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By Fax & By Email

Dear Miss Yeung

Further submission on Telecommunications (Amendment) Bill 2002

I refer to the paper entitled "Legislative Council Bills Committee on Telecommunications (Amendment) Bill 2002, Administration's Proposed Committee Stage Amendments and Other Improvements" which you circulated to me on 19 March 2003.

As Telstra International HK Limited ("Telstra") has already provided comprehensive submissions to the Legislative Council on the proposed Telecommunications Amendment (Bill) 2002, I have not restated its positions again in full in this further submission. Rather, I enclose a table which sets out the amendments which were proposed in Telstra's earlier submissions and provides analysis of whether the administration's proposed amendments address those concerns.

I respectfully submit that many of our concerns have not been addressed. Accordingly, I would appreciate the opportunity to present to the Bills Committee at this meeting scheduled for 30 April 2003.

Yours sincerely



FOR. C. ASTON
Simon Brookes
General Counsel, International
Telstra International HK Limited

Encl

Telecommunications (Amendment) Bill 2002
Status of Amendments

Item	Amendment Requested	Dealt with by the Administration's Committee Amendments? Stage	Telstra's further comments
1	Mergers and Acquisitions should be regulated on an industry wide basis.	Not dealt with.	Telstra maintains its position that it is inappropriate for telecommunications industry specific legislation to be introduced.
2	The powers created by the proposed section 7P should be vested in a board rather than an individual.	Not dealt with.	This is an important issue. International best practice is that powers that enable the regulation of the structure of an industry are vested in a board not an individual.
3	The change of control threshold is too low (for example, a change in control occurs if someone becomes a director of a licensee irrespective of the size or composition of the board).	Not dealt with.	The threshold is far too low. The threshold should be increased so that it only covers situations where there is a true change in control.
4	The tests in section 7P(1) should be objective (that is, whether or not a change in control occurs should not be determined on the basis of the TA's opinion).	Partially dealt with.	<p>The inclusion of matters in the schedule will assist in ensuring that the TA's powers are exercised on an objective basis. However, the substantive provision still applies "<i>where Authority ... forms the opinion</i>". Accordingly, the legislation does not adopt an objective model.</p> <p>We observe also that this list appears to have been taken from section 50 of the Australian Trade Practices Act 1974 (which is a generic, non-industry specific merger and acquisition regulation). However an item that is omitted is "the extent to which substitutes are available in the market or likely to be available to the market. "In our view this item should also be included in the list of matters</p>

			to be taken into account under section 7P.
5	The guidelines issued by the TA under section 6D should be subject to review by the Legislative Council.	Not dealt with.	<p>The amendment which provide for a split in the commencement of the various provisions of the ordinance is a positive amendment. However, there is no independent review of the guidelines - it is the TA that determines when the substantive provisions commence.</p> <p>Given the importance of the guidelines, it is critical that they are subject to independent review. This review should be conducted by the Legislative Council and accordingly the substantive provisions should not come into force until such a review has happened (see 6 and 11 below in this regard).</p>
6	The Ordinance or the guidelines should provide for safe harbours.	Not dealt with.	In order to provide certainty to the industry, the guidelines or the Ordinance must provide for safe harbours. The Legislative Council should delay passing the Ordinance until such safe harbours are devised.
7	The scope of directions issued by the TA under section 7P(1) should be determined on an objective basis and confined to Hong Kong.	Not dealt with.	The proposed section 7P(1) provides that the TA may “ <i>direct the licensee to take such action specified in the notice as the Authority considers necessary</i> ”. This provision should be drafted to provide for an objective test. Accordingly, it should provide that the TA may “ <i>direct the licensee to take such action specified in the notice to the extent necessary</i> ”.
8	The TA should only be permitted to issue a direction under section 7P(1) if it is in the public benefit to do so.	Not dealt with.	The Ordinance is premised on the assumption that competition in itself is an important outcome. However, this is only the case if competition is in the public benefit. The Ordinance should expressly require the TA to consider the public benefit.
9	There should be a time limit specified in clause 7P(1) during which the TA may exercise his power to issue directions after a	Partially dealt with.	The insertion of a time period in which the TA must commence his investigation largely deals with this concern.

	change of control.		
10	The TA should be permitted under section 7P(6) to consent to changes in control which are in the public benefit. Moreover, the TA should only be permitted to exercise the powers under section 7P when it is in the public benefit to do so.	Not dealt with.	The same concerns as outline in item 8 apply.
11	The proposed statutory basis for voluntary pre-approval in section 7P(5) and consent given by the TA in section 7P(6) should incorporate clear statutory procedures.	Not dealt with.	It may be that these issues can be adequately dealt with in the guideline. This is another reason why it is important that the guideline is subject to review by the Legislative Council.
12	The amendments should not preclude an option for an informal clearance procedure.	Not dealt with.	Telstra accepts the explanation given by the Administration.
13	There should be a limit on the costs which may be recovered by the TA under section 7P(11) for considering an application under subsection 7P(5).	Not dealt with.	It is inappropriate that the TA may incur and recover his costs without any limitations.
14	Appeals under section 32L to the Appeal Board should be on their merits and the timeframes for appeal increased.	Partially dealt with.	The time period for appeals to be lodged (14 days) needs to be increased.
15	Licence conditions should not deal with the same subject matter as section 7P.	Not dealt with.	The legislation should make it clear that the licence conditions cannot deal with the same subject matter.