

RESPONSE TO TRA'S "CONSULTATION ON RETAIL TARIFF REFORM PACKAGE"

**COMPLIANCE COMPLEXITIES AND CONCERNS
UNDER THE TRA PROPOSED
"CONSULTATION OF RETAIL TARIFF NOTIFICATION"**

SUBMISSION

BY

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1. Introduction

The key reasons put forward by TRA, in the Consultation Document, for proposed changes of tariff approval process are:

1. "The process of formal approval is resource intensive and administratively burdensome on both TRA and the Licensee."
2. "More importantly, it does not provide sufficient guidance with regards to the tariffs that may or may not be approved, i.e. on tariffs that may or may not be considered to be fair, equitable and non-discriminatory as per article 58 of the Telecommunications Law"

Para 8 of the Consultation Document

The reasons for change, outlined above, remain unaddressed even in the (proposed (new) regime) proposed changes – consultation documents. The consultation document does not identify what burdens are reduced and more precisely, what does not have to be done that is currently in place is not explained. The new proposed changes, in general, has added to general terminology (fair, equitable and non-discriminatory), increased complexity and administratively will be more burdensome to implement and maintain.

Rebalancing would further increase the administrative burden, in the short term, because new costing based on rebalancing would need to be completed and number of currently approved tariffs would need to be resubmitted for approval or through the new notification process.

The approach taken in the consultation is that the process would apply to all situations regardless of the level of impact or type of activity. The process would be too onerous in some situations such as short term temporary offers.

The ease of implementation and ease of validation (proof) should be the primary objectives of any legislation but the consultation document is deficient on both counts.

This response includes analysis and comments on areas outlined below:

- Requirements and Burden of Compliance Analysis
- Removal of Ambiguity Analysis
- Complexity Analysis
- Resource Intensive and Administratively Burdensome Analysis
- Undefined Threshold

2. Requirements and Burden of Compliance Analysis – more or less

The consultation documents do not identify what burdens are reduced, more precisely, what does not have to be done in the future which is currently done now is not explained. At best the proposed consultation documents are silent on what would **not** be required to be done. Since the underlying information would still be required to support pricing the proposed requirements are additions to what is currently in place. There are three key requirements which when analysed demonstrate that first two requirements remain unchanged and the third requirement on surface appears to remain unchanged but when analysed against the level of detail it clearly demonstrates significant additional requirements. In fact the proposed additional rules and additional tests that need to be cleared have increased significantly without any gain to anyone involved.

Requirement	Current Regime – required yes / no	Proposed Regime – required yes / no	Comments
SMP to be subject to tariff control – sec 58 (a)	Yes	Yes	There is no change in this requirement all SMP are still subject to tariff control. This is acknowledged in para 13 of the Consultation Document.
Is compliance required with Accounting Separation Regulation – FAC and LRIC	Yes	Yes	In the proposed regime there are more stringent requirements, which must be fulfilled such as without proxy for LRAIC, it may not be possible to determine the outcome of some tests, FAC permissible provided there is no reason to believe that LRAIC will exceed FAC.
Does the requirement for tariff to be fair and equitable, non-discriminatory and based on forward looking costs dropped.	No	No	There is no change in this requirement but the mechanism of meeting these requirements have changed from approval of tariff proposal to approval through notification process. This is acknowledged in para 18 of the Consultation Document.
Formal approval of tariff	Yes	Yes	Under the old regime SMP is required to file for new services and changes to approved tariff. In the new regime also this is the case but the number of additional rules and additional tests that need to be cleared has increased significantly without any gain to anyone involved. In fact the already burdensome situation has been made even more onerous.

There is no reduction in burden of compliance because none of the key requirements have been dropped:

- SMP operators remains subject to tariff control,
- tariff proposed must be fair and equitable, non-discriminatory and based on forward looking costs and
- formal approval (or no prohibitions after notification) still required.

But additional rules and additional tests have been proposed which would increase the burden of compliance, in fact it has made the already burdensome situation more onerous because more resources and time would be required to understand, prepare notifications and apply highly prescriptive rules and tests additional checks such as sensitivity analysis and draft responses where rules/tests fall short.

Based on analysis above it can be concluded that burden of compliance has significantly increased due to increased in requirements, additional rules and additional tests, which are complex and will require specialist skill set to acquire and understand and implement. In addition new systems would need to be implemented or existing systems significantly modified to meet the requirements supporting proposed tests. Additional rules, tests and analysis requirements will increase the time to market and reduce any competitive advantage that may have existed at the commencement of the process. Ultimately, increased cost of compliance for products in, or partly in, SMP markets would impact on price or quality of service or both for the customer.

3. Removal of Ambiguity Analysis – more or less

The three key requirements analysed clearly demonstrate that the current terminology of “fair and equitable, non-discriminatory” remains unexplained and unremoved in the new regime and additional ambiguity has been introduced in the proposed regime. The additional ambiguity is introduced by terms such as “...material improvement in customer benefits”, “...significantly exceed the price level anticipated under competitive market conditions”, “an equally efficient downstream competitor”, “similar competitive markets”, “same relevant market” ...and many more such terms are open to interpretation and judgment of individuals who themselves may apply these terms differently in similar situations.

Clarity in terms and tests	Current Regime	Proposed Regime	Comments
Is there clarity in fair and equitable, non-discriminatory?	No	No	There is no clear explanation provided in the Consultation Documents.
Is there clarity in terms used in the Consultation Document?	N/A (new document)	No	<p>No, in fact, more ambiguity has been introduced because there is no guidance on key terms such as: “material affect”, “materially increases”, “significant expected increase”, “substantially higher than the level expected in a competitive market” – what is the monetary and/or percentage threshold change at which price or costs would become material.</p> <p>Non-price terms – at what threshold change does the contract length, quality of service become material, time taken to provision, maintenance terms, minimum call period.</p>
Is their clarity and sufficient guidance with regards to the tariffs that may or may not be approved?	No	No	<p>No, because the terms in the tests are too ambiguous (“...material improvement in customer benefits”, “...significantly exceed the price level anticipated under competitive market conditions.” “an equally efficient downstream competitor”). Lack of transparency in TRA’s decision making process and even handedness (fair and equitable) across the operators because of ambiguity in the tests themselves including “failing the quantitative part of a test does not necessarily imply that a notified tariff has been breached the associated rule” but based on accompanying explanation the tariff may be prohibited or allowed to launch.</p>

The lack of precise definition and adequate guidance to enable consistent outcome to be achieved would in itself be a step backwards both for the industry and the TRA. How these are applied by the TRA and how the application is perceived by the industry and wider community would be a challenge because the TRA must not only demonstrate independence by demonstrating they are efficient, effective, regular, reasonable, non-discriminatory and transparent to all but their actions must also be perceived to be even-handed to all – industry and the wider community.

More confusion is caused by the following statement “TRA recognises that an ex-ante test for excessive pricing for individual products or services produced by a multi-product cannot be definitive.” If TRA recognises the imprecise nature of the rules and associated tests then it must be assumed that TRA at best is trying to achieve “reasonable assurance” and not “absolute assurance”. This reasonable assurance also exists under the current regime but the new regime appears to be a half-way-house between absolute assurance and reasonable assurance. Any decisions based on such discretionary powers may, in Batelco’s view, leave TRA open to criticism for lack of independence and playing favorites.

4. Complexity Analysis – more or less

Due to inherent ambiguity in the rules the consultation documents first documents (i) the rules, (ii) followed by few paragraphs in an attempt to add clarity to the rules, (iii) followed by tests in an attempt to add more clarity, (iv) followed by requirements to pass the test in an attempt to add further clarity, (v) followed by examples to bring clarity by explaining further how the rules are to be applied. The complexity of process and evidence requirements is onerous to say the least. Specialist resource would need to be employed just to understand the rules, then to apply the different rules consistently to different types of services and along the way produce and retain many different pieces of evidence for a single notification. Then also be prepared to explain the application of these complex rules to TRA as and when they request more information.

The level of complexity has also increased due to additional rules and associated tests, (i), identify type of service, (ii) identify applicable tests for type of service, (iii) determining cost standard, (iiia) LRAIC, (iiib) LRAIC + or (iiic) LRAIC (wholesale input price + downstream costs), to be applied, (iv) determining permissible measures (such as use of (iva) FAC in place of LRAIC or (ivb) LARIC+, (ivc) LRAIC + EPMU or (ivd) FAC (with EMPU) and then (v) ensuring that proxy exists for LRAIC because without the proxy some tests cannot be determined.

In addition confusion is added to complexity because “failing the quantitative part of a test does not necessarily imply that a notified tariff has breached the associated rule” but based on

accompanying explanation the tariff may be approved or disapproved. Such ambiguity is not only detrimental to all that may be bound by the rules and associated tests but also seriously brings the independence and objectivity of TRA into question because TRA would find difficult to implement these tests consistently themselves.

Another added requirement proposed is the completion of sensitivity analysis, which based on assumptions that may or may not eventuate. After accounting separation requirements (existing requirement) and all above requirements and assessments are complete then only can an operator start filling in the notification form for submission to TRA. All this effort still does not guarantee that TRA approval would be achieved because under the proposed regime TRA would have too many additional and discretionary powers at its disposal.

The ease of implementation and ease of validation (proof) should be the primary objectives of any legislation but consultation document is deficient on both counts.

5. Resource Intensive and Administratively Burdensome Analysis – More or Less

The first two of the four key requirements analysed demonstrate that for SMP products or other products bundled within SMP products there is no reduction in the effort that would make the process less resource intensive but last two key requirements demonstrate significantly increased administrative burden. In addition, the complexity highlighted in previous section would increase the administrative burden by requiring specialist resource to understand the rules and how they are to be implemented; in addition, new systems would need to be implemented or existing systems significantly modified to meet the requirements supporting proposed tests. The burden of proof in tests is more, price discrimination test in para 28 and para 29, of the draft guidelines explain what evidence SMP operator should provide but because these explanations lack clarity Para 30 of the draft guidelines is included to elaborate and add clarity further on the information (evidence) that should be provided. Ultimately, increased cost of compliance would impact on price or quality of service or both for the customer.

Costs	Current Regime	Proposed Regime	Comments
Is there change in process for obtaining underlying data?	No	No	No, most recent separated regulated account forms the basis of costs. Cost forecasting is required under both regimes.
Is there change in the level of data integrity in the underlying process?	No	No	No, cost of each component shall be taken into account in calculating the total cost of providing the service, which shall be fully explained and backed up with detailed calculations.
Is sensitivity analysis to be conducted	No	Yes	Sensitivity analysis in itself would create significant workload in particular if there are several key assumptions for which such analysis has to be completed.
Are there additional requirements to be met?	No	Yes	Ex-ante rule and associated tests create significant work load.

Rebalancing would further increase the administrative burden, in the short term, because new costing based on rebalancing would need to be completed and number of currently approved tariffs would need to be resubmitted for approval. This process would be significantly detrimental to customers because the lead time prior to filling the notification form will take longer and have a higher risk of rejection because of too many ambiguities in the tests and process themselves. While TRA's intent is to make the notification process shorter, the ambiguities in the tests and process could lead to unnecessary requests for information or raising of unnecessary compliance concerns. Overall, the complexity and ambiguity in the proposed notification process and associated tests would increase the cost of doing business, which would be to the detriment of the market and may even not result in or be perceived as not to result in a level playing field for all operators.

6. Undefined Threshold and Community Interest position

The approach taken in the consultation is that the process would apply to all situations regardless of the level of impact or type of activity. The process will be too onerous in some situations such as promotions, raffles, road shows, exhibitions etc.

The proposal is silent on force majeure or other emergency situations where services are to be provided in the interest of community at significantly reduced prices or below costs to enable timely communication. Any approval of tariff before providing a service in such situations would be impossible.

The proposal is also silent on level of flexibility and discretion that an operator would have in inclusion of value added services or products that are customised to suit special needs of the business customer.