



4 August 2003

Mr Ken Walliss
Director – Convergence
Australian Competition and Consumer Commission
GPO Box 520J
MELBOURNE VIC 3001

Dear Mr Walliss

Revisions to the Dispute Resolution Guidelines for telecommunications access disputes

As a general principle, and as outlined in a previous submission¹ to the Commission, Vodafone holds that in the vast majority of cases, commercial access outcomes are achievable through negotiation and driven primarily by the market realities of business necessity and effective competition. As you are aware, to date Vodafone has not initiated any disputes with the Commission. This reflects Vodafone's approach to commercial negotiations and an underlying imperative to achieve commercially negotiated outcomes – enabling consumers to reap the rewards of new and innovative products and services brought to market in a timely manner, and thus supporting the long term interests of end-users.

We also acknowledge that the majority of access negotiations across the industry are undertaken and successfully concluded commercially without the necessity of regulatory intervention. Given this, Vodafone continues to find it disturbing that the Commission continues to focus on arbitration and an interventionist approach, which inherently diminishes the value and emphasis of commercially negotiated outcomes. We note the Commission references that consideration of whether arbitration should be terminated will be made on a case-by-case² basis. However Vodafone does not believe that this sufficiently addresses commercially sensitive situations where a contract is on foot.

Furthermore, the increased probability of the Commission applying regulatory intervention heightens the expectancy that commercial outcomes are simply a preliminary step to intervention. The result of such expectation may provide incentives to industry participants to pursue interventionist/arbitrated outcomes rather than commercial outcomes.

¹ Vodafone submission 2002, *Regulations of telecommunications access disputes – a draft guide* – p1

² Australian Competition and Consumer Commission (May 2003), *Resolution of Telecommunications Access Disputes*, p78.

Again, Vodafone holds that a statement of policy and intent regarding the preference for commercial outcomes is required to ensure that the intent of the legislative amendments is not lost. This would also provide the Commission an opportunity to frame the primacy of commercial negotiation and the law of contract.

Following are specific areas where Vodafone believes that changes remain necessary to ensure that the Guideline correctly reflects the intent of the objectives of the legislation, further enhancing the Commission's approach to administering the arbitration provisions of Part XIC of the *Trade Practices Act 1974* and maintaining that commercial outcomes are preferable to regulated outcomes.

COMMERCIALLY NEGOTIATED OUTCOMES

Vodafone made a previous submission that highlighted the requirement for a greater focus on commercially negotiated outcomes. We acknowledge that the Commission has included some amendments in the Preface and Chapter Two of the Guideline, however we remain concerned that a number of Vodafone's substantive concerns were not addressed by the Commission.

Regarding this, Vodafone makes the following positions and suggestions to reinforce the pre-eminence of commercially negotiated outcomes:

- As a general matter, in competitive markets participants have a greater incentive to reach commercially negotiated outcomes, rather than regulated outcomes. To illustrate this, Vodafone holds that the mobile market is competitive, and the Commission also acknowledges that the mobile market is becoming *increasingly competitive*³. Subsequently, the product of a competitive market is commercially negotiated outcomes.

Vodafone is concerned that there remains little acknowledgement in the Guideline of the competitive and increasingly competitive nature of telecommunications markets – specifically the mobile market. Vodafone holds that the Commission must acknowledge the competitive nature of the markets, and the incentive this provides to procure commercial outcomes.

- Furthermore, Vodafone notes that there is still no statement that a commercially negotiated outcome is preferable to an outcome determined by the regulator. We remain committed to encouraging the Commission to include a prominent statement reflecting this position in the Guideline. To illustrate this we note the preference for a commercially negotiated outcome is implicit in the legislative requirement that the parties are 'unable to agree'.

³ Australian Competition and Consumer Commission (September 2002), *Pricing Methodology for the GSM and CDMA termination Services*, p5

Additionally, the Commission could further support the implicit nature of commercial negotiation and the preference for commercially negotiated outcomes by addressing the use of its power under section 152CT. Specifically, the Commission could explicitly state that it would use its power under section 152CT to direct negotiations because it considers that requiring commercial negotiations to develop options and solutions in arbitration will result in optimum outcomes.

UNABLE TO AGREE

As referenced in Vodafone's previous submission⁴, we remain concerned that the Commission has set a low threshold for Commission intervention into commercial matters. The Commission continues to maintain that;

*the unable to agree threshold should not be interpreted as a particularly high threshold.*⁵

Additionally, the example provided by the Commission following this illustration of interpretation, is increasingly worrisome;

*the Commission considers that the existence of a contract in and of itself does not necessarily preclude a party from notifying an arbitration.*⁶

While 'unable to agree' is open to different interpretations – and Vodafone concedes that the Commission may be unable to adopt a different view without legislative change – we propose that there may be an alternative approach to address the concerns of Vodafone, and additional stakeholders, regarding the interpreted low level of the 'unable to agree' threshold issue.

Vodafone suggests that subject to case-by-case consideration, the Commission could indicate how it will apply section 152CS⁷ to arbitrations involving existing contracts. For example, the Commission can indicate that it will usually use its 152CS power to terminate arbitrations where a contract already exists, except in exceptional or extraordinary circumstances. Furthermore, while Vodafone acknowledges that the Guideline currently provides that;

*in instances where the dispute is in relation to varying an existing contract, the Commission will generally be reluctant to continue the arbitration unless there is evidence of significant competition concerns of other significant concerns relevant to the long term interest of end users,*⁸

⁴ Vodafone submission 2002, *Regulations of telecommunications access disputes – a draft guide* – p2

⁵ Australian Competition and Consumer Commission (May 2003), *Resolution of Telecommunications Access Disputes*, p8.

⁶ Ibid, p8

⁷ *Trade Practices Act 1974*

⁸ Australian Competition and Consumer Commission (May 2003), *Resolution of Telecommunications Access Disputes*, p65

we also suggest that the Commission could identify 'rules of thumb' for inclusion in the Guideline which would indicate when the Commission should terminate an arbitration.

Vodafone believes that such rules should apply to disputes regarding existing contracts, and may encompass wording such as:

The Commission is likely to terminate arbitration if:

- A contract has been concluded which specifically addresses the issues which the access seeker states are in dispute and the contract was concluded more than [number] months previously; and
- A contract has been concluded which does not address the issue which the access seeker states is in dispute and dispute resolution options under the contract have not been exercised.

BACKDATING

Vodafone appreciates the inclusion in the Guideline of a suggestion made in a previous submission⁹ that while *the Commission, in general, will be inclined to backdate determinations*¹⁰ it must consider each case on its merits. This supports Vodafone's position that the case for backdating depends inherently on the nature of the arbitration.

Vodafone notes that there are few substantive changes to the backdating provisions in the Guidelines, other than the specification of the likely methodology for the calculation of interest. To that point Vodafone notes that the likely methodology proposed by the Commission is one of opportunity – rather than using a commonplace commercial calculation of interest. Vodafone queries the appropriateness of the methodology identified by the Commission, particularly where there may be a contract on foot with an access seeker which specifies a means of calculating interest. We would appreciate the Commission's further consideration regarding this issue.

Vodafone stresses that the achievement of market-driven commercial outcomes should be the optimal position for all parties to a negotiation. We consider that commercial outcomes offer better outcomes for consumers than regulated outcomes – and hence are in the long term interest of end users. We again encourage the Commission to embrace the true spirit of commercial outcomes by adopting the suggestions outlined in this paper. We believe that these will assist the Commission to provide clarification and explicit parameters associated with regulatory intervention. This will further that regulatory intervention will only be used in extraordinary cases to address market failure and ensure the long term interest of end users is maintained.

⁹ Vodafone submission 2002, *Regulations of telecommunications access disputes – a draft guide*, p4

¹⁰ Australian Competition and Consumer Commission (May 2003), *Resolution of Telecommunications Access Disputes*, p60

Vodafone looks forward to discussing these views further with the Commission.

Yours sincerely

Georgia-Kate Schubert
Manager, Public Policy
Vodafone Australia