

31 August 2001

Ms Andrea Griffiths
Secretary
Australian Senate
Environment, Communications, Information Technology and the Arts
Legislation Committee
Parliament House
Canberra
ACT 2600

Dear Ms Griffiths

Thank you for the opportunity to provide comments on the Trade practices Amendment (Telecommunications) Bill 2001 (the Bill).

Notwithstanding our strong views that it is now time to look towards lessening telecommunications specific regulation, Vodafone supports the Government's desire to streamline certain aspects of the telecommunications access dispute process. In our view the Bill, as drafted, is reasonably consistent with that objective. However, we believe there are a few areas where the Bill can be improved to provide added certainty and to better reflect the legitimate interests of telecommunications access providers and access seekers.

We would welcome the opportunity to discuss any of our views with the Committee in more detail, should it wish to do so.

152 AQA Pricing principles

In order for a declaration to be effective, and the long term interests of end users to be properly considered, Vodafone submits that it is vital that pricing principles are considered and finalised before a declaration is made. In effect, this would mean that the pricing principles determination would be made at the same time as the service is declared. In Vodafone's view, providing the Commission with the flexibility to make a determination "as soon as practicable after" a service is declared runs the risk of disconnecting the pricing principles from the declaration process.

Any time lag between a declaration and the issuing of final pricing principles creates significant uncertainty in the market place and can delay commercial negotiations.

The practical form of pricing principles is also an important factor to be taken into account in analysis of whether there will be long term benefits to end-users arising out of the declaration of a service. Different pricing principles could potentially sway the analysis on whether a service should be declared. For this reason, it is important that the consideration of the form of the pricing principle should be included in the declaration analysis.

152CRA Publication of determinations

Vodafone generally supports the expansion of the Commission's powers to enable it to publish the outcomes of determinations and the reasons for them. However, we are concerned that the power provided to it is not so broad that it would allow the Commission to publish commercially sensitive input data that is provided to it by the parties to a dispute. In particular, cost and other confidential company information should not be published without the agreement of the party providing the information.

152DMA Joint arbitration hearings

Vodafone submits that two or more access disputes merely sharing one or more matters that are common cannot be considered to be "common disputes". In our view the threshold should be much higher. That is, the disputes should be substantially the same in all material respects. Telecommunications issues are often complex and relatively small variations in either the context or the details surrounding a dispute will have a significant impact on the outcome.

Where the Commission believes that two or more disputes could be resolved more efficiently through being joined to form a common dispute, we believe the following process should be followed by the Commission:

- The affected parties are notified by the Commission that it holds a view that the disputes should be joined;
- Each of the parties is provided with the statements of claim (and defence, if available) of the other parties to the disputes that are intended to be joined;
- The parties are given 28 days to consider the matters set out in the statements of claim (and defence) and make a submission to the Commission setting out whether they agree with the Commission's view and if not give reasons why not; and
- The Commission makes a final decision having regard to the submissions of the parties.

152DR Operation and implementation of a decision that is subject to appeal

Vodafone is concerned about the inclusion of a provision in the Bill providing that an appeal to the Federal Court against a decision made by the Tribunal would not affect the operation of the decision or prevent action being taken to implement the decision. This is a significant change to parties' existing rights.

We also question whether this provision is necessary given efficiency gains that will be afforded through the limitations on appeal rights that are proposed in 152DOA.

Being forced to comply with a decision of the Tribunal that is subsequently overturned could have irreparable consequences for the access provider. This is because a decision by the Tribunal might require fundamental changes to the operation of the access provider's network and impact on both its immediate and future capability to provide services to its customers.

This might be mitigated if the access provider was given a damages undertaking so that its losses could be recouped in circumstances where an appeal was successful. In Vodafone's view, the undertaking would need to be provided by the Government,

since the access seeker may not have the financial substance to make such an undertaking effective.

Decision quality is advanced through the reflection and refinement that the appeals process brings. Given the large impact that regulatory action can have on investment decisions, we think it is critical to ensure that robust decisions are made. We believe that this process will be impaired significantly by this fundamental change to parties' rights.

Vodafone suggests that this issue should have the benefit of wider and more detailed debate. In the meantime, clause 152DR should be removed from the Bill.

Conclusion

Vodafone supports many of the provisions of the Bill but, in some cases, has proposed minor amendments where we believe it can be more closely aligned to the policy statements made by Governments or where parties legitimate interests are adversely impacted. The proposed amendment set out in 152DR has implications that go beyond a simple streamlining of the dispute resolution process and should be removed until it has been considered more fully.

Yours sincerely

Peter Stiffe
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