

**MTAS Conference
2nd and 3rd September
Agenda Item 10**

UNDERTAKINGS PROCESS

There is a limit to when the undertakings process should stop

1. All involved will be well-aware of the issues with the FTM process, when there was lack of clarity as to whom (Commission and/or Minister) and when (and how often) undertakings could be offered as part of the regulatory process, including as an alternative to regulation.
2. Soon after Telecom and Vodafone made a commercial offer to the Minister (following the Commission recommendation to regulate FTM termination rates), Cabinet released the *Regulatory Impact Statement of the Telecommunications Act Implementation Review* on 8 August 2005. That impact statement recommended the present formal undertakings regime, recognising that:

“Access providers can offer an informal undertaking to the Commission at the final stage of an investigation which can significantly delay completion of the investigation, and the subsequent report to the Minister, to the access provider’s advantage.”¹

3. The idea of undertakings is a “noble intent” if all parties act in good faith.
4. Undertakings may also be consistent with the principle that the regulatory regime should result in *commercially agreed cost-based prices*. But given the benefits to incumbents from delay and the fact that the worst case scenario of regulation is cost-based pricing, incumbents have no real incentives to offer credible undertakings.
5. It is for that reason that the Fletcher Report (Ministerial Inquiry) *recommended against an undertakings regime*.
6. The report recognised the flawed nature of the undertakings process, commenting:
”
 - *there would be potential for **gaming on content and timing** by those providers drafting undertakings, whereas the Commissioner is employed to act in the public interest;*
 - ***negotiations of undertakings could be lengthy and some market entry opportunities could be foreclosed in the meantime;***

¹ Office of the Minister of Communications, Implementation Review of the Telecommunications Act 2001, 8 August 2005, p 4.

- ***the party offering the undertaking would largely control the process, and the final outcome (if any) would almost certainly involve considerable compromise on the part of the Commissioner, with a risk that the interests of end users could be adversely affected;***
- *there would be potential for service providers to point to any approved undertaking as the definitive (one-and-only) agreement to apply for all access seekers;*
- *there would be an **additional complexity with undertakings as to how and by whom they would be enforced** and whether the Commissioner could make a determination on something that he/she had not been responsible for developing; and*
- *there would **be potential for significant delay if any undertakings proved inadequate and there was a need to then commence the specification/designation process.***¹² [emphasis added]

7. All these points are well-made and do not need re-stating.
8. But it is important to focus on the very last point, namely that if undertakings “fail” and the Commission has recommended undertakings as an *alternative* to regulation, that could lead to the need for a fresh investigation.
9. The incumbents are still asking for further opportunities to amend undertakings, despite the Commission having indicated in February this year that the parties’ final opportunity to submit revised undertakings would be in mid April 2009.³ The Commission have already given the incumbents major indulgences by granting extensions and further opportunities to submit revised undertakings.
10. Further, clause 15(1)(b) of Schedule 3A of the Act provides that an undertaking application “*must be made not later than 40 working days after the date on which the Commission commences a Schedule 3 investigation*”⁴ and clause 15(2) states that the Commission “*must not consider a late application*”.⁵ We are now over 180 working days since the commencement of the MTAS investigation.
11. This suggests that contrary to Vodafone and Telecom’s arguments, the Act does not intend the parties to see the Commission’s “final views” and take them into account for the purpose of submitting an undertaking.
12. While clause 16(3) does give the access provider “*a reasonable opportunity to amend in light of any submissions received by the Commission*”⁶, it cannot have been the purpose of the undertakings regime to allow the incumbents to

²Ministerial Inquiry into Telecommunications Final Report, 27 September 2000, p 58.

³ Commerce Commission, letter to interested parties *Investigation into Mobile Termination Access Services – Revised timetable*, 24 February 2009 ; and the Commission’s Indicative timelines as at 24 February 2009.

⁴ Telecommunications Act 2001, Schedule 3A, cl 15(1)(b)

⁵ Telecommunications Act 2001, Schedule 3A, cl 15(2).

⁶ Telecommunications Act 2001, Schedule 3A, cl 16 (3).

put a marker down within 40 working days, and then demand repeated opportunities to amend its undertaking so that it does not put forward anything closely resembling its best offer until just before the Commission's Final Report.

13. There is no link in the Act between undertakings and the CBA (in fact there is no mention of a CBA in the Act, nor is it a specific requirement as 2degrees submitted in its cross-submissions).
14. It is against that background that the Commission exercises its judgement, but that also there should be a "**drop dead date**", after which there should be no more undertakings.
15. The Cabinet paper recommending the undertakings regime (Implementation Review of the Telecommunications Act 2001) suggested that:

*"Amend the Act to **empower** the Commission during a Schedule 3 investigation and subsequently to administer an undertakings regime that meets the following general requirements*

*12.3 at the **Commission's discretion, to publicly announce a date after which it is legally bound not to consider any undertaking made as a counterfactual or any other influencing factor, in the investigation process;***"⁷ [emphasis added]

16. So Cabinet clearly envisaged that there would be a point where undertakings should not be allowed to delay the decision on whether or not to regulate. That point has passed.

Any undertakings should be recommended in conjunction with regulation, not as alternatives

17. While clause 2 (purpose of clauses 3 to 16) of Schedule 3A (Undertakings) of the Act describes undertakings as an alternative to regulation, it is submitted that if the Commission was minded to consider undertakings (and we say it should not be so minded), undertakings should only occur within the context of regulation (designation or specification) of MTAS.
18. As noted above, the Cabinet paper fully contemplated the harm of failed undertakings and the need to "re-start" the process (and consequent harm and economic inefficiency).
19. More importantly, this scenario is explicitly provided for in clause 3(2) (Commission may accept undertakings) of Schedule 3A, ie it *provides for regulation and acceptance of undertakings*.

⁷ Office of the Minister of Communications, Implementation Review of the Telecommunications Act 2001, 8 August 2005, p 18.

20. Clause 3(2) provides:

"If the Commission accepts an undertaking, a final report may include—

(a) a recommendation by the Commission that the Minister should accept the undertaking; and

(b) any of the following recommendations by the Commission:

*(i) **that the proposed regulatory change should be made:***

(ii) that the proposed regulatory change should not be made:

(iii) that the Minister's decision on the proposed regulatory change should be deferred." [emphasis added]

21. That wording is quite clear on its face and is not inconsistent with clause 2.

MERW