



**Submission by AAPT Limited  
to the Australian Competition and Consumer Commission**

**in response to the Discussion paper on  
*Vodafone's Undertaking in relation to the Domestic Digital Mobile  
Terminating Access Service***

**October 2005**

## Submission by AAPT Ltd

### 1. Introduction

AAPT welcomes the opportunity to make submissions to the Australian Competition and Consumer Commission (ACCC) on Vodafone's undertaking (the *Undertaking*) on the Mobile Terminating Access Service (the *MTAS*).

These submissions set out AAPT's comments on the proposed pass through safeguard, and the price and non-price terms proposed by Vodafone.

AAPT has previously made submissions on a number of issues with the modelling employed by Vodafone for the purposes of the undertaking (refer submissions dated 17 August 2005). AAPT notes that Vodafone has placed considerable emphasis on the need for the Commission to take into account Vodafone's direct costs in setting the access price. However, if Vodafone wishes the Commission to take into account its direct costs, it is imperative that Vodafone undertakes a complete and robust modelling exercise to ensure that its direct costs in providing the MTAS are correct and fully understood. AAPT reiterates its concerns that, instead:

- Vodafone's model uses historic data from 2002/03;
- The data inputs into the model are unaudited – there is no independent verification that the numbers provided by Vodafone to PricewaterhouseCoopers are accurate;
- Vodafone has relied excessively on external sources for information, rather than examining what occurs in its own network in Australia; and
- There are a number of modelling errors.

The onus is on Vodafone to show that its undertaking is based on robust and verified data. It is clear that there are a number of modelling errors in Vodafone's model, and that Vodafone has not relied on correct

(or audited) data. For these reasons, and the reasons set out in AAPT's previous submissions, the Commission should reject Vodafone's undertaking.

AAPT notes that by letter dated 29 June 2005, the Commission advised interested parties that it intended to close the consultation period on its discussion paper dated April 2005 (the *Discussion Paper*) on 17 August 2005, even though it did not consider at that time that Vodafone had made its confidential information reasonably available to interested parties. The Commission will be aware that AAPT had great difficulty obtaining access to Vodafone's confidential information for David Havyatt, Head of Regulatory Affairs. Mr Havyatt only obtained access to the confidential information on 18 July 2005. AAPT notes that it is difficult for parties to make meaningful submissions in the short period for consultation, without access to critical confidential information.

AAPT provides comments on the pass through safeguard and price and non-price terms in section 2 below. AAPT also refers the Commission to:

- It's preliminary submissions on Vodafone's unallocated cost model, dated 17 August 2005; and
- AAPT's submissions on the issues of the estimate of 'network externality effects' and 'Ramsey mark-ups', to follow shortly.

AAPT reserves its right to respond to the Commission's remaining questions at a later date.

## 2. The Undertaking

### Fixed-to-mobile pass through safeguard

The Commission has asked a range of questions about Vodafone's proposed fixed-to-mobile pass through safeguard.

AAPT is opposed to the fixed-to-mobile pass through safeguard on the basis that it mandates lower retail prices as the sole measure of the extent to which a lower price for the MTAS promotes competition in the market within which fixed-to-mobile services are provided, or the LTIE more generally. AAPT does not agree.

First, 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. A decision to accept an access undertaking might put in place necessary preconditions for improved competition and efficient use of and investment in infrastructure. Putting into place those preconditions can itself be in the LTIE, even if the necessary preconditions are not taken advantage of.

Secondly, to the extent that such preconditions are taken advantage of, improved competition can manifest itself in many forms other than just price reductions. In particular, improved competition may be associated with improvements in the quality of services provided (which may increase the cost of providing fixed-to-mobile call services). Further, lower input costs may be passed-through in the form of reductions in the price of other services provided in the bundle of pre-selected fixed line services. Hence, while fixed-to-mobile call prices may not fall by the same amount as the price of the MTAS in the short term, the LTIE can still be promoted if there are reductions in the price of other services as a result of lowering input costs for competitors in the market within which fixed-to-mobile services are provided.

By accepting an undertaking which mandated that the lower MTAS input price be passed through to the retail price, the Commission could be stifling competition by preventing the benefits from a lower MTAS rate being spent by access seekers on infrastructure or improved products and services. This would not satisfy the LTIE test.

### Non-price terms and conditions

AAPT provides specific comments on the non-price terms and conditions below.

#### Clause 7 (Credit Management and Security):

Clause 7.1(a)(ii) - The grounds giving rise to the right to conduct a creditworthiness review are vague and may be too easily triggered. In particular:

- clause 7.1(a)(ii)A only requires a "possibility" of an Insolvency Event - as currently worded, this clause will be too easily triggered;

- clause 7.1(a)(ii)B should only be triggered if the unpaid amount exceeds a certain minimum amount that remains unpaid for 5 Business Days after Vodafone has informed the Access Seeker that the due date has passed and that payment has not been received; and
- in clause 7.1(a)(ii)C, "significant" should be defined as a 50% or greater increase.

Clause 7.1(b)(i) - Vodafone should not have direct access to the Access Seeker records during the creditworthiness review, as access to such records may give Vodafone an unfair competitive edge over the Access Seeker. An independent third party should be appointed to conduct the audit in every case. The third party's report (containing summary details only) would then be given to Vodafone.

Clause 7.2 - This clause gives Vodafone the right to seek security where the Access Seeker does not meet Vodafone's "reasonable security requirements". The term "reasonable security requirements" is too vague. It should be tied to factors such as inability by the Access Seeker to pay its debts.

Definition of "Insolvency Event" - The appointment of an external administration should not be an Insolvency Event unless the appointment has continued for 20 Business Days.

## **Clause 11 (Confidentiality)**

Clause 11.3(a) - The parties should have the right to disclose Confidential Information to:

- a Regulator upon the reasonable request of the Regulator; and
- to its auditors for the purpose of audits.

As set out in clause E.4(d) of the ACCC "Final Determination - Model Non-Price Terms and Conditions (October 2003)" (the "Model Terms"), each party should have the right to disclose Confidential Information "in connection with legal proceedings, arbitration, expert determination and other dispute resolution mechanisms set out in this agreement or for the purpose of seeking advice from a professional person in relation thereto".

Definition of "Confidential Information" - The following types of information should not be treated as "Confidential Information"

- information which is already in the public domain
- information that is independently developed by the recipient
- information that was received by the recipient from a third party source otherwise than in breach of confidentiality obligations.

#### **Clause 14 (Liability and Indemnity)**

Clause 14.5(a)(ii) - The parties should not be liable for Consequential Loss under this indemnity (an indemnity for damage to equipment, Network or other tangible property). In addition, this indemnity should be subject to a cap of \$5M.

Clause 14.5(c) - This exclusion effectively requires the Access Seeker to exclude all liability in its contracts with its end users. This will have a negative impact on the Access Seeker and on consumers, and other users, who are customers of the Access Seeker. A clause of this nature will taint all of the Access Seeker's customer contracts (and not just those contracts under which the Access Seeker is re-selling Vodafone Mobile Terminating Access Service). The reason for this is that the Access Seeker will maintain only one set of customer contracts under which it may sell its own services and services acquired from a number of carriers. The Access Seeker will draft the liability clauses for those customer contracts on the basis of the most draconian liability provisions contained in its carrier contracts.

#### **Clause 15 (Suspension)**

Clause 15(a) - Vodafone has the right to suspend the Agreement or the supply if, "in the reasonable opinion of Vodafone", any of a number of events occurs. The words "in the reasonable opinion of Vodafone" should be deleted. Vodafone's right to suspend should be measured by objective, rather than subjective, standards.

Clause 15(a)(iii) - This clause gives a right to suspend on notice if an Insolvency Event arises. The Access Seeker should be given a 20 Business Day cure period.

There should be an express obligation on Vodafone to re-connect a service as soon as the event giving rise to the suspension ceases to exist.

#### **Clause 16 (Termination)**

Clause 16.1(a) - This clause gives Vodafone the right to terminate the Agreement if in the reasonable opinion of Vodafone the Access Seeker has attempted to use, is likely to use, or has used the Service in contravention of any law. The words "is likely to use" give Vodafone an unfair discretion and should be deleted. Similarly, the words "in the reasonable opinion of Vodafone" should be deleted.

Clause 16(b) - Each party has the right to terminate the Agreement if, "in the reasonable opinion" of the terminating party, any of a number of events occurs. The words "in the reasonable opinion of that Party" should be deleted. The right to terminate should be measured by objective, rather than subjective, standards.

Clause 16.2(a) - This clause gives Vodafone the right to terminate the entire Agreement where a service or all/part of the Agreement is suspended for more than 30 days. Again, this right is too broad. Vodafone

should only have the right to terminate that part of the Agreement, or the particular service, that was suspended.

#### **Annexure 4 (Dispute Resolution Procedures)**

Annexure 4 has not been provided. In our experience, this is frequently one of the more heavily negotiated provisions in carrier contracts - particularly the section dealing with billing disputes.

#### **Other Recommendations**

As set out in clause A.5 of the Model Clauses - except in limited circumstances, Vodafone's right to back bill should expire 6 months after the date the charge was incurred by the end user.

If the ACCC publishes a recommended rate for the mobile termination service that is less than the rate under the Agreement then the rate under the Agreement should automatically adjust to the ACCC's recommended rate.

#### **Standard Access Obligations**

AAPT does not intend to comment on Vodafone's decision not to specify in the Undertaking all the terms and conditions on which it will comply with its standard access undertakings at this time.