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**Submission in response to the  
Australian Competition and Consumer Commission's  
discussion paper**

**Access Undertakings  
domestic digital mobile terminating access service**

**Hutchison Telecommunications (Australia) Limited and  
Hutchison 3G Australia Pty Limited**

**December 2005**

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## Introduction

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On 7 October 2005, Hutchison Telecommunications (Australia) Limited (**HTAL**) and Hutchison 3G Australia Pty Limited (**H3GA**)(together **Hutchison**) submitted access undertakings (the **Undertakings**) to the Commission under the *Trade Practices Act 1974* (Cth)(the **Act**) in relation to the domestic digital mobile terminating access service (**MTAS**).

H3GA and HTAL each submitted an undertaking to the Commission regarding the supply of the MTAS in respect of Non-PMTS Calls (the **Non-PMTS Undertaking**).<sup>1</sup>

HTAL and H3GA each submitted two alternative undertakings regarding the supply of MTAS in respect of PMTS Calls:

- an undertaking which provides for two optional usage charges for the MTAS – one reciprocal, the other non-reciprocal (the **PMTS Dual Rate Undertaking**);<sup>2</sup> and
- an undertaking which provides for a single, reciprocal usage charge for the MTAS (the **PMTS Single Rate Undertaking**).<sup>3</sup>

The Non-PMTS Undertaking proposes that Hutchison will supply the MTAS at 18 cpm. Both the PMTS Dual Rate and Single Rate Undertakings contain an offer by Hutchison to supply the MTAS at the rate of 12 cpm on a reciprocal basis.

On 18 November 2005, the Commission issued a discussion paper in relation to the Undertakings. One of the matters raised by the Commission relates to the applicable standard access obligations (the **SAOs**) under s152AR of the Act, specifically:

The Commission seeks the parties views as to whether the reciprocal pricing structures in the PMTS Undertakings are consistent with the standard access obligations in relation to the provision of the MTAS.

Under s152BV(2)(b), the Commission must not accept the Undertakings unless it is satisfied that they are consistent with the applicable SAOs.

Hutchison submits that its Undertakings, and the reciprocal pricing structures proposed by them, are consistent with the applicable SAOs. In accordance with the Commission's established approach to assessing consistency, none of the terms and conditions proposed by the Undertakings raise any inconsistency with the applicable SAOs. At the very least, the Undertakings demonstrate 'a reasonable level of conformity' with the applicable obligations.<sup>4</sup>

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<sup>1</sup> In this submission, a reference to 'Non-PMTS Undertaking' singular includes the undertakings submitted by H3GA and HTAL in respect of Non-PMTS Calls.

<sup>2</sup> In this submission, a reference to 'PMTS Dual Rate Undertaking' singular includes the PMTS Dual Rate Undertakings submitted by H3GA and HTAL.

<sup>3</sup> In this submission, a reference to 'PMTS Single Rate Undertaking' singular includes the PMTS Single Rate Undertakings submitted by H3GA and HTAL.

<sup>4</sup> ACCC, *Optus's undertaking with respect to the supply of its Domestic GSM Terminating Access (DGTA) Service – Draft Decision*, November 2005 (the **Draft Decision on Optus' Undertaking**), p 202.

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Hutchison provides this submission in response to those aspects of the Commission's discussion paper which relate to the Undertakings and their consistency with the SAOs. In particular, the submission will address:

- the operation of the PMTS Undertakings and the reciprocal pricing structures proposed by them; and
- the overall consistency of the Undertakings with the applicable SAOs.

## **1. Operation of the PMTS Undertakings**

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### **1.1 Background**

Reciprocal pricing for the MTAS has long been the industry standard. The rationale for reciprocal pricing can be summarised as follows:

- Reciprocal pricing is inherent to a TSLRIC approach which is based on the 'efficient operator' concept rather than the actual costs of mobile operators.
- Reciprocal pricing enhances consumer welfare. As Gans & King have noted, the lack of transparency in the pricing of mobile tariffs (whereby consumers are ignorant of the amount paid by the B-party) is a significant contributing factor to the maintenance of artificially high MTAS prices, which is adverse to the LTIE.<sup>5</sup> Asymmetrical pricing would exacerbate the problem identified by Gans & King.
- Asymmetrical pricing necessarily involves efficient operators subsidising less efficient operators.

In Hutchison's view, the notion of an industry-wide price for the MTAS based on the estimated costs of an efficient, forward-looking operator is fundamental to the TSLRIC approach adopted by the Commission in the MTAS pricing principle. Accordingly, Hutchison offers access seekers a reciprocal price of 12 cpm for the MTAS on the terms and conditions set out in the PMTS Undertakings.

The PMTS Dual Rate Undertaking and PMTS Single Rate Undertaking provide that Hutchison will charge a rate of 12 cpm for its supply of the MTAS to access seekers who agree to charge Hutchison, or are otherwise required to charge Hutchison, an equal rate for their supply of the MTAS to Hutchison.<sup>6</sup> This conditional offer reflects the principle of reciprocity which generally informs commercial negotiations regarding the supply of the MTAS.

Hutchison submits that the PMTS Undertakings, including their reciprocal price terms, are consistent with the applicable SAOs, including Hutchison's obligation to supply the service under s152AR(3)(a). That said, Hutchison agrees with the Commission's previous comments that price-related terms are generally more relevant to the Commission's assessment of reasonableness under the Act.

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<sup>5</sup> J Gans and S King, *Termination Charges for Mobile Phone Networks – Competitive Analysis and Regulatory Options*, 22 December 1999.

<sup>6</sup> See H3GA and HTAL PMTS Dual Rate and Single Rate MTAS Undertakings, Attachment A, clauses 2.3 and 2.2.

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Accordingly, Hutchison submits that the Commission should give particular consideration to whether the *non-price* terms and conditions contained in the Undertakings are consistent with the SAOs.

## 1.2 Operation of reciprocal price terms in the PMTS Undertakings

The PMTS Dual Rate Undertaking differs from the PMTS Single Rate Undertaking in one respect: the PMTS Dual Rate Undertaking provides that Hutchison will supply the MTAS at the rate of 21 cpm to access seekers who do not accept Hutchison's 12 cpm reciprocal offer. The purpose of the PMTS Dual Rate Undertaking is twofold: it allows access seekers to benefit from a 12 cpm reciprocal rate, a rational price for an efficient mobile operator, while providing certainty of pricing for those access seekers that do not choose the 12 cpm reciprocal offer. The key concept in this alternative pricing approach is choice for the access seeker. The PMTS Dual Rate Undertaking would, if accepted, govern Hutchison's supply of the MTAS to all access seekers; those who choose to comply with the terms and conditions associated with the Rate 2 Usage Charge of 12 cpm and those who do not.

Hutchison has lodged the PMTS Single Rate Undertaking as an alternative to the PMTS Dual Rate Undertaking in the event that the Commission is minded not to accept the latter due to the optional rate of 21 cpm, such rate being above the target rate determined by the Commission in the MTAS pricing principle. If the Commission is minded to reject the PMTS Dual Rate Undertaking, Hutchison submits that the PMTS Single Rate Undertaking should be accepted. However, this undertaking will not be nearly as effective as its Dual Rate counterpart in ensuring faster, more widespread implementation of the target price of 12 cpm as its operation is limited to those access seekers who comply with the conditions associated with the Usage Charge of 12 cpm.<sup>7</sup> This is made clear by the limitation provision set out in clause 2.4 of Attachment A of the PMTS Single Rate Undertaking:

For the avoidance of doubt, Hutchison will not supply the H3GA Mobile to Mobile Terminating Service *on the terms and conditions contained in this Undertaking* to an Access Seeker who fails to comply with the conditions set out in clause 2.2 above.

Access seekers who do not satisfy clause 2.2 are beyond the scope of the PMTS Single Rate Undertaking and the terms and conditions contained therein do not govern Hutchison's supply of the MTAS to those access seekers. This limitation is consistent with s152BS(6A) which provides that an undertaking may be without limitations or may be subject to such limitations as are specified in the undertaking.

As to those access seekers who do not satisfy the terms and conditions set out in the PMTS Single Rate Undertaking, Hutchison will comply with its obligation to supply the MTAS to such access seekers on other commercially agreed terms or, failing agreement, on such terms as determined by the Commission in an access arbitration in accordance with s 152AY of the Act:

This section applies if a carrier or carriage service provider is required to comply with any or all of the standard access obligations.

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<sup>7</sup> See H3GA and HTAL PMTS Single Rate MTAS Undertakings, Attachment A, clause 2.2.

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The carrier or carriage service provider must comply with the obligations:

- (a) on such terms and conditions as are agreed between the following parties:
  - (i) the carrier or carriage service provider, as the case requires;
  - (ii) the access seeker; or
- (b) failing agreement:
  - (i) if an access undertaking given by the carrier or carriage service provider is in operation and specifies terms and conditions about a particular matter—on such terms and conditions relating to that matter as are set out in the undertaking; or
  - (ii) if an access undertaking given by the carrier or carriage service provider is in operation, but the undertaking does not specify terms conditions about a particular matter—on such terms and conditions relating to that matter as are determined by the Commission under Division 8 (which deals with arbitration of disputes about access); or
  - (iii) if there is no such undertaking—on such terms and conditions as are determined by the Commission under Division 8 (which deals with arbitration of disputes about access).

Hutchison therefore submits that the reciprocal pricing structures proposed by the PMTS Undertakings are consistent with its obligation to supply the MTAS under s152AR(3)(a).

## **2. Consistency with the SAOs**

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### **2.1 Approach to assessing consistency**

The Commission adopts a two-part approach to assessing the consistency of access undertakings with the applicable SAOs. First, the Commission must identify the SAOs that are applicable to the particular access provider. Second, it must consider whether the terms and conditions raise any inconsistencies with the applicable SAOs:

If the terms and conditions are not found to be inconsistent with the SAOs, the Commission is likely to regard the undertaking as being consistent with the applicable SAOs.<sup>8</sup>

As noted by Sackville J in the recent case of *Flanagan v Australian Prudential Regulation Authority* [2004] FCA 1321, 'there is a certain elasticity about the expression 'consistent with'.<sup>9</sup> The Macquarie Dictionary defines consistent as 'agreeing or accordant, compatible'.

Hutchison submits that the Commission should adopt the same interpretation of the word consistent as it has adopted in its previous assessment of access undertakings. That is, in determining whether the Undertakings are 'consistent with' the SAOs, the Commission

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<sup>8</sup> ACCC, *Draft Decision on Optus' Undertaking*, November 2005, p 202.

<sup>9</sup> at [47].

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should not require that the Undertakings display exact or complete correspondence with the SAOs, merely a reasonable level of conformity with the relevant obligations.<sup>10</sup>

## 2.2 Determining the applicable SAOs

Hutchison submits that the following SAOs apply to the Undertakings pursuant to s152AR of the Act:

- the supply of the declared service (s152AR (3)(a));
- the technical and operational quality of the declared service to be supplied (s152AR (3)(b));
- fault detection, handling, rectification and timing of the service to be supplied (s152AR (3)(c));
- the interconnection of facilities required to supply carriage services (s152AR (5)); and
- the provision of billing information (s152AR(6) and (7)).

Hutchison deals with each applicable SAO in turn.

### ***Supply of the service***

Under s152AR(3)(a), an access provider must, if requested to do so by a service provider, supply an active declared service to the service provider in order that the service provider can provide carriage services and/or content services.

Hutchison undertakes to the Commission that, while one or more of its Undertakings are in effect, it will supply access seekers with the MTAS on the terms and conditions specified in those Undertakings.<sup>11</sup>

To the extent that the Undertakings propose a service description that is narrower in scope than the declared MTAS service,<sup>12</sup> Hutchison submits that this does not prevent the Undertakings from being consistent with Hutchison's obligation to supply the MTAS. In this regard, Hutchison notes the Commission previous approach to assessment of the Optus Undertaking:

The Commission is of the view that an access provider can give an undertaking in relation to a subset of a declared service. Conversely, an access seeker could seek access to all or a subset of the declared service. If the Undertaking were to be accepted in its present form by the Commission, Optus would remain under an obligation to provide access to that part of the declared service not covered by the Undertaking. Access would be subject to commercial agreement or failing that, arbitration by the Commission.<sup>13</sup>

The same principles should guide the Commission's assessment of the reciprocal pricing terms contained in the PMTS Single Rate Undertaking. This clause provides that the Undertaking may apply to a subset of access seekers, namely, those who agree or are

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<sup>10</sup> ACCC, *Draft Decision on Optus' Undertaking*, November 2005, p 202.

<sup>11</sup> See H3GA and HTAL PMTS Dual Rate, PMTS Single Rate and Non-PMTS Undertakings, clause 5.1.

<sup>12</sup> See H3GA and HTAL PMTS Dual Rate, PMTS Single Rate and Non-PMTS Undertakings, Attachment A, clause 1.1.

<sup>13</sup> ACCC, *Draft Decision on Optus' Undertaking*, p 204.

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required to charge Hutchison the reciprocal rate of 12 cpm for the supply of the MTAS. Importantly, if the PMTS Single Rate Undertaking were to be accepted by the Commission in its present form, Hutchison would remain under an obligation to provide access to those access seekers not covered by that undertaking, that is, those who do not agree to charge Hutchison reciprocal rate of 12 cpm in accordance with clause 2.2 of Attachment A.

As noted above, this limitation is consistent with s152BS(6A) of the Act which provides that an undertaking may be without limitations or may be subject to such limitations as are specified in the undertaking.

Hutchison has submitted the Undertakings in furtherance of its obligation to supply the MTAS. Accordingly, the Undertakings – including the reciprocal pricing structures contained therein – are consistent with the applicable SAO in relation to the supply of the declared service.

***Technical and operational quality of the supplied service***

Section 152AR(3)(b) provides that an access provider must take all reasonable steps to ensure that the technical and operational quality of the active declared service supplied to the service provider is equivalent to that which the access provider provides to itself.

The applicable SAO in relation to this matter is provided for in clause 2.2(a) of Attachment B of the Undertakings, which states that:

In supplying the Service, [Hutchison] must treat the Access Seeker on a non-discriminatory basis, including but not limited to, if requested by the Access Seeker:

- (a) taking all reasonable steps to ensure that the technical and operational quality of the Service supplied to the service provider is equivalent to that which the access provider provides to itself.

Insofar as Hutchison undertakes to provide technical and operational quality of service equivalent to that which it provides itself, the Undertakings are consistent with Hutchison's obligation under s152AR(3)(b).

***Fault detection, handling, rectification and timing of the supplied service***

Section 152AR(3)(c) provides that an access provider must take all reasonable steps to ensure that the access seeker receives, in relation to the supplied service, fault detection, handling and rectification of a technical and operational quality and timing that is equivalent to that which the access provider provides to itself.

This SAO is included in clause 2.2(b) of Attachment B of the Undertakings, which provides that:

In supplying the Service, [Hutchison] must treat the Access Seeker on a non-discriminatory basis, including but not limited to, if requested by the Access Seeker:...

- (b) taking all reasonable steps to ensure that the Access Seeker receives, in relation to the Service supplied to the Access Seeker, fault detection, handling and rectification of a technical and operational quality and timing that is equivalent to that which [Hutchison] provides to itself.

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Given that Hutchison undertakes to provide fault detection, handling and rectification of a technical and operational quality and timing equivalent to that which it provides itself, the Undertakings are consistent with Hutchison's obligation under s152AR(3)(c).

***Interconnection of facilities required to supply carriage services***

The applicable SAO with respect to interconnection is contained in s152AR(5), which provides that:

If an access provider... owns or controls one or more facilities, the access provider must, if requested to do so by a service provider:

- (c) permit interconnection of those facilities with the facilities of the service provider to allow the service provider to supply carriage services and/or/content services;
- (d) take all reasonable steps to ensure that:
  - (i) the technical and operational quality and timing of the interconnection is equivalent to that which the access provider provides to itself; and...
- (e) take all reasonable steps to ensure that the service provider receives, in relation to the interconnection, fault detection, handling and rectification of a technical and operational quality and timing that is equivalent to that which the access provider provides to itself.

The Undertakings expressly permit interconnection of Hutchison's facilities with those of access seekers pursuant to clause 3 of Attachment B (Service and Interconnection) and Schedule 5 (Operations and Maintenance Procedures) to allow access seekers to provide carriage service and/or content services.

Accordingly, the Undertakings are consistent with the applicable SAO to provide interconnection under s152AR(5).

***Provision of billing information***

Section 152AR(6) and (7) create SAOs in relation to the provision of billing information. Under subsection (6), if an access seeker uses a declared service supplied by an access provider, the access provider, if requested to do so by the access seeker, must give the access seeker billing information in connection with the supply of the declared service. Subsection (7) provides that such billing information must be given in accordance with the Trade Practices Regulations.

The Undertakings expressly provide that Hutchison must provide billing information and communication information to access seekers in accordance with Schedule 3 of Attachment B (Billing and Settlement Procedures) and Schedule 8 of Attachment B (Communication Information):

- 3.2.1 [Hutchison] must provide Communication Information to the Access Seeker in connection with matter associated with, or incidental to, the supply of the Service:
- (a) at such times or intervals ascertained in accordance with any regulations made under sections 152AR(6) and (7) of the TPA, including any regulations made pursuant to these regulations...;
  - (b) in a manner and form ascertained in accordance with the regulations; and
  - (c) with such particulars ascertained in accordance with the regulations.

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To the extent that Hutchison undertakes to provide billing information in accordance with the regulations, the Undertakings are consistent with the SAO to provide such information under s152AR(6) and (7).

## Conclusion

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Hutchison submits that the LTIE is best served by the Commission accepting the PMTS Dual Rate Undertaking coupled with the Non-PMTS Undertaking.

Hutchison submits that the LTIE would also be served by the Commission accepting the PMTS Single Rate Undertaking coupled with the Non-PMTS Undertaking. This approach, however, would not be as beneficial to the LTIE as the former approach.

Notwithstanding the views expressed above, Hutchison submits that each individual Undertaking promotes the LTIE and is consistent with the SAOs applicable to the supply of the MTAS. Acceptance of one or more of the Undertakings submitted by each of HTAL and H3GA would therefore be in the LTIE.

Hutchison refers to its previous submission regarding the reasonableness of the Undertakings pursuant to s152AH(1). In assessing the reasonableness of the price related terms and conditions, particularly the 21 cpm proposed by the PMTS Dual Rate Undertaking, Hutchison urges the Commission to take into account:

- the interplay between all of the price related terms and conditions contained in the Undertakings; and
- the different markets in which those terms and conditions apply.

Hutchison maintains the view that 12 cpm represents an appropriate price for the MTAS.<sup>14</sup>

To the extent that the Undertakings represent a departure from the adjustment path proposed by the MTAS pricing principles, Hutchison submits that the target price of 12 cpm for the MTAS is a conservative estimate of its underlying cost and strikes an appropriate balance between the legitimate interests of access seekers and the LTIE.

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<sup>14</sup> Hutchison, *Submissions by Hutchison in response to the Commission's discussion papers on Vodafone MTAS Undertaking and Optus MTAS Undertaking*, 2005 and ACCC, *Mobile Services Review, 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 Decision**).