

Committee Secretary  
Senate Standing Committee on Environment, Communications and the Arts  
PO Box 6100  
Parliament House  
Canberra ACT 2600

6 October 2009

Dear Sir/Madam

Vodafone Hutchison Australia Pty Limited welcomes the opportunity to comment on the Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill (the **Bill**).

We previously commented on separation arrangements for Telstra and on streamlining the access regime in response to the Department of Broadband, Communications and the Digital Economy's (the **Department**) *National Broadband Network: Regulatory Reform for 21st Century Broadband* discussion paper. At the time we said:

- vertical and horizontal separation of Telstra was necessary;
- if structural separation of Telstra was not pursued, functional separation was the only alternative for ensuring non-discriminatory access to services;
- the negotiate-arbitrate model should be abolished and that its component processes, such as access undertakings, should also be abolished; and
- a streamlined regulatory process should replace the negotiate-arbitrate model.

We stand behind these comment and we are pleased to find many of them addressed by the Bill. We welcome the move to reshape telecommunications regulation and to remove the roadblocks that have previously restricted competition.

We are concerned, however, that the move to strengthen and streamline the access regime provides too much discretion to the Australian Competition and Consumer Commission (the **Commission**), with too little accountability. The Commission's decisions should be subject to independent review. We view that the Bill should include provisions for a merits review of either the Commission's declaration or its determination (or both).

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## **Promoting accountability and transparency**

The Commission must be accountable for the application of the access regime legislation. However, the proposed reforms mean that the Commission is solely responsible for both building the case for an access determination and assessing its merits. Unlike the court system, the Commission is subject to a potential conflict of interest through its role in forming evidence and making a decision based on such evidence. While we acknowledge that the Commission typically seeks comments from interested parties prior to making its decisions, we are concerned that the Commission may have an inadvertent bias (or the perception of bias) toward evidence it gathers or forms itself.

We do not view that the Bill provides adequate safeguards to address the Commission's potential conflict of interest. Specifically, we do not consider that the judicial review process is sufficient for promoting accountability in the Commission's decision. The threshold for identifying errors in law is too high when it might be the evidence itself that is in dispute and when there is a potential conflict of interest in how that evidence is considered.

The threshold for review should permit the merits of the initial decision to be reconsidered. The review should be undertaken by a body, in our view the Australian Competition Tribunal, that is independent of the evidence-gathering process. We consider that an independent merits review is necessary to ensure accountability and consistency in the Commission's decisions.

Our concern about the lack of merits review is founded on our experience with the Commission's processes. For instance, in *Vodafone Australia Limited v the Australian Competition and Consumer Commission* [2005], the Australian Competition Tribunal made several criticisms of the Commission's approach to assessing Vodafone Australia's access undertaking. In our view, ensuring that there is scope for such appraisals will help to maintain the integrity and transparency of the Commission's decision-making process. Indeed, we contend the existence of an option to seek a merits review will, in many instances, be sufficient to ensure the accountability of the Commission's decisions.

We further note that including provisions for a merits review is consistent with international best-practice. For example, article 4 of the European Commission's Communications Framework Directive allows for an appeal on merits to a 'body that is independent of the parties involved'.

We recommend that the Bill be amended to include provisions for an independent merits review.

## **Providing certainty and removing delays**

We recognise that introducing a merits review may require additional amendments to promote the efficient operation of the access regime. We share the Government's concern about measures that could delay the regulatory process or that could increase regulatory uncertainty. However, in our view the benefits from a merits review process exceed the costs associated with regulatory uncertainty or delays.

We consider that additional measures are available to reduce delays and minimise regulatory uncertainty, including:

- preventing the admission of new evidence to a merits review;
- providing the Tribunal with the power to amend the Commission's declaration or access determination either in full or in part;
- not permitting any stay on a declaration or an access determination. Specifically, the Commission's declaration or access determination should be implemented from the proposed date of effect. If there is an appeal to the Tribunal and it decides to revoke the declaration or amend the access determination then its decision should not be applied retrospectively; and
- imposing time limits on how long the Tribunal can take to undertake a merits review.

These measures ensure that the objective to streamline the access regime can be achieved without sacrificing the accountability and transparency provided by an independent merits review.

The effort to transform and improve the telecommunications access regime is necessary and long overdue. For the most part, the reforms outlined in the Bill are well-considered and will help to improve competition. That said, an amendment instating a merits review is necessary to ensure that the few benefits of the previous access undertaking process are not lost in the effort to overcome its many shortcomings.

Yours faithfully



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