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Technology & Communications Law

Committee Secretariat
Environment, Communications, Information Technology
and the Arts Legislation Committee
Parliament House
CANBERRA ACT 2600

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Dear Ms Griffiths

EXPOSURE DRAFT – STREAMLINING TELECOMMUNICATIONS ACCESS

We act for Primus Telecommunications Pty Ltd ("**Primus**") in the above matter.

We refer to the exposure draft of the *Trade Practices Amendment (Telecommunications) Bill 2001* (the "**Bill**"). We are instructed to provide the following comments on the proposed amendments to the *Trade Practices Act 1974* (Cth) (the "**TPA**"), as set out in Schedule 1 of the Bill.

SCHEDULE 1 – AMENDMENTS

Subject to the comments and suggestions set out below, Primus supports the proposed amendments to the TPA.

Item 1 – Pricing Principles

As most of the services which are likely to be declared pursuant to Part XIC of the TPA have already been declared, proposed section 152AQA would be of little practical benefit to the industry if it did not apply to services which were declared *before* the commencement of the amending Act.

A particular benefit to the industry of proposed section 152AQA applying to services which have already been declared is that any pricing principles which have been developed by the Commission (for example, in respect of local carriage services) would form a clear starting point for existing access disputes (proposed sub-section 152AQA(6)) and this would to a large extent prevent an access provider from seeking to have a matter reviewed by the Australian Competition Tribunal on the basis that the Commission applied the wrong pricing principles. This would in turn reduce the ability of a powerful incumbent to engage in regulatory gaming.

Accordingly, Primus proposes that item 24(1) be amended to read as follows:

"(1) The amendment made by item 1 applies in relation to

(a) services that are declared to be declared services either before or after the commencement of this Act; and

(b) declared services that are varied after the commencement of this Act."

Further, Primus suggests that the Committee consider ways of strengthening the pricing principles to ensure the prevention of predatory pricing.

Item 14 – Using information from one arbitration in another arbitration

Primus proposes that proposed sub-section 152DBA(2) be amended to read: "The Commission may do so only if it considers this would result in the promotion of the object of this Part or in the current arbitration being conducted in a more efficient or timely manner."

These amendments would give the Commission broader scope for considering information from another access dispute where it is appropriate to do so, having regard to the long term interests of end-users.

Item 15 – Joint arbitration hearings

Primus proposes that proposed sub-section 152DMA(2) be amended to read: "The Chairperson may do so only if he or she considers this would result in the promotion of the object of this Part or in the common disputes being resolved in a more efficient or timely manner."

These amendments would give the Chairperson broader scope for joining arbitration hearings where it is appropriate to do so, having regard to the long term interests of end-users.

Item 19 – Matters the Tribunal may have regard to for the purposes of the review

Primus is very concerned that proposed section 152DOA, as presently drafted, may be taken advantage of by a party with substantial legal and regulatory resources at its disposal, by that party submitting as much information, documents and evidence as it possibly can during an arbitration before the Commission, for the purposes of:

(a) delaying the arbitration;

(b) further regulatory gaming, by way of "out-resourcing" its opponents;

(c) broadening the scope of matters it may subsequently argue before the Tribunal; and

(d) due to (b) above, restricting the submissions which its opponents may wish to make and the evidence which its opponents may wish to adduce before the Tribunal.

Primus has already seen evidence of Telstra apparently attempting to do so in at least one current arbitration before the Commission.

Before the Tribunal, a party ought to be able to rebut any matters on which another party makes submissions or adduces evidence. However, on a strict reading, proposed section 152DOA may be read as taking away that right. Accordingly, Primus proposes that the proposed section 152DOA be renumbered as sub-section 152DOA(1) and that a new sub-section 152DOA(2) be inserted as follows: "Sub-section 152DOA(1) does not prevent a party from making any submission or

adducing any evidence to rebut any submission made or evidence adduced by another party in the review."

Primus' comments in relation to this matter are subject to its comments in relation to the abolition of merits review, below.

Item 23 – Application of amendments

Part XIC sets out a regime for arbitrating *inter alia* prices for declared services, in circumstances where the parties have been unable to reach agreement. Until a party files a notice of an access dispute with the Commission, the price it pays for the relevant service is effectively unregulated and therefore the access provider can engage in monopolistic pricing of that service. In Primus' experience, this has tended to encourage access providers to file access undertakings with the Commission which are patently unreasonable (within the meaning of section 152AH of the TPA) and to delay negotiations with access seekers and therefore the filing of a dispute notice by the access seeker. This outcome is contrary to the purpose and objects of Part XIC of the TPA and has, in Primus' experience, resulted in inefficient access prices, less competition in relevant markets and higher retail prices for end-users.

Further, access seekers such as Primus have, since the introduction of the Part XIC access regime on 1 July 1997, been forced to absorb monopolistic access prices on the wholesale side of the market for services such as domestic PSTN originating and terminating access, whilst being under increasing competitive pressure to reduce their prices to their customers on the retail side of the market. This has, in Primus' view, been the one of the most significant failings of the Part XIC access regime and has enabled access providers to reap arbitrage profits for the period between the commencement of negotiations for access prices between the parties and the filing of a notice of access dispute by the access seeker.

Primus recognizes that it may be impractical and controversial to apply item 16 to access disputes which have been finalized or withdrawn.

Accordingly, Primus proposes that the reference to item 16 be deleted from item 23(2) and a new item 23(3) be inserted as follows: "The amendments made by item 16 apply in relation to access disputes that are on foot at the commencement of this Act or are notified after the commencement of this Act."

Abolition of merits review

Primus strenuously urges the Committee to consider the abolition of merits review in relation to access disputes determined by the Commission. In other words, Primus proposes that the provisions in Part XIC of the TPA relating to the Tribunal reviewing a final determination ought to be repealed.

Primus' experience to date (as a party to the PSTN review currently before the Tribunal) is that the review process has been misused by the incumbent as a form of gross regulatory gaming with the apparent purposes of:

(a) tying-up its opponents legal and regulatory resources; and

(b) intimidating access seekers wishing to lodge an access dispute with the Commission, by making it clear that if they do so they will be likely to be subjected to a lengthy and costly arbitration process and then an even more length and costly review process. As access

seekers may therefore be reluctant to lodge access disputes, this may in turn effectively enable the incumbent to charge monopoly prices to access seekers for declared services, notwithstanding Part XIC.

Further, Primus has not seen anything to date to suggest that the outcome before the Tribunal is likely to be much different from the Commission's final determination. This suggests that the review process is likely simply to be a "re-run" of the matter before the Commission, without adding any practical or forensic value to the dispute resolution process overall.

Primus will make further detailed comments regarding this issue in the context of a joint submission to the Committee by Primus, Optus, AAPT and Macquarie Corporate Telecommunications.

Yours faithfully
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