p. 3.

⁵¹ H3GA submission, 10 March 2005, p. 3.

175. 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.

Frontier model

Parties' views

176. 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.⁵²

177. 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. Vodafone also 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.

Commission's view

178. 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.

179. 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.⁵³ The Commission again notes HTAL's view that it is not possible for the Commission to consider expeditiously the Vodafone Undertaking information.⁵⁴

180. 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.

⁵² Vodafone submission, 10 March 2005, paragraph 3.10(a)

⁵³ Vodafone submission, 10 March 2005, paragraph 1.2(d), p. 3.

⁵⁴ H3GA submission, 10 March 2005, p. 3.

181. 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 opposed to considering welfare-maximising prices for the MTAS to the point of having pre-determined its position...⁵⁵

182. 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 Pricing Principle

Parties' views

183. Vodafone notes that the Commission is also required to have regard to its Pricing Principle contained in Annexure 1 of the Pricing Principles Determination.

184. 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 of its Pricing Principles Determination in determining the content of this interim determination, given that it is the subject of Federal Court proceedings.⁵⁶

185. 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.⁵⁷

186. 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+.

187. 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+, or 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.⁵⁸ 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 and that the Commission's 'Price Related Terms and Conditions [as specified in its Pricing Principle Determination] do not reflect the Commission's pricing principle'.

⁵⁵ Vodafone, Submission to the ACCC: Access Undertaking Mobile Terminating Access MTAS, 26 November 2004, p. iv.

⁵⁶ Vodafone submission, 10 March 2005, paragraph 1(a)(i), p. 1.

⁵⁷ *ibid.*

⁵⁸ Vodafone submission, 10 March 2005, paragraph 1(a)(iv), p. 2.

188. Further, Vodafone submits that if the Commission decides to have regard to its Pricing Principle Determination or any part thereof in the current arbitration proceedings, it must identify the evidentiary material relied on to support the conclusions in the Pricing Principle Determination so that Vodafone may interrogate and test this material.⁵⁹
189. 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.
190. 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, 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.
191. 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.'⁶⁰ 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.'⁶¹
192. HTAL submits that, under subsection 152AQA(6) of the Act, the Commission is required to have regard to the Pricing Principles Determination contained in the MTAS Final Report in relation to any decision it makes regarding an interim determination. HTAL notes that the target price arrived at by the Commission in its MTAS Final Report was 12 cpm and that the interim determination should reflect that target price.
193. HTAL further submits that the Mobile Services Review which led to the MTAS Final Report was a comprehensive review into the appropriate price for this service which took over a year to complete and received many submission from a large number of parties, including Vodafone which made several detailed submissions and participated in two public hearings.
194. In response to HTAL's submission, Vodafone notes that it is contradictory for HTAL to suggest that the Commission 'is required to have regard to the pricing principle in Annexure 1 of the Pricing Principles Determination' but also that 'the interim determination should reflect the target price' of 12 cpm. Vodafone submits that implementing a price of 12 cpm for 2005 would be contrary to both Annexures 1 and 2 of the Determination.
195. With respect to the Analysys Report, HTAL retained Marsden Jacob Associates, who reported that the Analysys Report was 'reliable and in-line with international best practice'. On this basis, HTAL submits that the report was relevant to the

⁵⁹ Vodafone submission, 16 March 2005, paragraph 10, p. 3.

⁶⁰ Vodafone submission, 8 July 2005, p. 2.

⁶¹ *id.* p. 1.

Commission's final MTAS decision and so is relevant to the Commission's interim determination.⁶²

Commission's view

196. In determining the content of this interim determination, the Commission has had regard to the Pricing Principle 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.
197. 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).
198. In this regard, the Commission notes that it does not believe Annexure 1 and 2 of its Pricing Principles 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 Principles Determination in its entirety when arbitrating an access dispute.
199. Moreover, the Commission considers that the Pricing Principles Determination, and the analysis undertaken in preparing it, represent the best available evidence for it to consider when determining what the price of the MTAS should be in an interim determination. The Commission notes that 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 HTAL) 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. 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.⁶³
200. 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 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.
201. Contrary to the views of Vodafone (as set out in paragraphs 161 and 186), the Commission continues to believe that this material supports the Commission's view

⁶² HTAL submission, 8 July 2005.

⁶³ MTAS Final Report, p. 215.

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.

202. 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 the indicative price related terms and conditions (including by making submissions in relation to the consultancy report prepared for the Commission by Analysys).'⁶⁴ The Commission has provided the parties with an opportunity to argue against the application of the Pricing Principles Determination in this case.
203. For the reasons discussed in paragraphs 167 to 175 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.
204. 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 Principle 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.
205. 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'.⁶⁵ As indicated in paragraph 43 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' views

⁶⁴ *ibid.*

⁶⁵ Vodafone submission, 10 March 2005, paragraph 1(a)(i), p. 1.

206. 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 a three year 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.
207. 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.
208. Vodafone further submits that its proposed Usage charge of 19.38 cpm for 2005 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 its proposed Usage charge for 2005 is robust and conservative for the reasons outlined in the MTAS access Undertaking submission and also in Appendix 1 to that submission.⁶⁶
209. HTAL submits that the Commission's adjustment path, as outlined in the Commission's MTAS Pricing Principles Determination, should not be applied. In this regard, HTAL notes that the Commission's underlying rationale for the adjustment path was a concern that any move to reduce substantially the price of the MTAS could generate significant disruption to the pricing and business strategies of mobile network operators.⁶⁷ HTAL submits that this rationale does not apply between the parties to this access arbitration as HTAL and its parent, Hutchison Telecommunications (Australia) Limited, have relatively small shares of mobile services market revenue. As a consequence, HTAL submits that a price of 12 cpm in an interim determination will have no meaningful impact on Vodafone's pricing or business strategy.
210. Therefore, HTAL submits that 12 cpm represents a reasonable price for the interim determination, particularly since the Commission considered this a 'conservative' target price. Further, HTAL notes that 12 cpm represents the amount currently not in dispute between the parties as to the appropriate price for the MTAS.⁶⁸

⁶⁶ Vodafone submission, 10 March 2005, paragraph 3.4(c), p. 5.

⁶⁷ H3GA reference this to p.216 of the MTAS Decision.

⁶⁸



211. Further, HTAL submits that an interim determination that contains a price of 12 cpm for the MTAS would encourage the parties to engage in further commercial negotiations and may result in the settlement of this dispute.⁶⁹
212. In reply, Vodafone submits that the proportion of the mobile market service revenue held by HTAL is irrelevant since the correct metric to measure the impact of a particular price on Vodafone's pricing or business strategy is the percentage of Vodafone's net termination revenues which HTAL accounts for. [REDACTED]
213. Further, Vodafone considers that regardless of the proportion of mobile services market revenue held by HTAL, the assertion that 'a price of 12 cpm will have no meaningful impact on Vodafone's pricing or business strategy' is incorrect. On the contrary, Vodafone submit that while it is accruing MTAS revenues on a conservative basis to take account of risks to those revenues, it has not considered the prospect that the Commission will issue an interim or final determination at a price below 18 cpm. Vodafone notes that if an interim determination contained a price below 18 cpm, its pricing and business plans would need to be substantially revised to account for the additional risk to revenues below 18 cpm. In this regard, Vodafone estimates that an interim determination that includes a price of 12 cpm for all access seekers implies that Vodafone should recalibrate its retail pricing plans to recover an additional [REDACTED] [c-i-c] of its fixed and common costs from its retail services in order to maintain total cost recovery across the business for 2005. Vodafone submits that such an outcome would be inconsistent with the LTIE and also with Vodafone's legitimate business interests.
214. Vodafone submits that an interim determination that contains a price of 12 cpm is not likely to materially affect the prospect of a negotiated outcome since it would not give the parties any meaningful indication as to the Commission's likely final determination.⁷⁰
215. In its response to the draft interim determination, HTAL explicitly stated its view that the correct metric to measure the impact of a reduced MTAS price is twofold:
- (a) the proportion of net MTAS revenues that HTAL represents for Vodafone; and
 - (b) the rate that HTAL would be prepared to Vodafone for the same service should an interim determination be granted.⁷¹
216. In this regard, HTAL undertakes to supply the MTAS to Vodafone at the rate of 12cpm in the event that the Commission makes an interim determination that Vodafone supply the MTAS to H3GA at 12 cpm under a 'Reciprocity Assurance'. HTAL also submits that this Assurance needs to form part of the interim determination.⁷²

⁶⁹ In support of this view, H3GA notes that while 17 interim determinations were issued by the Commission at the time of the Productivity Commission Final Report: Telecommunications-Specific Competition Regulation 2001, only five access disputes were then the subject of a final determination.

⁷⁰ In this regard, Vodafone considers that an interim determination is not likely to provide increased incentives for negotiation unless and until the Commission considers Vodafone's cost information in making an interim determination.

⁷¹ H3GA submission 2 June 2005, p.2.

⁷² *ibid.*

217. HTAL submits that the Commission must balance the certain promotion of the LTIE that is achieved by imposing the target price and the possible detriment to the LTIE that could be caused by disruption to Vodafone's pricing and business strategies when assessing whether to impose the adjustment path. HTAL submits that the Commission's conclusion that a price of 12 cpm in an interim determination is 'likely to have some impact' on Vodafone's pricing and business strategies is not sufficient to justify the application of the adjustment path and that has seen no evidence that the impact of an interim determination of 12 cpm on Vodafone's pricing and business strategies would so affect Vodafone as to be adverse to the LTIE.⁷³
218. HTAL submits that an interim determination of 12 cpm would not amount to a departure from the Pricing Principle Determination, arguing the target price is the fundamental component of the MTAS Pricing Principle Determination; the adjustment path is a pragmatic mechanism for moving the industry to that target price. HTAL submits that an interim determination that sets the price at the target price is wholly consistent with the pricing principle. HTAL submits that in the context of this arbitration, the adjustment path serves no purpose and, further, that applying the adjustment path in this access dispute is inconsistent with the object of promoting the LTIE.⁷⁴
219. The Commission notes that both parties have submitted to the Commission data that they believe shows the level of traffic each carrier terminates for the other carrier on their respective networks.⁷⁵ The Commission notes that most of the parties' data in this regard is contradictory. [REDACTED]

HTAL argues this difference in view relates to the inclusion, by Vodafone, of minutes of traffic relating to instances where traffic originating from an H3GA customer roaming on Vodafone's network terminates on the H3GA network when calculating net traffic volumes between the two carriers' networks. HTAL argues such traffic should be excluded when determining net traffic flows between the two carrier's respective networks.

Commission's view

220. In determining the content of this interim determination, the Commission has had regard to the adjustment path outlined in its Pricing Principles Determination. In the MTAS Final Report, the Commission noted that:

While the Commission believes that a closer association of the price of mobile termination services and its underlying cost TSLRIC+ of production would generate a number of benefits in terms of promoting the LTIE, a sudden decrease could also cause substantial adjustment costs. In particular, any move substantially to reduce the price of MTASs could generate significant disruption to the pricing and business strategies of MNOs. This, in turn, would impinge upon the legitimate business interests of access providers who have, to date, based their business plans around existing pricing structures and the previous retail benchmarking pricing principle. On balance, therefore, the Commission continues to believe it is appropriate that the price related terms and conditions of its pricing principle determination for the MTAS should

⁷³ *id.*, p.1 - 3.

⁷⁴ *op. cit.*

⁷⁵ H3GA submission, 24 June 2005; Vodafone submission, 21 June 2005

specify an adjustment path that ensures the price of the service gradually reduces to the target price...⁷⁶

221. The pricing principle determination specified that the price of access to the MTAS for the 2005 calendar year should be 18 cpm, and should be 15 cpm for the 2006 calendar year. 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.
222. The Commission notes HTAL submission that no such adjustment path should be followed in this interim determination due to the small proportion of MTAS traffic it would generate for Vodafone, and the limited impact reductions in the price HTAL pays for the MTAS would have on Vodafone's pricing and business strategies. The Commission also notes HTAL's proposed reciprocity agreement and believes this would further limit the impact of a reduction in the MTAS rate paid by HTAL to Vodafone on Vodafone's pricing and business strategies.
223. The Commission does not believe, however, that that these reasons justify the Commission setting a price for the MTAS in an interim determination that is not based on the MTAS Pricing Principles Determination. In particular, the Commission believes, in this particular case, that there would be the potential for it to set in place conditions that would advantage smaller carriers as opposed to larger carriers were it to set lower rates in arbitrations for those carriers that represented a smaller proportion of the access providers business. The Commission does not believe such an approach would promote competition, and therefore would not be in the LTIE.
224. The Commission also notes HTAL's submission that an interim determination that contains a price of 12 cpm would encourage the parties to engage in further commercial negotiations and may result in the settlement of this dispute⁷⁷, as well as Vodafone's objection to this proposition.⁷⁸ As noted in paragraph 62 above, the Commission notes that the price contained in an interim determination may not necessarily reflect the price contained in a final determination. To that extent, the Commission considers that it has no basis on which to conclude that an interim determination that contains a price of 12 cpm will necessarily encourage parties to engage in further negotiations, as opposed to an interim determination that is based on the adjustment path contained in the Commission's MTAS Pricing Principles Determination.
225. 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.
226. 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 MTAS access 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

⁷⁶ MTAS Final Report, page 216.

⁷⁷ H3GA submission, 10 March 2005, p.3.

⁷⁸ Vodafone submission, 16 March 2005, paragraph 18, p. 5.

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.

227. 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'.⁷⁹

228. The Commission disagrees with this statement 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 appear to imply.

229. The Commission agrees with Vodafone that the correct metric to consider the impact of a lower price for the MTAS on its pricing and business strategies is the proportion of MTAS revenues that HTAL represents for Vodafone. The Commission notes that Vodafone does not provide further detail on this 'proportion', although it indicates that it is greater than HTAL's overall market share.

230. The Commission appreciates that HTAL generates a relatively small proportion of Vodafone's overall MTAS revenue. However, the Commission does not believe that this alone should justify the Commission setting a price for the MTAS in an interim determination that is not based on the MTAS Pricing Principles Determination.

231. The Commission concludes that, based on the information currently before it, the adjustment path specified in its Pricing Principles Determination would be appropriate for this interim determination, and that the resulting prices for the MTAS would be likely to be in 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 when the interim determination commenced.

Vodafone's terminating roaming service

Parties' views

232. In the context of the H3GA/Vodafone MTAS access dispute, H3GA submits that in recent commercial negotiations, Vodafone offered to supply the terminating roaming service (TRS) to H3GA for approximately [REDACTED]. H3GA considers that this is a relevant factor to consider in making an interim determination for the MTAS as this is a very similar service to the MTAS and is therefore a strong indication that the true cost of the MTAS is [REDACTED].

233. H3GA notes that while this evidence may be irrelevant to a Final Determination, it should be taken into account for an interim given the speed with which it can be assessed and the fact it is corroborative of the MTAS decision.

234. Vodafone submits that the Commission should not place any weight on the fact that Vodafone offered to supply H3GA with the TRS at [REDACTED] due to the fact that:

- these are different services;

⁷⁹ Vodafone submission, 10 March 2005, paragraph 3.4(c), p. 5.

- the TRS is not declared and Vodafone is therefore free to price according to its perception of the competitive dynamics of the market;

- [REDACTED]

- It represents a proposed price, not any indication of Vodafone's cost.

235.

[REDACTED]

236. In its response to the draft interim determination, Vodafone argues that the Commission has not addressed Vodafone's submissions that [REDACTED]

[REDACTED] Commission has no basis on which to conclude that Vodafone's offer was intended to or did directly relate to any assessment of Vodafone's costs of supply of that specific service.

Commission's view

237. In determining the content of this interim determination, the Commission has placed limited weight on the fact that Vodafone offered to supply HTAL the TRS at [REDACTED]

238.

[REDACTED]

239. However, the Commission notes Vodafone's view that the TRS is not the same service as the MTAS, and is also not currently subject to declaration. That said, the Commission takes the view that these services are likely to share many technical characteristics and that they would likely use similar network components with a similar level of intensity. This suggests that Vodafone's underlying TSLRICs of supplying these two services are likely to be similar.

240. The Commission also notes Vodafone's submission that:

[REDACTED]

⁸⁰ Vodafone submission, 10 March 2005, paragraph 12(e), p. 4.

241.

The Commission has not formed a view on this issue for the purpose of making an interim determination as it would require further information than that which has been submitted by both parties to date. In making a final determination that took the price offered for the TRS into account, the Commission sought further information or supporting evidence on whether the relevant elasticities for these two services are different, and by what magnitude. The Commission notes neither party has provided such information.

The time period over which an interim determination should apply

Parties' views

242. HTAL submits that the Commission should issue an interim determination that includes a price for the MTAS of 12 cpm, reflecting the Commission's target price in the MTAS Pricing Principles Determination. In its submissions to the Commission subsequent to making its notification of an access dispute, HTAL does not appear to explicitly address the time period over which this price for the MTAS should apply. The Commission understands, however, from HTAL's notification that if the price determined for the MTAS is 12 cpm, HTAL is seeking a term of three years. However, if the price set is greater than 12 cpm, HTAL is seeking a term of one year.⁸¹
243. Vodafone did not appear to provide a detailed response in its submissions to this position of HTAL regarding the time period. However, in its submission Vodafone indicated its belief that the dispute only applied with respect to the 2005 calendar year. The Commission infers from this that Vodafone would be likely to disagree that an interim determination, if made, should apply for a period beyond 31 December 2005.⁸²
244. However, 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 for the reasons discussed below, and may be proceeding on the basis of an error of law if it did so.
245. 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
246. 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

⁸¹ HTAL, Notification of an access dispute under Part XIC of the *Trade Practices Act 1974*, 24 February 2005, paragraph 11, p. 3.

⁸² Vodafone submission, 15 March 2005, paragraph 5, p. 2.

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.

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.

247. 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.
248. 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.
249. 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.
250. 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 whether they are likely to be in dispute is irrelevant to whether the Commission has power to make an interim determination for those periods.
251. 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 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.
252. 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. Vodafone also submits that had the parties negotiated for a period longer than 2005 this considerations may have been different and resulted in a far different outcome.⁸⁴

⁸⁴ Vodafone submission 3 June 2005, paragraphs 7.1 and 7.2.

253. In the oral hearing of 20 June 2005, H3GA submitted that as a matter of power, there is nothing in the scope of the disagreement that limits the Commission's power to make a determination under subsection 152CP(2) of the Act.⁸⁵
254. Also in that hearing, HTAL submitted that there was no limitation in the dispute, as notified, as to the time which was being contemplated by HTAL for the provision of the MTAS. H3GA also noted that when, in the case management meeting, a question arose as to the period for which H3GA was seeking a determination, it was made clear that H3GA was not limiting itself to a one year time horizon. HTAL also noted that Vodafone, as a matter of substance, is really seeking to rely on its undertaking which itself has a three year time horizon moving to the figure of 16.15 cents over a three year period.⁸⁶
255. With respect to Vodafone's submissions in relation to procedural fairness and the time period to which an interim determination would apply, HTAL submitted that:
- It was or ought to have been apparent to all concerned that the period of the interim determination the Commission was considering could be the one year period for which provision is made in the Act
 - Vodafone has had plenty of opportunity to make submissions before the draft interim determination and, indeed, after the draft interim determination;
 - Vodafone has not brought forward the beginning of an argument about a denial of procedural fairness – only a generalised complaint about a lack of procedural fairness without further detail.⁸⁷

Commission's view

256. 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.
257. 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.
258. 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.
259. 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.
260. 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

⁸⁵ 20 June 2005 oral hearing transcript, Mr Gageler, p.7.

⁸⁶ *id.*, p. 8.

⁸⁷ *id.*, p. 9.

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.

261. 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 notes that:
- (i) HTAL's stated position that it seeks 12 cpm for supply of the MTAS for the 2005, 2006 and 2007 calendar years;
 - (ii) Vodafone submitted the entirety of its MTAS access undertaking material as part of its submissions on the making of an interim determination – which relates to the prices for supply of the MTAS for the 2005 – 2007 period (inclusive).
262. 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 approximately five and a half weeks to consider and prepare submissions in response to the draft interim determination).
263. 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 10 March 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.
264. 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 HTAL 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.

265. On the basis of the matters discussed above, the Commission's view, as outlined in paragraph 9 of the interim determination, 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.

Conclusion – Content of the interim determination

266. 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.