

Assessment of Optus' undertaking in relation to Declared Service – Mobile Terminating Access Service (MTAS)

Lodged under Division 5 Part XIC of the *Trade Practices Act 1974* (the Act) on 16 February 2007

(Optus 2007 Undertaking)

SUBMISSIONS LODGED BY AAPT LIMITED

pursuant to the Discussion Paper released by the ACCC on 7 March 2007.

1. Submission on the consistency with standard access obligations – section 152BV(2)(b) of the Act

AAPT accepts that the Undertaking is not inconsistent with Optus's standard access obligations to provide the MTAS.

2. Submission on reasonableness of the terms and conditions contained in the Undertaking – section 152BV(2)(d) and section 152AH(1) of the Act

(a) Whether the terms and conditions promote the long-term interests of end-users (LTIE)

AAPT finds it difficult to understand how an undertaking with a maximum effective period of only 6 months (assuming the ACCC accepted the Undertaking by 1 July 2007 and Optus did not exercise its right under the Undertaking to withdraw the Undertaking before its expiry on 31 December 2007) could possibly be in the *long term* interests of end users.

(b) Legitimate business interests of the access provider

AAPT submits that Optus's submission in support of the Undertaking provides no real explanation as to how the Undertaking protects its legitimate business interests.

It is not a *legitimate* business interest of an access provider to continue to extract rents well in excess of service costs.

(c) The interests of the persons who have rights to use the declared service

Optus claims that the Undertaking promotes the interests of persons who have rights to use the MTAS by:

- providing certainty to “the market” while the ACCC finalises MTAS Pricing Principles for the period 1 July 2007 to 30 June 2009¹;

¹ Letter from Mr Paul Fletcher of Optus to Mr Michael Cosgrave of the Australian Competition and Consumer Commission dated 16 February 2007.

- on terms “*consistent with the rates that [Optus] expect would have been arrived at through commercial negotiations which are capped by the existing pricing principles that had 3 cent decrements in price on a calendar year basis.*”²

First, AAPT notes that the strength of Optus’s claim relies entirely upon an assumption that the ACCC will not by 1 July 2007 be in a position to release indicative pricing for the provision of the MTAS for the period of the Undertaking. To AAPT’s knowledge, the ACCC has not informed the market that there will be a delay in it releasing indicative pricing for the period 1 July 2007 to 30 June 2009.

Second, AAPT submits that the terms and conditions of the Undertaking are not conducive to providing any real certainty to “the market” in circumstances where:

- (i) the Undertaking only applies to a limited set of access seekers; namely those that do not have a contract for the supply of the MTAS for the period covered by the Undertaking ; and
- (ii) the Undertaking may be withdrawn by Optus before 31 December 2007.

Third, AAPT notes that since June 2004, the market has been on notice of the ACCC’s view that the TSLIRC+ cost of supplying the MTAS is in the lower end of the 5-12cpm range. In these circumstances, AAPT questions any belief held by Optus that access seekers would expect commercial negotiations for the supply of the MTAS beyond 1 July 2007 to result in a price of 12cpm.

(d) The direct costs of providing access to the declared service

With respect, Optus’s submission in relation to this criterion is nonsensical. AAPT questions how Optus can argue that the Undertaking price is consistent with the direct costs of providing the MTAS in circumstances where those costs “*remain uncertain*”³ to it.

(e) The operational and technical requirements necessary for the safe and reliable operation of a carriage service, a telecommunications network or facility

Optus’s submission in support of the Undertaking provides no justification for its assertion that an Undertaking price of 12cpm is necessary for the safe and reliable operation of its mobile network. In these circumstances, AAPT submits that the ACCC cannot be satisfied that the Undertaking price is necessary for this purpose.

(f) The economically efficient operation of a carriage service, a telecommunications network or a facility

As noted by the Tribunal in *Application by Vodafone Network Pty Ltd & Vodafone Australia Limited* [2007] ACompT 1 at paragraphs [60-61]: “It

² Optus, *Optus Submission to Australian Competition and Consumer Commission on Domestic GMS Terminating Access Service Ordinary Access Undertaking*, March 2007, p. 29 at para 9.13.

³Ibid., at para 9.15.

cannot be sufficient simply to assert without any supporting material, that costs were efficiently incurred.”

Optus’s submission in support of the Undertaking contains no substantive analysis, nor indeed any modelling, to support a conclusion that the Undertaking price reflects the economically efficient cost of providing the MTAS. Indeed, by its own admission, Optus is unable to provide such information to the ACCC, having not finalised a view as to the TSLIRC of providing the MTAS⁴.

The Australian Competition Tribunal’s position is clear: failure to provide the ACCC with sufficient ‘hard information’ to support the reasonableness of the terms of an Undertaking is fatal:

- In *Application by Optus Mobile Pty Limited & Optus Networks Pty Limited* [2006] ACompT 8 at paragraph [118], the Tribunal observed that: *“there is still a need for the Commission (and, on review the Tribunal), to be satisfied, having regard to the matters set out in s 152AH and the objectives in s 152AB of the Act, that the firm’s costs are efficiently incurred.”*
- In *Telstra Corporation Limited* [2006] ACompT4 at paragraph [46], it was observed that *“...whenever an access provider seeks approval of an access undertaking from the Commission which involves a consideration of a price term by comparing it with costs, it would be necessary, in order to satisfy the statutory framework, that **the access provider establish** that its costs are efficient costs.”* (emphasis added)

As such, in circumstances where:

- (i) the ACCC cannot accept an undertaking unless satisfied that the terms and conditions specified in the undertaking are reasonable (s152BV(2)(d) of the Act);
- (ii) the ACCC’s most recently expressed view that *“the MTAS price of 12cpm contained in the MTAS Pricing Principles Determination for the period 1 July 2004 to 30 June 2007 reflects the upper bound of estimates of the efficient cost of supply of the MTAS available to the ACCC”*⁵ is supported by the work conducted at the request of the ACCC by WIK Consult, and indeed by Telstra⁶;
- (iii) Optus bears the onus of providing the ACCC with sufficient information to enable it to be satisfied as to the reasonableness of

⁴Ibid., p. 17 at para 7.3.

⁵ACCC, *Discussion Paper on the WIK Mobile Network and Cost Model to inform the MTAS Pricing Principles Determination 1 July 2007 to 30 June 2009*, February 2001, p. 5.

⁶See *Telstra Corporation Limited, Submission in response to the ACCC’s Discussion Paper on the WIK Mobile Network and Cost Model to inform the MTAS Pricing Principles Determination 1 July 2007 to 30 June 2009*, March 2007:

- (a) at p.3: *[Telstra] recognises that the outputs generated by the WIK Model appear to be in line with other sources which suggest that the efficient cost of supplying the MTAS is at the lower end of the Commission’s range of reasonable estimates (that is, in the order of 5-6cpm).”*
- (b) at p. 47: *“[Telstra] acknowledges that the outputs generated by the WIK Model for the key reference case scenario appear to be corroborated by other sources which indicate that the efficient cost of the MTAS is indeed at the lower end of the range of the Commission [sic] previous estimates of the cost of supplying the service.”*

the terms of the Undertaking – which in this case, AAPT submits includes providing the ACCC with information upon which the ACCC can be satisfied as to the unreasonableness of the price points generated by the WIK Model; and

- (iv) Optus has failed to provide the ACCC with any or any sufficient information upon which the ACCC could be satisfied as to the reasonableness of the terms of the Undertaking;

AAPT submits that the ACCC must reject the Undertaking.

AAPT notes that Optus claims that the Undertaking price is consistent with both the ACCC's current MTAS pricing principles. AAPT does not understand this claim in light of the fact that the ACCC's current pricing principles are expressed to apply **only** in relation to the period up to 30 June 2007. Indeed, in its final decision, the ACCC expressly stated: *“Given the dynamic nature of the telecommunications industry, the Commission believes it appropriate in this instance that its pricing principle apply **for no more than 3 years**. Accordingly, the Commission believes its pricing principle should apply until 30 June 2007.”*⁷ (emphasis added)

3. Other Relevant Matters – section 152AH(2)

AAPT is concerned that the effect of the Undertaking, if accepted, would have the practical effect of imposing a glide path approach to the introduction of any indicative pricing for the MTAS released by the ACCC. As such, AAPT submits that the ACCC should reject the Undertaking and adopt the MTAS pricing determined by the WIK Model Network and Cost Model with effect from 1 July 2007.

⁷ACCC, *Mobile Services Review – Mobile Terminating Access Service: Final Decision on whether or not the Commission should extend, vary or revoke its existing declaration of the mobile terminating access service*, June 2004, p. 220-221.