

CHAPTER 5

TRADE PRACTICES AMENDMENT (TELECOMMUNICATIONS) BILL 1996

Background

5.1 The Trade Practices Amendment (Telecommunications) Bill 1996 (the Bill) establishes the primary basis for competition regulation in this package of legislation. The Bill will amend the *Trade Practices Act 1974* (TPA) to provide special rules to control anti-competitive conduct by telecommunications carriers and carriage service providers and to deal with access to telecommunications services.

5.2 The Bill would insert a new Part XIB into the TPA establishing a special regime for regulating anti-competitive conduct in the telecommunications industry. This regime will apply in addition to Part IV of that Act, which regulates restrictive trade practices in general.

5.3 Under Part XIB, as well as being able to seek injunctions to stop anti-competitive conduct by a carrier or carriage service provider, the Australian Competition and Consumer Commission (ACCC) will be able to issue a competition notice stating that a carrier or carriage service provider has engaged in such conduct. The Part enables:

- the ACCC to seek pecuniary penalties; and
- third parties to seek damages

where anti-competitive conduct is engaged in after the ACCC has issued a competition notice and while the notice is in force. In addition, the ACCC will be able to make an order exempting specified conduct from the scope of the definition of anti-competitive conduct.

5.4 The ACCC will also be able to:

- direct carriers and carriage service providers to file tariff information with the ACCC; and
- make record-keeping rules with which specified carriers and carriage service providers will be required to comply.

5.5 Proposed Part XIC, also inserted into the TPA by the Bill, sets out an access regime for the telecommunications industry. The regime provides for

the declaration of carriage services and related services by the ACCC either following a recommendation of the Telecommunications Access Forum (TAF) or after a public inquiry. Once declared, standard access obligations apply to carriers or carriage service providers supplying those services (access providers), unless those persons are otherwise exempted.

5.6 The terms and conditions of access on which access providers comply with the standard access obligations are subject to commercial agreement, may be set out in an access undertaking or, failing agreement or the existence of a relevant access undertaking, may be determined by the ACCC in an arbitration. An access undertaking may incorporate or adopt the model terms and conditions set out in a telecommunications access code prepared by the TAF or determined by the ACCC.¹

5.7 The Committee has made some recommendations regarding the provisions of Part XIC. Recommendations have also been made in regard to the transitional arrangements for tariff filing arrangements and the telecommunications access regime (Chapter 6), and price discrimination in local call charges (Chapter 9).

Anti-competitive conduct (Part XIB)

Review of competition notices

5.8 In its submission to the Committee, Telstra recommended that the ACCC's power to issue a competition notice be subject to merits review by the Australian Competition Tribunal. Telstra argued that such a review mechanism is especially necessary because:

the competition notice is likely to be exercised where there is considerable uncertainty about whether a particular activity is anti-competitive.²

5.9 In particular, Telstra noted that the competition rule introduces new elements and constructions to the TPA.

5.10 Subject to a competition notice remaining in force during any period of review, ATUG expressed its support for the Telstra proposal.³ In addition, ATUG proposed a seven day consultation period before a competition notice

1 Explanatory Memorandum, Trade Practices Amendment (Telecommunications) Bill 1996, pp 1-2.

2 Telstra Corporation Ltd, Submission 43, Vol 3, p 467.

3 Australian Telecommunications Users Group, Submission 41a(S), Vol 4, p 776.

may be issued, during which the carrier or carriage service provider who is the subject of the notice, and any other person who has made a complaint in regard to the conduct which is the subject of the notice, may make oral or written submissions to the Commission on whether the notice should be issued. The option of allowing the ACCC to issue an interim notice during this consultation period was also suggested.⁴

5.11 Optus Communications/Optus Vision (Optus) expressed the view that a competition notice:

does not actually affect the rights of the carriers... [The ACCC has] to go to court in order to do that. If there are substantive problems with the competition notice - if the competition notice is wrong - those matters will be ventilated in the court.⁵

5.12 In a supplementary submission to the Committee, Optus suggested that the insertion of an appeal process may encourage 'procedural skirmishes' which reduce the ACCC's ability to act decisively.⁶

5.13 Telstra indicated that it did not support a consultation period as suggested by ATUG:

Standard practice is that the ACCC consults with parties where it has concerns about anti-competitive conduct, and we have no reason to think that this will not continue to be the case. These matters are probably best addressed in the guidelines which the ACCC are under an obligation to issue, rather than prescribing exactly in legislation.⁷

5.14 The ACCC said in evidence to the Committee that it consults with any party which is the subject of concern about market conduct.⁸ The Committee does not, therefore, consider a consultation period as proposed by ATUG to be necessary.

5.15 The Committee notes the concerns expressed in submissions that adequate opportunity be provided to persons subject to a competition notice to respond to the matters in that notice. They also note both that, as a matter of practice, the ACCC consults with parties the subject of concern about market

4 Australian Telecommunications Users Group, Submission 41, Vol 3, p 412.

5 Mr Bruce Meagher, Manager, Regulatory Affairs, Optus Vision Pty Ltd, *Committee Hansard*, p 73.

6 Optus Communications/Optus Vision, Submission 40b(S), Vol 5, p 1006.

7 Telstra Corporation Ltd, Submission 43b(S), Vol 4, p 797.

8 Mr David Lieberman, Commissioner, Australian Competition and Consumer Commission, *Committee Hansard*, p74.

conduct⁹ and that if the ACCC has breached the rules of natural justice, an aggrieved person would be able to seek judicial review¹⁰.

5.16 The receipt of a competition notice does not materially affect the rights of a carrier or carriage service provider. A competition notice is a statement by the ACCC that a specified carrier or carriage service provider has contravened, or is contravening, the competition rule with the effect of acting as prima facie evidence of that matter in any action taken in regard to that conduct. Whether the carrier or carriage service provider has engaged in anti-competitive conduct is a matter to be determined by the Federal Court. The Committee concludes that a right of appeal to the Australian Competition Tribunal is not necessary would be likely to impede the ability of the ACCC to act swiftly against anti-competitive conduct.

Telecommunications Access Regime (Part XIC)

Proposed content services

5.17 Proposed section 152AC provides definitions for the purposes of Part XIC. Telstra noted that the definition of 'carriage service' includes a 'proposed carriage service', whereas the definition of 'content service' does not. Telstra recommended a consistent approach be taken with both definitions.¹¹

5.18 The Committee believes that this apparent oversight should be corrected.

9 Mr David Lieberman, Commissioner, Australian Competition and Consumer Commission, *Committee Hansard*, p74.

10 Review rights would be available under the *Administrative Decisions (Judicial Review) Act 1977*, and under common law.

11 Telstra Corporation Ltd, Submission 43, Vol 3, p 504.

RECOMMENDATION 5.1

The Committee recommends that the definition of 'content service' in proposed section 152AC of the Trade Practices Amendment (Telecommunications) Bill 1996 be amended to include a 'proposed content service'.

Effect of the telecommunications access code

5.19 Telstra suggested that the terms of proposed section 152BO may give rise to ambiguity in interpretation of the Part, potentially precluding an access undertaking from adopting the model sets of terms and conditions in an access code developed by the ACCC, or enabling the ACCC to automatically accept such an undertaking.¹²

5.20 The Committee notes that the outcomes suggested by Telstra as a possible interpretation of proposed section 152BO would be at odds with the intended operation of the access regime.¹³

RECOMMENDATION 5.2

The Committee recommends that the Minister give consideration to amending proposed section 152BO of the Trade Practices Amendment (Telecommunications) Bill 1996 in light of concerns raised regarding its possible interpretation.

12 Telstra Corporation Ltd, Submission 43, Vol 3, p 503-504.

13 Explanatory Memorandum, Trade Practices Amendment (Telecommunications) Bill 1996, p 57.