



31 August 2011

Lauren Zhu  
Communications Group  
Australian Competition and Consumer Commission

**By email:** lauren.zhu@accc.gov.au

Dear Ms Zhu,

### **MTAS – Public inquiry to make an Access Determination**

Vodafone Hutchison Australia Pty Limited (**VHA**) writes to provide additional comments on the important issue of the pass through to retail end users of previous MTAS rate reductions and what we believe is the most effective mechanism to deliver this central objective.

As outlined in our submission, VHA agrees with the ACCC's concern that reductions in the MTAS rate are not being passed through to end-users of fixed-to-mobile (**FTM**) services.<sup>1</sup> Indeed, VHA has analysed Telstra's publicly available accounting separation data and found that the lack of pass through between 2004 and 2011 has resulted in an unrealised consumer FTM benefit in the order of \$1.1 billion to \$1.5 billion.<sup>2</sup> Therefore, in making a final access determination, it is of paramount importance that the ACCC address this issue. Any further reductions to the MTAS price will not provide meaningful benefits to end-users unless and until the issue of FTM pass through is addressed.

---

<sup>1</sup> ACCC (June 2011), *Domestic Mobile Terminating Access Service (MTAS)*, Discussion paper, pp. 8-9.

<sup>2</sup> See: VHA (July 2011), *Mobile Terminating Access Service*, Submission to the ACCC, p23.



In its submission to the ACCC, VHA proposed a pass through safeguard to address the problem that MTAS reductions have not been passed through to end-users of FTM services.<sup>3</sup> The elements of VHA's proposed approach to implement a pass through safeguard include:

- the initial threshold level for retail FTM prices (based on the average FTM revenue per minute) that acknowledges the lack of historic FTM pass through;
- a glide path for reductions in the threshold level for retail FTM prices linked to reductions in the MTAS rate;
- access seekers whose average FTM revenue per minute is lower than the threshold would be entitled to the cost-based MTAS rate based on an appropriate glide path; and
- access seekers whose average FTM revenue per minute is greater than or equal to the threshold would have the MTAS rate maintained at 9 cents per minute.

The benefits of this approach are that it:

- establishes a direct link between price regulation of the MTAS and the ACCC's objective to improve consumer welfare outcomes in the market within which FTM calls are provided;
- demonstrably promotes the long-term interest of end-users across the retail FTM market and the mobile services market;
- promotes competition between fixed carriers by providing incentives to meet the threshold in a timely manner;
- allows fixed and integrated carriers to adjust to the pass through safeguard in a manner that suits their particular circumstances (avoiding the unintended consequences of more prescriptive pass through safeguards); and
- is not dependent on coordinated action between the ACCC and the Minister.

---

<sup>3</sup> For more details see: VHA (July 2011), *Mobile Terminating Access Service*, Submission to the ACCC, p10.



We are pleased that a number of other submissions agree that there should be a link between any future MTAS price reductions and demonstrated pass through of previous reductions, although some submissions suggested that this should only apply to integrated telecommunications companies.<sup>4</sup> VHA sees merits in this proposal as it would provide additional competitive pressure on integrated carriers to pass on MTAS price reductions.

Telstra contends that if the ACCC were to impose such a pass through mechanism in a Final Access Determination, the ACCC will be acting *ultra vires*. This is incorrect. Introducing such a pass through mechanism is well within the power granted to the ACCC under s152BC of the *Competition and Consumer Act 2010* (Cth) (CCA), which provides that in making an access determination, the ACCC may:

- specify any other **terms and conditions** of an access seeker's access to the declared service (s152BC(3)(b)); or
- **deal with any other matter** relating to access to the declared service (s152BC(3)(j)).

The Australian Competition Tribunal (the *Tribunal*) has previously held that a proposed pass through provision is a 'term and condition' in relation to the supply of MTAS.<sup>5</sup> The Tribunal's construction remains good law and provides clear guidance as to the correct application of the relevant CCA provisions. The Tribunal stated that it "... [did] not accept that the inclusion of the Pass Through Safeguard raise[d] any issue of the invalidity" of the instrument containing the pass through mechanism.<sup>6</sup>

In passing provisions such as s152BC, the legislature has granted the ACCC wide powers in general terms. If the ACCC were to subject any further reductions in the MTAS rate to a pass through safeguard, it would do so as part of the terms and conditions of access to the declared service, as permitted by s152BC(3).

---

<sup>4</sup> For example see submissions from Macquarie Telecom Pty Limited, AAPT Limited and the Competitive Carrier's Coalition.

<sup>5</sup> *Re Vodafone Network Pty Ltd* [2007] ACompT 1 (at [272]-[273]). The Tribunal was considering the ACCC's decision to reject an access undertaking under the previous negotiate/arbitrate regime. Under the new regime, the same matters are relevant.

<sup>6</sup> *Re Vodafone Network Pty Ltd* [2007] ACompT 1 (at [272]).



Telstra further suggests that a pass through mechanism would be *ultra vires* due to the existence of another regulatory regime, namely *Telstra Carrier Charges – Price Control Arrangements, Notification and Disallowance Determination No. 1 of 2005* as amended (the **Determination**).<sup>7</sup> This argument has also been rejected by the Tribunal, which held that a pass through safeguard is not inconsistent with, or contrary to, the provisions of the Determination:

... [T]he provisions of the Determination may be relevant to the reasonableness of the pass through safeguard but they do not result in such an inconsistency with the Determination that it has the consequence that the [instrument containing the pass through mechanism] is invalid.<sup>8</sup>

The Determination is in no way inconsistent with the pass through mechanism proposed by VHA. The Determination puts a price cap on the increase in the price of a basket of services which includes FTM calls. VHA's proposed pass through mechanism does not contain any provisions which conflict or are inconsistent with the price cap imposed by the Determination.

VHA does not believe that a revised Telstra Price Control Determination that would require FTM reductions is the appropriate mechanism to give effect to an MTAS related policy objective. The legislature has empowered the ACCC to specify any terms and conditions of an access seeker's access to the declared services. A pass through mechanism is a term and condition of access. Given the fundamental issue facing the ACCC in meeting its statutory obligation to make a Final Access Determination (FAD) for the MTAS is the fact that reductions in the MTAS rate have not been passed through to end-users of FTM services, it is appropriate that the ACCC deals with this issue in the MTAS FAD.

---

<sup>7</sup> That is, a Ministerial control determination under Part 9 of the *Telecommunications (Consumer Protection and Service Standards) Act 1999* (Cth).

<sup>8</sup> *Re Vodafone Network Pty Ltd* [2007] ACompT 1 (at [277]).





It would be inappropriate for the ACCC to make a final access determination that reduces MTAS rates but leaves to the Minister the task of addressing the absence of pass through. A recommendation by the ACCC to the Minister that a retail price control be introduced under Part 9 of the *Telecommunications (Consumer Protection and Service Standards) Act 1999* (Cth) carries with it a number of risks including the political imperatives and consequential time lag in the Minister being able to implement such a determination.

The ACCC is best placed to bring certainty to this issue in a timely manner and in VHA's view the ACCC should welcome the opportunity to do so.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Matt M.'.

Matthew Lobb  
General Manager, Public Policy and Industry Strategy  
[matthew.lobb@vodafone.com.au](mailto:matthew.lobb@vodafone.com.au)

cc:

Julian James  
Acting Director  
Communications Group  
Australian Competition & Consumer Commission  
**By email: [julian.james@accc.gov.au](mailto:julian.james@accc.gov.au)**