# Telecom Competition Code - First Triennial Review

## Submission by StarHub Pte Ltd to the Info-communications Development Authority of Singapore

5 December 2003


Contact details: **StarHub Pte Ltd**
51 Cuppage Road
#07-00 StarHub Centre
Singapore 229469
Phone: +65 6825 5000
Fax: +65 6721 5004

Ronald Lim
Email: ronaldl@starhub.com

# Contents

# A. Introduction

1.1 StarHub Pte Ltd and its subsidiaries ("**StarHub**") welcome the opportunity to make this submission as part of the first triennial review of the Telecom Competition Code ("**2000 Code**").

1.2 This submission is in response to the draft Telecom Competition Code issued by the Info-communications Development Authority of Singapore ("**IDA**") for public consultation on 7 October 2003 ("**2004 Code**").

1.3 StarHub's submission is structured as follows:

- **Part A** contains this introduction;
- **Part B** contains an executive summary of the key points of StarHub's submission;
- **Part C** contains StarHub's statement of interest;
- **Part D** contains StarHub's detailed submissions on the key points contained in the executive summary;
- **Part E** contains a matrix setting out StarHub's submissions on other issues connected with the 2004 Code, cross-referencing to Part D where appropriate; and
- **Part F** contains the conclusion of StarHub's submission

1.4 This submission is based on StarHub's direct experience operating under the 2000 Code over the past three years and also draws on submissions previously made by StarHub to the IDA on particular regulatory issues, including:

- the request of SingTel Telecommunications Limited ("**SingTel**") for exemption from dominant licensee obligations with respect to the international telephone services ("**ITS**") market;
- the IDA's review of SingTel's Reference Interconnection Offer ("**RIO**"); and
- StarHub's submission to the IDA study on the competitiveness of Singapore's telecommunications markets in August 2003.

1.5 StarHub has proposed drafting to assist IDA and to support its submissions in many cases. However, StarHub notes that the proposed drafting amendments throughout this submission are only illustrative of the submissions being made and are not exhaustive in terms of all the

consequential amendments necessary. StarHub is willing to provide a complete mark-up of the 2004 Code if that would assist the IDA.

1.6 References to section numbers are references to sections in the 2004 Code, unless specified otherwise.

# B. Executive Summary of Key Points

1.1 StarHub generally welcomes the amendments proposed in the 2004 Code. StarHub believes that the adoption of the 2004 Code, together with the Telecommunications Act 1999 and the IDA as regulator of the telecommunications industry, will ensure that Singapore will have in place a basic framework with many of the features needed to foster sustainable, effective competition in the telecommunications industry.

1.2 However StarHub submits that there remains a need for further refinement of the regime and its implementation, in light of industry experience over the past three years and international precedent if the key aims of the regime are to be achieved (in particular, an internationally competitive telecommunications industry with services supplied to all people in Singapore efficiently and economically).[1]

1.3 In StarHub's view, the key points not yet addressed in the 2004 Code are set out in our submission below. StarHub submits that these issues are not simply issues that StarHub would like to see addressed for its own purposes - they are key points that reflect international best practice for the regulation of telecommunications and are necessary to ensure Singapore remains internationally competitive:

- *clarification of concept of "significant market power"* - in line with international precedent, StarHub submits there should be more clarity and guidance as to when a licensee is considered to have significant market power, particularly given the absence of established generic competition law in Singapore. StarHub submits that consistent with the IDA's recent decision on SingTel's request for exemption from dominance obligations in ITS, the IDA should adopt guidelines similar to those recently issued as part of the new European regulatory framework, including a rebuttable presumption of significant market power for a licensee holding a market share in excess of 40%;

- *private right of enforcement* - licensees are still totally reliant on the IDA to take action for breaches of the Code. This places new entrants at a distinct disadvantage especially if there are resource constraints hindering the IDA's ability to act in a timely manner. StarHub submits that there needs to be a private right of enforcement of the 2004 Code to increase its effectiveness and to

[1] StarHub notes and endorses the comments attributed to Jonathan Nadler of Squire, Sanders and Dempsey in CommsDay Asia on 9 October 2003. In particular, Mr Nadler noted that three years after liberalisation, it might be too soon to assume that most Singapore telecommunications markets are competitive. Accordingly, it is imperative that the existing regulation set out in the 2000 Code be refined and retained (i.e. consistent with "Phase II" of market development).

provide further disincentives for dominant licensees to engage in anti-competitive behaviour. Such a right would also alleviate resourcing pressures on the IDA by enabling a court to enforce aspects of the Code;

- *appropriate competition test* - StarHub submits that the current competition threshold test of "unreasonably" restricting competition imports an unnecessary degree of uncertainty, so should be clarified by incorporating a "substantial lessening of competition" test into the 2004 Code consistent with the approach in the US, Hong Kong, Australia and New Zealand. StarHub submits that the 2004 Code should also be amended so as to apply the competition test in a consistent manner, addressing actual, potential and intended effects on competition;

- *Consumer Protection (Fair Trading) Act* - StarHub is concerned with the deletion of the provisions of the 2000 Code regulating false or misleading claims and interference with end user/supplier relationships. StarHub submits that these issues are not adequately addressed in the recently enacted Fair Trading Act, particularly because the Act does not enable the IDA or aggrieved competitors to take enforcement action;

- *increased penalties for contraventions* - the current penalty of $1 million per contravention is not a sufficient disincentive for dominant licensees. StarHub submits that the financial penalty cap for breaches of the Code should be increased to ensure a dominant licensee does not profit from its unlawful conduct. IDA should seek to increase its penalties in line with international best practice;

- *interim decisions and backdating* - there is no clear power under the 2004 Code for the IDA to issue interim determinations or to backdate its final determinations (particularly in relation to pricing). StarHub submits that in order to reduce the incentives a dominant licensee has to delay and obstruct access negotiations, the 2004 Code should be amended to clarify that the IDA has the power to make interim determinations and to allow the IDA to backdate its final determinations. This would be in line with international precedent;

- *mandated wholesale services* - StarHub submits that certain fundamental wholesale services (such as local leased circuits ("**LLCs**"), wholesale line rental and wholesale digital subscriber lines ("**DSL**")) should be immediately mandated by the IDA and included in the RIO. In addition, StarHub submits that the 2004 Code should include a threshold test for the mandating of services based on the extent to which it is necessary to give effect to the regulatory

principles of promoting and maintaining effective and sustainable competition and permitting services based competition for the benefit of consumers set out in the Code;

- *regulatory intervention by IDA* - StarHub is concerned with the unreasonably high thresholds for requesting IDA enforcement of the Code, and with the breadth of discretion the IDA has to reject, delay or defer a request for enforcement. StarHub is also concerned that any such delay or deferment by IDA could have adverse effect on the licensee requesting for enforcement. StarHub submits that the Code should be amended to reflect the asymmetry of information between access seekers and access providers. Similarly, the IDA should have a duty to act on enforcement requests in accordance with specified timeframes;

- *guidelines and transparency* - transparency is a key principle of good regulation. StarHub submits that the IDA should be required to issue guidelines on how the provisions of the 2004 Code will be interpreted and applied to provide increased regulatory certainty for market participants. StarHub further submits that there should be clear and consistent use of public consultation on all issues affecting telecommunications operators in Singapore. There should also be an obligation on the IDA to publish determinations and decisions once they have been made; and

- *transparency in tariffing, RIO charging and pricing principles* - StarHub welcomes the amendments to the dominant licensee tariffing requirements, but submits that further amendments are necessary to ensure transparency and accountability. StarHub believes also that the 2004 Code does not contain sufficient detail on the pricing principles for Interconnection Related Services ("**IRS**") and Mandated Wholesale Services ("**MWS**"). StarHub submits that the IDA should be required to issue guidelines on how the IDA will apply those principles in the event of a dispute. StarHub submits that the lack of transparency in the derivation of RIO charges is restricting competition in the Singaporean telecommunications markets and should be addressed by a clear requirement in the 2004 Code for SingTel to publish information on its costing methodology.

# C. Statement of Interest

1.1 StarHub Pte Ltd is a Facilities Based Operator ("**FBO**") in Singapore, having been awarded a licence to provide public basic telecommunications services ("**PBTS**") by the Telecommunications Authority of Singapore ("**TAS**") (the predecessor to the IDA) on 5 May 1998.

1.2 StarHub Mobile Pte Ltd is a wholly-owned subsidiary of StarHub Pte 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.

1.3 StarHub 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 Pte Ltd completed a merger with Singapore Cable Vision Ltd to form StarHub Cable Vision Ltd.

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

# D. Detailed Submissions on Key Points

In this Part D, StarHub sets out its detailed submissions on key points arising under the 2004 Code. The remainder of StarHub's comments and drafting suggestions have been set out in the matrix in Part E.

## 1 Clarification of concept of "Significant Market Power"

**(Section 1.9)**

StarHub submits that there should be greater clarity as to when an entity will be regarded as having "Significant Market Power" ("**SMP**") as defined in section 1.9 of the 2004 Code - particularly in light of the IDA's recent decision on SingTel's dominance in the ITS market.

StarHub appreciates that market share is not the only factor that is relevant in considering the ability of an operator to behave independently of competitive market forces. However, in line with international precedent, StarHub submits it would be beneficial for rebuttable market share presumptions to be included either within the Code itself or in guidelines published by the IDA after consultation with the industry. StarHub believes guidance is particularly important because there is not yet any generic competition law in Singapore and, therefore, no body of Singapore precedent exists against which to assess the definition of SMP.

Given the similarity between the definition of SMP proposed in the Code and the definition contained in the EU telecommunications regulatory framework,[2] StarHub submits it would be appropriate for the IDA to base its guidelines on market share presumptions and guidelines already established in the EU context. In particular, StarHub notes that the current EU guidelines on the assessment of SMP in the EU framework[3] state that the EU SMP definition has now been aligned with the concept of dominance within the meaning of European Community law. The EU guidelines set rebuttable market share presumptions as follows:

> *[entities] with market shares of no more than 25% are not likely to enjoy a (single) dominant position on the market concerned. In the Commission's decision-making practice, single dominance concerns normally arise in the case of [entities] with market shares of over 40%…very large market shares - in excess of 50% - are in*

---

2 *Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a Common Regulatory Framework for Electronic Communications Networks and Services (Framework Directive)* [2002] OJ L 108/7.

3 *Commission Guidelines on Market Analysis and the Assessment of Significant Market Power Under the Community Regulatory Framework for Electronic Communications Networks and Services* [2002] OJ C 165/03.

*themselves, save in exceptional circumstances, evidence of a dominant position*[4]

Based on the EU guidelines, StarHub submits that there should be a presumption that SMP would normally arise in the case of a licensee holding a share in any telecommunications market in excess of 40%. StarHub notes this is consistent with the view expressed by the IDA in its recent decision on SingTel's request to exempt it from its dominance obligations with respect to the ITS market. In addition, StarHub submits that the IDA should identify that a market share in excess of 50% would, save in exceptional circumstances, be conclusive evidence of a dominant position.

As a result of the association of the EU SMP test with the concept of dominance, not only will the IDA be able to utilise the EU SMP guidelines, it will also be able to draw upon the body of EU legal precedent on the concept of dominance.

## 2 Private right of enforcement

**(Section 11.4)**

StarHub is concerned that the 2004 Code still fails to include a private right of enforcement. At present only the IDA is able to take enforcement action against telecommunications operators for breaching the Code. In particular, under section 11.4, enforcement action can be brought by IDA either on its own motion or at the request of a private party, but individual operators do not themselves have a separate right of enforcement. So while there is ex post regulation of the conduct of telecommunications operators in Singapore (as set out in sections 8, 9 and 10), that regulation is only enforceable by the IDA.

Despite an official from the Singapore government suggesting (during the IDA's workshop in October on the 2004 Code) that a right of action for breach of statutory duty may already exist in respect of breaches of the Code, StarHub has received legal advice that this may not be the case. This is due to the fact that the Code provides for enforcement action by IDA only, including the imposition of financial penalties. StarHub is advised that where the legislation imposes a penalty for breach of a statutory duty, that is generally a ground for holding that no common law action for damages lies for breach of that duty (*Management Corporation Strata Title No. 586 v Menezes*[5]).

[4] Ibid, at paragraph 75.

[5] [1992] 1 SLR 807.

StarHub is concerned with the need for total reliance on the IDA for enforcement of, in particular, breaches by the incumbent of access requirements and conduct rules under the Code. As new entrants suffer as a result of anti-competitive conduct on the part of the incumbent, this inability to initiate separate proceedings places any new entrant at a distinct competitive disadvantage, particularly when there may sometimes be resource constraints hindering the IDA's ability to act promptly.

The situation is exacerbated by:

- the fact there is not at present any generic competition legislation in Singapore, pursuant to which a private right of enforcement would be expected;

- the fact the fair trading legislation recently enacted in Singapore not only does not include a private right of enforcement for competitors, but is also restricted to conduct in relation to consumers; and

- the absence of any guidelines as to how the IDA will apply the conduct provisions of the Code to particular market behaviour (see our comments below in paragraph 9 of this Part D in relation to transparency and the need for such guidelines).

StarHub submits that a private right of enforcement is crucial to enable operators (and new entrants in particular) to seek protection against Code breaches in circumstances where the IDA may not have the available resources for immediate investigation and action, and to allow them to claim compensation for losses incurred as a result of an incumbent's anti-competitive behaviour.

This is consistent with the approach taken in overseas jurisdictions. For example:

- in Australia, operators have a private right of enforcement in relation to anti-competitive conduct under Part XIB of the Trade Practices Act 1974, where they may seek an injunction[6] and orders for damages for loss or damage suffered as a result of the anti-competitive conduct.[7] Operators also have a right to privately enforce standard access obligations under Part XIC of the Act where their interests have been

[6] Trade Practices Act 1974, s151CA.

[7] Trade Practices Act 1974, s151CC.

affected by a contravention of those obligations.[8] New Zealand has a very similar regime; [9]

- in the United Kingdom, a person may bring an action against an electronic communications network or service provider if that person suffers loss or damage as a result of the provider's failure to comply with certain conditions imposed by the regulator or the requirements of an enforcement notification;[10]

- in Hong Kong, a person sustaining loss or damage from a breach of provisions of the Telecommunications Ordinance relating to anti-competitive conduct, abuse of a dominant position, misleading or deceptive conduct and non-discrimination, or from a breach of a licence condition, determination or direction relating to those provisions, may bring an action for damages, an injunction or other appropriate remedy, order or relief against the person who is in breach;[11] and

- in the USA, the Federal Communications Commission may, in relation to a complaint against a carrier for breach of the Communications Act, award to the complainant monetary damages.[12]

It can be expected that such private rights of enforcement will promote compliance and deter any breaches of the Code as operators will appreciate the likelihood of their competitors exercising their enforcement rights should there be a breach.

Private rights of enforcement would also reduce industry participants' reliance on the IDA and, more importantly, the resourcing pressures currently being placed on the IDA by enabling the courts to adopt an important role in enforcing.

---

8 Trade Practices Act 1974, s152BB.

9 See, for example, Commerce Act 1986, s83 and Telecommunications Act 2001, s61.

10 Communications Act 2003, s104.

11 Telecommunication (Amendment) Ordinance 2000, section 26 (amending section 39A of the Hong Kong Telecommunications Ordinance).

12 Communications Act of 1934, ss 208 and 209.

# 3 Appropriate competition test

**(Sections 8 and 9)**

StarHub submits that the general competition test used in the 2004 Code of "unreasonably" restricting competition should be amended or clarified in the manner proposed below.

StarHub submits that the current use of the term "unreasonably" imports an unacceptably high degree of uncertainty into the application of the competition test within sections 8 and 9 of the 2004 Code.

The use of the term "unreasonably" suggests, for example, that certain restrictions on competition may be "reasonable". However, there is no indication as to how such reasonableness would be assessed. The concept of "reasonableness" is inherently uncertain, not directly related to the competitive process and is without any useful body of regulatory precedent.

StarHub submits that the accepted international approach to a competition test of this nature is to focus on the extent to which competition has been restricted. An objective threshold is usually applied to describe the requisite extent. For example, considering the approach adopted by other key APEC nations:

- Japan is the APEC nation with a competition test that seems to most closely mirror the test in the 2004 Code. Japan uses the concept of "unreasonable restraint of trade". However, section 2(6) of the Antimonopoly Act 1947 specifically defines the concept of an "unreasonable restraint of trade" in the following terms:

  > "*The term "unreasonable restraint of trade" as used in this Act shall mean such business activities, by which any entrepreneur, by contract, agreement or any other concerted actions, irrespective of its names, with other entrepreneurs, mutually restrict or conduct their business activities in such a manner as to fix, maintain, or increase prices, or to limit production, technology, products, facilities, or customers or suppliers, thereby causing, contrary to the public interest, a* ***substantial*** *restraint of competition in any particular field of trade.*" [emphasis added]

  Hence, in Japan, the concept of "unreasonable restraint of trade" is interpreted as a "substantial restraint of competition".

- Australia and New Zealand both use the concept “substantial lessening of competition” test;[13]
- the United States uses the term “substantially lessen competition” in the Clayton Act;[14]
- Hong Kong uses the concept “substantially restricting competition” in sectoral competition rules set out in telecommunications licences. Hong Kong currently does not have a generic competition law, but rather has sectoral competition laws for the telecommunications industry set out within telecommunications licences;[15]
- Korea uses the concept of “restriction of substantial competition”.[16]

StarHub submits that it would be consistent with international practice if the competition threshold used in the 2004 Code were amended to incorporate a “substantial lessening of competition” test.

StarHub submits that this should occur by adopting the Japanese approach and specifically defining the concept of “unreasonably restricting competition” to incorporate a “substantial lessening of competition” test.

StarHub notes that the concept of "substantial" should be interpreted as requiring an assessment of the materiality of the effect on competition in the particular market circumstances. The appropriate threshold of materiality should be low, in the nature of whether the effect on competition is more than trivial or insignificant (i.e., more than "de minimus"). International precedent on the concept of "substantial" (as used in the United States, Australia and New Zealand, for example), does not require that an effect on competition is "large" or "weighty" to satisfy the "substantial" requirement. Rather, international precedent equates "substantial" with "real" (i.e., recognisable) or "of substance" (i.e., not trivial) in the particular context.

If necessary, IDA may wish to include a suitable definition of "substantial" in the Code with this in mind. For example, section 2(1A) of New Zealand's Commerce Act 1986 expressly defines "substantial" as meaning “real or of substance” (i.e. not trivial).

---

[13] See, for example, Part IV and s151AJ of the Trade Practices Act and Part 2 of the Commerce Act 1986.

[14] See ss 13 and 14 of the Clayton Act 1914, 15 USC 13.

[15] Condition 15(1)(a) of PCCW-HKT Telephone Limited's FTNS / Fixed Carrier Licence (29 June 1995) provides that the licensee "shall not engage in conduct, which in the opinion of the Authority, has the purpose or effect of preventing or substantially restricting competition".

[16] Chapter 1, Article 2(8-2) of the *Monopoly Regulation and Fair Trade Act* defines "An Act Substantially Restraining Competition". Chapter 3, Article 7 of the same Act refers to conduct which "substantially restricts competition".

StarHub further submits that the current drafting of the 2004 Code is inconsistent in the manner in which the competition test is applied. Some sections contemplate actual effect, some contemplate potential effect, some contemplate intended effect, and some contemplate various permutations of these concepts. These inconsistencies will create difficulties in the interpretation of the 2004 Code and lead to uncertainty in the application of the competition test and associated compliance with it.

StarHub therefore submits that consistent concepts for the application of the competition test should be used throughout sections 8 and 9 of the 2004 Code. The broadest and most appropriate application of the competition test would be to use the following three concepts in each relevant section:

- actual effect - drafted as "has the effect of substantially lessening competition";
- potential effect - drafted as "is likely to have the effect of substantially lessening competition"; and
- intended effect - drafted as "has the purpose of substantially lessening competition".

The consistent application of all three concepts would ensure that anti-competitive behaviour is effectively regulated in Singapore telecommunications markets.

StarHub notes that the same tripartite approach of "purpose, effect or likely effect" is used in a number of jurisdictions, including both Australia and New Zealand.[17]

# 4 Consumer Protection (Fair Trading) Act 2003

**(Sections 7.4.1 and 7.4.2)**

StarHub is concerned at the deletion of sections 7.4.1 and 7.4.4 of the 2000 Code. StarHub presumes the deletion was made on the basis that these provisions are intended to be covered by the new Consumer Protection (Fair Trading) Act 2003 ("**Fair Trading Act**").

StarHub strongly submits that these sections should be included in the 2004 Code, notwithstanding the enactment of the Fair Trading Act.

[17] In Australia, for example, see section 45 and section 151AJ(2)(b) of the Trade Practices Act 1974. See also, section 27 of the New Zealand Commerce Act 1986.

Under section 6 of the Fair Trading Act, a "consumer" (defined narrowly) who has entered a consumer transaction involving an unfair practice may commence an action in a court of competent jurisdiction against the supplier. In addition, under section 9 of the Fair Trading Act, applications for injunctions may only be made by a "specified body", namely the Consumers Association of Singapore and Singapore Tourism Board. There is no opportunity for competitors or the IDA to take enforcement action against licensees who have engaged in misleading or deceptive conduct, despite the profound impact serious misleading or deceptive conduct can have on the competitiveness of the Singaporean telecommunications regime.

StarHub submits that reliance on the Fair Trading Act alone would create a very significant gap in Singapore's telecommunications regulatory regime as aggrieved competitors will have no recourse of action against unfair conduct by other competitors.

In StarHub's experience, individual consumers rarely make claims directly against licensees. Rather it is usually competitors that closely monitor each other's conduct and complain where that conduct is unfair to consumers (and the competitors). In the telecommunications industry, which has substantial technical requirements and requires significant specialised knowledge, consumers are less able to identify misleading and deceptive conduct. Rather, it is competitors that are best placed to identify such conduct and have the resources to take action or alert regulators of the need for appropriate action. As can be seen from the IDA's regulatory decisions and enforcement actions published on its website, the complainants in the majority of enforcement actions were industry players requesting enforcement of the 2000 Code's false and misleading claims provisions.

StarHub submits that sections 7.4.1 and 7.4.4 of the 2000 Code should be retained.

StarHub further submits that the ability for competitors or the IDA to take action for misleading or deceptive conduct is consistent with international precedent. For example:

- in Hong Kong, anyone who believes a licensee has engaged in conduct which is misleading or deceptive may complain to the Office of the Telecommunications Authority (**"OFTA"**). OFTA may also start an investigation on its own initiative.[18] OFTA has acknowledged that although ordinary consumers can usually be taken to have some knowledge of the product or service they are buying and can read the terms and conditions; if products are new or complex, this knowledge

[18] *Telecommunications Authority Guidelines: Misleading or Deceptive Conduct in Hong Kong Telecommunications Markets*, page 17, The Office of Telecommunications Authority, Hong Kong.

cannot be assumed.[19] Anyone who can prove they have sustained loss or damage from a breach of the above consumer protection provisions (i.e. not just consumers) can also bring that action for damages, an injunction or other appropriate remedy, order or relief against the licensee in breach;[20]

- in Australia, any person[21] sustaining loss or damage from a breach of consumer protection provisions in Part V of the Trade Practices Act 1974 (which includes provisions prohibiting misleading or deceptive conduct), may bring an action for damages and/or apply for appropriate rectification or relief against the person in breach.[22] Further, the Australian Competition and Consumer Commission ("**ACCC**") or any other person may seek an injunction to restrain breaches of these Part V provisions.[23] Competitors for instance are often the parties who bring court actions for injunctive and other relief under the Trade Practices Act 1974; and

- similarly, in New Zealand under the Fair Trading Act 1986, any person who has suffered or is likely to suffer loss or damage from conduct of any other person who is in breach of provisions relating to misleading or deceptive conduct, false representations and unfair practices, may apply for an injunction[24] or any other orders[25] as set out under the Fair Trading Act. The courts in New Zealand have clearly held that competitors are entitled to seek the protection of section 9 of the Fair Trading Act (relating to misleading or deceptive conduct).[26]

---

19 *Telecommunications Authority Guidelines: Misleading or Deceptive Conduct in Hong Kong Telecommunications Markets*, page 5, The Office of Telecommunications Authority, Hong Kong

20 Telecommunications (Amendment) Ordinance 2000 s 26 (amending s 39A of the Ordinance).

21 Australian courts have held that the terms 'any person' and 'any other person' must be given their natural meaning and cannot be qualified to limit the right to apply for relief to consumers only - *R v Judges of the Federal Court of Australia; Ex parte Pilkington ACI (Operations) Pty Ltd* (1978) 142 CLR 113 at 131, per Murphy J.

22 Trade Practices Act 1974, s 82(1), s 87.

23 Trade Practices Act 1974, s 80(1).

24 Fair Trading Act 1986, s 41.

25 Fair Trading Act 1986, s 43.

26 *Lane's Appliance Centres Ltd v Commerce Commission (*unrep, High Court, Christchurch AP 57/89, 8 June 1989).

# 5 Increased penalties for contraventions

**(Section 11.4.4.4)**

StarHub submits that the current penalty of up to $1 million per contravention is not a sufficient disincentive for dominant licensees and is very low when compared to other jurisdictions. StarHub submits that the current financial cap should be increased to ensure that a dominant licensee does not profit from any anti-competitive conduct.

In StarHub's view, a higher penalty per contravention, plus a penalty per day of continued contravention after a cease and desist notice is given by the IDA, would be a more appropriate disincentive and is in line with international precedent. For example:

- in Australia, fines of up to AUD$10 million may be imposed for each breach of a carrier licence condition.[27] In addition, fines of up to AUD$1 million per day may be imposed for continuing contraventions of the competition rule;[28] and

- in the UK, where an operator has been notified of a breach of a condition imposed by the regulator and has not rectified the breach, or has contravened an enforcement notice, the regulator may impose a penalty not exceeding 10 per cent of the turnover of the operator's relevant business for the relevant period as the regulator determines appropriate and proportionate.[29]

StarHub submits that a penalty regime along these lines would be more appropriate in the current environment where incumbents around the world are posting significant revenue and profit figures. For example, a maximum fine of $1 million for the SingTel group, which has reported revenue of $10.2 billion and net profit after tax of $2 billion,[30] would not be a sufficient disincentive.

---

[27] Telecommunications Act 1997, s570.

[28] Trade Practices Act, s151BX.

[29] Communications Act 2003, s 97

[30] SingTel's Annual Review and Summary Financial Statement 2002/2003

# 6 Interim determinations and backdating

**(Section 11.4.3 and 11.4.4)**

It is well acknowledged that an incumbent telecommunications operator has very little incentive to commercially agree on the provision of access to a new entrant.[31] For this reason, Singapore and international best practice are that, at least until effective competition exists, access should be mandated and the resolution of disputes between incumbents and new entrants should be regulated.

However, even if access is mandated, an incumbent operator still has an incentive to obstruct negotiations and create an access dispute, delaying access to a new entrant. For this reason, StarHub submits that the existing regulatory regime needs to be amended to:

- allow for the backdating of final IDA determinations to the date on which the parties commenced negotiations. This has particular application in determination of access *pricing* disputes; and

- allow for the issuing of interim access determinations. At present, the IDA only has specific power under the Code to make interim directions to cease and desist.[32] StarHub submits that it is also necessary for the IDA to be able to make interim orders requiring positive action by the relevant operator. StarHub notes that the draft dispute resolution guidelines issued by the IDA for comment on 7 October 2003 provide for the IDA to impose an interim determination of an access dispute where appropriate. However, StarHub submits this power needs to be specifically provided for in the Code, not only in guidelines - particularly as it is unclear from the draft guidelines when interim orders would be "appropriate".

Both of these measures are in line with international best practice and in accordance with the regulatory principle of efficiency in decision making. For example, the need for regulatory power to issue interim decisions and to backdate final determinations to address these issues has been recognised in Australia, resulting in an amendment to the Trade Practices Act 1974 to enable the ACCC to make an interim determination in an access dispute[33] and to enable the ACCC in a final determination to provide for all or part of the determination to apply retrospectively from as early as the date the

---

[31] For example, reference can be made to the comments on this issue set out in the World Bank's *Telecommunications Regulation Handbook*.

[32] Telecoms Competition Code, s10.3.1.4.

[33] Trade Practices Act 1974, s 152CPA (inserted by the Telecommunications Legislation Amendment Act 1999.

parties to the dispute began negotiations.[34] The ACCC may also require a party to pay interest to the other party.[35] As noted in the Explanatory Memorandum to the amending legislation, these provisions are intended to:

> *…encourage commercial agreement and co-operation during access arbitrations by removing incentives for delay and to ensure a considered and reasonable outcome is ultimately applied to the interim period which may otherwise be covered by an interim determination or a commercial agreement which one or more parties may be disputing.*[36]

Interim decisions are seen by the ACCC as important for the smooth operation of the access regime ensuring access seekers get timely access and preventing or deterring access providers from using disputes as a way of delaying access.[37]

Similarly, in the United Kingdom, the Office of Telecommunications ("**Oftel**") has acknowledged that the dispute resolution process is a means to swiftly resolve disputes that arise due to the particular nature of communications markets and it will apply determinations retrospectively depending on the merits of the case.[38]

# 7 Mandated wholesale services

**(Appendix 2, section 7)**

StarHub supports the MWS category and the requirement that MWS be provided under a dominant licensee's RIO to facilities-based licensees. As StarHub has submitted on previous occasions,[39] while facilities-based competition is an appropriate long term goal for Singapore, SingTel's overall dominance together with the dominance it has in a number of key markets,

---

[34] Trade Practices Act 1974, s152DNA (inserted by the Telecommunications Legislation Amendment Act 1999 and amended by the Telecommunications Competition Act 2002).

[35] Trade Practices Act 1974, s152DNA(6).

[36] Supplementary Explanatory Memorandum for the Telecommunications Legislation Amendment Bill 1998, at page 33.

[37] ACCC's *Resolution of access disputes - a guide to dispute resolution under Part XIC of the Trade Practices Act 1974 and the Telecommunications Act 1997*, October 2002, at page 48.

[38] Oftel, *Dispute Resolution Under the New EU Directives - A Consultation by Oftel and the Radiocommunications Agency* (November 2002), at page 13.

[39] See *Submission by StarHub Pte Ltd to IDA Study on Competitiveness of Singapore's Telecommunications Market (15 August 2003*) and *StarHub's Response to IDA's Consultation Paper - Designation of Singapore Telecommunications Limited's Local Leased Circuits as Mandatory Wholesale*.

means that services-based competition should be encouraged for a period in order to foster sustainable competition for the longer term.

However, StarHub has a number of concerns with the MWS provisions:

- StarHub submits that certain key services should be prescribed as MWS immediately. As presently drafted, no services are listed in the MWS category:

  - In accordance with the IDA's proposals in its consultation on LLCs,[40] StarHub submits that wholesale LLCs should be specified as a MWS under Appendix 2. As set out in StarHub's submissions on the IDA's LLC consultation,[41] the lack of effective competition in the retail market for LLC services as a result of SingTel's continuing dominance in the wholesale LLC market, and its ability to use that dominance to constrain pricing flexibility and prevent other facilities-based operators from competing effectively, requires regulatory intervention so that access to this critical building block for downstream services can be obtained.

  - StarHub also submits that a wholesale direct exchange line ("**DEL**") service (or line rental), and a wholesale DSL service should also be prescribed as MWS. The need for each of these wholesale products was articulated in StarHub's submission to the IDA study on competition in the Singapore telecommunications market in August 2003 in response to particular questions raised by the IDA. In that submission, StarHub also set out a description of each of these services.

    In particular, StarHub submits that a wholesale DEL service is required in order to counteract the significant market power SingTel has through its control of over 99% of the local loop. StarHub submits that SingTel's overwhelming dominance in the provision of DELs to end users perpetuates dominance in other markets - in particular, business customers, given that most of the business customers today do not have access to the SCV cable network.

    Similarly, the lack of a regulated wholesale DSL product is prohibiting competition developing in the retail broadband

---

[40] See IDA consultation paper *Designation of Singapore Telecommunications Limited's Local Leased Circuits as Mandatory Wholesale Service*, 30 May 2003.

[41] See *StarHub's Response to IDA's Consultation Paper - Designation of Singapore Telecommunications Limited's Local Leased Circuits as Mandatory Wholesale*.

data and Internet markets, particularly for business customers who do not have access to the SCV cable network.

- Please also refer to StarHub's submission to the IDA Study on competitiveness of Singapore's telecommunications market in August 2003, in relation to internet peering with STIX.

- StarHub submits that the 2004 Code should also set out a threshold for determination of a MWS to promote regulatory certainty and transparency and encourage investment in Singaporean telecommunications markets. StarHub submits that an appropriate threshold test would require the IDA to mandate a wholesale service where necessary to give effect to the regulatory principles set out in section 1.5 to take measures to promote and maintain effective and sustainable competition and to permit services based competition for the benefit of consumers. StarHub submits that the threshold test should also make reference to the condition set out in section 2.2.1(a) (i.e. if facilities are sufficiently costly or difficult to replicate so that requiring new entrants to do so would create a significant barrier to rapid and successful entry into the telecommunications market in Singapore, services provided by means of those facilities should be mandated).

  StarHub submits that the introduction of a threshold test would be in line with the approach taken in other overseas jurisdictions. For example:

  - in Australia, when assessing whether to regulate a service, the ACCC must be satisfied that this regulation will promote the long-term interest of end users, or the "**LTIE**" test.[42] In particular, the ACCC must have regard to the extent to which the service is likely to result in the achievement of the following objectives:[43]

    - the promotion of competition in markets for services;
    - achieving any-to-any connectivity; and
    - encouraging the economically efficient use of, and the economically efficient investment in, the infrastructure by which the listed services are supplied;

[42] Trade Practices Act 1974, s152AL.

[43] Trade Practices Act 1974, s152AB.

- a similar LTIE test is applied in New Zealand;[44] and
- when considering whether to impose access obligations on operators with significant market power, EU national regulatory authorities must take into account, amongst others, the following factors:[45]
    - the technical and economic viability of using or installing competing facilities, in the light of the rate of market development, taking into account the nature and type of interconnection and access involved;
    - the feasibility of providing the access proposed in relation to the capacity available;
    - the need to safeguard competition in the long term; and
    - the provision of pan-European services.

# 8 Regulatory intervention by the IDA

**(Sections 11.3, 11.4 and 11.1.2)**

StarHub is concerned with some of the amendments to section 11 with regard to dispute resolution and enforcement and the discretion the IDA has retained not to act in particular disputes and on enforcement requests involving dominant licensees.

In particular, StarHub is concerned that the amendments to section 11.3 in relation to dispute resolution have reduced the IDA's role in interconnection and access disputes involving dominant licensees - limiting the IDA's role to the resolution of disputes on reaching Individualised Interconnection Agreements and Sharing Agreements (as the terms are defined in the 2004 Code). StarHub submits that where one party to a dispute involving interconnection or access (including the resale of end user services) is a dominant licensee, the IDA should have only a limited discretion to decline to be involved in resolving the dispute. StarHub submits that this discretion should be limited to circumstances where it is clear the disputing parties have not made any genuine attempt to resolve the dispute between themselves.

[44] Telecommunications Act 2001, s18.

[45] Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities, Article 12.

Accordingly, StarHub submits that section 11.3(a) should be widened to include other access and interconnection disputes involving a dominant licensee (including Interconnection Agreements with a dominant licensee which are currently subject to the IDA's discretion under section 11.3(b) and disputes relating to the resale of End User services under section 4.2.2.2). Please see StarHub's further drafting suggestions on section 11.3(c) in Part E of this submission.

In addition, unless there is a private right of enforcement under the Code, the ability for an operator to request the IDA to take action on its behalf against an incumbent operator, which has, for example, failed to provide timely, reasonable and non-discriminatory terms and conditions or has otherwise behaved in an anti-competitive manner, is essential to enable effective competition in the market.

This being the case, StarHub is concerned with the thresholds set out in the Code for requesting IDA enforcement, and with the discretion the IDA has to reject, delay or defer those requests. Due to the nature of anti-competitive behaviour, any delay or deferment in enforcement would be to the detriment of the aggrieved party.

In particular, StarHub has the following concerns with the provisions of section 11.4.1:

- StarHub submits that the thresholds set out in section 11.4.1.1 are too high and fail to recognise the asymmetry of information between an access seeker and an access provider and the fact that access seekers will not have all the facts available to them, nor the investigative powers at their disposal. In addition, a party requesting enforcement should not be obliged to make good faith attempts to resolve an underlying dispute before the IDA accepts a request for enforcement when the request for enforcement may not involve a dispute as such. For example, the issue at hand may be a breach by a licensee of a conduct rule or other Code contravention rather than a failure to provide access.

  Further, where an underlying dispute has been escalated to IDA for resolution and it is clear that a request for enforcement is independent of the outcome of the dispute resolution by IDA, StarHub submits that IDA should accept a request for enforcement and initiate enforcement proceedings without having to wait for the resolution of the underlying dispute.

  StarHub submits that the concerns with section 11.4.1.1 are exacerbated by the prohibition in section 11.5 on the introduction of new facts and information. StarHub appreciates that the licensee requesting enforcement action should be required to provide a level

of information so as to deter false or vexatious allegations, but it should not be required to effectively carry out the *entire investigation* before the IDA will accept the request (an impossible burden in most cases). StarHub submits that the inability of a requesting licensee to produce supporting documentation should not be used against the requesting licensee or to reject the request for enforcement action.

Given the severe information asymmetry in favour of the incumbent in Singapore and its dominance in so many telecommunications markets, not to mention the uneven playing field, the IDA should have a bias toward accepting and investigating requests for enforcement against a dominant licensee from other licensees.

- StarHub submits that the IDA should have a clear duty to investigate alleged breaches of the Code and to seek further information (including by using its information gathering powers under section 59 of the Telecommunications Act and/or the relevant operator licence) if the party seeking enforcement is unable to provide this information - for example, if the necessary information is confidential, with an end user or with the infringing licensee. In particular, in relation to section 11.4.1.2, the IDA should not have an option to decline a request except in certain limited specified circumstances - for example, where:

  - the claim is vexatious or clearly without merit;
  - the allegations, even if established, would not constitute a contravention; and
  - the exercise of the enforcement discretion would not be consistent with the objectives of the Code.

  StarHub submits that consistent with regulatory principles of transparency in decision-making, the IDA should also be required to provide reasons where it declines an enforcement request in accordance with the specified circumstances.

  Please see the relevant section of Part E of this submission for detailed proposed drafting.

- StarHub submits that section 11.4.1.3 should be deleted in its entirety. The IDA should not have the ability to defer consideration of an enforcement request, particularly where the grounds on which it may do so are not specified. Such an ability is unfair to aggrieved licensees who, in the absence of any private right of enforcement, are reliant on the IDA to promptly investigate complaints and take action where warranted. The ability to extend the time for consideration of a

complex or novel issue is covered by section 11.4.1.2(b). In all other cases, the IDA should be required to consider enforcement requests and to only reject those requests in certain limited specified circumstances (as per our comments above).

If such delay or deferment is needed, IDA should ensure that the remedy has retrospective effected (see our comments in paragraph 6 of this Part D above)

StarHub further submits that the sensible requirements under the 2000 Code that any enforcement action be "timely" (section 10.2.1) and "proportionate" to the severity of the contravention (section 10.2.3) should be retained. Timely and proportionate enforcement action is necessary to provide a disincentive to incumbent operators and to ensure new entrants are not disadvantaged by the anti-competitive conduct of incumbent operators. This would be assisted by a higher penalty cap - see our comments in paragraph 5 of this Part D above. As noted by the World Bank:

> *Delays in deciding major regulatory issues can retard development in the sector. Interconnection issues provide prime examples.*[46]

StarHub submits that the 2004 Code will only be as good and effective as its implementation. Accordingly, StarHub submits there is a need for the IDA to have sufficient resources and to be staffed with people with the necessary skills and technical, legal and industry knowledge. StarHub expects that some of the timeliness issues previously encountered by StarHub may be caused by resource limitations upon the IDA. StarHub submits that additional resourcing for the IDA would assist in resolving some of the competition concerns raised (particularly as a more active role by the IDA is required), as would a private right of enforcement for licensees (see our comments in paragraph 2 of this Part D above).

# 9 Guidelines and transparency

**(Section 1.5.6)**

Transparency is one of the key principles of good regulation. StarHub notes that this principle is embodied in section 1.5.6 of the 2004 Code. The importance of transparency in ensuring credibility of the regulatory process is noted by the International Telecommunications Union in its 2001 report

---

[46] *Telecommunications Regulation Handbook*, World Bank, November 2002 - Module 1: Overview of Telecommunications Regulations, at paragraph 1.4.4.

*Effective Regulation Case Study: Singapore 2001*[47] and also by the World Bank.[48]

Regulatory transparency is also required by the terms and conditions of Singapore's Free Trade Agreements with Australia and the USA. In particular, Article 9.12 of the United States - Singapore Free Trade Agreement requires Singapore to ensure that:

> *(a) rulemakings, including the basis for such rulemakings, of its telecommunications regulatory body and end-user tariffs filed with its telecommunications regulatory body are promptly published or otherwise made available to all interested persons; and*
>
> *(b) interested persons are provided with adequate advance public notice and the opportunity to comment on any rulemaking proposed by the telecommunications regulatory body.*

Although transparency in the IDA's decision-making process has increased, there are still several areas where regulatory transparency is absent from the existing Singaporean regime. StarHub submits that these need to be addressed to ensure the credibility of the IDA decision-making process is maintained. In particular:

- StarHub submits that the 2004 Code should contain a requirement for the IDA to issue guidelines on how certain of the provisions of the 2004 Code will be interpreted and applied. In particular, although the 2004 Code contains provisions enabling ex post regulation of the conduct of market participants, there is currently no guidance on how these provisions will actually be applied to particular market behaviour by the IDA. Such guidelines would give new entrants (who are currently reliant on the IDA to take action under the Code in a regulatory environment where there is no generic competition legislation to provide precedent or guidance) a degree of certainty as to the acceptable and unacceptable market parameters. Regulatory certainty will in turn promote investment in the Singaporean telecommunications industry.

  The need for guidelines is recognised by the World Bank as part of the proactive regulation required in order to increase competition.[49] It

---

[47] International Telecommunications Union, *Effective Regulation Case Study: Singapore 2001* (2001).

[48] World Bank, "Module 1: Overview of Telecommunications Regulations" in *Telecommunications Regulation Handbook* (November 2002), at paragraph 1.4.4.

[49] World Bank, "Module 1: Overview of Telecommunications Regulations" in *Telecommunications Regulation Handbook* (November 2002), at paragraph 1.4.1.

is also consistent with the IDA's previous behaviour[50] and in accordance with international precedent in Australia,[51] the United Kingdom[52] and Hong Kong.[53]

- StarHub submits that although section 1.5.6 requires the IDA to provide an opportunity for public comment "in connection with material issues", this threshold creates uncertainty as to when the IDA will publicly consult on decisions, particularly when an obligation to seek public comments is specified in some provisions of the 2004 Code, but not in others. For example, while there is a requirement for the IDA to provide an opportunity for public comment on the triennial review of the Code under section 1.6.1, there is no equivalent obligation in relation to modifications of the Code under sections 1.6.2 and 1.6.3.

  StarHub further submits that decisions regarding individual companies and complaints should be considered and reached having regard to general public comment. For example, section 1.7.1 (relating to the IDA's right to grant exemptions) should include an obligation on the IDA to provide an opportunity for public comment.

---

[50] StarHub notes that the IDA has previously issued guidelines on the 2000 Code, but only on requests for enforcement action - see the IDA's, *Advisory Guidelines Governing Request for Enforcement Action Submitted by a Licensee or User Pursuant to Subsection 10.4 of the Code of Practice for Competition in the Provision of Telecommunications Services* (24 January 2003).

[51] In Australia, the ACCC has published guidelines on anti-competitive conduct in telecommunications markets (see ACCC, *Anti-Competitive Conduct in Telecommunications Markets - An Information Paper* (August 1999)) and, in particular, the approach the ACCC will take when considering whether a carrier or carriage service provided has engaged, or is engaging in anti-competitive conduct. An amendment to the Trade Practices Act in 2002 required the ACCC to formulate guidelines on the issue of a competition notice and to have regard to those guidelines when issuing a competition notice (Trade Practices Act 1974, s151AP). The ACCC has also issued guidelines on pricing principles and the conduct of access disputes (see, for example, the ACCC's *Revised pricing guidelines for access prices of PSTN terminating and originating access services provided by non-dominant or smaller fixed networks - Pricing Principles Paper*, January 2002, *Pricing methodology for the GSM and CDMA Termination Service, Final Report*, September 2002 and *Resolution of Telecommunications Access Disputes - A Guide*, May 2003 (revised)).

[52] Oftel has published numerous guidelines on its strategy and approach to regulation of the telecommunications industry and, in particular, how UK competition legislation will be applied to the telecommunications industry. See for example, *Implementing Oftel's Strategy: Effective Competition Review Guidelines* (August 2000); Oftel, *Application of the Competition Act in the Telecommunications Sector* (January 2000); and Oftel, *Oftel's Competition Act Strategy - A Statement by the Director General of Telecommunications* (July 2002).

[53] In Hong Kong, OFTA has issued guidelines to assist in the interpretation and application of the competition provisions of the Fixed Telecommunications Network Services Licence and also on misleading and deceptive conduct in Hong Kong telecommunications markets. See OFTA's *Guidelines to assist the interpretation and application of the competition provisions of the FTNS Licence*, June 1995 and *Misleading or Deceptive Conduct in Hong Kong Telecommunications Markets*, Telecommunications Authority Guidelines, 21 May 2003.

In this regard, StarHub notes that industry participants affected by the IDA's recent decision on exempting SingTel from certain of its dominance obligations for ITS had no opportunity to comment on market definitions proposed by the IDA in its decision.

Proposed drafting for each of these sections and other sections under which an opportunity for public comment should be made available have been included in Part E of this submission.

- StarHub submits that decisions and determinations of the IDA should be made public, so the industry can assess the regulatory intervention of the IDA and monitor enforcement action against incumbent and other operators. Accordingly, StarHub submits that the two references to the word "generally" should be removed from section 1.5.6.

# 10 Transparency in tariffing, RIO charging and pricing principles

**(Sections 4.4, 6.3 and Appendix 1 - section 2.1)**

*Tariffing*

StarHub welcomes the amendments made to the obligations on a dominant licensee to file and publish tariffs. However, StarHub submits that further amendments are necessary to ensure these tariffs are transparent and so non-dominant licensees have access to sufficient information to monitor a dominant licensee's compliance with the Code and to meet the thresholds required for the IDA to act on an enforcement request under the Code.

In particular, StarHub submits that all of the tariff should be published and not just "minimum information" as currently required by the 2004 Code. StarHub submits that the format for publication and other specific information should be required upfront so that there is clarity in understanding the published tariffs. In this respect, StarHub submits that the IDA should issue guidelines on how it expects a Dominant Licensee to publish its tariffs. StarHub submits these guidelines should track the requirements of section 4.4.2.1 - so that all the necessary information is available.

In addition, while StarHub accepts that the requirement to publish its tariffs should remain with the dominant licensee, StarHub submits that the IDA should be required to publish:

- the fact that it approved a particular tariff on a particular date; and
- certain minimum information about that tariff (e.g. product name).

This will enable non-dominant licensees to monitor a dominant licensee's compliance with its tariff obligations and prevents a dominant licensee from claiming that a particular tariff has not been approved.

*RIO charging*

StarHub has previously made submissions to the IDA on the need for greater transparency of charges under SingTel's RIO.[54] StarHub submits that the 2004 Code needs to be clarified so that it is clear a dominant licensee is required to make the *derivation* of its RIO charging available (i.e., charging methodology rather than confidential costing information). StarHub submits that such a lack of transparency under the existing regime raises very considerable concerns. Access seekers currently have no visibility as to how the charges are derived and therefore have little ability to make submissions to the IDA on the issue of whether the charges imposed by SingTel are reasonable relative to SingTel's underlying costs or how they compare with industry benchmarks. Publication of the charges and their derivation will ensure the Singapore telecommunications industry is in a better position to identify whether the cost elements are true and correct.

*Pricing principles*

StarHub believes that the 2004 Code does not contain sufficient detail on the pricing principles to be applied in determining the charges for IRS and, to the extent that other services (such as MWS) may also be subject to the same pricing methodologies and standards, those other services. In particular, in order to promote certainty and encourage regulatory transparency, StarHub submits that the IDA should be required to propose and publicly consult on a set of guidelines setting out in detail how the IDA will apply the Forward Looking Economic Cost (FLEC) pricing methodology and the Long Run Average Incremental Cost (LRAIC) charging standard in the event of a dispute over IRS or MWS charges (e.g. key modelling assumptions). Together with the requirement for a dominant licensee to provide information as to how its RIO charges are derived, an indication of the approach the IDA will take in arbitrating an access dispute is important as it may assist parties in commercial negotiations by narrowing the boundaries for those negotiations. They are also a useful tool in alternative dispute resolution processes between non-dominant licensees. Alternatively, greater detail could be specified in Appendix 1.

Relevant issues that IDA may wish to address include, for example:

---

[54] *Submission by StarHub Pte Ltd to IDA in relation to Review of SingTel's Reference Interconnection Offer*, 15 July 2003.

- the appropriate means of defining the increment of output that constitutes the "total service", including relevant factors to be taken into consideration when determining that increment;
- how the "share of indirect costs that are discernibly caused by the provision of those services" is to be determined;
- the manner of determining the appropriate allocation of a proportion of shared fixed costs and common costs;
- the appropriate asset valuation technique (e.g., current costs) and depreciation profile; and
- the appropriate means of determining or benchmarking the relevant WACC.

The IDA's own accounting separation costing methodology may be of assistance in relation to some of these issues. StarHub also understands that the "LRAIC" approach in Singapore is essentially the same as the LRAIC (or "FL-LRIC") approach used in Europe and Hong Kong, and is essentially the same as the "TSLRIC" approach used in Australia.[55] There have been a number of discussion and policy papers on these issues in these jurisdictions which may assist IDA.[56]

StarHub submits that publication of pricing principles by the IDA would be consistent with international regulatory precedents and prior practice of the IDA. For example:

- in Australia, the ACCC is required to determine pricing principles in certain circumstances. For example, the ACCC is required to determine pricing principles relating to the price of a declared service (similar to an IRS) at the time the service is declared.[57] The ACCC also publishes guidelines on the pricing principles and application of

---

[55] The World Bank's *Telecommunications Regulatory Handbook* comments, for example, at page B-15: "*The European Commission has adopted a TSLRIC-type approach, called Long Run Average Incremental Cost (LRAIC) as its preferred costing methodology. The term "average" is intended to capture the policy decision that defines the increment as the total service."*

[56] For example, the various EU regulators published a document in November 2000 titled" Principles of Implementation and Best Practice Regarding FL-LRIC Cost Modelling as Decided by the Independent Regulators Group", http://www.oftel.gov.uk/publications/pricing/lric0101.pdf. The Australian Competition and Consumer Commission has published a document titled "Access Pricing Principles - Telecommunications: A Guide" which sets out principles used in Australia in the application of TSLRIC: http://www.accc.gov.au/pubs/Publications/Utilities/Telecommunications/accpriprin.pdf

[57] Trade Practices Act 1974, s152AQA.

those principles in relation to number portability.[58] Most recently, in accordance with its statutory obligations, the ACCC has set model price and non-price terms and conditions for core declared services;[59]

- the provision of pricing principles and guidelines on how they will be implemented is used as a regulatory tool by regulators in the UK and the EU;[60] and

- in March 2000, the IDA published a report on the methodology for determining fixed and mobile inter-operator number portability charges, setting out guidelines for calculating charges for number portability services based on pre-determined pricing methodologies and the framework to be applied by the IDA in assessing and reviewing future number portability charges.

Please also see the relevant paragraphs of Part E of this submission for further comments on this section.

---

[58] See, for example, the ACCC's *Pricing Principles for Local Number Portability - a guide*, June 1999, *Pricing Principles for Mobile Number Portability*, May 2001.

[59] Trade Practices Act 1974, s 152AQB - see the ACCC's *Final Determination for model price terms and conditions of the PSTN, ULLS, and LCS services*, October 2003 and *Final Determination - Model Non-price Terms and Conditions*, October 2003.

[60] See, for example, Oftel's *Access to Bandwidth: Indicative prices and pricing principles*, May 2000 and also *Principles of implementation and best practice regarding FL-LRIC cost modelling*, as decided by the Independent Regulators Group, 24 November 2000.

# E. Matrix

# F. Conclusion

StarHub welcomes the triennial review of the 2000 Code and appreciates the opportunity to comment on the proposed amendments. StarHub believes that many of these amendments are necessary and beneficial to the development of effective and sustainable competition in Singapore.

However, StarHub submits that further amendments are still required to ensure the 2004 Code assists that competition and is consistent with Singapore's international obligations and to bring it into line with international precedent.

StarHub further submits that for the amendments to be effective, the implementation of the 2004 Code must also be consistent with those of international best practice, namely with:

- transparency
- recognition of the uneven playing field between the incumbent and new entrant; and
- pro-activity of the regulator

StarHub is willing to discuss any of the issues raised in this submission further with the IDA.