9 September 2005

Chairman
Senate ECITA Legislation Committee
Parliament House
CANBERRA
ACT 2600

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Dear Chairman

VODAFONE'S CONCERNS WITH THE PROCESS AND SUBSTANCE OF THE T3 "COMPETITION REFORMS"

Vodafone welcomes the opportunity to provide a submission to Senate Environment, Communications, Information Technology and the Arts Legislation Committee's Inquiry into the Government's "T3" legislative package (the "Package"). Vodafone also made a number of verbal submissions at the Committee meeting on 9 September 2005.

Vodafone has significant concerns with the consultative process that has occurred with respect to the development of the legislative Package. Despite the fact that the Package would make substantial changes to the telecommunications regulatory regime, the Package has not been the subject of any significant public or industry consultation. Vodafone has only been afforded little over 24 hours to form its views in relation to a legislative Package that will have substantial implications for Vodafone's business, the Australian economy and the Australian community.

Vodafone is also concerned with important elements of the Government's legislative Package. Vodafone's comments in this regard are limited to the Telecommunications Legislation Amendment (Competition and Consumer Issues) Bill 2005 ("the Bill"). This Bill contains significant amendments to the access regime outlined in Part XIC of the *Trade Practices Act* 1974 ("TPA") which, in Vodafone's view, are inconsistent with the "underlying philosophy" of Part XIC of the TPA: to encourage commercial negotiation and voluntary undertakings. Such a fundamental change in regulatory approach cannot be made without due consideration.

While Vodafone understands that there may be a need for expedition in relation to some aspects of the Package in order to "clear the way" for T3 and increase regulatory certainty, Vodafone believes that many provisions of the Bill are not pre-conditions for T3 and are far more likely to create uncertainty rather than reduce it. More specifically, there is uncertainty as to whether the amendments contained in the Bill would affect access disputes and undertakings which have already commenced. Vodafone believes that the new legislative provisions in this regard should only apply prospectively.

Furthermore, the Bill would remove necessary checks and balances on the exercise of wide-ranging regulatory powers. The haste with which such significant reforms may be passed is likely to result in poorly considered and poorly drafted legislation that may result in greater uncertainty, and moreover inefficient and costly regulation. Vodafone outlines its specific concerns below.

Process concerns

Although the Department of Communications, Information Technology and the Arts (DCITA) conducted some consultation on the T3 regulatory reform earlier this year, that consultation was merely a preliminary consultation outlining some very broad options. The options canvassed in that consultation ranged, for example, from the complete abolition of the access undertaking regime, to "any other amendments to Part XIC necessary or desirable in order to make its operation more effective". No draft or final conclusions were published, and no clear indication of the nature, depth and breadth of likely reforms was provided.

Vodafone therefore first became aware of the specific content and drafting of such significant legislation late yesterday. Needless to say, Vodafone has not had sufficient time to analyse the Package and seek the necessary legal and regulatory advice on its implications. Regardless of the content of the Package, the evident lack of consultation may well produce uncertain and counter-productive results.

Vodafone therefore proposes that the Committee recommend:

1. that those provisions of the Bill which are time critical to the T3 process be specifically identified so that they may be fast-tracked while ensuring that the other aspects of the Bill are subject to a consultation process appropriate to the importance of the proposed changes contained in the Bill and the industry it would affect; and

2. that transitional provisions be inserted to ensure that undertakings and arbitrations currently on foot are not subject to the amendments contained in the Bill.

Substantive concerns with the legislative Package

In the time available, Vodafone has been able to identify the following substantive concerns with the Bill.

1. Procedural Rules – Schedule 7

In our view Schedule 7 would effectively provide the Australian Competition and Consumer Commission ("the Commission") with a discretion to determine those aspects of procedure not specifically governed by Part XIC, and also to make substantive policy decisions which lie at the heart of Part XIC (particularly whether to defer access disputes while considering undertakings).

Vodafone has a threshold concern with granting the Commission such wide-ranging powers to determine procedures and regulatory decisions without constraint or the opportunity for independent review. Vodafone believes that the Commission must be required to, in making Procedural Rules, take into account the policy objectives including the underlying philosophy of Part XIC of the TPA off encouraging commercial negotiation and voluntary undertakings.

Vodafone does not believe that Schedule 7 could be considered a pre-condition to T3 or so time critical as to justify such little consideration. The provisions are unlikely to foster certainty in the short to medium term because, following passage of the legislation, the Commission will have 6 months to set out a plan for developing those rules, then will require a significant period of time to develop the specific rules. They are therefore unlikely to be settled before T3 and will remain a source of uncertainty for prospective T3 shareholders.

Vodafone is similarly concerned by a number of statements contained in the EM and RIS. For example:

- the RIS refers at page 25 to the *"...six month timeframe for resolution of access disputes and consideration of undertakings introduced in 2002"*. While there is such a timeframe set out in section 152BU(5) of the TPA in relation to undertakings, there is no such timeframe or expectation in relation to access disputes.

- The RIS states on the same page that *"...uncertainty... leads to delay in regulatory decisions and hence delayed access to services."* However, the Standard Access Obligations set out in section 152AR of the TPA contain an obligation to supply declared services. For that reason, access disputes do not ensure that access seekers have timely access to declared services. Rather, they settle the terms of that access, especially price. Part XIC already provides for both interim determinations, and a power to backdate terms of access. These provisions ensure that there is unlikely to be a significant impact on access seekers if the complexity of the issues requires a significant period of time before a final determination is made.

On our understanding of the Part XIC provisions, the references contained in the RIS to "delay" and "gaming" are confusing. Since the desire to eliminate such "gaming" appears to form the basis for Schedule 7, the utility of these provisions as a whole is entirely unclear.

The RIS appears not to countenance the possibility that well-informed and rational regulatory decision-making may be characterised by a degree of complexity and importance to require a significant period of time for consideration. Instead, the RIS acknowledges that it is not possible to distinguish "gaming" from legitimate exercise of rational checks and balances on regulatory decision-making. However, the Bill then essentially proposes to remove some important checks and balances.

Vodafone has specific concerns with the following aspects of Schedule 7:

a. **Item 9** (and other similar provisions in relation to processes other than access undertakings) undermines the process for considering access undertakings by the Commission. It may also potentially limit the ability of the Australian Competition Tribunal (ACT) to act as an effective review mechanism of Commission decisions to accept or reject access undertakings. These provisions would allow the Commission to request information within a specific timeframe, and then reject the Undertaking if it were not provided within that timeframe. Once the existing provisions of Part XIC are considered, it is clear that the new provisions would not provide additional incentives for access providers to provide such information, but would remove the incentives for rational decision-making which the prospect of ACT review places on the Commission.

   The only existing restriction on the Commission's power to issue information requests is the requirement in section 152BT(2) for information requests to be "about the undertaking". The Commission currently takes the view that the existing provisions:

- already empower the Commission to not only request information which the access provider already holds, but to require the access provider to prepare new information regardless of the reasonableness or time and cost implications of doing so;

- empower the Commission, if an access provider does not provide the information requested, to refuse to consider the undertaking under section 152BT(3) or alternatively to continue to consider the undertaking, but place little or no weight on any evidence to which the information request relates; and

- empower the Commission to take such matters into account in exercising its ongoing discretion as to whether to defer arbitrations while it considers undertakings. That is, the Commission could decide to re-activate an arbitration if there was an unreasonable delay in providing information requested.

As such, Item 9 is therefore unnecessary. The existing provisions of Part XIC ensure that access providers have incentives to provide information, and that the Commission has appropriate remedies if an access provider does not provide information which is required for the Commission to assess the undertaking.

Item 9 may allow the Commission to avoid independent review of a decision to reject an undertaking by the ACT. Section 152CE allows ACT review only for decisions made by the Commission under specific sections of the TPA. If the Commission is to be granted the powers set out in item 9, ACT review must be available to ensure that the Commission does not use this power to artificially avoid independent scrutiny of such significant regulatory decisions.

b. **Item 23** provides that the Commission may make Procedural Rules that allow it to determine at its discretion whether to prioritise access disputes or undertakings. This may authorise the Commission to remove the presumption contained in section 152CLA(4) that access undertakings should take priority over disputes. In Vodafone's view, this undermines the underlying philosophy of Part XIC to give preference to negotiation and voluntary undertakings. It is not appropriate to grant the regulator such a wide discretion to determine fundamental regulatory policy.

2. Any to any connectivity – Schedule 8

The uncertainties and potential impact of the provisions of Schedule 8 should not be underestimated. Schedule 8 in effect introduces a new concept to the access regime through which services could be "designated" without reference to the established criteria, processes, and checks and balances set out in Part XIC in relation to declared services.

The only criteria to be considered for a service to be designated is "any to any connectivity". However, because interconnection services are the mechanism by which any to any connectivity is achieved, it is difficult to conceive of a circumstance in which a refusal to acquire interconnection services (however justified) would not impact upon any to any connectivity.

Once a service is designated, this would not only force a carrier to acquire those services from a carrier service provider, and empower the Commission to arbitrate disputes regarding terms of access, but empowers the Commission to determine the rules and criteria to be applied to that arbitration. There is no requirement to exercise these powers consistent with the objects or existing arbitration provisions of Part XIC, nor in a manner which is consistent with the LTIE. This would create a second tier of access regulation almost wholly at the Commission's discretion.

Vodafone's understanding is that Schedule 8 is intended to address a specific issue. However, it has been drafted in extremely broad terms allowing its application to a wide variety of other circumstances. Vodafone considers that this approach is misguided. Any specific concerns should be addressed specifically rather than by subjecting an industry to substantial regulatory uncertainty.

Vodafone will continue to consider the Package and the Bill and looks forward to a substantive opportunity to work with the Committee and Government to ensure that the T3 regulatory reforms are well-informed, appropriate and productive.

3. Procedural fairness – Schedule 12

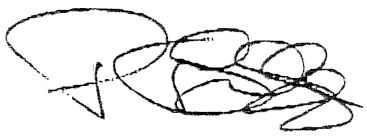
The Commission is already empowered by section 152CR(3) to choose whether or not to take into account any relevant matter in making an interim determination. Schedule 12 would additionally remove the Commission's obligation to observe procedural fairness in making an interim determination. As a matter of principle, Vodafone considers that the right to procedural fairness

should not be removed lightly since it provides a fundamental protection against poor administrative decision-making.

Vodafone does not consider that this can be justified on the basis that procedural fairness would only be waived in relation to interim determinations which implement pre-existing pricing principles. It is the Commission's view that it is not constrained in determining pricing principle by reference to any statutory criteria or requirements to ensure consistency with the spirit or letter of other relevant provisions of Part XIC. There is no specific statutory constraint which prevents the Commission from determining pricing principles which are illogical, impossible to apply, inconsistent with the LTIE, or which give the Commission an unrestrained discretion to determine interim terms of access. Procedural fairness is therefore an important component of administrative law which in this case acts as one of few checks on the Commission's discretion to determine interim terms of access.

Vodafone urges the Committee to take account of the concerns expressed above and looks forward to an opportunity to engage in further consultation on these important matters.

Yours sincerely.



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