Government of
The Republic
of Vanuatu

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Consultation Paper on Proposed Amendment of the Telecommunications and Radiocommunications Regulation Act No. 30. 2009

INVITING PUBLIC COMMENT AND INPUT

5 June 2017

Contents

CONSULTATION FEEDBACK INFORMATION

The Telecommunications and Radiocommunications Regulator (TRR) welcomes and invites comments and feedback to this consultation document from all interested parties.

TRR is consulting directly with its stakeholders to ensure they are aware of TRR's desire to amend the Telecommunications and Radiocommunications Regulation Act No 30 of 2009 (the Act) and for them to understand the current problem that TRR has with some specific sections of the Act as well as need for new inclusions.

The Act has now been in force for eight (8) years and during that period it has operated without amendment.

Currently, the Act limits TRR's ability to undertake further key required regulatory action framed around liberalization of the market. Now that the market is growing, and continues to grow, it is important that the current legislation is amended to cater for regulation of issues that the market is currently facing and, importantly, for the future to ensure there is sustainable market competition in Vanuatu.

A review of the current Act is now proposed by TRR following its experience over 8 years of implementation of the 2009 Act.

We now invite comment on TRR's proposed amendment of the Act, and would appreciate your provision of information to be clear through your referral to each proposed amendment outlined in ANNEX's A and B, and also responding to key questions in ANNEX C. In that Annex, TRR has set three key questions at the end of this Consultation Paper Wherever possible, please refer to these questions and provide your views/feedback or comments and also if you have specific questions to provide us with your queries.

Further:

- Any other general comments you wish to make on the consultation document are welcomed and should also be clearly indicated/referenced;
- In the interests of transparency, TRR will make public all or parts of any submissions made in response to this Consultation Document unless there is a specific request to treat all or part of a response in confidence. If no such request is made, TRR will assume that the response is not intended to be confidential. TRR will evaluate requests for confidentiality according to relevant legal principles.
- Respondents are required to clearly mark any information included in their submission that they consider confidential. They must provide reasons why

that information should be treated as such. Where information claimed to be confidential is included in a submission, respondents are required to provide both a confidential and a non-confidential version of their submission. TRR will determine, whether the information claimed to be confidential is to be treated as such, and, if so, will not publish that information. In respect of the information that is determined to be non-confidential, TRR may publish or refrain from publishing such information at its sole discretion.

- TRR will accept comments in English, French or Bislama;
- If comments are submitted in printed format, they must be submitted on A4 paper accompanied, wherever possible, by a flash drive containing the comments or in electronic format.
- Comments on this consultation document should be provided to TRR via the following means:

    - Email address consultation@trr.vu
    - Posted or hand delivered to:
    - **Public Input – Consultation Paper on Proposed Amendment of the Telecommunications and Radiocommunications Regulation Act No. 30. 2009**
    - Telecommunications and Radiocommunications Regulator
    - P O Box 3547, Port Vila, Vanuatu;

- The deadline for public Comments is **4:30pm, Friday 23rd June 2017**. Given the limited proposals put forward for amendment, TRR considers a 3 week consultation period to be satisfactory.
- For any phone enquiries regarding this Consultation document, please call the following numbers:

(678) 27621 or (678) 27487;

All comments will be reviewed by TRR, and TRR will consider every comment submitted when finalizing its report or decision. For transparency, a record of every comment received will be made available for public information, unless comments are labeled 'In Confidence'.

For more information about TRR's Consultation Guidelines, please visit the following website;

http://www.trr.vu/index.php/en/public-register/guidelines/consultation-guideline.

You are welcome to visit our website http://www.trr.vu for more details on the latest developments in the telecommunication services industry and other related matters.

1.0 INTERPRETATION

The 'Key' terms used in this proposed Amendment are either already defined in the Act or otherwise are defined in the proposed Amendment.

2.0 INTRODUCTION

2.1 Background

The Telecommunications and Radiocommunications Regulation Act No. 30 of 2009 (Act) has now been in force for eight (8) years and during that period it has operated without amendment. The existing legislation was developed for the primary purpose of implementing liberalization and competition, development of new and improved telecommunications services, especially mobile services, and providing incentives for telecommunications/ICT investors to invest in Vanuatu based on the Telecommunications Policy Statement of the Government of Vanuatu of 2007.

A review of the current Act has been proposed by Telecommunications and Radiocommunications Regulator (TRR) following its experience over 8 years of implementation of the 2009 Act and its regulation of the critical telecommunications/ICT sector. This experience suggests areas where contradictions, vagueness and lack of detail should be addressed. Enforcement is an issue as well and enforcement powers need strengthening.

TRR proposes that the Act needs amendment to include new provisions as well as amendment of some existing provisions.

Annex A provides a policy statement and background to the proposed legislative amendments to the Act, which TRR seeks to have the Government's Council of Ministers (COM) approve to facilitate the amendment process, following industry/stakeholder consultation.

Annex B outlines the regulatory impact assessments for the proposed amendments in each case.

Annex C provides the consultation questions that stakeholders are invited to address.

Following industry review and consultation, TRR will seek the approval for any changes from the Prime Minister, as the responsible Minister, and the COM. Any

amendments approved by the COM will be drafted into legislation by the State Law Office (SLO) for consideration by the Parliament.

The consultation paper is also available on TRR's website (www.trr.vu).

2.2 Objectives and Purpose

The objectives and purpose of the proposed Amendment are as follows:

- TRR's experience is that there are areas of the Act where contradictions, vagueness and lack of detail need to be addressed;
- The current legislation is framed around market liberalization, but some sections are limiting TRR's effectiveness in performing its required functions; and
- Technology evolvement is rapid and the telecommunications/ ICT market is now growing and expanding too many Islands of Vanuatu. This places pressure on the current telecommunications and radiocommunications regulatory framework; particularly since the Act has remained unchanged since its establishment in 2009 and, currently does not cater for or address these changes and creates some negative impacts on the market and for users of these services.

3.0 PROPOSED AMENDMENTS & REGULATORY IMPACT ASSESMENT

It is the role of the State Law Office (SLO) to develop detailed text for amendments to legislation in Vanuatu in the accepted style and format. It is the role of TRR, and other agencies, when proposing amendments or additional legislation to specify the changes required rather than to draft text for such changes. The attached documents adhere to this division of responsibilities.

Annex A provides a Policy Statement and details the proposed new additions and proposed revisions to the Act that are required. **Annex B** outlines TRR's Regulatory Impact Assessment.

4.0 FUTURE AMENDMENTS

The Government has initiated, with TRR, discussions on the possibility of expanding the remit of the Regulator to include broadcasting regulation and to examine various

legislative changes that would enable this to occur. TRR considers that broadcasting issues will be the subject of a separate procedure and consultation and, consequently, no broadcasting issues have been raised in this consultation.

5.0 CONSULTATION QUESTIONS

Annex C outlines the key questions that will guide you on your input.

ANNEX A

Proposed Amendment of the Telecommunications and Radiocommunications Regulation Act No. 30 of 2009

POLICY STATEMENT and LEGISLATIVE AMENDMENTS (for approval by the COM)

The proposed amendments to the Act takes into consideration the following Government Policies and it is consistent with these policies as well as facilitating achievement of the aspirations set out in these Policies:

1. The Telecommunications Policy Statement of the Government of Vanuatu of 2007 (the Telecommunications Policy Statement of 2007);
2. The National Information and Communication Technology Policy of 2013 (ICT Policy);
3. Universal Access Policy of 2013 (UAP) and
4. Vanuatu 2030 The People's Plan: National Sustainable Development Plan (NSDP 2030).

PROPOSED NEW PROVISIONS IN THE ACT

1. Infrastructure Sharing – for inclusion in Section 7 of Part 2 of the Act

This proposed amendment would give specific powers to the Regulator to make regulations on infrastructure sharing.

This proposal gives full effect to the Telecommunications Policy Statement of 2007 clause 3.4 paragraph 3 of which reads:

> *"[This Policy and the assigned Regulator] will also promote sharing, by any operator, of idle and inefficient to duplicate telecommunications infrastructure ("bottleneck infrastructure", such as submarine cables, backhaul microwave or optical fibre systems, BTS sites, coaxial cables or copper pairs for local loops) owned by other operators. This access will be reciprocal, and the corresponding infrastructure shall be rented at fair and non – discriminatory prices."*

Section 5, paragraph 5 also reads:

> *"Sharing of infrastructure will be encouraged. Telecommunications service providers may construct their own networks-for which they would require a license, as noted above. However, they may also use the infrastructure of their operators. Accordingly, those operators will be obliged to share their infrastructure with any provider of telecommunications services, on a fair non-discriminatory basis".*

Section 7.5 of the Policy statement continues to read *"Regulation will ensure access to key idle facilities or infrastructure difficult or inefficient to duplicate of any existing company, to any new entrant company. That access will be mandatory for dominant operators, should be reciprocal and paid at fair prices".*

> *"The sharing of infrastructure seeks essentially to reduce the cost of providing competitive services in rural, isolated or remote areas".*

TRR currently has developed a Mast Sharing Services Description and is currently facilitating infrastructure sharing by getting the operators to:

a) minimise the number and extent of land dispute issues where infrastructure assets are located;
b) improve cost recovery for operators who roll out infrastructure in Vanuatu;
c) help overcome the costs and logistical challenges posed by Vanuatu's geography and topology; and
d) assist in minimising environmental impact of multiple infrastructures.

Inclusion of infrastructure sharing as an explicit goal of the legislation, as envisaged by the Telecommunications Policy Statement of 2007, will further encourage operators to consider sharing of both current and planned infrastructure. At present, there is evidence of infrastructure sharing but mostly between operators (such as TVL) and utilities (such as public works and electricity authorities) in the duct and trench sharing. Further measures are required to encourage sharing between competing telecommunications operators.

Infrastructure sharing regulation based on the Telecommunications Policy Statement of 2007 will enable sharing on an open access mandated basis and not leave sharing to the relatively rare circumstances where operators might have overwhelming and concurrent commercial incentives.

In particular, it is proposed that the Act be amended to include a positive statement promoting infrastructure sharing in the terms of the 2007 Policy and to specifically empower the Regulator to take reasonable and relevant steps to promote

infrastructure sharing when addressing all issues that arise in the course of administering the Act.

2. TRR Independence and Government Remuneration Tribunal - Part 2 of the Act

It has always been a fundamental plank of Government policy in this area that TRR should be independent in its implementation of the Act and regulatory administration. This policy will be compromised if TRR is subject to the Government Remuneration Tribunal. The Policy statement of the Government for 2007 clearly provided that *"the URA (in this case the TRR) will be legally, institutionally and financially separate from the Government, and specifically from the Ministry of Infrastructure and Public Utilities (MIPU), and will perform its regulatory functions independently of the policy-setting and ownership functions in dependently of the policy-setting and ownership functions carried out by the Government in the Sector*".

The Act should explicitly provide that the remuneration of TRR and its staff are not within the jurisdiction of the Government Remuneration Tribunal. In addition, the Act should be amended to affirm that TRR is an independent statutory body that does not form part of the Government of Vanuatu (as defined in the Interpretation Act).

3. Access to land by Service Providers – Part 2 of the Act

It is proposed that a new power be given to the TRR under Section 7 of the Act to mediate disputes that arise in relation to access to land required by service providers in order to supply telecommunication services.

It is envisaged that the mediation power would only be exercised where a service provider needs access to customary land for the supply of telecommunications services but cannot achieve access because it cannot reach an agreement with the owners or legal occupiers of the land on reasonable commercial terms. Current TRR experience has resulted in a list of Operators versus land owner disputes that are still outstanding after five (5) years or more years.

It is further envisaged that the power would be triggered by a request for mediation by the service provider affected. TRR would have discretion whether to accede to such a request, and would exercise judgment on whether the parties had negotiated in good faith or were likely to reach an agreement given more time. Under the proposed amendment, TRR could also consider whether the access requested was proportionate to the access needed to establish or operate infrastructure on customary land.

It is also proposed that the access dispute may be submitted by the Regulator or a party to the Ministry of Lands and for resolution under the *Customary Land Management Act of 2013* (as amended).

Further, it is proposed that the Regulator may provide such reasonable assistance the Regulator deems necessary as part of the process of dealing with the customary land, including the making of an order certifying whether the purpose for which the land or facilities is required is for public purposes under the Land Acquisition Act.

It is also proposed that the Regulator may exercise such other powers under this Act or other Acts as the Regulator considers appropriate to resolve the matter. Such other powers may include the ability for the Regulator to register or approve the contracts for new sites, establish standard forms of contract for all operators and all landowners to use as a basis to commence commercial land agreements between them.

4. Liability of Regulator for costs of legal proceedings - Part 9 of the Act

TRR has limited resources and budget but, and importantly, its potential liability for litigation costs arising from non-compliance by regulated parties is high, given the propensity of some operators to challenge regulatory decisions in court. This potential impacts TRR significantly and is a constraint on legitimate regulatory initiatives because TRR cannot afford significant legal costs.

There is no equivalent constraint on some operators, especially those that are part of international corporate groups. These operators have the capacity to incur substantial legal costs which would create a heavy burden on TRR were it to fail in a case and have costs awarded against it. That heavy burden may well result in budgetary embarrassment and an inability to undertake or conclude TRR work programs, or pay the costs associated with continuing operations, such as staff wages and day to day operating expenses.

Other Pacific regulators, such as the Office of the Regulator in Samoa, have been embarrassed in this way. In the Samoan case the legislature took action to impose constraints on court challenges by requiring litigants to make initial payments.

It is proposed that Section 50(1) of the Act be amended to provide that TRR should not be liable for the legal costs of other parties in any proceeding brought against, or by, TRR, irrespective of the outcome of the proceedings, except in cases where the Court finds that TRR's actions in defending or bringing proceedings were frivolous or otherwise entirely without merit.

5. *TRR Enforcement Powers - Part 9 of the Act*

The Act does not contain express powers for TRR to make regulatory orders, or impose fines, on service providers for breaches of their obligations under the Act. Instead, TRR must bring a Supreme Court proceeding and seek remedies or fines as determined by the Court.

In the absence of an amendment, regulated parties have and will continue to contend that TRR does not have powers to make the usual types of Orders that other regulators can typically make (subject to judicial review). This has enabled some operators to act with considerable impunity knowing the administrative and procedural difficulties faced by TRR in enforcing compliance.

The licences issued to service providers state that for a breach of its licence conditions, the licensee is "subject to" maximum fines payable to TRR. However, one licensee (ICL) has claimed in proceedings currently before the Supreme Court that these licence terms does not permit TRR to impose any such fine, which can only be imposed by the Supreme Court. The matter of direct enforcement therefore remains uncertain and, certainly, not a solid basis on which TRR might take enforcement action.

TRR proposes that Part 9 of the Act ("Enforcement") be amended to permit TRR to make Orders imposing fines on service providers for breaches of their obligations under the Act (including under a licence), and for TRR to make Orders requiring or prohibiting, or to remedy, conduct in breach of such obligations. It is proposed that such Orders and the fines they impose would be subject to judicial review in the normal manner.

PROPOSED AMENDMENTS OF EXISTING PROVISIONS IN THE ACT

6. *Scope of the Act: Section 3 (a) and (b) of the Act. Act to bind the State – Part 1 of the Act*

In the recent past the Government has claimed to be, and has been, exempt from the payment of regulatory fees and charges, even in situations where it is competing or proposes to compete with private sector operators that are subject to regulatory fees and charges. In principle, this is wrong because it distorts the development of the market for telecommunications services in Vanuatu and undermines fair competition. The Government relies on Subsections 3(a) and 3(b) of the Act for this approach.

There are two broad principles involved in this issue that need to be supported. The first is that Government should be required to make payments at the standard rates for regulatory services (including licence and other fees) in the same way that Government must pay, like any other citizen or enterprise, for the services that it uses. The second principle is that fair competition requires that Government, insofar as it chooses to be a provider of telecommunications services, should not have an exemption from paying the fees and charges that its competitors in the private sector must pay.

It is therefore proposed to suitably amend the subsections referred to ensure that the two broad principles are implemented. It may be that this can be achieved only by the deletion of all words after "Government of Vanuatu" in Section 3.

7. Exception Versus Licence – Part 3 of the Act, Section 14

The separate instrument called an "Exception" has given rise to confusion (and has tended to cause some confusion), as has the requirement that TRR only issue an "Exception" when a License would not be efficient or necessary in TRR's experience over the years. One cause of confusion is the mistaken view that an Exception is really an Exemption from all of the obligations that might otherwise be associated with a licence.

The Term "Exception" should be revised to something like "Limited Licence", and should be issuable where TRR considers that a Limited License is more appropriate.

It could also be re-titled — for example, “Operating Approval”.

The proposed possible terms, “Limited Licence”, “Operating Approval” and some other terms that could be employed, do not have the risk of major misunderstanding that has accompanied “Exception”.

8. Universal Access – Part 4 of the Act.

Under Part 4 of the Act, universal service programs to expand telecommunications services to under-served areas can only be implemented via a specified series of steps, which include a “levy” on all service providers, and “subsidy contracts” entered into by TRR to have additional services provided.

Given the success of the Government’s UAP and TRR’s implementation of it, it is proposed that, provided TRR complies with the Government’s UAP, Part 4 of the Act should be amended allow TRR to implement alternative types of UA programs. For example, building on the success of the UAP *Pay or Play* approach, it could be a program in which service providers agree to implement specified additional services in order to not be required to pay an annual levy, and service providers that do not implement such projects can be required to pay a levy. This is the essence of the *Pay or Play* approach, and it should be reflected as an alternative in Part 4 of the Act.

The current legislation is restrictive, for both TRR and Operators, in facilitating the rollout of services.

9. Designation Of Dominance - Part 5 of the Act, Section 21.

Section 21 sets out the alternative criteria that may be used by the Regulator to designate a service provider as dominant in a telecommunications market. This is an important process because different regulatory obligations apply depending on whether a service provider is designated as dominant or not.

However, it is not beyond doubt whether or not a designation of dominance is a separate proceeding that must be completed both before and separately from any enquiry into specific obligations or market behaviour.

TRR propose an amendment that makes it clear that TRR may designate a service provider as dominant as part of an investigation into prior conduct and into the desirability of imposing ex ante obligations in anticipation of the exercise of market power resulting from market structure. The amendment will facilitate regulatory

efficiency but will not impact on the right of service providers to put their views on or to appeal regulatory decisions.

As currently drafted, Section 21 may have the unintended consequence that, unless a service provider has been formally "designated" as dominant by the Regulator, it has no obligations as a dominant service provider as set out in section 23 of the Act (even if it clearly meets the criteria for dominance).

The amendment should therefore go further and require service providers who satisfy the criteria for dominance in Section 21 to be required to comply with the obligations in Section 23 whether or not they have been designated by the Regulator as dominant. Service providers who are in any doubt about the matter should be able to seek the views, or a determination, of the Regulator for the avoidance of any continuing regulatory uncertainty.

10. Pre-Approval – Section 24 of Part 5 of the Act

Section 24 of the Act enables any person to invite the Regulator to approve conduct that may not amount to a contravention of any provision. The invitation must be made prior to engaging in the conduct subject of the proposed approval – hence pre-approval. Such approval can be given in circumstances in which the Regulator believes that the conduct will not or is unlikely to substantially lessen competition or otherwise inhibit competition in any telecommunications market.

TRR proposes amendment for pre-approval to be given, subject to conditions that might be imposed by TRR, or subject to the conduct to which approval is sought being modified from that proposed.

In addition, it is proposed that Section 24 be amended to permit TRR to give such an approval if sought after the conduct commences, provided that this is without prejudice to TRR's power to fine or apply any other remedy in relation to the conduct prior to an approval. Such an amendment will extend the scope of approvals but retain the principle of liability for acting in contravention to the Act.

11. Interconnection – Section 26 of Part 6 of the Act

TRR seeks amendment that enables TRR to intervene in the setting of interconnection charges irrespective of whether there is a dispute between service providers about interconnection pricing, or not. Typically, this would occur if TRR considers that interconnection charges are not cost-based, or that they may adversely affect competition or fail to advance the objectives of the Act.

It is further proposed that in the determination of interconnection charges under one or other of these circumstances that TRR should have power to back-date the determination by up to 12 months, if that appears to be fair and reasonable in all of the circumstances. The argument in favour of retrospective effect in this case is that experience shows that operators have often drawn out interconnection disputes and also failed to advise TRR of interconnection agreements to gains the advantage of delay in the imposition of charges. The possibility of back-dating will remove the incentives for such delays and non-disclosure.

12. Tariffs – Part 7, Section 33 of the Act

The use of the term "Tariffs" in Part 7 has caused substantial confusion. There has been substantial confusion in practice about whether the term refers only to a maximum or "standard" price, rather than to actual prices charged or offered. The other provisions of Section 33 ["Tariff Approval"] which provide important regulatory powers and protections have been largely ineffectual because of the restrictive meaning applied to "Tariffs" to date. The confusion is at risk of being litigated at great expense and with the dedication of substantial industry resources. A better alternative is for the confusion to be cleared up through legislative amendments.

TRR seeks amendments that:

a) replace the term "tariff" with "prices";
b) define "price" to mean actual prices charged or offered;
c) allow TRR to require pre-approval of prices even if a service provider is not "dominant;" and
d) deletion of terms that exempt price reductions from a requirement for regulatory approval.

Generally Part 7 currently is not adequate to deal with a wide range of pricing issues, including "predatory" pricing that is below cost.

Part 7 also should provide that in making orders or determinations on pricing, TRR may consider whether the pricing proposed or existing in the market should be cost-based or promotes the objectives of the Act.

In addition, it is proposed that Part 7 be amended to enable TRR to make regulations on the processes and timescales that should apply to price filing and registration.

ANNEX B:

REGULATORY IMPACT ASSESSMENT OF THE PROPOSED AMENDMENTS TO THE TRR ACT

	Part of the Act to be amended	Assessment under the status quo (i.e. under existing Legislation)	Assessment under the amendment as proposed
1	***Infrastructure Sharing – for inclusion in Section 7 of Part 2 of the Act*** Infrastructure sharing policy (NEW)	(-) There is no specific mention of infrastructure sharing in the current Act despite Government Policy being very supportive of such sharing to reduce costs of service to end users.	(+) If a new section is included, it will give weight to infrastructure sharing and enable TRR to promote it more effectively. (+) Service Providers are to commercially arrange for any required infrastructure sharing where possible.
2	***TRR Independence and Government Remuneration Tribunal - Part 2 of the Act*** The Act should provide that the remuneration of TRR and its staff are not within the jurisdiction or mandate of the GRT, and needs to affirm that TRR is an independent Statutory body that does not form part of the Government of Vanuatu as defined in the Interpretation Act. (NEW)	(-) TRR has been approached several times to present its staff remuneration to the GRT. The GRT can make decisions that unreasonably constrain TRR's operations and access to specialised labour through seeking to apply general Government precepts to TRR's operations. Section 7(9) also clearly outlines that the provision of Public Service Act (CAP 246) does not apply to the Regulator or his or her staff.	(+) Maintains the current operational practice as continuous reporting is done each year. (+) To give certainty and assurance to all stakeholders, including Investors in the sector that TRR is able to employ staff with appropriate specialised expertise and competence. (+) Trust and confidence on TRR operations and promoting Good Governance practices relevant to its powers, duties and functions under the TRR Act.
3	***Access to land by Service Providers – Part 2 of the Act*** Amendment to include the power of the Regulator to mediate land disputes on customary land if requested. (NEW)	(-) No provisions at the moment making it difficult for the service providers as they have no legislative assistance from the Regulator or the Government. Ultimately it is end-users who suffer from the service consequences of this. (-) High cost of building infrastructure, including the further costs from dismantling if action is taken by disgruntled customary land owners.	(+) This proposal will minimise land disputes and their costs to service providers, and ultimately to end-users of telecommunications services. (+) Reassurance to service providers that they may have confidence in continuing to build and extend their networks into rural areas.
4	***Liability of Regulator for costs of legal proceedings - Part 9 of the Act*** It is proposed that Section 50(1) of the Act be amended to provide that TRR should not be	(-) TRR has limited budget and resources and its programs would be seriously impacted if costs of litigants (who are able to afford expensive overseas counsel) were awarded against TRR.	(+) If litigants were required to bear their own costs when they appeal TRR decisions or contest enforcement and other actions, they would adopt a more appropriate posture in incurring substantial legal costs. However, they would not be

	Part of the Act to be amended	Assessment under the status quo (i.e. under existing Legislation)	Assessment under the amendment as proposed
	liable for the legal costs of other parties in any proceeding brought against, or by, TRR, irrespective of the outcome of the proceedings, except in cases where the Court finds that TRR's actions in defending or bringing proceedings were frivolous or otherwise entirely without merit.	(-) TRR is constrained in the exercise of its regulatory powers, particularly in relation to enforcement, because of the potential for awards of costs against it. (-) Operators are well aware of TRR's precarious budgetary and resource position.	precluded from taking action where they considered it to be warranted nor in exercising the rights that they currently have to participate in legal proceedings. (+) TRR would be reassured and not constrained in fully discharging its regulatory remit because of concerns about possible serious budgetary and resource implications from the award of costs.
5	***TRR Enforcement Powers - Part 9 of the Act*** The amendment is to cater for TRR's enforcement Powers under section 44 of the Act on and or for direct imposition of fines on Service Providers for breaches of their obligations under the Act and under instruments issued pursuant to the Act, including licences. (NEW)	(-) Service providers are aware of the problems associated with current enforcement powers and take advantage of the procedural challenges faced by TRR. (-) The requirement to have fines approved and the amount set by Courts is time consuming and costly and reduces the effectiveness of enforcement across the board. (-) TRR is unable to match its current regulatory tools with behaviour that is disruptive or anti-competitive. Hence, there is a need to consider other approaches at the TRR level for enforcement management such as imposing on the spot fining and other enforcement mechanism that is more effective and timely.	(+) TRR is able to ensure service providers comply in a timely manner with their regulatory obligations. .
6	***Scope of the Act: Section 3 (a) and (b) of the Act. Act to bind the State – Part 1 of the Act*** Amendment to section 3 (a) & (b) of the Act to ensure that the State and the Government shall pay all regulatory charges.	(-) It is contrary to fair competition and the normal practice of Governments to pay for services used for regulatory charges not to apply.	(+) Encourage trust and private investment in the industry in Vanuatu in the knowledge that competition will not be distorted by unfair exemptions in favour of the Government.
7	***Exception Versus Licence – Part 3 of the Act, Section 14***	(-) Confusion about the extent of Exceptions and the conditions to which they might be made subject by TRR.	(+) The term could be more understandable if this is clarified under a specific name such as 'Limited Licence' or 'Operating Approval.' (+) Set clear limitations and scope for Exceptions (or whatever the name that is adopted) for operators. (+) Promotes effective compliance
8	***Universal Access – Part 4 of the Act***	(-) The Act does not facilitate any alternative universal service arrangements such as *Play or Pay.*	(+) Funds collected from the Operators can be utilized for services given Vanuatu has covered almost 98% of the population in terms of service coverage and access.

	Part of the Act to be amended	Assessment under the status quo (i.e. under existing Legislation)	Assessment under the amendment as proposed
	Amendments required on the extension of Universal Access to enable alternative schemes such as *Play or Pay*	(-) TRR is mandated by the Government and the UAP to deliver on certain universal access targets without the authority to introduce alternative arrangements that will assist in implementing the targets. (-) TRR is implementing other UAP projects particularly piloting universal services on the areas identified by the Government. The Act should be amended to recognise such initiatives as part of the UAP scheme.	(+) The proposed amendment will stimulate the uptake of the Services already available e.g. Internet and others in the rural areas given the access are already available. (+) TRR is covered and protected to implement such projects as mandated for by the Government.
9	***Designation of Dominance - Part 5 of the Act, Section 21***	(-) There is confusion as to whether Section 21 requires prior and separate determination of dominance or whether it may be determined in the course of other proceedings and investigations. (-) Dominance obligations only arise if there has been a formal designation by TRR rather than if the criteria objectively apply.	(+) The amendments will enable a much more efficient approach to the designation of dominance and make it clear that a two-part process is not required (that is, a prior and separate dominance determination followed, if at all, by consideration of the competition or other substantive issue to be addressed). (+) Places obligations on operators if the dominance criteria are applicable even in the absence of a formal determination by TRR. Regulatory certainty can be achieved by permitting operators who are uncertain to seek the views of TRR before they take contemplated action.
10	***Pre-Approval – Section 24 of Part 5 of the Act*** Amendment of the clause on Pre-approval of conduct by the Service Providers	(-) The current pre-approval scheme in the Act is unduly restrictive and does not permit attaching conditions to approvals (usually for the protection of competition or of end-users) or for negotiating modified conduct to that proposed	(+) The amendment will enable a more flexible and reasonable approach to pre-approvals and also enable some negotiation rather than binary decisions to approve or reject invitations.
11	***Interconnection – Section 26 of Part 6 of the Act*** Amendment to enable TRR intervention on interconnection issues in the absence of operator disputes	(-) Current provision does not cater for TRR to intervene in the public interest unless a dispute occurs between the operators concerned and it is referred. (-) Provides the opportunity for operators to prolong the process involved. Licensees can discuss interconnection but effectively delay competitive entry.	(+) Provides an avenue for TRR to determine interconnection prices when there is no agreement reached within a certain time frame provided for negotiations. (+) Gives TRR a power to determine interconnection charges that are not in the public interest (by being cost related), even if the operators have agreed.
12	***Tariffs – Part 7, Section 33 of the Act*** Replacing 'Tariffs' with 'Prices' and also permitting TRR to require pre-approval of all prices	(-) The term tariff has caused substantial confusion and has constrained the extent of price regulation to a sub-set of prices that operators call "tariffs". This has meant that TRR has been	(+) The new defined term will mean actual prices charged or offered by Service Providers can be properly regulated.

	Part of the Act to be amended	Assessment under the status quo (i.e. under existing Legislation)	Assessment under the amendment as proposed
		severely hampered in one of its most important functions – effective price regulation and control. (-) Part 7 prevents TRR from considering price reductions including those that may be predatory and anti-competitive. (-) The Tariff approval is highly restrictive and has been ineffectual in practice (s.33).	(+) It will allow TRR to require pre-approval of prices even if the service provider is not dominant, and the details of the process may be included by TRR in regulations

(+) = positive consequence; (-) = negative consequence (n) = neutral comment

ANNEX C: Consultation QUESTIONS

Q1. Do you agree with the proposed changes and the regulatory impact assessment as presented? (Please answer in relation to each change and regulatory impact assessment separately.)

Q2 If “yes” please give your reasons – which may well be differ from the reasons put forward in this document. (We are trying to collect all relevant experiences to inform the outcome of this exercise)

Q3 If “no” please give your reasons and your alternative approach, if any, to addressing the problem raised in the document