



# **Optus's 2007 Undertaking in relation to the Domestic Mobile Terminating Access Service**

## **Discussion Paper**

**March 2007**

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## **Preface**

Optus Mobile Pty Limited and Optus Networks Pty Limited (together Optus), lodged an ordinary access undertaking (the Optus 2007 Undertaking) pursuant to Division 5 Part XIC of the *Trade Practices Act 1974* (the Act) with the Australian Competition and Consumer Commission (the ACCC) on 16 February 2007. The Optus 2007 Undertaking specifies certain terms and conditions upon which Optus undertakes to supply the domestic GSM terminating access service (DGTAS).

Under Part XIC of the Act, the ACCC must accept or reject the Optus 2007 Undertaking. The process the ACCC will follow to assess the Optus 2007 Undertaking will be open and public, allowing parties to express their views and provide relevant information to the ACCC.

# **1. Submissions on this Discussion Paper**

## **1.1. Submission deadline**

Interested parties are invited to make submissions to the ACCC in relation to the Optus 2007 Undertaking **no later than four weeks** from the date of publication of this Discussion Paper. That is, submissions should be made by no later than 5 pm, Thursday, 5 April 2007. The ACCC will consider these submissions in deciding whether to accept or reject the Optus 2007 Undertaking.

## **1.2. Commercial-in-confidence material**

All submissions will be considered as public submissions and will be posted on the ACCC's website.

If parties wish to submit commercial-in-confidence material as part of their submission to the ACCC, parties should submit both a public and a confidential version of their submission. The public version of the submission should clearly identify the confidential material by replacing the confidential material with an appropriate symbol or 'c-i-c'.

The ACCC encourages parties to make their submissions in a way that facilitates the efficient assessment of their various submissions, including the verification of any facts or data upon which those submissions are based. In this regard, parties are encouraged to restrict confidentiality claims to a minimum and to establish appropriate confidentiality regimes for the disclosure of any information that is claimed to be confidential, to allow a critical assessment of their submissions.

## **1.3. Format of submissions**

For the purposes of facilitating the efficient assessment of submissions, the ACCC has provided a submission template (Appendix 1) to assist parties in:

- meeting the ACCC's formatting preferences; and
- outlining the key issues that should be addressed in their submissions.

The ACCC would prefer that interested parties use the submission template to make their submissions.

Written submissions only will be accepted.

Submissions must:

- be provided electronically (in MS Word or PDF format) that is text-searchable to allow a 'copy and paste' function;
- use a text font size no smaller than 12 pt, Times New Roman;

- be single-spaced; and
- include a copy of the decision or extraneous material attached to the submission, with the relevant referenced sections clearly marked, where quotes from a court or tribunal decision or other extraneous material (such as consultants' reports) are relied on.

#### **1.4. Contact and submission lodgement details**

Please forward submissions **by email** to the Contact Officer:

**Ms Danet Khuth**  
Communications Group  
Australian Competition and Consumer Commission  
GPO Box 3648  
Sydney NSW 2001

Email: [danet.khuth@acc.gov.au](mailto:danet.khuth@acc.gov.au)

**cc: Ms Gwenda Gleeson**  
Communications Group  
Australian Competition and Consumer Commission  
GPO Box 3648  
Sydney NSW 2001

Email: [gwenda.gleeson@acc.gov.au](mailto:gwenda.gleeson@acc.gov.au)

Any queries in relation to this Discussion Paper should be directed to Ms Danet Khuth via email ([danet.khuth@acc.gov.au](mailto:danet.khuth@acc.gov.au)) and cc: [gwenda.gleeson@acc.gov.au](mailto:gwenda.gleeson@acc.gov.au).

## 2. Introduction

### 2.1. Declaration of the Mobile Terminating Access Service (MTAS)

Part XIC of the Act establishes a regime for governing access to certain services in the telecommunications industry. The ACCC may declare carriage services and related services to be declared services. Providers of an active declared service (access providers) have an obligation to supply that service.

On 30 June 2004, the ACCC replaced the existing GSM and CDMA terminating access service declaration with a new declaration under section 152AL of the Act.<sup>1</sup> The new declaration provided an amended description of the MTAS that included voice services terminating on all mobile telecommunications networks.

On the same date, the ACCC also determined pricing principles for the MTAS (the *MTAS Pricing Principles Determination*),<sup>2</sup> as it is required to under the Act. The *MTAS Pricing Principles Determination* stipulates that the price of the MTAS should follow an adjustment path such that there is a closer association of the price and underlying efficient cost (i.e. TSLRIC+) of the service.

As part of the *MTAS Pricing Principles Determination*, the ACCC also specified price-related terms and conditions of access. These can be found at Annexure 2 to the *MTAS Pricing Principles Determination*. These price-related terms and conditions set out the indicative prices for the supply of the MTAS. The price of access to the MTAS for each specified period is outlined below:

**Table 2.1: Price-related terms and conditions relating to access to the MTAS**

Period	Price (cents per minute - cpm)
1 July 2004 to 31 December 2004	21 cpm
1 January 2005 to 31 December 2005	18 cpm
1 January 2006 to 31 December 2006	15 cpm
1 January 2007 to 30 June 2007	12 cpm

The 12 cpm ‘target price’ in the *MTAS Pricing Principles Determination* was set having regard to the best information the ACCC had available to it at the time of making the

<sup>1</sup> Declaration under section 152AL(3), *Trade Practices Act 1974* - Domestic Mobile Terminating Access Service as a declared service (30 June 2004), No GN 28, 14 July 2004, pp. 2155-6.

<sup>2</sup> *Trade Practices Act 1974* – Determination under section 152AQA – Pricing Principles for Domestic Mobile Terminating Access Service (30 June 2004), [www.comlaw.gov.au](http://www.comlaw.gov.au) – Legislative Instrument - F2007B00329.

determination in relation to the TSLRIC+ of providing the MTAS. This included cost information sourced from regulatory accounting data supplied by Optus and Telstra under the Regulatory Accounting Framework (RAF) and international cost benchmarking information. On the basis of this information, the ACCC determined that the TSLRIC+ of supplying the MTAS in Australia was likely to be in the range of 5 cpm to 12 cpm. As a conservative approach, the ACCC selected a target price to which the MTAS price should tend as the upper bound of this range (i.e. 12 cpm) in its *MTAS Pricing Principles Determination*. The range of 5 cpm to 12 cpm established has informed the current *MTAS Pricing Principles Determination* which expires on the 30 June 2007.

In the *MTAS Final Report*<sup>3</sup>, the ACCC stated that any reduction below 12 cpm would be supported by the development of a bottom-up cost model:

‘Given it [the Commission] has:

- not developed a specific model to estimate TSLRIC+ in Australia at this time, and
- concerns regarding the possible harm that might be caused by disrupting the business plans of MNOs if the Commission were to immediately reduce the price of the MTAS to TSLRIC+,

.....

Over the longer term, however, the Commission wishes to stress that before it would reduce the price of the MTAS below the upper end of the range of best estimates available to it of the TSLRIC+ of providing the MTAS, the Commission would develop a more detailed estimate of the TSLRIC+ of providing the MTAS in Australia. This could be via developing a model to specifically model the TSLRIC+ of providing the MTAS in Australia, or via a detailed international benchmarking exercise that sought to make adjustments for all factors that drive the TSLRIC of providing the MTAS in different countries for Australia-specific factors.’<sup>4</sup>

The development of a bottom-up cost model is considered an important supplementary confirmation and support for the robustness and reliability of the international cost benchmarking and RAF analyses informing the indicative prices in the *MTAS Pricing Principles Determination*.

To this end, WIK Consult was engaged to develop a bottom-up cost model to inform the ACCC about the efficient cost of supply of the MTAS in an Australian context using a TSLRIC conceptual framework. On 1 February 2007, the ACCC released the WIK report and discussion paper. On 16 February 2007, the ACCC released the WIK Consult Mobile Network and Cost Model to interested parties that have signed an access deed. Further details about the WIK report and the consultation process are available at the ACCC’s website: [www.accc.gov.au](http://www.accc.gov.au).

The ACCC will use the WIK Mobile Network and Cost Model to inform indicative prices for the MTAS from 1 July 2007 to 30 June 2009.

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<sup>3</sup> ACCC, *Mobile Services Review Mobile Terminating Access Services Final Decision on whether or not the Commission should extend, vary or revoke its existing declaration of the mobile terminating access service*, June 2004 (the *MTAS Final Report*).

<sup>4</sup> *ibid.*, p. 211.

### **3. Optus 2007 Undertaking**

Optus lodged an ordinary access undertaking with the ACCC in relation to the DGTAS on 16 February 2007.

The Optus 2007 Undertaking specifies certain terms and conditions on which Optus undertakes to supply the DGTAS.

Specifically, the Optus 2007 Undertaking includes:

- a schedule describing the relevant service; and
- a schedule outlining Optus's proposed charges for the Optus DGTAS.

#### **3.1. Price-related terms and conditions**

Optus offers to supply the DGTAS at a rate of 12 cpm for the term of the Optus 2007 Undertaking, being from the later of 1 July 2007 or the date of acceptance by the ACCC to 31 December 2007.

A full description of the means by which Optus proposes to charge access seekers for a particular billing period can be found in Schedule 2 to the Optus 2007 Undertaking.<sup>5</sup>

#### **3.2. Non-price terms and conditions**

The Optus 2007 Undertaking does not apply to any agreements with an access seeker which:

- are effective on the date the Optus 2007 Undertaking is accepted and
- incorporate an express price for the supply of the Optus DGTAS.<sup>6</sup>

Other than the service description and the primacy of existing agreements, the Optus 2007 Undertaking does not expressly deal with any other non price terms and conditions.

#### **3.3. Optus's Submission in support of the Optus 2007 Undertaking**

In its cover letter to the Optus 2007 Undertaking, Optus submits that:

- the Optus 2007 Undertaking provides certainty to the market in the period before detailed consideration can be given to bottom up cost modelling of the MTAS;<sup>7</sup>
- the Optus 2007 Undertaking price is consistent with the cost estimate made by the ACCC in its most recent pricing principles;<sup>8</sup> and

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<sup>5</sup> Optus, *Optus 2007 Undertaking*, Schedule 2, p. 6

<sup>6</sup> *ibid.*, clause 2.2, p. 2.

<sup>7</sup> Optus, *DGTA Service Undertaking*, Cover Letter to Optus 2007 Undertaking, 16 February 2007, p. 1.

<sup>8</sup> *ibid.*



- the Optus 2007 Undertaking is consistent with Optus's legitimate commercial interests to have certainty over its costs and for regulated price reductions to be consistent with previous determination. Without certainty regarding costs, Optus believes its legitimate commercial interests would be harmed and competition lessened if a lower access price were determined by the ACCC.<sup>9</sup>

At the time of lodgement of the Optus 2007 Undertaking, Optus indicated that a further submission in support of the undertaking would be provided. Once the ACCC has received this submission it will be published on the ACCC's website.

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<sup>9</sup> *ibid.*

## **4. The legislative criteria for the assessment of undertakings**

### **4.1. The role of an access undertaking**

Division 5 of Part XIC of the Act enables access providers to voluntarily lodge written access undertakings with the ACCC specifying the terms and conditions upon which they agree to supply a specified service.

There are two types of undertakings:

- (1) ordinary access undertakings, which are lodged in relation to current declared services; and
- (2) special access undertakings which relate to services that are either not yet declared, or that the carrier does not yet supply.

Carriers and carriage service providers which provide declared services are required to comply with standard access obligations (SAO) as prescribed in section 152AR of the Act. The SAOs facilitate the supply of declared services by access providers to access seekers,<sup>10</sup> in order that access seekers can provide carriage services and/or content services.

Section 152AY(2) of the Act specifies how the access provider must comply with the SAOs when there is a relevant undertaking in operation. Most relevantly, section 152AY(2)(b)(ii) states that if an accepted access undertaking does not specify terms and conditions about a particular matter (such as an SAO), the access provider must comply with such terms and conditions relating to that matter as are determined by the ACCC under Division 8 (which deals with arbitration of disputes about access to the MTAS).

Section 152BV of the Act sets out the obligations of the ACCC in assessing an ordinary undertaking that does not adopt a set of model terms and conditions set out in an approved telecommunications access code. Section 152BV therefore applies to the undertaking proposal submitted by Optus.

Section 152BV(2) provides that the ACCC must not accept the undertaking unless:

- (a) the Commission has:
  - (i) published the undertaking and invited people to make submissions to the Commission on the undertaking;
  - (ii) considered any submissions that were received within the time limit specified by the Commission when it published the undertaking; and
- (b) the Commission is satisfied that the undertaking is consistent with the standard access obligations that are applicable to the carrier or provider; and

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<sup>10</sup> Section 152AG of the Act sets out the circumstance in which a person is taken to be an 'access seeker' in relation to a declared service for the purposes of Part XIC.

- (c) if the undertaking deals with a price or a method of ascertaining a price – the Commission is satisfied that the undertaking is consistent with any Ministerial pricing determination; and
- (d) the Commission is satisfied that the terms and conditions specified in the undertaking are reasonable; and
- (e) the expiry time of the undertaking occurs within 3 years after the date on which the undertaking comes into operation.

## **4.2. Publication of undertakings and invitation to make submissions**

The ACCC published the Optus 2007 Undertaking and cover letter on its website at [www.accc.gov.au](http://www.accc.gov.au), on 7 March 2007, and invites submissions to be made within four weeks from the date of publication of this Discussion Paper (that is, by 5 pm, Thursday, 5 April 2007).

## **4.3. Consistency with standard access obligations**

As noted above, the SAOs are set out in section 152AR of the Act. Subject to class or individual exemptions made by the ACCC, a carrier or carriage service provider must comply with the SAOs in regard to declared services it supplies either to itself or to other persons.<sup>11</sup>

The terms and conditions of the Optus 2007 Undertaking only deal with the service description and pricing for the supply of Optus's DGTAS. The Optus 2007 Undertaking does not address all the terms and conditions on which Optus will comply with the applicable SAOs.

The Optus 2007 Undertaking states that additional terms and conditions relating to the supply of, and interconnection with, the Optus DGTAS and other applicable SAOs are to be negotiated and agreed between Optus and individual access seekers prior to the supply of the service or to be determined by the ACCC through arbitration proceedings.<sup>12</sup>

## **4.4. Consistency with Ministerial pricing determination**

The Minister has not made a pricing determination in relation to the MTAS. The Optus 2007 Undertaking is therefore not inconsistent with any relevant Ministerial pricing determination.

## **4.5. Reasonable terms and conditions**

Under Part XIC of the Act, the ACCC cannot accept an undertaking unless it is satisfied that the terms and conditions specified are reasonable. In determining whether terms and conditions are reasonable, the ACCC must have regard to the following matters:

- whether the terms and conditions promote the long-term interests of end-users (the LTIE);

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<sup>11</sup> Refer to ss.152AS and 152AT of the Act.

<sup>12</sup> Optus, *Optus 2007 Undertaking*, pp. 1 and 3.

- the legitimate business interests of the carrier or carriage service provider concerned, and the carrier's or carriage service provider's investment in facilities used to supply the declared service concerned;
- the interests of persons who have rights to use the declared service concerned;
- the direct costs of providing access to the declared service concerned;
- the operational and technical requirements necessary for the safe and reliable operation of a carriage service, a telecommunications network or a facility; and
- the economically efficient operation of a carriage service, a telecommunications network or a facility with reference.<sup>13</sup>

This does not, by implication, limit the matters to which regard may be had.<sup>14</sup>

The ACCC will assess whether the terms and conditions specified in the Optus 2007 Undertaking are reasonable with regard to these matters.

#### **4.6. Expiry date and the term of the Optus 2007 Undertaking**

If the ACCC accepts the Optus 2007 Undertaking, it will commence operation from the later of 1 July 2007 or the date of acceptance by the ACCC, and will continue until the earlier of:

- 31 December 2007; or
- a decision by the ACCC to revoke the declaration of the MTAS; or
- termination, withdrawal or replacement of this Optus 2007 Undertaking in accordance with the Act.

The ACCC notes that the Optus 2007 Undertaking has no effect in respect of the period that precedes any acceptance by the ACCC, and may be withdrawn by Optus before its expiry date.

### **5. The ACCC's process for assessing the Optus 2007 Undertaking**

As stated above, the ACCC has published the Optus 2007 Undertaking, and Optus's submission in support of it. The ACCC invites interested parties to make submissions to the ACCC on whether to accept or reject the Optus 2007 Undertaking. Please refer to section 1 of this Discussion Paper for details.

Following its review of the Optus 2007 Undertaking and the submissions of interested parties, the ACCC may or may not proceed with issuing a draft decision prior to the release of its final decision.

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<sup>13</sup> Refer to sub-section 152AH(1) of the Act.

<sup>14</sup> Section 152AH(2) of the Act.

Interested parties should be aware that the ACCC may decide not to issue a draft decision if it does not consider this step to be necessary in this case.

### **5.1. Time limit for assessment**

The Act imposes a time limit for the ACCC's assessment of undertakings. While the ACCC intends to make its decision as soon as it is practicable to do so, the ACCC must in any event make a decision within six months of lodgement of an undertaking with the ACCC. If the ACCC does not do so, it is deemed to have accepted the undertaking.

The ACCC may also extend the decision-making period by an additional three months but must provide a written notice to the carrier or service provider which includes a statement explaining why the ACCC has been unable to make a decision on the undertaking within the six-month period. In addition, if the ACCC requests further information in relation to the undertaking, the time taken for the ACCC to receive the information is excluded from the six-month period. Similarly, any consultation period specified by the ACCC is excluded from this timeframe.<sup>15</sup>

Interested parties should note that following its review of the Optus 2007 Undertaking and the submissions of interested parties, the ACCC may or may not proceed with issuing a draft decision prior to the release of its final decision.

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<sup>15</sup> See the revised section 152BU (5), (6) & (7)

## **Appendix 1 - Submission Template**

### **Assessment of Optus's 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 THE [Insert Name of party making the submissions]** pursuant to the **Discussion Paper** released by the ACCC on 7 March 2007.

#### **Matters to be specifically addressed by party**

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

*[Parties should address whether the Undertaking is consistent with applicable standard access obligations]*

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

*[Matters which the ACCC must take into account in considering the reasonableness of the terms and conditions contained the Undertaking.]*

*[Among other things, parties should address the appropriateness of the 'the 'future with or without test' against the relevant statutory criteria.]*

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

*[Insert submission]*

**(b) Legitimate business interests of the access provider**

*[Insert submission]*

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

*[Insert submission]*

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

*[Insert submission]*

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

*[Insert submission]*

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

*[Insert submission]*

### **Other Relevant Matters – section 152AH(2)**

*[At its discretion, the ACCC may take into account any other matters relevant in assessing the reasonableness of the Optus 2007 Undertaking]*