14 June 2002

Mr Ken Walliss
Director, Regulatory
Telecommunication Group
Australian Competition and Consumer Commission
GPO Box 520J
MELBOURNE VIC 3001

Dear Mr Walliss,

Regulations of telecommunications access disputes - a draft guide

As a general principle, Vodafone strongly believes that industry specific regulation should be minimised where effective competition exists for telecommunications services. In competitive markets, the proper role of regulation should be to address anti-competitive behaviour through generic competition law. We are confident that in the vast majority of cases commercial access outcomes are achievable through negotiation, driven by the market reality of effective competition. Vodafone Australia has never initiated a dispute with the Commission. We are committed to achieving successful access agreements by commercial negotiation. This is consistent with the approach used globally by the Vodafone Group. We pride ourselves on the ability to successfully negotiate commercial access agreements to provide an increasing range of innovative products and services to our customers. It is in Vodafone's best interests to achieve a win/win situation through successful commercial negotiation. We understand that we are not alone in securing commercial outcomes – most access negotiations undertaken in the market are commercial contracts and do not require regulatory intervention.

Given this, our main issue with the draft guide concerns the emphasis that is placed on the arbitration process. From the emphasis placed on regulatory intervention in the draft guide, it appears that such intervention is inevitable. This decreases the incentive for both access seekers and providers to enter negotiations on truly commercial terms. This is because the probability that the Commission will intervene is heightened – thereby thwarting commercial outcomes though the expectation of regulatory intervention.

Accordingly, Vodafone believes that the emphasis placed on this in the draft guide will subvert the objective of the legislative amendments, which is to streamline and speed-up arbitration processes. Our view is that the document in its current form may give industry players incentives to pursue arbitrated outcomes in preference to commercial outcomes.

To address this, we recommend that the Commission produce an overview document to the draft guide which 'sets the scene' and emphasises the primacy of commercial negotiation and the law of contract. We consider that it is critical that the Commission emphasises that arbitration will only be applied in rare cases – where it is clear that market failures exist, and that without regulatory intervention the long term interest of end-users would be adversely impacted.

Vodafone suggests that an overview document could include:

- Commercially negotiated outcomes are best practice;
- Commercially negotiated outcomes provide the best outcomes for end-users;
- Case management must also encourage commercial negotiation before considering other dispute resolution options;
- All avenues of commercial resolution must be exhausted prior to Commission intervention; and
- Commission intervention will be assessed on a case-by-case basis.

There are also a number of specific areas where changes are required to align the intent of the draft guide with the objectives of the legislation. We consider that these changes will enhance the Commission's approach to administering the arbitration provisions of Part XIC of the *Trade Practices Act 1974.* As stated previously, Commission intervention should only occur where absolutely necessary; where all other avenues of dispute resolution have been exhausted; and regulatory intervention addresses market failure and is in the long term interests of end-users.

'UNABLE TO AGREE'

Vodafone is concerned that the Commission has set too low a threshold for Commission intervention into commercial negotiations. In particular we note that the Commission appears to indicate that arbitrated outcomes will be the 'norm' rather than the 'exception' in the telecommunications industry. This is portrayed in the Commission's assertion that it: *does not consider that 'unable to agree' threshold should be interpreted as a particularly high threshold,*[1] and the illustration that the existence of a contract does not necessarily preclude notifying a dispute by a party to the contract.

Unfortunately this statement merely serves to signal to parties a view that the Commission is likely to favour regulatory intervention over commercial outcomes. This is likely to destabilise the commercial negotiation process, as each party will come to the negotiations with a view that the final outcome will be determined by the Commission.

To address this, Vodafone suggests greater emphasis should be given to a statement made further into the draft guide that commercial negotiations and arrangements be encouraged from the

[1] Australian Competition and Consumer Commission, *Resolution of Telecommunications Access Disputes – a Draft Guide*, p6

outset, and that the Commission will be reluctant to intervene in existing commercial arrangements. This will enhance the conviction of both parties to negotiate a commercial agreement from the outset, and also satisfy an important objective of the legislative regime, as noted by the Commission and cited above.

CONFIDENTIALITY

Vodafone supports public disclosure of information in some limited circumstances, provided that legitimate commercial interests are not impacted and there are valid purposes to which the information will be put, including disclosure that supports the resolution of disputes involving regulated services. However, a balance needs to be struck between the degree of public disclosure that aids negotiation and too much disclosure that harms the legitimate negotiating powers of one of the parties to the negotiation.

For example, we consider much of the information provided under record-keeping rules to be commercially sensitive and should not be disclosed unless the benefits of doing so can be clearly shown to outweigh the commercial cost to Vodafone. More broadly, release of such information would have an unnecessarily detrimental impact on our commercial negotiating position in the competitive market. Such concerns were recognised by the Productivity Commission in its recent Inquiry Report on Telecommunications Competition Regulation. The Commission noted, in relation to potential public disclosure of record-keeping rule information that, *there is a need to protect commercially sensitive material relating to costs and other data such as returns and profitability provided to the ACCC.*[2]

The Commission states in the draft guide that it considers that it should disclose all relevant matters to parties involved in the arbitration of any access dispute. The Commission then adds that its power to withhold confidential information from a party to a dispute is one that is likely to be used sparingly – and only after balancing the extent to which non-disclosure may harm the interests of the party not receiving the information.

Vodafone is concerned that the implied position is that the Commission will share all material, including confidential information, to all parties to a dispute, irrespective of – and indeed prior to – analysis of the dispute on a case-by-case basis. There are numerous examples of everyday transactions where one party has more or less information about prices than another, which does not require regulatory intervention. The ACCC should only use its powers regarding disclosure to target specific instances of market failure and where intervention can be shown to improve the outcome for the long term interests of end users – rather than merely the commercial gain of one of the parties to the dispute. Even in such circumstances affected parties should have the opportunity to provide arguments for or against disclosure of the information.

[2] Productivity Commission (2001), *Telecommunications Competition Regulation*, Inquiry Report, p214.

We suggest that the Commission's position – as outlined at 6.3.1 of the draft guide[3] – be stated at the outset. This approach will augment the Commission's position regarding confidentiality, and support process streamlining by accenting the Commission's willingness to make assessments on a case-by-case basis, and that the requirements of procedural fairness are not absolute and can be modified by the need for confidentiality.

Vodafone recognises the Commission's need for information in order to fulfil its functions. However, the extent of public disclosure required by the ACCC should be linked to the competitiveness of the market. For example the mobile communications market is currently one of the most competitive markets in Australia, and consequently this should reduce the necessary disclosure of confidential information. Public disclosure should be targeted to specific examples of market failure, while enabling competitors in the mobile market to undertake legitimate commercial negotiation.

BACKDATING

Vodafone considers that backpayments should remain unspecified and treated on a case by case basis. Vodafone is disappointed that the Commission states that: *in general the Commission will be inclined to backdate determinations*[4] which is followed by the Commission's statement *each case must be considered on its merits*[5].

Vodafone believes strongly that the case for backdating will depend on the nature of the arbitration. This principle must apply to any backdating of the final determination and subsequent backdating by either party. We recommend that the Commission preface the backdating provisions in the draft guide with a statement that each case will be assessed on its merits.

Vodafone acknowledges that different arbitrations will require different resolutions. One important factor influencing the backdating or otherwise of a final determination is the ability to pass on higher or lower access prices through to retail prices. For example, in a case where the arbitrator makes an interim determination of a low access price – commercial prudence will mean lower interim prices will not be passed on in full in case the final price is higher.

Backdating will often disadvantage an access provider. This would occur when a lower access price has been determined for a period, but that lower price has not had a chance to be passed through to end-users for the same period. The exception to this is when competition, or specific regulatory intervention, has forced an access seeker to accept a lower price during that period. The arbitrator should be free to judge such circumstances on their merits, and in accordance with the relevant principles, rather than in accordance with a broad calculation rule.

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[3] Australian Competition and Consumer Commission, *Resolution of Telecommunications Access Disputes – a Draft Guide*, p38

[4] ibid, p55

[5] ibid, p55

The achievement of a market-driven commercial outcome should be the optimal position for all parties to a negotiation. In general, we consider that market outcomes are more likely to deliver benefits to customers than regulated outcomes. We believe this can be achieved by the addition of an overview in the guide – outlining the principle-based parameters for regulatory intervention. This will provide a strong signal to the industry that regulatory intervention will only used in extreme cases to address market failure, and only where it is in the long term interests of end-users.

We look forward to discussing our views further with the Commission.

Yours sincerely

Peter Stiffe
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Vodafone Pacific