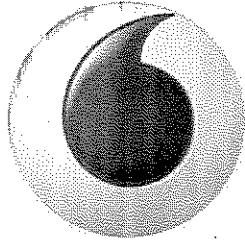


**VODAFONE NEW ZEALAND LIMITED
SUBMISSION TO THE MINISTRY OF
ECONOMIC DEVELOPMENT**



vodafone

Telecom's Draft Separation Plan

23 November 2007

Summary

1. Vodafone/Ihug welcomes the opportunity to provide comment on Telecom's draft separation plan.
2. As an Access Seeker it is important that the plan allows for services to be purchased on equivalent terms as soon as possible so that competition can flourish.

Key Issues

Equivalence

3. Vodafone/Ihug's key priority is equivalence. Our clear preference is for EoI but if delays in achieving that can be justified, then we want equivalence of product, processes and pricing as soon as possible. The newer services that are part of Telecom's NGN are more important than legacy products, given that it may well be a challenge to deliver true EoI on legacy platforms. However, the longer legacy products remain in the market without an NGN-based replacement, the more important equivalence for those products becomes. An example is phone line resale, a product that Telecom is suggesting will remain until 2020.

Implementation

4. Telecom has provided considerable detail on its proposed equivalence implementation timetable. The timeframes for providing equivalence are long, with the justification that it will take that timeframe to upgrade its legacy systems.
5. It is not possible to adequately evaluate Telecom's implementation timetable and decide how acceptable it is. Nor do we consider that submissions are the best mechanism for confirming the acceptability of the implementation timetable. We suggest that the best way to progress this with would be via an industry working group under the TCF umbrella, working in much the same way as the LLU and UBA STD working groups have done. Telecom has made its proposal and could use the working group to work through it and make amendments where necessary. The LLU and UBA STD working groups have shown that much can be achieved by the industry working together in this manner.

Relevant Network Access Services

6. The definition of Relevant Network Access Services needs to be flexible enough to

include any future designated or specified services that are provided over Telecom's Access Network. That definition should be flexible enough to expand to include other assets and systems of Telecom that may become the subject of regulation in the future.

7. We expect that alternative forms of access other than bitstream access may well become subject to regulation and, if so, they should be provided by the ANS Unit (with its more rigorous equivalence obligations), rather than the Wholesale Unit. Examples of such forms of regulated access that may arise in this country include duct access, fibre unbundling, wavelength unbundling and active line access.
8. If Access Seekers can access these bottleneck assets they can build their own NGN to deliver these same NGN services.
9. Interconnection with Telecom's NGN services in a forward looking manner (e.g. IP interconnect for voice rather than today's legacy TDM interconnect) is more important than wholesale access to these services, and should be provided sooner rather than later.

Cabinetisation

10. Vodafone/lhug will be addressing separately the issue of cabinetisation. For the purposes of this submission we would like to make the point that we believe that cabinetisation impacts on equivalence, and in particular that Telecom has used cabinetisation as a way to by-pass initial equivalence.

Undertakings

Part 1: Definitions and Interpretation

11. We comment on the key definitions in Part 1 elsewhere in this submission, in relation to the parts of the Undertaking where they are mainly used.

Part 2: Scope and Application

General comments

12. In general terms, we found Part 2 to be dangerously broad and general in its application, with the effect that these general provisions would qualify and, on occasion, negate the specific obligations elsewhere in the Undertaking. We believe the Ministry must pay particular attention to the broad and general "carve outs" in this part; this is especially the case if clause 8 (which we believe should be deleted) is to remain.

Requirement to be on contract

13. In order to receive a Relevant Service, an Access Seeker must be a party to an agreement with Telecom, or have requested access under a standard terms determination or undertaking (clause 6.2). Although a standard terms determination seems the most likely avenue for Access Seekers, at least for the crop of UCLL Relevant Network Access Services, it may be that an Access Seeker will need to enter into an agreement with Telecom to receive one of the other types of Relevant Service. However, there is nothing in the Undertaking that sets out what the terms of any such agreement will be. This puts Telecom in a strong position to demand terms of its choosing.

Conflict with duty to act in best interests of Telecom

14. Clause 7.1 provides that the Undertakings do not limit or apply to the duty of the board etc. to act in the best interests of Telecom. Although we understand clause 7.1 is consistent with the Determination, we cannot see how this provision would be interpreted where performance of Telecom's obligations under the Undertaking would not be in its best interests (which we assume would be often).
15. We do not understand clause 7.2. The Ministry should seek to clarify with Telecom what the effect of this clause is.

Use of qualifying language

16. We generally found that the Undertaking liberally uses qualifying words such as “reasonably”, “substantially” and “materially” in circumstances where it is not obvious why there should be such a qualification. For example, in this part, Telecom only needs to disclose documented formal decisions of the ANS Unit if the IOG “reasonably” requests them (clause 7.4(b)). We believe the IOG should not have to demonstrate a reasonable request in this situation.
17. We are concerned that the extensive use of qualifying words of this nature will create a significant challenge to the Minister in enforcing this Undertaking.

Part 3: Implementation

18. Although we note that it is lifted from the Determination, we are not certain that the list of clauses that take effect from the Separation Date in clause 9.1 is complete. For example, what about clause 7.4 or clause 31? There are a number of new provisions that were not in the Determination, which are contained in the Undertaking. These should be reviewed for inclusion in this list.
19. Another approach, which would be preferable, would be to provide in clause 9.1 that all obligations in the Undertaking commence from the Separation Day, with the exceptions being listed in clause 9.2.

Part 4: Fixed Network Access Service Business Unit (ANS Unit)

Scope of ANS Unit business

20. We found the description of the scope of the ANS Unit’s business in clause 13.1 to be curious, in the sense that it makes no reference to the term “Relevant Network Access Services”, or any of the key definitions in clause 14.2. We suggest this scope of business be reviewed to state that the ANS Unit’s scope of business is to provide the Relevant Network Access Services at the very least.
21. Clause 13.2 is a potentially dangerous provision. As it stands, the board or CEO may amend the scope of business of the ANS Unit. It does allow for a reduction in scope that is less than material (query whether they should be able to reduce the scope at all), but in any case it should be clear that the ANS Unit must at all times provide the Relevant Network Access Services and comply with its obligations under clause 14.1.

Definition of "Relevant Network Access Services"

22. Although the definition is lifted from the Determination, we believe the definition of Relevant Network Access Services needs to be flexible enough to include any future designated or specified services that are provided over Telecom's Access Network (and indeed that definition should be flexible enough to expand to include other assets and systems of Telecom that may become the subject of regulation in the future). A mechanism of this nature is contemplated by section 69F(3)(e) of the Act.
23. For example, we acknowledge that Telecom will be providing a bitstream service based on Telecom's FTTP access network as a Relevant Wholesale Service. However, it is entirely possible in some parts of the country that Telecom's FTTX access network will become just as much of a bottleneck as its existing copper local access network and, as such, may become subject to greater levels of regulated access under the Act.
24. We expect that alternative forms of access other than bitstream may well become subject to regulation and, if so, they should be provided by the ANS Unit (with its more rigorous equivalence obligations), rather than the Wholesale Unit. Examples of such forms of regulated access that may arise in this country include duct access, fibre unbundling, wavelength unbundling and active line access.

The Equivalence of Inputs standard

25. The definition of Equivalence of Inputs or Eol is, at least in clause 1.2(a), broadly consistent with the meaning of equivalence in section 69E of the Act. However, it is the qualifying words in clause 1.2(b)(ii) that seem out of place. Paragraph (b) seeks to qualify the meaning of "the same" (the words used in section 69E). In fact, it sets out circumstances where the words "the same" can mean "different to". We do not understand why the vaguely referenced matters in clause 1.2(b)(ii) should create a reason to treat an Access Seeker differently to a Telecom Business Unit.

Compliance with the Eol standard

26. Compliance with the Eol standard by the ANS Unit is not immediate - not even close. In fact, the migration plans set out in the schedule mean that the lesser standard of "Front End Equivalence" will not be available for over two years, with full Eol not available for over four years. Further, even newly built Relevant Network Access Services will not be available to meet the Eol standard for over four years (clause 23; see comments below). This means that, just as the new era of broadband competition

begins, Access Seekers will need to wait for years before equivalence can be mandated through the separation process.

27. For all intents and purposes, therefore, the Eol standard and its lesser cousins will be irrelevant for Access Seekers for the coming years. Clause 21 and the schedules ensure this will be the case.
28. This delay in equivalence places significant focus on the remaining protections for Access Seekers in the Undertaking, particularly the obligation on the part of the ANS Unit not to discriminate (clause 31; see comments below).

Relevant Network Access Services built after the Approval Date

29. Clause 23.1 applies to Relevant Network Access Services built by the ANS Unit after the Approval Date. We query why newly built services should be subject to the same sorts of limitations that apply to legacy services, which Telecom details in Parts 1 and 3 of the schedule ("massive task", "900 tightly linked applications" etc.).
30. With new services, we cannot understand why Telecom cannot take the opportunity to apply new procurement applications and interfaces, that would enable these new services to meet equivalence standards, earlier than four years from now.
31. We recommend that any newly built service should be designed from the beginning on an Eol basis and that it not be released to another Telecom Business Unit until Eol is met.

Employees of the ANS Unit

32. We agree that an Employee of the ANS Unit should not be able to work for any other part of Telecom. We query whether this restriction should apply equally to a contractor or agent of Telecom that works on the ANS Unit's business. Telecom employs a considerable number of contractors, including through its outsourcing arrangements, and we do not believe a clear line can be drawn between these people and more permanent Employees. Similar comments can be made in relation to clauses 35.1 and 36.1. In addition, we believe that the same principles should apply to Telecom's advisors and consultants.
33. Further, the strict application of clause 26.1 is undermined by the ability of Telecom to contract out its ANS Unit Employees to other parts of the Telecom business. This would include the Retail Units. We believe this sort of contracting should only be

allowed to the Wholesale Unit in exceptional cases, and in any case not at all to the Retail Units. We have similar concerns with clause 38, which we find difficult to reconcile with clause 26, and with clause 54.2.

Non-discrimination

34. We agree with the non-discrimination principle in clause 31.1 and we note the considerable significance of this principle given that equivalence will not be available for years to come.
35. However, we have some concerns with the watering down of this principle in the "for the avoidance of doubt" wording in clause 31.2. In paragraph (a), we query whether this qualification should only apply based on a comparison of how an independent company **without market power** would behave. We also believe "might" should be changed to "would".
36. Further, we believe clause 31.2(b) is too broad. A Telecom Business Unit might have slightly different requirements or circumstances, but if they do not materially impact on the delivery of the service there shouldn't be any discrimination. These comments in relation to paragraphs (a) and (b) apply equally to clause 56.2.
37. We believe that clause 31 should be capable of applying from the Separation Day, rather than July 2008 (as would be the case given the combination of clauses 9.1 and 9.2).
38. As a general note, we have found that Telecom's inclusion of various "for the avoidance of doubt" clauses appear to be designed to qualify the primary obligation that comes immediately before (which is normally lifted straight from the Determination), sometimes with the effect of almost completely negating that primary obligation.

Disclosure of Customer Confidential Information

39. We are concerned that clause 33.2 breaks down the separation of the ANS Unit by allowing the unit to disclose confidential information about an Access Seeker to other parts of Telecom without the Access Seeker's consent. Most alarmingly, this includes disclosure to Retail Units, but also to the Wholesale Unit. We cannot see any reason why Retail Units or indeed the Wholesale Unit should be able to receive Customer Confidential Information and we suggest that this be explicitly carved out of clause 33.2.

40. The Ministry should note that, for some services, the Wholesale Unit may compete with an Access Seeker for wholesale business. For example, an Access Seeker might want to offer a UBA service, based on UCLL acquired from the ANS Unit, in competition with the Wholesale Unit's UBA service. Accordingly, separation of the ANS Unit from the Wholesale Unit may be as important to some Access Seekers as separation of the ANS Unit from the Retail Units.

Disclosure of Commercial Information

41. Clause 34.1 states that ANS Unit Commercial Information may not be disclosed to an Access Seeker unless it is being provided with the Relevant Network Access Service. However, a potential Access Seeker may require access to this information before deciding whether to take that service. In these circumstances, so long as appropriate confidentiality undertakings are obtained, we believe that information should be provided.
42. We also believe that the carve out in clause 34.2 should be modified to ensure that information will always be available to Access Seekers if that same information is made available by ANS Unit to the Retail Units or the Wholesale Unit.
43. We have similar concerns in relation to clause 59. From a legal perspective, we are uncertain how information can be confidential to a business unit (which is not itself a legal entity).

Incentives of ANS Unit Employees

44. Although the incentives of ANS Unit Employees are controlled under clauses 35.1 to 35.3, clause 35.5(b) undermines their effect by allowing them to participate in group wide benefits (which might, for example, include Telecom share options).

Changes to Telecom's Access Network

45. Clause 39.1 sets out the rules in relation to consultation over changes to Telecom's Access Network, etc. We believe the general principle should be that any consultation that the ANS Unit has with Retail Units and the Wholesale Unit should be at the same time, and on the same basis, as with the Access Seekers. The various qualifying words in clause 39.1 compromise this general principle.
46. Further qualification to the consultation requirement is found in clause 39.2. We do not understand how there could be any justifiable circumstances that should entitle

the ANS Unit to consult in a different manner with the Retail Units or the Wholesale Unit as compared to Access Seekers.

Part 5: Wholesale Business Unit

NGN bitstream service

47. We note that a packet-based bitstream service that enables access to Telecom's NGN is included as a part of the Relevant Wholesale Service (clause 45.2(a)(iv)). On its face, this means that Telecom is required to provide this service to Access Seekers under clause 45.1. However, this service (and the similar "FTTP Access Service") is not required to be provided under a Part 2 determination, a Schedule 3A undertaking or under any other law. This means that, in fact, Telecom is not required to provide this service under clause 6.1 (which is further reinforced by clause 2.2).
48. While we accept that the FTTP Access Service, or the NGN bitstream service, should be a service provided by the Wholesale Unit, Access Seekers should be provided access to the equivalent unbundled variants of these services out of the ANS Unit, at the same time as these services are made available by the Wholesale Unit. The unbundled variants may include duct access, fibre unbundling, wavelength unbundling etc.
49. It is unclear whether this packet-based bitstream service is intended to be the same as the "FTTP Access Service" (dealt with in some detail in clause 65). The significance is that the equivalence obligations apply to services that fall within the Relevant Wholesale Service, but not otherwise. We note the non-discrimination obligation applies equally to the FTTP Access Services under clause 65.3.

Responsibilities of the Wholesale Unit

50. Clause 46.2 is another "for the avoidance of doubt" clause, which has the purpose of qualifying one of the obligations set out in the Determination. It attempts to devolve some aspects of the Wholesale Unit's business to the Retail Units. This may be acceptable, but only if an Access Seeker is able to provide those same aspects of the service itself. This may require information from the Wholesale Unit and a relatively high level of cooperation between the Wholesale Unit and the Access Seeker.

The Resale Equivalence standard

51. We understand the Determination introduces the concept of a Resale Equivalence

standard, and that is dealt with in clause 47. However, we note that the definition of Resale Equivalence is a lot softer than the definition of Eol. For example, Resale Equivalence uses words such as "substantially similar" (not even "substantially the same"!), as compared to "the same" in the definition of Eol. Resale Equivalence states that systems etc. must not place Access Seekers at a "material service delivery disadvantage" as compared to the requirement in Eol that Telecom use systems etc. that Access Seekers are "able to use in the same way".

52. We do not see why there should be a difference in equivalence concepts between Eol and Resale Equivalence. Indeed, it is not even clear that the Act would permit such a difference. Section 69E requires that third party access seekers "are treated in the same or an equivalent way to Telecom's own business operations". There is no subtle distinction in treatment between network access services and wholesale services in that wording.

Operating at arm's length

53. We note the wording in clause 52.4 which allows the Wholesale Unit to act other than on an arm's length basis in its dealings with the Retail Units. We are concerned that these exceptions may be overly broad, and permit a level of interaction that undermines the separation of these units.

Disclosure of Customer Confidential Information

54. We note that an equivalent of clause 58.2(c) does not feature in clause 33.2. Indeed, we do not understand why any such disclosure would be necessary, except in the circumstances in paragraph (a) (i.e., operationally necessary). We also have similar concerns to those set out above in relation to clause 33.2 to the extent that disclosure of Customer Confidential Information may be made by the Wholesale Unit to Retail Units.

Wholesale Unit's incentives

55. We generally found that the restrictions on the incentive packages on Wholesale Unit Employees under clause 60 were weaker than the equivalent restrictions on ANS Unit Employees under clause 35 (see comments on clause 35 above). We do not understand why these Employees should be treated differently than ANS Unit Employees.

Legal and regulatory employees

56. The principles included in clause 63.2 should be duplicated in Part 4 (Fixed Network Access Service Business Unit (ANS Unit)) and we see no reason why this should be otherwise. In addition we believe that the "chinese wall" concept in clause 63.2(b) could be strengthened, such as that intermediate and junior staff (such as those below General Counsel level) should operate separately as between the units.

Part 6: Retail Units

Retail Unit Employees working for other units

57. Clause 70.2 largely negates the protections in clause 70.1. We believe, at the very least, a Retail Unit Employee should not be able to work for the ANS Unit, even on an arm's length contract basis.

Influence of Commercial Policy

58. We accept that Retail Units may influence the Commercial Policy of the Wholesale Unit in the ways set out in clause 71.2. However, we are far less comfortable with the breadth of that influence when it comes to the ANS Unit. We suggest the Ministry consider the breadth of this influence when reviewing clause 71.2.

Part 8: Enforcement and Oversight for Compliance with Separation Plan

Functions of the IOG

59. We recommend that the catch all wording contemplated by clause 82(o) of the Determination should be included in clause 78.1.

Support of the IOG

60. The success of these Undertakings will in large part depend on the effectiveness of the IOG. We believe that the IOG should be given generous leeway to investigate and monitor Telecom's compliance with the Undertakings. However, we are concerned that the IOG's powers of investigation and monitoring are curtailed by a number of provisions of the Undertaking.
61. For example, we believe the IOG should be able to demand information from Telecom and to require Employees and the Board to front up and answer all questions put by the IOG. We do not accept the liberal use of "reasonably require" throughout clause 79.1. The IOG is there to do a job and should not be deterred in performing that job by

claims from Telecom that their requirements are not "reasonable". This will be a challenging enough job for IOG members as it is without having to battle Telecom for every last piece of information.

62. We believe the IOG should be provided with annual and long-term corporate plans and technology plans of the ANS Unit and the Wholesale Unit (see clause 27.1).
63. Generally, if the Ministry accepts Telecom's various qualifications to the obligations set out in the Determination that have been included in the Undertaking, then we believe that Telecom should report to the IOG on all instances where it is seeking to take advantage of those qualifications. For example, Telecom should report to the IOG whenever it is looking to take advantage of the qualifications on the words "the same" in the definition of Eol in clause 1.2(b).

Part 9: Participation in Policy and Disclosure of Certain Information

64. In relation to the Part A, B and C Persons table in Part 2 of Schedule 2, we encourage the Ministry to look more closely at the participation aspects. We are not convinced that all people working in all these groups need to be across the listed areas. We believe the list should be limited, or described in a way more specific to the person/group and area.

Part 10: Miscellaneous Provisions

Preferred unit

65. We could accept clause 93.2, but believe it should be made clear that if, for example, an Access Seeker wanted to deal with the ANS Unit for access to Relevant Network Access Services, then they should not have to deal with the Wholesale Unit just because "a significant number of Access Seekers would prefer" to deal with the Wholesale Unit.

Force Majeure

66. Clause 94.1(c) is unacceptable. These matters are within Telecom's control. Telecom has had long enough to prepare for separation and should not be able to throw up its hands and say it does not have to comply with the Undertakings because it has not been able to obtain adequate labour.
67. We also are concerned about clause 94.1(f). Telecom uses a fairly large quantity of

outsourced services and should not be able to escape its responsibilities by claiming that its outsourced providers did not deliver.

Use of contractors and outsourced providers

68. The Ministry should consider clauses 95 and 96. If Telecom is using contractors or outsourced providers, then Telecom must remain responsible for performance of its Undertakings, regardless of whether there is a clause in the contract that requires the contractor or outsourced provider to comply with the Undertakings. Telecom is responsible for the actions of its Employees; in the same way, the Undertaking must provide that Telecom is responsible for the actions of its contractors and outsourced providers. This also ties in to the point we make above about events of Force Majeure.

Whistleblowing

69. Clause 101 should be extended to enable contractors, agents and advisors to report matters to the IOG and protect them (and certainly not seek to punish their employers).

Failure to comply with Undertakings

70. We found clause 104(b) difficult to follow. It appears to allow Telecom breathing space to comply with its milestone delivery obligations, but we did not understand how it would actually work. The Ministry should resolve this with Telecom.

Employees working for Telecom

71. All Employees shifting from one of the Required Telecom Business Units to another should be required to destroy or return any Customer Confidential Information. See clause 105.

Consent withheld or delayed

72. Clause 108 is unacceptable. It is not a feature of the Act or of the Determination. It is a try on tucked in at the end where it is hoped that it will go unnoticed.

Schedules

73. In the time available, we have not been able to adequately review the migration plans

in the schedules. Further, we believe that no Access Seeker has the resources on their own to adequately evaluate these migration plans and decide how acceptable they are. The migration plans are crucial to the whole separation process, as they dictate how much of a delay there will be before equivalence can be realised.

74. We do not believe that these submissions are the best mechanism for confirming the acceptability of the migration plans. We recommend that the best way to progress this issue is through an industry working group under the TCF umbrella, working in much the same way as the LLU and UBA STD working groups have done.
75. Telecom has made their proposal for migration and now they need to justify it before such an industry forum. The LLU and UBA STD working groups have shown that much can be achieved by the industry working together in this manner.