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Ms Alison Russell
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Australian Competition and Consumer Commission
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Dear Ms Russell,

Vodafone submission to the Commission regarding *Draft Part XIC Procedural Rules 2008*

Vodafone welcomes the opportunity to provide its views to the Australian Competition and Consumer Commission (**Commission**) on the draft *Part XIC Procedural Rules 2008* (**Rules**). Vodafone supports the Commission's objective that the Rules should promote timeliness and certainty in decision-making by the Commission under Part XIC of the *Trade Practices Act 1974* (**the Act**).

Vodafone's comments are informed by our experiences of Part XIC of the Act, particularly the experience of submitting an access undertaking associated with the mobile terminating access service. Through the associated processes of the undertaking process, Vodafone believes that it is vital that guidance, rules and regulatory and legislative frameworks are drafted with a keen eye on the practical implementation on workability of such – for the benefits of all parties to such a process.

Further, poor drafting – particularly that which serves to grant increased discretion and/or increases ambiguity – tends to generate unnecessary delays, increasingly builds dissatisfaction with the process and also increases uncertainty for the parties involved. This increasing uncertainty is vital for the parties in material courses of actions such as those encompassed by Part XIC.

To this end, Vodafone is concerned that as presently drafted, some of the Rules actually create uncertainty regarding the way in which the Commission will deal with various matters arising under Part XIC. This submission sets out Vodafone's suggestions as to how these issues could be addressed in the Rules.

Part 2 Documents

Rule 10 Expert Reports

Vodafone appreciates the need to provide a degree of guidance in respect of the provision of expert reports to the Commission as part of various regulatory processes under Part XIC, and considers that the proposed Rule 10 reflects the trend in the Federal and State Supreme Courts requiring expert reports to clearly set out the foundations of the report. However, Vodafone is concerned that, to a certain extent, Rule 10 goes beyond what is reasonably appropriate in respect of an administrative process.

In particular, Vodafone is concerned that:

- the rules do not allow the Commission the discretion to accept expert reports that do not conform with all of the requirements specified in Rule 10; and
- Sub rule 10(7) is too vague and impractical to be applied in respect pf Part XIC processes.

Discretion to accept non-conforming expert reports

As noted in the draft explanatory statement accompanying the Rules, Rule 10 has been drafted to reflect the requirements set out in the Federal Court Practice Direction: *Guidelines for Expert Witnesses in Proceedings in the Federal Court of Australia* (**Practice Direction**). However, the Practice Direction merely provides guidance in respect of expert evidence and does not operate to prevent the court from accepting and considering expert evidence that does not comply. We note that the Practice Direction of 5 May 2008 expressly states as follows:

> *"The guidelines are, as their title indicates, no more than guidelines. Attempts to apply them literally in every case may prove unhelpful. In some areas of specialised knowledge and in some circumstances (e.g. some aspects of economic evidence in competition law cases) their literal interpretation may prove unworkable."*

In contrast to the advisory nature of the Practice Direction, the Rules seek to apply each of the matters specified as a fixed and essential requirement, to be applied in every instance. Rule 12 specifically states that the Commission will not have regard to any document that does not comply with the requirements. It is incongruous for the rules which apply to an administrative process to set a higher evidentiary threshold that would be applied in court proceedings.

Vodafone is therefore concerned that the approach taken to expert reports in the Rules is unduly restrictive and may hamper the ability of the Commission to be appropriately informed. There are likely to be many instances where parties to a Part XIC process may wish to put before the Commission evidence that does not comply with all of the requirements of Rule 10. In particular, parties may wish to provide the Commission with an array of materials in which opinions are expressed including:

- reports specifically commissioned by the party seeking to rely upon the report, from an external expert in the context of the Part XIC process;
- reports commissioned in another context, by the party seeking to rely upon the report or another person, that are relevant to the Part XIC process; and

- general opinion based material such as academic articles and international consideration of relevant issues.

In Vodafone's case, as an international organisation involved in similar regulatory processes in a variety of jurisdictions, the lack of discretion to consider expert reports that do not comply with the literal requirements of Rule 10 is especially concerning – in particular to the extent that the Rules would apply to exclude expert reports that were prepared prior to the enactment of the Rules, or report that were prepared in an international context, that are relevant to a Part XIC process in Australia.

Therefore, Vodafone submits that either Rule 10 should be substantially amended or, as is the case with the Practice Direction, should be expressed to be advisory only. While the Commission should have discretion not to accept a report that does not comply with the Rule 10, the Commission should not be required to do so as a matter of course, and the Commission should only exercise the discretion where the non-compliance casts considerable doubt on the veracity of the evidence.

Rule 10(7)

In addition to the general comments above regarding the need for flexibility in the application of Rule 10, Vodafone is particularly concerned by the practicality of applying Rule 10(7) to Part XIC processes. Rule 10(7) states:

> *If an expert changes a material opinion in an expert report provided to the Commission, the change must be communicated by the person who provided the report to the Commission as soon as practicable.*

Such a requirement makes sense in the context of court proceedings, which are generally singular, finite proceedings for which evidence has been specifically prepared, and in which the relevant expert will personally testify. However, Vodafone is concerned that sub rule 10(7) will be too difficult to apply in the context of a Part XIC processes, which by their nature tend to be more iterative and inter-related. For example, in the context of Part XIC processes a report may be prepared in relation to a particular concept (such as WACC asymmetry) and then utilised in a number of contexts, from pricing principles, undertakings and arbitrations. However, for reports of this nature, it may be particularly difficult to determine whether an expert had "changed an opinion" (for example if the expert expressed doubts about the applicability of WACC asymmetry in a different report in another context internationally).

In addition, in the context of Part XIC, the following aspects of the application of sub rule 10(7) are unclear:

- On whom is the obligation imposed, the expert or the party who has commissioned or relied upon the expert's report or both?
- Is there a positive duty to review other reports and opinions expressed by the expert to determine whether there are any inconsistencies?
- At what point expressing a different opinion in a different context becomes a material change of opinion?

- For what period of time does the obligation extend? For example, is the obligation extinguished once the Commission has made the relevant decision at the end of the Part XIC process for which the expert's report was prepared or lodged?

- What obligations, if any, does the expert or party relying upon the report (including the Commission) have if the Commission or another party refers to the expert report in any subsequent Part XIC process (especially given draft Rule 29)?

We therefore recommend that sub rule 10(7) be deleted as it is too uncertain in its application, unduly onerous and impractical. Given that reports provided to the Commission in the context of Part XIC processes are subject to critical review by both the Commission and other parties to the relevant process, there is already a clear incentive to ensure that experts are willing to stand by the opinions expressed in any relevant report.

However, to the extent that the Commission wishes to retain an obligation in the Rules to be notified of changes of expert opinion, Vodafone considers that from a practical perspective the person who bears the obligation should be the person who provided the expert report to the Commission – including the Commission itself where it has retained the expert – and that the obligation should continue only until the determination of the Part XIC process for which it provided the report.

Vodafone suggests that Rule 10(7) be amended as follows:

> *If t<u>he person who provided an expert report to the Commission in a Part XIC process becomes aware during that process that the expert does not hold</u> a material opinion in that expert report, then that change of opinion must be communicated by the person who provided the report to the Commission as soon as practicable.*

Further, the explanatory statement accompanying the Rules should clarify that the Rule only relates to circumstances where the relevant expert no longer stands by the opinions expressed in the relevant report. That it does not impose an ongoing obligation on the person submitting the report to seek out and notify the Commission of circumstances in which the expert has reached different conclusions on the basis of differing circumstances, or has expressed an opinion in a slightly different manner.

<u>Rule 11 Declaration of Accuracy and Completeness</u>

Rule 11(1) states:

> *A document provided to the Commission in a Part XIC process must contain or be accompanied by a declaration that the information contained in the document is accurate and complete and that no matters of significance which are considered to be relevant have been withheld.*

Vodafone understands that the purpose of this rule is to ensure that the Commission is provided with information in Part XIC processes that is accurate *and* is complete in the sense that it would not be rendered inaccurate if additional information were provided.

As the Commission is aware, parties provide a substantial number of documents during the course of a Part XIC process – ranging from informal email correspondence to formal reports, submissions and cost models. It is impractical and unnecessary to require each document to be accompanied

by such a declaration. Further, in order for the declaration to retain its value, the person making the declaration must be in a position to attest to the accuracy and completeness of the document.

This may not be possible for every document provided to the Commission, such as correspondence or documents prepared by third parties that were not retained by the provider, such as an article from a journal, material provided in other jurisdictions for similar purposes, or similar materials of a general nature.

Vodafone recommends that Rule 11(1) be redrafted to confine its scope by limiting Rule 11(1) to the material documents provided to the Commission in a Part XIC process that purport to provide factual information in support of the relevant undertaking or application.

Rule 10(4)(f) requires that an expert report must contain a declaration by the expert that he or she has made all the inquiries which he or she believes to be desirable and appropriate and that no matters of significance which are considered to be relevant have been withheld. Given this, it is appropriate to limit the scope of Rule 11 to factual information rather than opinions. In addition, it is appropriate to limit the obligation to material documents, rather than every piece of correspondence, to ensure that the Rule does not have an unintended effect on the beneficial flow of information between parties and the Commission.

Vodafone also suggests that the rule be re-drafted to better reflect the Commission's objective of ensuring that it can rely upon the accuracy of the information provided to it in Part XIC processes.

For clarity, Vodafone recommends that the Rule be amended to provide "*...no matters of significance which the provider considered to be relevant have been withheld such that the factual content of the document is misleading ".*

Part 3 Variations and Modifications of a Minor Nature

Rules 14 and 15 Modification Notices

Vodafone supports the introduction of Rule 14 allowing the Commission to accept minor or technical amendments to applications for exemption orders, undertakings and undertaking variations. This will deliver greater efficiency to Part XIC processes as minor amendments to such applications will not require the entire process to be re-commenced.

In determining whether a modification is a modification of a minor nature, the Commission will have regard to whether the modification corrects typographical, grammatical, arithmetic, or other similar errors and whether the modification will result in a material change in the effect of the document being modified.

Due to the minor nature of the modifications covered by Rule 14, Vodafone considers that the proposed time limit of 28 days from the date of the application in Rule 15 is unnecessary. Specifically, we believe that in such an event, an application must be made before the Commission makes a decision regarding the relevant application which acts as a natural time limit of such non-material modifications. The time limit is also undesirable from an efficiency perspective as it may result in an application having to be resubmitted and the process restarted for what is by definition a minor non-material modification to the application.

However, from an efficiency perspective, it would be appropriate for Rule 14 or Rule 15 to specify a period of time within which the Commission had to determine whether or not it accepted the

modification – so that if the Commission rejected the modification the applicant could begin the process of re-applying as soon as possible.

Part 4 Confidential Information

Vodafone appreciates the need for more streamlined and uniformed processes for dealing with confidential information in the context of access disputes and undertakings but is concerned that the draft rules may be administratively burdensome and may fail to appropriately balance the need to protect confidential information from inappropriate access and misuses.

Rule 20 Requests for Confidentiality

Rule 20(3) states:

> *After considering the reasons a document provider has given under sub rule (2) in relation to the confidential document, the Commission must:*
>
> *(a) inform the document provider that, in the Commission's opinion, some or all of the information in the document is confidential; and*
>
> *(b) notify the document provider in writing of the Commission's decision under paragraph (a).*

Vodafone is concerned that Rule 20 will place an unnecessary administrative burden on the Commission, and therefore cause delays, by requiring that the Commission "*must*" form a view in respect of every confidentiality claim. In order to reduce the obligation that this Rule imposes on the Commission, we suggest the Commission amend the Rule to provide:

"the Commission may within [X] days:

> *(a) determine whether, in the Commission's opinion, some or all of the information in the document is not confidential; and*
>
> *(b) notify the document provider in writing of the Commission's decision under paragraph (a)."*

Vodafone is also concerned that Rule 20, as presently drafted, does not set out the process governing what is to occur where the Commission forms a view that some or all of the information in the document is not confidential. We believe that this is an important matter for the Rules to address.

Rule 25 Access to Confidential Documents

Rule 25 sets out the process for other persons to obtain access to confidential information provided to the Commission. Under Rule 25, a person requesting a copy of a confidential document (a **requestor**) and the document provider are required to negotiate in good faith to agree the terms on which the confidential document is provided. If they cannot agree, the Commission may determine the terms on which the document provider will provide the requestor with a copy of the confidential information.

Vodafone is concerned that the Rules proceed on the basis of an underlying assumption that every requestor should be given access to a confidential document, the only constraint being that Rule

25(2) states that a requestor who makes a request for confidential information in relation to an access dispute must be a party to the access dispute – and that therefore the threshold for unable to agree may be interpreted and applied by the Commission at an inappropriately low level.

Notably, no constraint is placed on the underlying assumption that a requestor should be given access to a confidential document in relation to other types of Part XIC process, which include declaration inquiries, pricing principles inquiries, and exemption applications. Vodafone recognises that these are processes that involve public inquiry, and that therefore broad access to relevant materials is generally beneficial, for the purposes of accessing confidential documents. However, Vodafone believes it would be appropriate to limit the definition of the requestor to only include persons with a legitimate interest in participating in that process.

Further and most importantly, where the requestor is an organisation, there needs to be an appropriate means of limiting the individuals within the organisation that are permitted to access the material. There are clearly circumstances where disclosure of confidential information to a particular individual would not be appropriate and where potential detriment may arise. For example, if commercial staff were given access to information disclosing their competitors' cost base, customer information or future strategy, this may enable anti-competitive conduct and result in a substantial and unnecessary lessening of competition.

The owner of the confidential information must have the power at all times to impose reasonable limits on the individual advisers and staff that are permitted to access the confidential information. The Rules should differentiate between staff who have a purely legal or regulatory role, and staff who have a strategic and/or commercial role or responsibilities.

In addition, Vodafone submits that Rule 25 should contain additional provisions:

- requiring the Commission to consider the nature of confidential information and exercise appropriate restraint in not providing access to confidential information where the potential detriment would outweigh the benefit to the consultation process;
- giving the document provider an opportunity to notify the Commission of any reason why the requestor should not be provided with access; and
- giving a document provider the right to withdraw confidential documents if it does not agree with the Commission's terms on which the confidential document provider will be provided to the requestor.

The inclusion of such provisions would, for example, be necessary to appropriately address circumstances in which providing access to certain confidential information may result in the document provider breaching other agreements.

Vodafone is also concerned that the time periods specified in Rule 25 are too short. We recommend that in Rule 25(5), the document provider and the requestor should be given five business days (rather than three business days) to reach agreement. Similarly, in Rule 25(7), the document provider should be given three business days (rather than one business day) in which to provide a copy of the confidential document.

While we appreciate the need to address confidentiality in a timely manner, requests for access to confidential material and the terms of appropriate access often need to be considered by a variety of staff within an organisation (including legal, regulatory, technology and commercial areas) in order to appropriately identify the magnitude of the risk, the appropriate terms of a confidentiality agreement and the nature and roles of the individuals within an organisation to which disclosure

would be appropriate. Given the need for cross-organisational and inter-organisational consultation – and possibly also involving external advisers for both organisations to the bilateral arrangements – it may not always be possible to comply with the timeframes proposed in the Rules.

Part 5 Deferrals

Rule 27 Deferral of consideration of an access undertaking etc

Rule 27(1) states:

> *The Commission may defer consideration of:*
>
> *(a) an access undertaking; or*
>
> *(b) an access undertaking variation;*
>
> *by giving a written notice to the person who gave the Commission the undertaking or variation.*

The explanatory memorandum to the *Telecommunications Legislation Amendment (Competition and Consumer Issues) Bill 2005* states:

> *There are concerns that access providers are gaming the access undertaking process by knowingly lodging incomplete or otherwise unacceptable access undertakings in order to delay Commission consideration of access disputes and therefore the possibility of binding Commission decisions on access disputes in favour of access seekers.*
>
> *The proposed amendments ... allow the Commission to exercise its discretion to prioritise undertaking or arbitrations in the Procedural Rules in such a way as to deter access providers from lodging access undertakings in order to delay a decision on an access dispute.*

While Vodafone shares the concerns regarding the gaming of Part XIC processes, we are concerned that draft Rule 27 does not impose any constraints on the Commission's ability to defer consideration of an access undertaking or variation and that this deferral may take place for any amount of time and for any reason. Such a broad discretion is inconsistent with the stated objective of promoting timeliness and certainty in decision-making by the Commission under Part XIC of the Act.

We suggest that the Rules should limit the circumstances in which the Commission may defer consideration of an access undertaking to those identified in the Bill, i.e. where the Commission believes on reasonable grounds that the access provider is knowingly lodging incomplete or otherwise unacceptable access undertakings in order to delay the Commission's consideration of access disputes, and therefore to delay binding Commission decisions on access disputes in favour of access seekers.

Part 6 Use of information

Rule 29 Using Information in Part XIC processes

Rule 29(4) states:

> *The Commission may have regard to the information referred to ... regardless of whether:*
>
> *(a) the person who gave the information, produced the documents, or gave the evidence consents;*
>
> *(b) the person who gave the information, produced the documents, or gave the evidence imposed, or purported to impose, any limitations on the subsequent use of the information, documents, or evidence at the time the information, documents, or evidence were first given or produced to the Commission and to which the Commission did not agree at that time.*

Vodafone appreciates that for some declared services, such as MTAS, the Commission has given consideration to matters relating to access and pricing in numerous contexts, including previous access undertakings and disputes. It is appropriate for the Commission to inform itself of background information and previous history when addressing a new Part XIC process relating to such a service. However, there is a risk that information may be relied upon that is incorrect or out of date. Further, Vodafone believes that the Commission should be required to discharge the same onus as parties to matters under Part XIC to maximise the integrity of the legislative provisions and associated of the Act, and the resultant decisions.

Vodafone recommends that the Commission should be required to notify:

- the person who originally gave the information, produced the documents, or gave the evidence, that the Commission intends to have regard to the information;
- in the case of an access dispute, each party to the dispute; and
- in the case of an undertaking, undertaking of application for an exemption order - the person submitting the application or undertaking.

These persons should then be given the opportunity to make submissions on the Commission's utilisation of the documents, evidence or information. This is particularly important where the Commission is intending to utilise older information under circumstances where the Commission is not under an obligation to release a draft decision for comment before making a final determination.

Part 7 Access disputes

Rule 32 When arbitrations can be joined

Rule 32 allows the Commission to jointly arbitrate two or more access disputes. While Vodafone appreciates that joining disputes will be expedient in some instances, there may be occasions where it would not be appropriate. Vodafone is concerned that there is no specific obligation on the Commission to consult the parties before making the decision to join the arbitrations. Vodafone suggests that the parties should be given the opportunity to make submissions on whether such a joint arbitration would be likely to increase the complexity or cost of the dispute or otherwise adversely or unfairly affect their interest. For example, even if one or more matters are

common to the disputes, one party may not be concerned with the costs of running the dispute, contrary to the approach of another party.

Vodafone appreciates the opportunity to comment on the *Draft Part XIC Procedural Rules 2008*. We look forward to discussing these matters with the Commission to ensure an increasingly workable and practical telecommunications regulatory environment.

Regards

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