

Senate Economics Legislation Committee
ANSWERS TO QUESTIONS ON NOTICE

Treasury Portfolio

Budget Estimates 29, 30 & 31 May 2007

Question: bet 39(ACCC)

Topic: Acts Interpretation Act - Exemptions

Hansard Page: E27

Senator O'BRIEN asked:

Senator O'BRIEN—Let us go back to the Foxtel exercise, because it is that aspect of the law that I wanted to examine, where the ACCC granted an exemption to certain competition requirements only for the exemption to be overturned on review after construction had started. There seems to be a lot of disquiet in industry about issues of regulatory certainty that the exemption process provides. Are you aware of that disquiet?

Mr Cosgrave—There are two provisions that people who are contemplating investing can use. One relates to an exemption from regulation and one relates to the terms and conditions on which they will provide access to other access seekers. You correctly indicate that in Foxtel one of those provisions was used in the exemption application. That was ultimately overturned by the Australian Competition Tribunal, in part because of a view that the infrastructure was likely to be invested in in any case. What is being contemplated by parties here is the lodging of access undertakings whereby they will indicate terms and conditions in advance on which they will provide access. That is quite an important distinction, because in one instance you are seeking that total exemption from access obligation; in the other, you are in fact accepting that you will need to provide access and specifying that up front for the purposes of getting certainty in the terms and conditions on which you will provide that.

Senator O'BRIEN—Given all of that, is it the case that, by virtue of section 33(3) of the Acts Interpretation Act, even if an exemption is granted by the ACCC the commission may unilaterally vary or revoke that exemption so long as it follows the same process that it was obliged to follow when granting the exemption?

Mr Cosgrave—That is a legal question as to the application of the act. I will take that part of the question on notice, although I think the answer is, yes, as a matter of law you could. It would be quite a different matter as a matter of regulatory practice, having gone through an extensive public process, the purpose of which is to provide certainty to parties as to whether you would as a matter of practice vary your ruling. It seemed to be counterintuitive with the objective of these provisions, which is to provide certainty to investors.

Senator O'BRIEN—The legislative framework permits it, but you are saying that it is not a matter of policy?

Mr Cosgrave—What I am saying is that it may be. I have taken on notice to be absolutely certain for your benefit. But maybe it is a matter of power; as with a number of other instruments, you could vary it. But these are provisions put in place to provide certainty for investors. You would clearly hesitate long and hard if, having given certainty to investors, you were entertaining an application to vary that. You would hesitate long and hard before you went in that direction, if indeed you would at all.

Answer:

Section 33(3) of the *Acts Interpretation Act* permits a decision maker, such as the ACCC, to vary or revoke an instrument. An “instrument” includes an exemption determination or order under sections 152AS, ASA, AT or ATA of the *Trade Practices Act*. However, section 33(3) requires that the power to vary or revoke the instrument be exercised in ‘a like manner’ and be subject to the same ‘conditions’ as the original power that was relied on to make the instrument.

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Therefore, before the ACCC may vary or revoke an exemption order, the ACCC must consult on the proposed variation or revocation, if the ACCC is of the opinion that the decision is likely to have a material effect on the interests of a person. The ACCC must also be satisfied that varying or revoking the exemption order will promote the long term interests of end-users.