



TELSTRA CORPORATION LIMITED

Submission in response to the ACCC's Draft
Decision:

Hutchison's Undertaking in relation to the
Domestic Digital Mobile Terminating Access Service

May 2006

1 Introduction

1.1 Background

On 7 October 2005, Hutchison Telecommunications (Australia) Limited (“HTAL”) and Hutchison 3G Australia Pty Limited (“H3GA”) (collectively “Hutchison”) submitted to the Australian Competition and Consumer Commission (“Commission”) six ordinary access undertakings specifying the terms and conditions on which Hutchison will comply with its standard access obligations (“SAOs”) in respect of the domestic digital mobile terminating access service (“the Undertakings”). Hutchison provided the Undertakings following the Commission’s declaration of the Domestic Digital Mobile Terminating Access Service (“MTAS”) with effect from 1 July 2004.

The Commission issued a discussion paper regarding the Undertakings on 18 November 2005 (“Discussion Paper”) and called for submissions from the public. Telstra provided its submission in that process on 23 December 2006 (“December Submission”).

The Commission published its draft decision in April 2006 (“Draft Decision”) in which it proposes to reject the Undertakings. Telstra makes this further submission (“Submission”) in support of the Commission’s Draft Decision to reject the Undertakings. This Submission should be read in conjunction with the December Submission and capitalised terms not defined in this Submission have the same meaning as set out in the December Submission.

1.2 Summary of Telstra’s submissions

Telstra supports the conclusion reached by the Commission in the Draft Decision that the Undertakings should be rejected. Telstra also supports the Commission’s conclusion that the prices of 18cpm and 21cpm contained in the Undertakings are not reasonable.

However, Telstra has concerns about some aspects of the Draft Decision including the Commission’s view on the conditional nature of the 12 cpm price, and the security and termination rights in the non-price terms and conditions of the Undertakings. More detailed submissions in relation to these issues are set-out below.

2 Rejection of the Undertakings

Telstra supports the Commission’s Draft Decision to reject the Undertakings. Telstra agrees with the Commission’s view that the Undertakings are not reasonable and that the Commission is therefore required to reject the Undertakings.

3 Price terms and conditions of the Undertakings

3.1 12 cpm is reasonable, the alternative prices proposed by the Undertakings are unreasonable

Telstra supports the Commission's conclusion in the Draft Decision that 12 cpm is a reasonable price for the supply of MTAS by Hutchison. Telstra also supports the Commission's analysis that the higher alternative prices proposed by the Undertakings are not reasonable. However, for the reasons set out in section 3.2 of this Submission, Telstra disagrees with the Commission's conclusion that all price terms and conditions in the PMTS 'Single Rate' Undertakings are reasonable.

3.2 Other price terms and conditions are unreasonable

The 12 cpm pricing for MTAS offered in the PMTS 'Dual Rate' Undertakings and PMTS 'Single Rate' Undertakings is subject to Hutchison's right to cease charging 12 cpm if Hutchison "*reasonably believes that the access seeker is not complying, or is unlikely to comply*" with the conditions in relation to reciprocity and transit traffic.¹

Telstra previously submitted in the December Submission that this is unreasonable because Hutchison:

- should not have the right to cease supplying at 12 cpm solely by reference to its reasonable belief; and
- should not have the right to cease supplying at 12 cpm simply because it has a belief that an access seeker is "unlikely to comply" with the relevant conditions.

Telstra has also indicated its concern that the additional obligation imposed by the PMTS 'Dual Rate' Undertakings and PMTS 'Single Rate' Undertakings to require access seekers to provide Hutchison "on request" all reasonable assistance (including all relevant information or documents) to enable Hutchison to determine whether the access seeker is complying with the conditions attaching to the 12 cpm pricing² could be too onerous and require the divulging of confidential information.

The Draft Decision considered that the above requirements were reasonable, and responded to Telstra's concerns by arguing:

¹ See PMTS 'Dual Rate' Undertaking, Attachment A clause 2.4; and PMTS 'Single Rate' Undertaking, Attachment A clause 2.3.

² See PMTS 'Dual Rate' Undertaking, Attachment A clause 2.6; and PMTS 'Single Rate' Undertaking, Attachment A clause 2.5.

- access seekers have the right, under clause 2.4(b) of Attachment A, to refer disputes to dispute resolution in accordance with Attachment B (or under any existing agreement);³ and
- “there is an overall obligation on the parties to act both reasonably and in good faith in relation to their contractual activities”;⁴ and
- “if Hutchison did act unreasonably, the access seeker would be within its rights to invoke the dispute resolution mechanism and insist on good faith performance” .⁵

Telstra remains concerned that these obligations are unreasonable. The Commission’s position also appears to be inconsistent with views previously expressed by the Commission (eg in relation to Telstra’s PSTN Undertakings).

Without the Commission having seen any of the existing agreements, it is an unsafe assumption that all existing agreements contain both an adequate dispute resolution clause as well as a requirement for the parties to act in good faith. Further, the Commission’s approach may not reasonably safeguard the interests of persons who have a right to use the declared service. The provisions allow Hutchison unreasonably broad legal rights, exercisable at its sole discretion. Telstra’s concern is whether it is reasonable to expect that access seekers’ interests are protected by the assumption that a requirement of good faith performance would restrict Hutchison from exercising its legal rights. Requiring access seekers to resort to dispute resolution procedures to read down Hutchison’s legal rights is not only inefficient (as compared with clearly articulating legal rights from the beginning) but is also fraught with commercial risk and uncertainty for access seekers.

Telstra considers that these provisions require the Commission to find that the price terms and conditions of the PMTS ‘Single Rate’ Undertakings are not reasonable.

3.3 MTAS pricing for transit traffic

The 12 cpm pricing for MTAS offered in the PMTS ‘Dual Rate’ Undertakings and PMTS ‘Single Rate’ Undertakings is subject to a condition that the access seeker only acquires the Hutchison MTM terminating access service for the purpose of terminating, on Hutchison’s mobile network, a PMTS Call originating in Australia from that access seeker’s mobile network or the mobile network of a related body corporate of the access seeker.

In response to concerns raised by Telstra in the December Submission, the Draft Decision indicates that the Commission is of the view that “on the basis of the information before it, it cannot be satisfied”⁶ that this requirement is a breach of subsections 45(2)(a)(i) and (ii) and

³ Draft Decision, p 30

⁴ Draft Decision, p 30

⁵ Draft Decision, p 30

⁶ Draft Decision, p 30

(b)(i) and (ii) and subsection 47(3) of the TPA. Telstra reiterates its concerns as to the TPA risks of this requirement. The Commission’s failure to consider or analyse these concerns in any detail is troubling given that access seekers would be compelled to contract with Hutchison based on the terms of the Undertakings.

4 Non-price terms and conditions of the Undertakings

4.1 Non-price terms and conditions are not reasonable

Telstra supports the conclusion in the Draft Decision that the non-price terms and conditions of the Undertakings are not reasonable. Particularly, Telstra agrees that the intended overriding effect of the Undertakings in relation to Hutchison’s other MTAS agreements is uncertain and unreasonable. Telstra also agrees with the Commission’s analysis that the operation of clause 5 of the Undertakings in relation to existing agreements is unreasonable.

However, as discussed below, Telstra does not agree with the Commission’s analysis of the Annexure B terms and conditions in relation to security and termination. Telstra reiterates its view that these provisions are unreasonable.

4.2 Security

Telstra reiterates its concern that clauses 7.7 through 7.9 of the Undertakings provide Hutchison with an unreasonably wide and uncertain right to unilaterally set the circumstances in which security is required, and the quantum of security required, to be paid by an access seeker. The Draft Decision indicates the Commission’s view that the obligation to act in good faith (clause 14.4) may prevent the unreasonable operation of the security clauses.⁷

As discussed above in section 3.2, Telstra has concerns that an obligation to act in good faith provides sufficient protection for access seekers against the unreasonable operation of Hutchison’s specific rights. Telstra considers that such an approach may be inconsistent with the Commission’s stated considerations of “fairness and balance”⁸ in determining whether the Undertakings are reasonable.

4.3 Termination

Telstra remains concerned about the reasonableness of Hutchison’s right to terminate an MTAS service (clause 13.10(h) of Attachment B), on 5 business days notice, after a variation to the agreement is requested but not agreed within 90 days. The Draft Decision indicates that this provision is reasonable because an equal termination right is provided to both Hutchison and the access seeker. This view fails to take into consideration an important purpose of the

⁷ Draft Decision, p 100

⁸ Draft Decision, p 94

regulation of MTAS: to provide certainty of MTAS supply to access seekers. The purpose and motivations of Hutchison and access seekers to terminate the agreement may well be very different in various circumstances; an equal right to terminate may well be used to very different effect by Hutchison as compared with access seekers. A reciprocal right of access seekers to terminate does not prevent the unfair exercise of such right by Hutchison.

Further, Telstra believes that a 5 business day notice period for the termination of an MTAS service is unreasonable.

Telstra submits that Hutchison's termination right goes beyond what is reasonable to protect Hutchison's legitimate interests, and is therefore unreasonable.

5 Conclusion

Telstra supports the conclusion reached by the Commission in the Draft Decision that the Undertakings should be rejected. However, Telstra has reiterated its concerns about some aspects of the Draft Decision for the Commission's further consideration.

Telstra Corporation Limited

12 May 2006