VODAFONE NEW ZEALAND LIMITED SUBMISSION TO THE AUSTRALIAN PRODUCTIVITY COMMISSION

Australian and New Zealand Competition and Consumer Protection Regimes Issues Paper

27 August 2004

Introduction

Vodafone New Zealand welcomes the opportunity to provide preliminary comments to the Productivity Commission's Australian and New Zealand Competition and Consumer Protection Regimes Issues Paper.

Vodafone Group Plc has equity interests in 26 countries, and partner networks in a further 13 countries. Vodafone has 1.5 million customers in New Zealand and a network covering 97% of where the population work and play. Vodafone Australia provides mobile services to 2.6 million Australian customers.

Vodafone New Zealand and Australia are increasingly seeking to leverage off joint planning and operations. For example, Vodafone recently announced Nokia will partner Vodafone New Zealand and Australia in the establishment of 3G network infrastructure. Customers will benefit from Vodafone Australia and Vodafone New Zealand having chosen a vendor in common, through seamless access to services across the busy Tasman divide. Vodafone New Zealand also provides certain finance functions on a shared basis for Australia and New Zealand.

We note that the terms of reference of the study focuses on the core restrictive trade practices, business acquisitions and consumer protection provisions of the Trade Practices Act 1974 (TPA) in Australia and the New Zealand Fair Trading Act 1986. The terms of reference do not specifically include telecommunications-specific regulation such as Part XIB of the TPA. However, Vodafone will make some comment on the telecommunications-specific regulation where we consider it appropriate.

Policy Approach

Vodafone considers that the primary principle for competition and consumer protection regimes in Australia and New Zealand should be one of regulatory forbearance with regulation only where necessary – ie; where there is proven durable market failure and where benefits of intervention outweigh costs. The risks of unintended consequences of regulatory intervention are too high to intervene without considerable caution. This is particularly so where regulatory intervention in one jurisdiction impacts on the operations of trans-Tasman businesses. In considering continuation of existing regulations or extension of regulatory reach, the respective regulatory agencies should undertake a rigorous cost-benefit analysis to determine whether a regulatory proposal is appropriate. To do otherwise may deter trans-Tasman investment and innovation.

In principle there may be considerable merit in adopting the best practices from both regimes. Lower compliance costs are likely to increase efficiency and lower costs to consumers. However, there is a risk that the principle of adopting best practices from both regimes may be unrealistic. In reality investment from Australia comprises 21% of total foreign investment in New Zealand. By contrast New Zealand investment comprised just 2% of foreign investment in Australia. Against this backdrop the likelihood of Australia adopting New Zealand's regulatory practices – even if they are "best in class" in some areas – appears questionable. Consequently the practical policy decision is not likely to be "what are the best elements we can draw from each regime" but rather "should New Zealand adopt Australian regulation and if so – how much?

Regulatory Harmonisation

Even if one assumes that the outcome from regulatory harmonisation would be the creation of a "best in class" trans-Tasman regime, as the Issues paper correctly points out there are risks associated with harmonisation of regulatory regimes. These include the risk of :

- Reduced effectiveness of competition and consumer protection regimes for example, by adopting a "lowest common denominator" approach rather than what is best suited to each jurisdiction;

- Higher administrative costs in law-making and/or enforcement (such as longer delays and extra financial costs of formulating and updating laws in co-ordination with other jurisdictions);

- Reduced competition between regulatory regimes that would encourage best practice; and

- Loss of sovereignty (power to act independently in the interests of citizens or customers could be curtailed. For example multi-jurisdictional law making processes and institutions could become more remote and less responsive to the concerns of citizens.

The onus should be on the protagonists of regulatory harmonisation to demonstrate that the benefits outweigh the costs.

Substantive Law

The Issues Paper proposes various policy options for greater co-operation, co-ordination and integration of New Zealand and Australian competition and consumer protection regimes. Vodafone notes that there are important differences between the New Zealand and Australian regimes, it is important for the respective competition regulators to have a clear understanding of the ways in which the regulatory regimes differ when making regulatory decisions. It may not be the case that decisions by one regulator can simply be adopted in the other jurisdiction.

For example, in relation to the recent investigations into mobile termination rates in Australia and New Zealand, the decision-making framework required to be applied by the ACCC in Australia is different to the framework that must be applied in New Zealand. In Australia, Part XIC of the TPA establishes a regime for regulated access to carriage services and services which facilitate the supply of carriage services. The ACCC is primarily concerned with the promotion of the long term interests of end users (LTIE) (and promotion of competition was only one of many factors that merely had to be considered when assessing the promotion of LTIE).

In contrast, the New Zealand Telecommunications Commissioner is required to consider first whether the regulation of mobile termination services would promote competition. Then, if so, the Commissioner must consider whether the promotion of competition which would result, would be enough to deliver long-term benefits to end users.

Hence under the NZ legislation the threshold for imposing regulation is higher. There is a significant difference between an assessment of whether the declaration is in the long-term interests of end users having regard to the extent to which competition, economic efficiency and any-to-any connectivity are promoted.

Vodafone would not expect the New Zealand Commerce Commission (NZCC) to rely on the conclusions of the ACCC or any other regulator without first considering how the decision can be applicable in the New Zealand legal, economic and market context. To do otherwise may result in the inappropriate adoption of the precedent by the NZCC. This may impact on investment in infrastructure and innovative new products and services in New Zealand relative to Australia.

Exemptions

The Issues Paper suggests that "government owned enterprises may be exempted from certain provisions."[1]

Given the government ownership of Telstra, and the single share (Kiwi Share) owned by the government in Telecom NZ, this provision for exemptions may – at least in telecommunications – allow companies that already enjoy a strong market position to further entrench their position. Such an outcome would be unlikely to be in the long term interests of end users or promote competition.

Conclusion

In this brief preliminary submission Vodafone has highlighted some concerns regarding the policy objectives around regulatory harmonisation, the risks involved, the significant differences in legislative objectives, and concerns related to proposed exemptions.

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[1] P.19 Issues paper, APC