

## Appendix Two:

### TelstraClear response to Vodafone Undertaking to the Commission Schedule 3A in respect of national roaming and co-location services Public version

This appendix provides comment to particular aspects of Vodafone's undertaking.

TelstraClear considers that Vodafone's current undertaking<sup>1</sup> is deficient, and in its current form would be unlikely to deliver the necessary pro-competitive benefits to New Zealand end-users. However, TelstraClear does support, in principle and with appropriate safeguards, an undertaking in lieu of regulation. The undertaking would have to be materially altered before the Commission should consider it a reasonable proxy for appropriate regulation.

Vodafone Undertaking		TelstraClear comment
Parties	The Undertaking is proposed to be a legal agreement between Vodafone and the Commerce Commission	<ul style="list-style-type: none"><li>• The process under Schedule 3A requires that the Commission gives consideration to the undertaking, and provides a recommendation to the Minister as to whether the Minister should accept or reject the undertaking.</li><li>• The legislation appears unclear whether the undertaking is an agreement between Vodafone and the Commission or between Vodafone and the Telecommunications Minister (e.g. the TSO agreement between the Crown and Telecom).</li></ul>
Clause 2.1	The Undertaking takes legal effect immediately after it is registered by the Commission under Clause 6 of Schedule 3A and continues until 5 years from the date of registration, unless earlier terminated.	<ul style="list-style-type: none"><li>• TelstraClear does not consider it appropriate that Vodafone is permitted to terminate the Undertaking prior to the expiration of the 5-year period. This would cause an unacceptable level of uncertainty for an access seeker as they would be unable to offer any</li></ul>

<sup>1</sup> Vodafone, *Submission in support of an Application for Schedule 3A Undertaking in respect of National Roaming and Co-location*, 19 January 2007.

Vodafone Undertaking		TelstraClear comment
		<p>certainty of coverage for customers. Consequently, an access seeker's ability to compete with the incumbents would be severely constrained. This term therefore contradicts s.18 of the Act, which is the basis on which the Commission should be assessing the Undertaking.</p> <ul style="list-style-type: none"> <li>• Section 7(1)(b) requires that the undertaking also includes: "any further period that the Commission and the relevant access provider may agree". TelstraClear considers that this would allow, by mutual agreement, an extension. This would prevent the industry having to go through an extended process to simply extend the undertaking.</li> </ul>
Clause 2.2	For the avoidance of doubt, the Undertaking (including, without limitation, any prices in the Undertaking) has no effect in respect of the provision of the Vodafone Roaming Services or Vodafone Co-location Services by Vodafone to an Access Seeker under an existing agreement on the date on which the Undertaking is registered by the Commission, for as long as that agreement remains on foot.	<ul style="list-style-type: none"> <li>• TelstraClear opposes this clause. The purpose of the investigation, and consequent recommendations to the Minister, is to best give effect to the promotion of competition.</li> <li>• Any agreement reached prior to the acceptance of an undertaking is likely to be on unfavourable terms to the access seeker, reflecting asymmetric bargaining power given Vodafone's monopoly position held in the GSM market.</li> <li>• If the Commission recommended amending Schedule 1 rather than accepting an undertaking, section 30S would require that, despite a commercial agreement being in place between an access provider and access seeker, an access seeker could request supply on the terms of the regulated service.</li> <li>• TelstraClear submits that this requirement should hold for an undertaking if an undertaking is to stand in</li> </ul>

Vodafone Undertaking	TelstraClear comment
<p>Clause 4.2</p>	<p>Vodafone may, at any time during the term of the Undertaking:</p> <ul style="list-style-type: none"> <li>(a) give the Commission notice seeking approval of a variation or replacement of the Undertaking; or</li> <li>(b) by written notice to the Commission, withdraw the Undertaking.</li> </ul>
<p>place of improved regulation under Schedule 1.</p> <ul style="list-style-type: none"> <li>• TelstraClear opposes this clause as it is inconsistent with s.18 of the Act.</li> <li>• Investment decisions require certainty, and the guarantee that roaming will be available on reasonable terms is vital to stimulate investment.</li> <li>• A registered undertaking is a binding commitment in lieu of regulation. It is not an offer that should be made spuriously and then withdrawn at the sole discretion of the access provider. As drafted, clause 4.2 would allow Vodafone to terminate an undertaking by simply writing to the Commission.</li> <li>• By putting forward an undertaking in lieu of regulation, and then withdrawing it at its discretion once the Minister has accepted it, would lead to strategic gaming, uncertainty and delay.</li> <li>• Schedule 3A does not provide for an access provider to withdraw its undertaking once registered. In contrast, section 8(2) provides that, despite the registration of an undertaking, the Commission and Minister preserve options in respect of investigations into regulatory change.</li> <li>• TelstraClear would support a limited review clause, similar to the section 58 &amp; 59 clarification and reconsideration powers for determinations relating to Schedule 1 services. This would provide limited flexibility for minor amendments during the life of the undertaking, but preserve investment certainty for the duration of the undertaking.</li> </ul>	

Vodafone Undertaking		TelstraClear comment
<b>Schedule 1</b>		
<b>Services Description Vodafone Roaming Services</b>		
Clause 1	<p>Vodafone roaming services exclude:</p> <ul style="list-style-type: none"> <li>(a) Value added Services and access to Value Added Services service nodes;</li> <li>(b) Out-bound international roaming services and facilities;</li> <li>(c) Wireless LAN services (also known as WiFi and WiMax) or any similar services;</li> <li>(d) Cellular mobile services and functionality used in non-mobile applications;</li> <li>(e) Number allocations; and</li> <li>(f) Synchronous services, other than Calls.</li> </ul>	<ul style="list-style-type: none"> <li>• The clause should state that “roaming” is limited to 2G-type services – voice and SMS etc.</li> </ul>
Clause 1	<p>For these purposes, Value Added Services means services or functionality that provide benefits to a customer or end user that are not part of the standard telecommunications services or functionality associated with a basic retailer cellular mobile telecommunications service, including (without limitation):</p> <ul style="list-style-type: none"> <li>a) Vodafone Live! and other Vodafone content or third party content;</li> <li>b) Any further services provided to Vodafone End Users;</li> <li>c) Any services or functionality that are not integral to the sending or receiving of Roaming Traffic (including, without limitation, location-based services);</li> <li>d) Vodafone’s voice mail and voice messaging;</li> <li>e) Services provided by Vodafone’s Intelligent Network or pre-pay platforms;</li> <li>f) Mobile commerce services; and</li> </ul>	<ul style="list-style-type: none"> <li>• TelstraClear accepts this definition of “Value-Added Services” as it is consistent with TelstraClear’s proposal that a designated roaming service should only apply to 2G-type voice and SMS services.</li> </ul>

Vodafone Undertaking		TelstraClear comment
	g) Customer self-service applications.	
<b>Schedule 2 Pricing Vodafone Roaming Services</b>		
Clause 1	The prices for circuit-switched voice or data traffic originated by or terminated to Access Seeker End Users while roaming on the Vodafone Network will be 21.5 cents per minute per leg (on a minute plus second basis).	<ul style="list-style-type: none"> <li>21.5 cents is [ ]TCLRI. The resources required to produce the services are similar. TelstraClear considers that a more appropriate price would be the Commission's benchmarked price for mobile termination, ie 15cpm per leg.</li> </ul>
Clause 2	The price for SMS originated by or terminated to Access Seeker End Users while roaming on the Vodafone Network will be 9.5 cents per Text Message.	<p>TelstraClear notes that the text prices are significantly higher than Vodafone's retail prices:</p> <ul style="list-style-type: none"> <li>9.5 cents per text message is significantly higher than Vodafone's TXT 1000 retail price of 1 cent per text message.</li> <li>On a retail-minus basis, using the best price as a starting point, the roaming price on the basis of Vodafone's TXT 1000 for text messages would be 1 cent minus 16% (16% being the current discount for regulated services, where the service is subject to limited competition), ie 0.84c per text.</li> </ul>
Clause 3	The price for packet-switched data and MMS originated by or terminated to Access Seeker End Users while roaming on the Vodafone Network will be 4.9 cents per 1 MB with each use of the Vodafone Network charged at a minimum of 10 KBs and rounded up to the nearest 10KB on each use.	<ul style="list-style-type: none"> <li>This is equivalent to \$49 for a 1GB plan. TelstraClear notes that Vodafone offers its 1GB Broadband Everyday plan for \$49.95 per month for a two-year term. Using a retail-minus discount of 16% would equate to a price of \$41.96.</li> </ul>

Vodafone Undertaking		TelstraClear comment
<b>Schedule 3</b>		
<b>Terms and Conditions Vodafone Roaming Services</b>		
Clause 2.1(a)	Clause 2.1(a) requires that, before Vodafone is required to make available and provide the Vodafone Roaming Services to the Access Seeker under the Undertaking, Vodafone and the Access Seeker must agree: an Implementation Plan (including the Services Commencement Date), Technical Specifications, and Operational Procedures.	<ul style="list-style-type: none"> <li>• TelstraClear accepts that Vodafone had limited time in which to provide an undertaking following the enactment of the Telecommunications Amendment (No 2) Act.</li> <li>• However, TelstraClear is concerned that the development of the Implementation Plan, Technical Specifications and Operational Procedures would be significant and complex, and may take significant time to agree.</li> <li>• TelstraClear is concerned that Vodafone is seeking to assume the role of the decision-maker with this term, which is inappropriate given its dominant market position and its position as a competitor to the access seeker.</li> <li>• The ongoing uncertainty of such important components may delay the entrance into the market. The proposed undertaking does not provide a mechanism to resolve disputes on the implementation plan, technical specifications and operational procedures. An entrant would require significant confidence about the process to resolve such disputes.</li> <li>• Clause 3.1 of Schedule 3 requires that these requirements be satisfied prior to the obligation to make roaming services available to the access seeker. This provides an incentive to delay resolution of the issues thereby hindering competitive entry.</li> </ul>

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Clause 2.1(c)	<p>Before Vodafone is required to make available and provide the Vodafone Roaming Services to the Access Seeker under the Undertaking:</p> <p>(c) The Access Seeker Mobile Network:</p> <ol style="list-style-type: none"> <li>a. has not less than 150 cell sites; and</li> <li>b. is operational and is ready for commencement of the Access Seeker Mobile Services.</li> </ol>	<ul style="list-style-type: none"> <li>• Vodafone’s Undertaking provides for an initial build of 150 cellsites, with roaming available for the duration of the undertaking. This contrasts with an alternative approach of an initial build requirement with a subsequent build-out requirement over an agreed time period.</li> <li>• The trade-off between these two options appears to be higher prices (as described in Schedule 2 of Vodafone’s undertaking) in exchange for roaming for the duration that the undertaking is current.</li> <li>• TelstraClear considers that the availability of commercial roaming at cost-based prices during a build-out period is likely to best give effect to the promotion of competition for the long term benefit of end users by encouraging efficient infrastructure investment, rather than ongoing reliance on roaming to deliver a solution.</li> </ul>
Clause 3.2	<p>To the extent reasonable practicable, Vodafone shall ensure the Vodafone Roaming Service will be continuously available and fault free. The Access Seeker acknowledges that Vodafone does not guarantee that the Vodafone Roaming Services will be continuously available or fault-free.</p>	<ul style="list-style-type: none"> <li>• TelstraClear considers that Vodafone should use its best endeavours in accordance with good industry practice to ensure the Vodafone Roaming Service is continuously available and fault free. Access Seekers should not be prevented from seeking remedy for any fault or lack of service under this Agreement.</li> <li>• Furthermore, this obligation should ensure that an access seeker receives equivalent service, such that Vodafone’s own services are not prioritised over those of an access seeker.</li> </ul>
Clause 3.4	<p>Vodafone will have no obligation to provide the Vodafone Roaming Services over any other part of any other network</p>	<ul style="list-style-type: none"> <li>• Vodafone has proposed that an undertaking apply for</li> </ul>

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	deployed by Vodafone, except to the extent agreed in writing between the parties.	<p>a period of five years, and in that period TelstraClear would expect that further investment in 3G technology would occur. Vodafone's proposal involves a risk that 2G-type technology is swapped out in its network, and an entrant would then lose roaming ability.</p> <ul style="list-style-type: none"> <li>• TelstraClear's preference, as set out in the submission, is that the services provided by roaming are limited to 2G-type voice and SMS services, but the network over which that roaming is provided is agnostic, consistent with the Commission's Mobile Termination Reconsideration recommendation. In that report, the Commission concluded that the termination of voice traffic (on either a 2G or 3G network) would not impact on an access provider's incentives to invest in next-generation technologies to deliver data services for example.</li> </ul>
Clause 3.6	Vodafone will not be required to provide, or to continue to provide, the Vodafone Roaming Services where Vodafone requires the consent of a third party to provide the Vodafone Roaming Services to the Access Seeker and the consent has not been obtained or any consent has been withdrawn or terminated	<ul style="list-style-type: none"> <li>• TelstraClear is uncertain as to the extent of such commercial arrangements Vodafone has that would prevent Vodafone providing roaming services to an access seeker. The Commission would need to explore the extent to which this would be an issue.</li> <li>• Vodafone should have the positive duty to obtain consent for such access.</li> </ul>
Clause 3.8	Vodafone may, at any time and without liability to the Access Seeker, suspend, restrict or withdraw any part of the Vodafone Roaming Service, including any particular part of the Vodafone Network, where it suspends, restricts or withdraws the equivalent service to Vodafone Customers (where applicable) in the particular part of the Vodafone Network.	<ul style="list-style-type: none"> <li>• The access seeker is purchasing a national roaming service from Vodafone. Vodafone cannot arbitrarily restrict that service without suitable notice and compensation.</li> </ul>

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Clause 4.1	The Access Seeker will reimburse all of Vodafone's reasonable costs for the set up and development of the Vodafone Roaming Services within 30 days of receipt of a tax invoice from Vodafone.	<ul style="list-style-type: none"> <li>• TelstraClear does not consider that an access seeker should be required to separately reimburse Vodafone for development of the Vodafone Roaming Services.</li> <li>• Access providers have obligations to provide services, and it is unusual for the access provider to require reimbursement of development costs upfront. Rather, such costs, including set-up costs, should form a part of the ongoing access price.</li> <li>• For example, Telecom has statutory obligations to provide bitstream services, however the costs to develop capability to provide these services at wholesale were not an upfront cost for access seekers.</li> <li>• There is no incentive for Vodafone to minimise those costs where all costs are immediately recovered from the access seeker.</li> </ul>
Clause 4.2	Reimbursement under clause 4.1 may include reimbursement of a proportion of the costs already incurred by Vodafone in providing services equivalent or similar to the Vodafone Roaming Services to other persons and which have already been paid for by those other persons and where Vodafone has an obligation to pay a contribution to Common Costs received from the Access Seeker to those other persons.	<ul style="list-style-type: none"> <li>• Access seekers should only be required to pay for costs incurred in providing the service to that access seeker. This clause suggests that Vodafone is seeking reimbursement for costs of providing services to other access seekers, which they have already paid for.</li> </ul>
Clause 4.3	Vodafone will determine the proportion of the Common Costs to be contributed to by the Access Seeker on a pro-rated basis in equal shares as between the Access Seeker and all other third parties that have contributed towards the Common Costs.	<ul style="list-style-type: none"> <li>• Refer to clause 4.1 comments.</li> <li>• This clause suggests that access seekers and other third parties pay for all of Vodafone's common costs, which is not appropriate. The contribution to</li> </ul>

Vodafone Undertaking		TelstraClear comment
		common costs should be proportionate to the access seeker's use of Vodafone's network, eg the proportion of total minutes attributable to the access seeker.
Clause 5.1	On the date that Vodafone begins to make available and provide the Vodafone Roaming Services to the Access Seeker under the Undertaking, and at the beginning of each subsequent calendar quarter during the Term, the Access Seeker will pay in advance an access fee (Access Fee) calculated in accordance with clause 5.2. Any usage charges incurred by the Access Seeker during that quarter or shorter period (in the case of the first payment) will be applied against that Access Fee.	<ul style="list-style-type: none"> <li>• TelstraClear assumes that an access fee is intended to remove/reduce Vodafone's credit exposure from payment default by access seekers.</li> <li>• TelstraClear accepts that some form of credit guarantee would be appropriate to minimise Vodafone's credit exposure. However, this should only be on normal commercial terms.</li> <li>• TelstraClear does not consider that an access fee (credited against actual usage) is appropriate or necessary.</li> <li>• A forecasting requirement would be appropriate, with a payment estimated on the forecast.</li> <li>• TelstraClear does not understand why usage below expected should forfeit the access fee proposed. The access fee appears to cover both fixed and variable costs. An alternative may be to have separate fees for fixed and variable costs so that the access seeker is only charged for the services that it uses.</li> </ul>
Clause 5.2	Calculation of the Access Fee	<ul style="list-style-type: none"> <li>• Refer to clause 5.1 comments.</li> </ul>
Clause 5.4	The Access Fee will be non-refundable, including where the Access Seeker's total usage charges for the relevant quarter are less than the amount of the Access Fee, and any shortfall may not be passed over to any other calendar quarter	<ul style="list-style-type: none"> <li>• Refer to clause 5.1 comments.</li> </ul>

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Clause 5.5	Vodafone will be entitled to terminate the Vodafone Roaming Services provided to the Access Seeker under the Undertaking if the Access Fee payable in any four consecutive quarters is the same as the Minimum Access Fee.	<ul style="list-style-type: none"> <li>TelstraClear does not understand the purpose of this clause. An entrant's investment in its initial build (even under Vodafone's proposal) is significant. National roaming is a service offered to the access seeker's end-users. Non-utilisation of the offer by these end-users should not be reason to withdraw the offer of this service in the future if an access seeker is able to meet its financial obligations to the access provider. If the access fee covers fixed costs, then there is no basis for withdrawing the service since no variable costs should be incurred in the event of non-utilisation of the service.</li> </ul>
Clause 6.1	Where the Access Seeker builds or acquires a part of the Access Seeker Mobile Network in the coverage area of a Vodafone Location Area (LA) that LA will become an Exclusion Zone. Access Seeker End Users are not able to roam on the Vodafone Network in an Exclusion Zone.	<ul style="list-style-type: none"> <li>The acceptability of this clause is dependant on the definition of "Location Area" which is an undefined term in the undertaking. In a phased build-out, development of a single site in a region (for example) should not automatically provide a blanket exclusion for that whole region. TelstraClear considers that exclusion is only appropriate where the access seeker is capable of providing voice and SMS services throughout the Location Area to the same quality of service levels as Vodafone.</li> </ul>
Clause 8.1	<p>During the Term:</p> <p>(a) Vodafone will be the exclusive provider in New Zealand of services equivalent or similar to the Vodafone Roaming Services to members of the Access Seeker Group; and</p> <p>(b) the Access Seeker will not (and will ensure that members of the Access Seeker Group will not) acquire any such</p>	<ul style="list-style-type: none"> <li>TelstraClear does not support this clause. This clause seeks to maintain a monopoly on the provision of roaming services into the future. The clause prevents an access seeker utilising any other roaming services of competitors.</li> <li>The undertaking, which Vodafone proposes will be in place for five years, would prevent roaming on another network as future competition emerges.</li> </ul>

Vodafone Undertaking		TelstraClear comment
	<p>equivalent or similar services in New Zealand from any other person.</p> <p>For the purposes of this clause 8.1, services may be equivalent or similar to the Vodafone Roaming Services even if:</p> <p>(c) they include additional features, services and functionality to the Vodafone Roaming Services. This may include, for example, services that are specifically excluded from the definition of Vodafone Roaming Services in Schedule 1; or</p> <p>d) they are provided over a different type of network to the Vodafone network; or</p> <p>e) the network from which customers may roam is different in size to the Access Seeker Mobile Network.</p>	<ul style="list-style-type: none"> <li>• TelstraClear considers that this clause is wholly inconsistent with the notion of the promotion of competition for the long-term benefit of end-users, by preventing competitive choice.</li> <li>• Furthermore, this description of equivalent services is unnecessarily broad. It would prevent the access seeker from distinguishing its services from those of Vodafone by obtaining additional services from Telecom (or another competitor as competition emerges), and thereby limits the services offered to end-users.</li> </ul>
Clause 9.3	<p>Access Seeker End Users will be, and only they will be, the ultimate recipient of:</p> <p>(a) The Vodafone Roaming Services; and</p> <p>(b) The Access Seeker Mobile Services.</p> <p>Where:</p> <p><b>Access Seeker End User</b> means any end-user of the Access Seeker Mobile Services who is entitled to receive Access Seeker Mobile Services; but excludes:</p> <p>(a) any Access Seeker Reseller (except where they are</p>	<ul style="list-style-type: none"> <li>• This requirement limits competition by preventing an access seeker from providing roaming services to inbound international roaming customers and should be removed, as it substantially restricts the access seeker's ability to distinguish its service offerings from Vodafone.</li> </ul>

Vodafone Undertaking		TelstraClear comment
	<p>themselves an end-user of the Access Seeker Mobile Services); and</p> <p>(b) any in-bound international roaming customers.</p>	
Clause 10.1	<p>The access seeker may resell, re-supply or wholesale the access seeker mobile services to, and only to, any third party approved by Vodafone (in its absolute and sole discretion).</p>	<ul style="list-style-type: none"> <li>• This provides Vodafone with inappropriate discretion over the access seeker’s commercial interests and should be removed.</li> <li>• Vodafone’s right to refuse resale, re-supply or wholesale should be limited to ensuring integrity of its network, on the basis of security and interoperability, for example.</li> </ul>
Clauses 11.1, 11.2	<p>All roaming traffic originating or terminating on the Vodafone network will be routed to a Handover Point, regardless of the called party’s network (the <b>Handover Principle</b>).</p> <p>Handover Point - the access seeker will establish and maintain Handover Points for handing over and receiving roaming traffic to and from the VF network in the premises specified by VF in Auckland, Wellington and Chch (which will be the same premises as VF has its interconnection handover points). Handover Points for data sessions, separate from Handover Points used for other types of roaming traffic will be established and maintained by the access seeker in these premises in Auckland, and, upon six months prior written notice by VF, in Wellington and Chch.</p>	<ul style="list-style-type: none"> <li>• TelstraClear considers that the handover point should be agreed between the parties rather than specified in the undertaking, and the parties should be required to have regard to good network design principles and practices.</li> </ul>
Other provisions		<ul style="list-style-type: none"> <li>• TelstraClear agrees with the use of the co-location description of service as stated in the Telecommunications Act 2001.</li> </ul>

Vodafone Undertaking		TelstraClear comment
<b>Schedule 5 Pricing Co-location Services</b>		
Clause 1	<p><b>Option One:</b></p> <p>An Access Seeker can pay half of the replacement capital cost of the site (excluding the costs of radio equipment, which each person pays for separately), and split the shared operating costs of the site evenly. Each party pays its own costs for power (the only non-shared operating cost).</p>	<ul style="list-style-type: none"> <li>It is possible that more than two parties will co-locate on a site, yet Option One assumes the access seeker will pay half of the replacement capital costs. The provision should therefore be redrafted so that the access seeker pays an equal share of the replacement capital cost, and would be reimbursed should further parties co-locate on the site and contribute towards capital costs.</li> </ul>
Clause 1	<p><b>Option Two:</b></p> <p>An Access Seeker can make no capital contribution, but instead pay an operating fee equivalent to a 13% yield on half of all the capital costs each year. Otherwise this method is the same as the first.</p>	<ul style="list-style-type: none"> <li>Option Two does not make provision for more than two parties co-locating on the site. Provision needs to be made for splitting the operating fee where there are already two or more parties locating on the site, and these parties have made capital contributions.</li> </ul>
<b>Schedule 6 Terms and Conditions Vodafone Co-location Services</b>		
		<ul style="list-style-type: none"> <li>TelstraClear agrees with the terms, conditions and processes of the Vodafone Co-location Services being those set out the co-location code as approved by the Commission in Decision 593.</li> <li>Should the approved co-location code be amended under sections 13 and 14 of Schedule 2 of the Act during the period of the undertaking, the terms and conditions should pass through to the obligations under the undertaking.</li> </ul>

