

COURT ENFORCEABLE UNDERTAKING
Australian Securities and Investments Commission Act 2001
Section 93AA

The commitments in the undertaking are offered to the Australian Securities and Investments Commission (ASIC) by:

VODAFONE HUTCHISON AUSTRALIA PTY LIMITED ACN 096 304 620
Level 1, 177 Pacific Highway
NORTH SYDNEY NSW 2060

1. Background

ACCC staff member as delegate of ASIC

- 1.1. Pursuant to section 102 of the *Australian Securities and Investments Commission Act 2001* (Cth) (ASIC Act), ASIC has relevantly delegated to the Executive General Manager, Enforcement Division of the Australian Competition and Consumer Commission (**the Delegate**):
 - a. all of the functions and powers conferred on it under Division 2 of Part 2 of the ASIC Act (other than section 12GLC and Subdivisions GB and GC of Division 2 of Part 2) to the extent that those powers and functions may be necessary for, or reasonably incidental to, the investigation of, and commencement and conduct of any proceedings in relation to, matters involving financial products and services provided as part of, or in connection with, the supply or possible supply of telecommunications services; and
 - b. all of the powers and functions conferred on ASIC by or under Part 3 of the ASIC Act, other than section 50, and any regulations made for the purposes of that Part, to the extent that those powers and functions may be necessary for, or reasonably incidental to, the exercise or discharge by the Australian Competition and Consumer Commission (ACCC) of a power or function delegated under paragraph a. above.
- 1.2. ASIC has delegated the above functions and powers to the Delegate, for the purposes of the ACCC regulating certain conduct in relation to the provision of financial products and services provided in connection with the supply of telecommunications services, including conduct that would comprise:
 - a. making false or misleading representations, within the meaning of section 12DB(1)(b) of the ASIC Act, that a particular person has agreed to acquire services.

Vodafone's business

- 1.3. Vodafone Hutchison Australia Pty Limited ACN 096 304 620 (**Vodafone**) carries on the business of supplying retail telephony and data services for mobile phones and tablets (**mobile services**).

Vodafone's direct carrier billing service

- 1.4. Vodafone, in trade or commerce, offers mobile services to consumers for personal or domestic use (**customers**). Vodafone charges for the mobile services either as:
 - a. pre-paid services, where customers purchase credit in advance, and the purchased credit is used to pay for mobile services as the services are used; and
 - b. post-paid services, where customers are billed (generally monthly) in arrears (although some charges, for example access fees, may be charged in advance).
- 1.5. During the period from at least 1 January 2013 to 1 March 2018 (**relevant period**), Vodafone made available to customers a Direct Carrier Billing service (**DCB service**).
- 1.6. Vodafone's DCB service enabled customers to purchase online software and services (**digital content**) from a third party, and have the charges for that content billed to their Vodafone account. Digital content could be purchased through Vodafone's DCB service:
 - a. on a one-off purchase basis (during the entirety of the relevant period); and
 - b. on a subscription basis (until mid-2015, with all existing subscriptions phased out by mid-2016).
- 1.7. Digital content purchased via the DCB service (known as **DCB content**) included 'premium' content services (such as news websites) and downloadable applications (such as games or ringtones) and other content (such as 'voting' in television programs).
- 1.8. Content purchased via the DCB service was created by third party content providers (**Content Providers**) who did not have a direct relationship with Vodafone. Rather, their digital content offerings were compiled and marketed by third-party providers (**Aggregators**) who had contractual arrangements with Vodafone to make the content available for purchase by Vodafone customers.
- 1.9. For the purposes of this Undertaking, the DCB service did not include digital content for which identity verification was a pre-purchase requirement, by way of the customer entering account details or payment information or by sending an SMS or expressing verbal agreement (i.e. Premium SMS, Spotify Premium, ReadyApps and 1800Reverse).

Relevant Conduct

- 1.10. The Delegate considers and Vodafone agrees that during the relevant period, Vodafone did not adequately inform its customers that:
 - a. the DCB service was a default setting on Vodafone mobile services – that is, customers were not required to opt-in to the DCB service on their mobile service prior to purchasing third party digital content; and
 - b. consequently, if they were to purchase content on their mobile devices, even unintentionally, they would be billed directly by Vodafone via the DCB service.
- 1.11. During the relevant period, Vodafone customers could be charged for DCB content with one or two ‘clicks’ on a web-browser while using their device connected to the Vodafone network.
- 1.12. During the relevant period, Vodafone did not require its customers to complete any form of identity verification before having DCB content charges billed to their account. For example, customers were not required to sign in to an account, provide a password, send a text message or provide payment details in order to purchase DCB content.
- 1.13. Until December 2017, Vodafone had a general policy of referring complainants to Aggregators to resolve their dispute in the first instance. After changing the policy in December 2017 to require customer complaints to be handled by Vodafone directly, Vodafone found that the new policy was not always being applied correctly, and it reiterated the policy to its customer care team in September 2018.
- 1.14. The Delegate considers and Vodafone agrees that, from at least February 2015, Vodafone was aware of issues with its DCB service including:
 - a. a two-fold increase in revenue but a three-fold increase in complaints about the DCB service received in the 2014-15 financial year compared to the 2012-13 financial year;
 - b. that the nature of some complaints was customers inadvertently signing up to the DCB service;
 - c. that some customers were incurring charges for DCB content they never requested, received or used;
 - d. that some customers were continuing to be charged despite unsubscribing from DCB content;
 - e. that some customers were not receiving adequate assistance from Vodafone to resolve their complaint and, after being directed to third parties by Vodafone, had difficulty obtaining refunds from those third parties; and
 - f. that some customers lacked awareness as to what Vodafone’s DCB service was.
- 1.15. In response to an increase in complaints received about the DCB service in the 2014-15 financial year, Vodafone implemented changes to its service including:

- a. ceasing to offering new DCB subscriptions in mid-2015, with all existing subscriptions phased out by mid-2016;
 - b. terminating several non-compliant Aggregators and Content Providers;
 - c. moving to a 'single aggregator model', to allow Vodafone to deal directly with complaints and manage services;
 - d. requiring DCB content to include a 'terms and conditions' check box; and
 - e. discontinuing its policy of referring complainants to Aggregators to resolve the dispute in the first instance.
- 1.16. The changes introduced by Vodafone described at paragraph 1.15 coincided with significant decreases in complaints to Vodafone and to the Telecommunications Industry Ombudsman (TIO) about the DCB service in the period from July 2015 to 2018.
- 1.17. By March 2018, Vodafone's DCB service was only available in respect of a limited number of DCB content offerings that require express customer agreement and which had not been the subject of complaints.

Vodafone's acknowledgment

- 1.18. The Delegate considers and Vodafone agrees that from at least February 2015, Vodafone was aware that the operation of its DCB service had led to customers unintentionally purchasing DCB content without their knowledge or consent and therefore incurring charges for that content without their knowledge or consent (**Non-Consenting Customers**).
- 1.19. The Delegate considers and Vodafone agrees that, in these circumstances, by applying charges for DCB content to the accounts of Non-Consenting Customers, Vodafone made false or misleading representations in connection with the supply or possible supply of a financial service within the meaning of the ASIC Act to each of the Non-consenting Customers that they had agreed to acquire that DCB content (when they had not), and in doing so, likely contravened section 12DB(1)(b) of the ASIC Act. Vodafone has indicated a willingness to resolve this matter by the provision of an undertaking under section 93AA of the ASIC Act.

2. Undertakings

Vodafone offers the following undertakings to ASIC pursuant to section 93AA of the ASIC Act:

Automatic refunds

- 2.1. By no later than 12 weeks from the date of this undertaking, identify each customer who, from 1 January 2013 to the date of this undertaking and in relation to DCB content charges applied by Vodafone, made a complaint:
- a. directly to Vodafone; or
 - b. to the TIO;

- 2.2. By no later than 16 weeks from the date of this undertaking, begin to communicate with each customer identified in accordance with paragraph 2.1 and for whom Vodafone has contact details, refund all charges for DCB content applied to those customers' accounts for DCB content that was the subject of the complaint identified under paragraph 2.1 (to the extent that the customer has not already received a full refund of all such charges from Vodafone or some other party).
- 2.3. The refunds under paragraph 2.2 may be provided as account credits for persons who are Vodafone customers at the time the refund is applied but must not be applied as a voucher or credit to purchase digital content or services other than the mobile service which the customer already has.

Customer notifications and refunds

- 2.4. By no later than 12 weeks from the date of this undertaking, identify each customer who:
- a. incurred charges for any of the following DCB content between 1 December 2014 and 1 March 2018:
 - i. Gamifive;
 - ii. Browser Games;
 - iii. Jamster;
 - iv. Play Planet;
 - v. iGirls;
 - vi. Waala Mobile; and/or
 - vii. iFortune and
 - b. has not received a refund for all such charges from Vodafone.
- 2.5. By no later than 16 weeks from the date of this undertaking, begin to inform using last known contact details each customer identified in accordance with paragraph 2.4 that they may be eligible for a refund of any DCB content charges incurred in relation to the content listed at paragraph 2.4(a) that was purchased inadvertently or without their knowledge, and inform each such customer how to apply for such a refund.
- 2.6. Refund each customer identified in accordance with paragraph 2.4 that applies for a refund in accordance with 2.5, all relevant DCB content charges applied to the customer's account, to the extent that it is asserted by the customer that:
- a. the DCB content purchase was unintentional; and
 - b. the DCB content charges were applied to their Vodafone account without their knowledge or consent.
- 2.7. The refunds under paragraph 2.6 may be provided as account credits for persons who are Vodafone customers at the time the refund is applied but must not be applied as a voucher or credit to purchase digital or services other than the mobile service which the customer already has.

- 2.8. For a period of 12 months from the date of this undertaking, deal directly with future complaints (including in relation to past periods) in relation to DCB content charges and seek to resolve those complaints in good faith.

Reporting

- 2.9. Inform the ACCC within 20 weeks of the date of this undertaking and every 4 months thereafter for one year, of:
- a. the steps taken to identify customers in accordance with paragraph 2.1;
 - b. the number of customers identified in accordance with paragraph 2.1;
 - c. the number of customers refunded in accordance with paragraph 2.2;
 - d. the value of refunds provided in accordance with paragraph 2.2;
 - e. the steps taken to identify customers in accordance with paragraph 2.4;
 - f. the number of customers identified in accordance with paragraph 2.4;
 - g. the steps taken to communicate with those customers in accordance with paragraph 2.5;
 - h. the number of customers who were refunded in accordance with paragraph 2.6;
 - i. the value of refunds provided in accordance with paragraph 2.6;
 - j. the number of customers that applied for a refund in accordance with paragraph 2.5 but were refused a refund by Vodafone;
 - k. the value of the refunds that were refused to customers that were identified in accordance with paragraph 2.4;
 - l. the number of customers who complained to Vodafone and applied for a refund in accordance with paragraph 2.8;
 - m. the value of refunds provided in accordance with paragraph 2.8;
 - n. the number of customers that applied for a refund in accordance with paragraph 2.8 but were refused a refund by Vodafone; and
 - o. the value of the refunds that were refused to customers that were identified in accordance with paragraph 2.8.

Complaint handling

- 2.10. Within 4 weeks from the date of this undertaking, fully adopt and implement a process for recording complaints in relation to the DCB Service in accordance with the definition set out in ASIC's Regulatory Guide 165 'Licensing: Internal and external dispute resolution':

***Complaint.** A complaint means an expression of dissatisfaction made to us related to our products or services or to our complaints handling process where a response or resolution is explicitly or implicitly expected.*

3. Acknowledgments

Vodafone makes the following acknowledgments:

- 3.1. Vodafone acknowledges that either or both of ASIC and the ACCC may issue a media release on execution of this undertaking referring to its terms and the concerns of the Delegate which led to its execution.
- 3.2. Vodafone acknowledges that either or both of ASIC or the ACCC may, from time to time, publicly refer to this undertaking.
- 3.3. Vodafone acknowledges that either or both of ASIC or the ACCC may make this undertaking available to the public, including by placing it on a register, publishing it and allowing third parties to publish it.
- 3.4. Vodafone acknowledges and accepts that this undertaking in no way derogates from the rights and remedies available to any other person arising from any conduct described in this undertaking.
- 3.5. Vodafone acknowledges that this undertaking has no operative force and effect until accepted by the Delegate.

EXECUTED by Vodafone Hutchison Australia Pty Limited

ACN 096 304 620 in accordance with
Section 127(1) of the *Corporations Act 2001*
on the 10 day of July 2019



Signature of Director

Barry Roberts-Thomson

Name of Director (printed)



Signature of Director / Secretary

Trent Gzinner

Name of Director / Secretary (printed)

**ACCEPTED BY THE AUSTRALIAN SECURITIES AND INVESTMENTS
COMMISSION PURSUANT TO SECTION 93AA OF THE ASIC ACT BY ITS DULY
AUTHORISED DELEGATE:**



Richard Fleming
Acting Executive General Manager
Enforcement Division
ACCC

Delegate of the Australian Securities and
Investments Commission

Date

15 July 2019