CONSULTATION BY THE MINISTRY OF INFORMATION, COMMUNICATIONS AND THE ARTS ON REVIEW OF THE TELECOMMUNICATIONS ACT (Cap. 323)

Submission by the StarHub Group to the Ministry of Information, Communications and the Arts

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Statement of Interest

StarHub Ltd is a Facilities Based Operator ("FBO") in Singapore, having been awarded a licence to provide public basic telecommunication services ("PBTS") by the Telecommunications Authority of Singapore ("TAS") (the predecessor to IDA) on 5 May 1998. Nucleus Connect Pte Ltd, a wholly-owned subsidiary of StarHub Ltd, incorporated on 14 April 2009, was appointed as the Operating Company of the Next Generation Nationwide Broadband Network.

StarHub Mobile Pte Ltd is a wholly-owned subsidiary of StarHub Ltd. StarHub Mobile Pte Ltd was issued a licence to provide public cellular mobile telephone services ("PCMTS") by the TAS on 5 May 1998. StarHub launched its commercial PBTS and PCMTS services on 1 April 2000.

StarHub Ltd acquired CyberWay (now StarHub Internet Pte Ltd) for the provision of Public Internet Access Services in Singapore on 21 January 1999.

In July 2002, StarHub Ltd completed a merger with Singapore Cable Vision to form StarHub Cable Vision Ltd ("SCV"). SCV holds a FBO licence and offers broadband and cable TV services.

StarHub Online Pte Ltd is a wholly-owned subsidiary of StarHub Ltd. StarHub Online Pte Ltd was issued a licence to provide Public Internet Access Services in Singapore on 22 February 2005.

This submission represents the views of the StarHub group of companies, namely, StarHub Ltd, StarHub Mobile Pte Ltd, StarHub Internet Pte Ltd, StarHub Online Pte Ltd and StarHub Cable Vision Ltd.

1. Executive Summary

StarHub welcomes the opportunity to comment on the amendments proposed by the Ministry of Information, Communications and the Arts ("MICA") to the Telecommunications Act (Cap. 323) ("TA"), and supports the need for the legislation to keep pace with developments in the industry and with market conditions.

In the proposed amendments to TA, StarHub would like to highlight the following points:

- The proposed maximum financial penalty may need to be moderated and may require greater clarity, as the proposed regime could result in different licensees who breach the same regulatory condition being subject to significant disparity in financial penalties (due to different business turnover). The proposed administrative action for failure to pay financial penalties could also have serious adverse consequences to a licensee's business operation and impact to end users. It would be inappropriate to adopt this measure just because of the challenges involved in recovering debts from licensees.

- The impact on PTLs of the proposed amendments to the PTL rights is unclear, as the scope of "basic telecommunication service" is not clearly defined. The proposed amendments to confine PTL privileges only to the provision of basic telecommunication service could also significantly undermine PTLs' ability to provide a full suite of telecom services to fulfil the infocomm needs of the public.

- Rather than amending section 19 of the TA to empower IDA to issue written orders to building developers/owners, we submit that it would be more effective to issue the COPIF under section 26(1)(f) of the TA, thereby ensuring compliance. If the provisions of the COPIF are not rigorously enforced, this could seriously undermine operators' ability to deploy and maintain access networks and services to end users.

- The issuance of a Special Administration Order ("SAO") is a very strict measure. It could affect substantial accrued legal rights of not only the licensee, but also a wide range of its contractual counter parties. The broad scope of the SAO - and the uncertainty as to how the SAO would be applied - could undermine investment certainty.

- The imposition of separation on an operator is also a strict measure that would have a major impact on that operator. The broad conditions on which separation may be imposed could undermine business certainty. Therefore, separation should be imposed only on fibre access networks, and should not be applied retrospectively to operators of existing legacy networks. It should also be considered as a last resort, and must be subject to detailed analysis and clear and transparent safeguards, before it is implemented.

- We respectfully suggest that the current review should also seek to align the TA with the Competition Act (Cap. 50B), that (*inter alia)* provides for appeals via a Competition Appeal Board.

StarHub is pleased to provide its comments on the proposed amendments to the TA in the following section.

2. Specific Responses

Revision of Maximum Penalty Cap

Question 1: MICA invites views and comments on the proposal to revise the ceiling for the maximum financial penalty that may be imposed by IDA under section 8 of the TA, for breach of licence conditions, code of practice or standards of performance, or directions, to 10% of the annual business turnover of licensable services, or $1 million, whichever is higher.

Administrative action for failure to pay financial penalties

Question 2: MICA also invites views and comments on the proposal for IDA to be empowered to suspend or revoke a licence, or to reduce the period for which a licence is to be in force, on a case-by-case basis, in the event of a licensee's failure or refusal to pay a financial penalty under section 8 of the TA.

StarHub notes that the Consultation Paper has proposed to revise the maximum financial penalty to 10% of the annual business turnover for licensable services, or $1 million, whichever is higher.

While StarHub agrees that the current maximum financial penalty of $1 million is inadequate, we are concerned with the proposed increase of the maximum financial penalty to 10% of the annual business turnover for licensable services, and the manner in which it could be imposed on licensees for non-compliance with regulatory conditions. Under the proposed amendment, different licensees who breach the same regulatory condition and who have the same percentage applied to their business turnover may be subject to a significant disparity in financial penalties, if their business turnover is very different. StarHub respectfully submits that it would be important to moderate the maximum financial penalty to a lower percentage (such as 5% of annual turnover), and to set out in greater clarity how the financial penalties would be computed for breach of regulatory conditions.

StarHub also notes that the Consultation Paper has proposed empowering IDA to be able to suspend or cancel the whole or part of a licence, or to reduce the period for which a licence is to be in force, on a case-by-case basis, in the event of a licensee's failure or refusal to pay a financial penalty within a specified period.

StarHub is concerned with the impact of this proposal. As MICA will be aware, suspension or cancellation of the whole or part of a licence, or reduction in the period for which a licence is to be in force, would have serious adverse consequences to a licensee's business operation, and would negatively impact end users. StarHub is of the view that it would be inappropriate to implement this amendment just because of the need to overcome the challenges in recovering debts from licensees. It is also unclear to StarHub whether IDA has encountered many licensees who failed or refused to pay the

financial penalties that were imposed on them. StarHub respectfully suggests that MICA considers other options, such as imposing late interest on the financial penalty imposed on a licensee, if the licensee fails or refuses to pay the financial penalty. This is a more standard remedy imposed by the courts for late payment of debt. StarHub also submits that an enforcement action should not be taken against a licensee when the licensee has appealed against IDA's decision on the financial penalty.

Question 3: MICA invites views and comments on the proposed modifications to PTL rights and the consequential amendments to sections 9, 12, 13, 14, 18 and 70 of the TA.

StarHub notes that the Consultation Paper has proposed that PTL privileges under the TA need to be reviewed to ensure that PTLs at each layer of the Next-Gen NBN industry structure enjoy statutory protection of their installations and plants, and access rights to deploy telecom systems that are used for the provision of telecom services. The Consultation Paper also proposed that PTL privileges under the TA would only apply if they are used to fulfil, or to assist a PTL to fulfil, its "unique basic PTL obligations".

StarHub is concerned with the proposed amendments to the PTL rights. The impact on PTLs of the proposed amendments is unclear, as the scope of the basic telecommunication service is not clearly defined. Currently, a PTL is able to enjoy certain privileges under the TA, such as statutory protection of its installations, and access to lands or buildings for the purposes of installation or plant, which help to facilitate the installation, maintenance and protection of a PTL's systems used to provide telecommunication services. PTLs make significant investments in their infocomm infrastructure in order to provide a full range of infocomm services to the public.

StarHub would also highlight that it would be difficult to administer and implement the amended provisions of the TA, given that it is common to have the same underlying infocomm infrastructure providing a full suite of services to end users, including the basic telecommunication service. Under the proposed amendments it is unclear what happens if the PTL's infrastructure is used to provide basic and value-added telecoms services.

With the increase in sophistication of end users and reliance on infocomm services, StarHub submits that it is critical that PTLs continues to enjoy the current privileges under the TA, so they can effectively expand and maintain the necessary network infrastructure.

Question 4: MICA invites views and comments on the proposal for IDA to be given the power to issue written orders to building owners/developers to require compliance with the COPIF as proposed in section 19 of the TA.

StarHub notes that the Consultation Paper has proposed to amend section 19 of the TA to empower IDA to issue written orders, to a developer or owner of any land or building who is contravening, or has contravened, any provision of the COPIF, as IDA considers necessary for the purpose of securing compliance.

StarHub would respectfully suggest that a more effective solution would be to enforce compliance with the COPIF provisions by issuing the COPIF under section 26(1)(f) of the TA. While this approach might be slightly more cumbersome, it is increasingly important for operators to have the ability to rollout and maintain infocomm infrastructure to end users to ensure high quality and timely delivery of services. If there is lack of enforcement on compliance to COPIF provisions, this could seriously undermine operators' ability to deploy and maintain access networks and services to end users.

In the approach proposed in the Consultation Paper, it is unclear how a waiver application from a building developer or owner would be considered and granted by IDA. This approach could also introduce delay to operators' effort to provide services to end users. As the provision of space and facilities under the COPIF would impact operators, StarHub submits that if IDA adopts this approach, the relevant operators should be consulted on any waiver application made by the building developer or owner.

StarHub also notes that IDA may vary or revoke the code of practice issued under section 19, or a written order issued to a building developer or owner. StarHub respectfully submits that, prior to any variation or revocation of any code of practice or written order, the relevant operators should be consulted on the likely impact of such variation or revocation. This would avoid unnecessary uncertainties and implementation difficulties faced by operators and building owners. For instance, the COPIF 2008 required operators to pay for the utility charges incurred for the operation of their infrastructure deployed in the buildings. However, due to the lack of clarity in this requirement, there is considerable uncertainty as to how the payment of utility charges should take effect and be implemented.

Question 5: MICA invites views and comments on the proposal to incorporate new concepts such as "voting shares", "voting power", "associates", business trust and trust, and the strengthened penalty framework in Part VA of the TA.

StarHub notes that the Consultation Paper has proposed amendments to the consolidation provisions of the TA to account for new concepts of mergers and acquisitions. These include: (a) requirements to notify or seek the relevant regulator's approval for changes in voting power, in addition to changes in voting shares; and (b) the inclusion of interest in the acquired party held by an acquiring party's associates, in determining the acquiring party's voting shares/voting power in the acquired party.

In addition, given that new business models (such as business trusts and other forms of trusts) may be structured to hold and manage telecommunication assets, the Consultation Paper has proposed to incorporate the concept of these trusts into the consolidations provisions of the TA.

StarHub appreciates the need for the TA to keep up with new concepts of merger and acquisitions. Therefore, StarHub generally supports the proposed revisions to the consolidation provisions of the TA to ensure alignment with other legislations and to allow regulatory oversight on business trusts or other forms of trusts. However, StarHub submits that the inclusion of "associates" into the TA would cause significant difficulties, given that many entities are part of the Temasek group. For instance, both StarHub and Singapore Telecommunications Limited are part of the Temasek group, which has currently in the order of 2,000 associates. StarHub therefore proposes that any amendment to the consolidation provisions of the TA must take into account a party's ability to actually control another entity, whether by voting shares or by directors to the Board.

Question 6: MICA invites views and comments on the proposal to provide the Minister with the power to make Special Administration Orders under the newly introduced Part VB in the TA.

StarHub notes that the Consultation Paper has proposed allowing Minister to issue Special Administrative Orders ("SAOs") directing the takeover of control of a licensee's affairs, business and property by another person. The Consultation Paper also proposed that the SAO provision will only be applied to PTLs, operators who control CSI, and other licensees which may be designated by the Minister in the public interest. The Consultation Paper indicated that the SAO provisions need to be exercised with great care to provide investment certainty and protect the interests of shareholders and

creditors of the abovementioned operators. The Consultation Paper proposed to limit the circumstances under which the Minister may exercise a SAO, to cases where:

i. The telecom licensee is unable to continue to hold its licence;

ii. The telecom licensee is or is likely to be unable to pay its debts;

iii. The Minister considers it in the interest of the security and reliability of supply of telecom services in Singapore; or

iv. The Minister considers it in the public interest.

While StarHub appreciates the importance of ensuring a key telecom network or service continues to be functional in some circumstances, StarHub is concerned that by allowing the Minister to issue a SAO directing the takeover of control of a licensee's affairs, business and property, it would send a strong negative message to the market, undermining investment faith and certainty in the industry. In addition, the cases in which the Minister may exercise a SAO are very broad and are not fault-based.

StarHub would also point out the following additional considerations with regard to the SAO provision:

i. The issuance of a SAO is a strict measure. If implemented, it could affect substantial accrued legal rights of not just the licensee, but a wide number of its contractual counter parties. For example, a SAO could trigger an event of default rights under the licensee's loan agreements, which would in turn cause cross defaults on other financial agreements. This would have ramifications on solvency, and may cause downstream defaults in the licensee's agreements for *inter alia* network infrastructure, wholesale and content. The licensee's business may be forced to cease, impacting adversely on the rights of shareholders, creditors, customers and business counter parties. We submit that there is no sufficiently strong justification to impair the business operations, financial stability and override shareholders, creditors and other contractual rights.

ii. As the Consultation Paper has correctly pointed out, there are already existing regimes in place under the Companies Act which address circumstances where the telecom licensee is insolvent or facing insolvency. We believe that these measures are adequate to address the concerns raised in the Consultation Paper. To introduce a new regime which may interfere with existing processes could create uncertainty as to the rights of creditors and shareholders in the insolvency process. PTLs and operators who control CSI may have difficulties obtaining investment or credit as investors and financial institutions may be hesitant to invest money into companies which are at risk of losing substantial assets. The broad scope of the circumstances in which SAOs may be issued, and

the lack of clarity on how the SAOs might be applied, could create uncertainty and risk.

iii. StarHub notes that Consultation Paper has proposed that the property, rights and liabilities of a licensee under the SAO could be transferred to one or more prescribed transferees. The prescribed transferee could mean the Authority or "a person nominated by the Authority". However, should the Minister appoint a person to take over the property, rights and liabilities of the licensee under the SAO, it is unclear how would such a person be appointed, what credentials such a person must have, and the extent of the responsibilities that such a person is required to undertake. For example, would another licensee be directed to take over the property, right and liabilities of the licensee under the SAO? StarHub submits that it is also necessary for the TA to address the appointment of the transferee(s), impact to the transferee(s) and their interests.

Question 7: MICA invites views and comments on the proposal to provide the Minister with power to require structural or operational separation under the newly introduced section 69C in the TA.

StarHub notes that the Consultation Paper has proposed that the Minister be given powers to impose structural or operational separation on a vertically-integrated operator controlling networks or wholesale services important or necessary for the effective functioning of a competitive market. The Consultation Paper proposed that that an operator may be subject to separation if:

i. It operates a telecom system that is required by other telecom licensees for the provision of telecom services and such a telecom system is so costly or difficult to replicate by an efficient competitor such that requiring the competitor to do so would create a significant barrier to market entry; or

ii. It has the ability to exercise significant market power in a market for a telecom service where that telecom service is required by other telecom licensees for the provision of telecom services, and it is so costly or difficult to provide that telecom service such that requiring an efficient competitor to do so would create a significant barrier to the provision of competitive telecom services by the competitor.

The Consultation Paper has also proposed that the Minister will impose separation on the operator only if he considers it necessary in the public interest, having regard to any one or more of the following:

i. To promote and maintain fair and efficient market conduct and effective competition between persons engaged in commercial activities connected with telecom technology in Singapore;

ii. To promote the efficiency and international competitiveness of the telecom industry in Singapore;

iii. To eliminate or reduce barriers to competition arising from the control of any telecom system, or the possession of significant market power, by the operator; and

iv. To promote transparency, non-discrimination, and equivalence of supply in relation to the provision of telecom services in Singapore.

StarHub appreciates the need for IDA to have the necessary powers to effectively regulate the industry. However, StarHub is concerned with the broad scope of separation powers the Consultation Paper has proposed. MICA would appreciate that imposing a separation on an operator is a severe measure and would have a major impact on that operator. StarHub submits that the conditions under which separation may be imposed on the operator are too broad. The proposed measures could undermine business certainty in the industry, and could also affect accrued legal rights of the operator and its contractual counter parties.

Having the ability to exercise significant market power does not necessarily warrant the imposition of separation, especially if there has been no actual anti-competitive behaviour. Operators who display anti-competitive behaviour can already be regulated under the provisions of the Telecom Competition Code. We respectfully submit that there does not appear to be any additional benefit to be gained in introducing separation. Rather, the significant costs inefficiencies and disruption suffered by an operator could far outweigh any intended benefit.

In addition, as the market is already progressing towards Next-Gen NBN, StarHub believes that the focus of any separation measures should be on operators who deploy extensive fibre networks and provide next generation broadband services to end users, given the potential for such networks to be become bottleneck facilities.

Therefore, StarHub submits that the imposition of structural or operational separation must not be applied retrospectively to operators of existing legacy networks (i.e. DSL and HFC). Separation of existing networks would be extremely disruptive, and could unfairly penalize existing network operators. In addition, we do not believe that existing networks will present the same regulatory challenges as the new fibre networks.

Given that the imposition of structural or operational separation would have major adverse impact on the operators in question, StarHub also submits that the imposition of structural or operational separation must only be considered as a last resort and must

be subject to detailed analysis and clear and transparent safeguards before it is implemented.

3. Other Issues

StarHub notes that the Consultation Paper has proposed revisions to the maximum penalty cap and consolidation provisions, to align with other domestic legislation. However, we note that the TA still has several inconsistencies with the Competition Act (Cap. 50B), including the area of appeals to an Appeals Board.

The Competition Act provides that most decisions of the Competition Commission can be appealed to the Competition Appeal Board. Similarly, in the broadcasting sector, MICA has already established appeals boards (such as the Broadcast, Publications and Arts Appeal committee). We also note that appeal boards have been provided for in other jurisdictions. For example, in Hong Kong, a licensee can appeal to the Telecommunications (Competition Provisions) Appeal Board against a decision by the Hong Kong Telecommunications Authority. However, under the TA, appeals are to the IDA and then to the Minister. StarHub respectfully suggests that the appeal process in the TA should be aligned with to the Competition Act.

4. Conclusion

StarHub welcomes the review of the TA and supports the need for the legislation to keep pace with developments in the industry and with market conditions.

StarHub does have some concerns on the proposed increase in maximum financial penalty, and the administrative action for failure to pay financial penalties. We would therefore respectfully suggest that MICA provides greater clarity and moderates such measures to ensure fairness. We also believe that some moderation may be needed in regard to the imposition of SAO or a separation on a licensee, which could create significant uncertainty and undermine investment faith in the industry.

Finally, given that the Consultation Paper has sought to align the TA with other legislation, we suggest that it might now be appropriate to consider implementing an Appeals Board under the TA, as provided in the Competition Act.

StarHub is grateful for the opportunity to comment on this matter.

StarHub Ltd
8 October 2010