SUBMISSION TO THE TRADE PRACTICES ACT REVIEW

Review of the Competition Provisions of the Trade Practices Act 1974

3 July 2002

1. Scope and context of the review

1.1 Vodafone welcomes the opportunity to provide submissions to the Committee of Inquiry in its review into the competition provisions of the Trade Practices Act 1974 (the **Act**) and their administration, specifically Part IV (and associated penalty provisions) and Part VII.

1.2 Vodafone notes that the terms of reference are general in nature and do not seek responses to any specific issues. As a result, Vodafone's submissions will be of a similar, general nature, intended to address the broad issues set out in the terms of reference and commenting on the most prevalent issues that have been raised publicly by various interested parties in relation to the review.

1.3 Vodafone anticipates that the Committee of Inquiry will seek further comment from members of industry at a later stage in the review process on issues of relevance to the Committee.

2. Our experience

2.1 Vodafone has experience in the workings of an effects test, given that one exists in the Telecommunications specific parts of the Act. Vodafone is also in a unique position in that it can draw on its experience of the workings of comparable generic competition legislation in other jurisdictions in which the Vodafone Group operates.

2.2 Regular reviews of competition law are an essential part of sound public policy. Such reviews help ensure that markets are operating as intended. If identifiable problems exist in the competitive performance of any market, those problems should be clearly identified and resolved, by amendments to legislation if necessary.

2.3 Equally, however, if there are no obvious problems with the competitive performance of markets or those problems cannot be specifically linked back to the efficiency or otherwise of existing legislation then any legislative amendments may, in fact, hinder rather than benefit those markets. Regulation that inhibits business and undermines the ability of firms to compete can cause as much harm as firms that breach the Act.

2.4 The Act as it stands, both with its generic and industry-specific legislation, effectively controls practices recognised as anti-competitive. There is no evidence of serious deficiencies in generic competition laws to warrant the introduction of further controls in Part IV and Part VII, especially those controls that grant additional powers to the ACCC. The ACCC has broad powers that need no further broadening.

2.5 Indeed, from a macro-economic perspective, Australia's economy has prospered while operating under its existing competition law regime, when compared with the performance of Australia's main trading partners.

Telecommunications-specific regulation

2.6 In Vodafone's view there was a clear policy rationale behind the introduction of the effects test into Part XIB of the Act. It was that, in relation to the unique combination of factors making up the telecommunications industry in Australia, the generic legislation contained in Part IV was not sufficient to encourage competition and that it left considerable scope for anti-competitive conduct in that industry.

2.7 However, these regulations were intended only to be transitional in nature and once effective competition was established in telecommunications markets, the telecommunications industry would return to being governed solely by generic competition law, that included the "purpose" test in section 46.

2.8 With this in mind, Vodafone questions the proposed introduction of an "effects" test into generic competition law where there is no clear reason.

3. The public commentary

3.1 As the terms of reference do not seek a response to any specific issues, nor outline the proposals that the government may take in relation to any amendments to the Act, Vodafone has sought to respond to the public comment surrounding suggested amendments to Part IV and Part VII of the Act.

3.2 The ACCC is seeking amendments to the Act that will bring Australia "into line with best practices internationally"[1]. Such an approach would necessarily involve, according to the ACCC, the introduction of measures to prevent misuse of the market by big companies against smaller rivals through the introduction of an "effects" test and the introduction of harsher penalties, including jail sentences for "hard-core, high-level collusion".

Effects Test

3.3 The differences between the present "purpose" test contained in section 46 of the Act and the proposed "effects" test has been a long-standing debate in competition law. On one side is the alleged difficulty in proving that a company had the "purpose" of misusing market power to reduce competition in a market. On the other is the risk of erroneously catching legitimate business conduct

1 Professor Allan Fells, (2002) , "Trade Practices Act Review 'Major Opportunity': ACCC", ACCC Media Release, 9 May.

with the incorporation of an "effects" test and the consequent effects of inhibiting vigorous competitive activity.

3.4 In Australia, since the adoption of the Act, no fewer than six committees have reviewed and rejected proposals to introduce an “effects” based test into section 46 of the Act.[2] In general, the rejections have been based on the following arguments, which Vodafone supports:

The current test has not been proven deficient and the effects test contains its own deficiencies

- The alleged inadequacies of the “purpose” test in section 46 have not been proven. No critical issues have been raised in relation to the current operation of section 46 that would warrant an amendment to the test.

- The proposed “effects” test does not improve on the current test. Moreover, the “effects test” does not address the central issue of how to distinguish between unacceptable anti-competitive conduct and acceptable pro-competitive conduct. While the courts may in time develop a gloss upon the effects test to ensure such a test did not prohibit economically efficient conduct, this does not provide business with certainty and it is not clear that the final result would differ from the existing interpretation of section 46.

- The introduction of an “effects test” would force companies to evaluate the potential effect on competitors and/or potential competitors of every decision or action they may take rather than focus solely on the purpose of the firm in taking the decision or action. The uncertainty would deter firms from engaging in activities that, while they harm competitors, do not harm competition. Companies should be encouraged to compete aggressively by taking advantage of new and superior products, greater efficiency and innovation.

- Removing the purpose element altogether and replacing it with an effects test could give the provision a very wide application and bring within its ambit much legitimate business conduct. It is only the purposive misuse of market power, and not inadvertent pursuit of efficiency inspired conduct, that should be at risk.

[2] The Trade Practices Consultative Committee (the Blunt Committee) review in 1979; The House of Representatives Standing Committee on Legal and Constitutional Affairs (the Griffiths Committee) review in 1989; The Senate Standing Committee on Legal and Constitutional Affairs (the Cooney Committee) review in 1991; The Independent Committee of Inquiry (the Hilmer Committee) review in 1992; The House of Representatives Standing Committee on Industry Science and Technology (the Reid Committee) review in 1996/7; and the Joint Select Committee on the Retailing Sector (the Baird Committee) in 1999.

- Adopting a Part XIB-type approach to generic legislation, which is more expansive in scope, coupled with proposed criminal sanctions for breach, increases the risk of regulatory error and overreach.

It grants the ACCC too many interventionist powers

- The ACCC already has wide powers under Part IV. These powers should not be extended without distinct and identifiable reasons.

Effects is already there in part

- The addition of section 46(7) of the Act (as a result of the Blunt Committee's considerations) has meant that purpose can be inferred from conduct, thus removing any alleged difficulties of proof under the "purpose" test.

- The decision in *Queensland Wire Industries Pty v Broken Hill Proprietary Company Ltd (1989) 167 CLR 177* case reinforced the principle that it is possible to infer purpose from effect.

Not adopted internationally

- The introduction of an effects test will not bring Australia "into line with best practices internationally"[3]. Of Australia's major trading partners, none has adopted an effects test in its generic competition legislation that is devoid of purpose. For example, New Zealand reviewed it and rejected it as recently as 1999.

How will the effects test assist smaller players?

- It is not clear how greater intervention will assist the smaller players without stifling the ability of the bigger players to compete globally.

Criminality

3.5 Further public commentary has surrounded the proposal of introducing harsher penalties for breaches of Part IV of the Act. In particular, the ACCC has called for jail sentences for "hard-core, high-level collusion". Vodafone is not adverse to higher penalties for flagrant breaches of competition law in relation to collusion. However, Vodafone is concerned with the inability to narrow the scope of these penalties specifically to "hard-core high-level collusion" and the resulting effects on business dealings that the introduction of criminal sanctions could have.

3 3 Professor Allan Fells, (2002) , "Trade Practices Act Review 'Major Opportunity': ACCC", ACCC Media Release, 9 May.

3.6 Vodafone is concerned that an amendment to the Act will not distinguish sufficiently between offences of "hard-core, high-level collusion" and more general breaches of Part IV that cover a range of other anti-competitive activities which are arguably less serious.

3.7 Vodafone has these further particular concerns:

- If the Act does not accurately define these “hard-core, high-level” collusive activities to the extent that business is certain of the parameters, then there is a high likelihood that individuals within business will be risk averse because they seldom share the gains from anti-competitive behaviour;

- Individuals already face large sanctions from engaging in anti-competitive behaviour (e.g. adverse effects on reputation and future job prospects, particularly in a small country such as Australia); and

- Financial penalties against both the individual and the company are sufficient deterrents against anti-competitive actions.

4. Looking forward

4.1 As stated earlier, this submission is necessarily brief and we look forward to providing more detailed responses as the Committee of Inquiry identifies specific areas of concern for comment at a later stage in the review process.