

CHAPTER 6

TELECOMMUNICATIONS (TRANSITIONAL PROVISIONS AND CONSEQUENTIAL AMENDMENTS) BILL 1996

Background

6.1 The Telecommunications (Transitional Provisions and Consequential Amendments) Bill 1996 (the Bill) contains transitional provisions and consequential amendments related to the Telecommunications Bill 1996.

6.2 The Bill deals with the merger of the Australian Telecommunications Authority (AUSTEL) and the Spectrum Management Agency (SMA) and the transfer of competition policy resources from AUSTEL to the Australian Competition and Consumer Commission (ACCC) on 1 July 1997. The merger on this date of AUSTEL and the SMA to form the Australian Communications Authority (to be known as the ACA) is part of a proposed scheme for regulating telecommunications in Australia from 1 July 1997 under the Telecommunications Bill 1996.

6.3 The Bill also provides for transitional provisions relating to a number of other matters including the telecommunications access regime under proposed Part XIC of the *Trade Practices Act 1974* (TPA) and carrier licensing. Access agreements between carriers registered under section 144 of the *Telecommunications Act 1991* immediately before 1 July 1997 will be deemed to have been registered with the ACCC under the proposed new access regime arrangements. They will therefore be enforceable as though they were a determination by the ACCC under the access regime. Existing carriers will be deemed to have been granted a carrier licence under the proposed Telecommunications Act on 1 July 1997. In addition, after 5 June 1997 the Minister will be able to make, vary or revoke carrier licence conditions generally or in relation to each specific licence. This will enable the Minister to vary existing carrier licence conditions in line with the provisions of the new legislation.¹

6.4 The Committee has made recommendations concerning transitional arrangements for the telecommunications access regime, tariff filing obligations and the numbering plan.

Telecommunications Access Regime

1 Explanatory Memorandum, Telecommunications (Transitional Provisions and Consequential Amendments) Bill 1996, p 1.

6.5 Clause 39 of the Bill provides that the ACCC must prepare a statement specifying the services which will be deemed from 1 July 1997 to be the initial list of declared services for the purposes of the telecommunications access regime. The statement will draw on those services contained in access agreements between the three existing carriers as at 13 September 1996 (when exposure draft legislation was released by the Minister for Communications and the Arts) and, in addition, include a carriage service for the supply of broadcasting services over cable networks generally.

6.6 In addition, provision is made:

- (a) to ensure that the continuity of access agreements registered under section 144 of the *Telecommunications Act 1991* is not affected by the repeal of that Act; and
- (b) to continue the immunity enjoyed by those agreements from the application of Part IV of the TPA until 31 December 1997 (although the ACCC will be able to extend that protection for periods of up to 90 days if renegotiations or arbitration procedures have not been completed).²

Services covered by pre-commencement agreements

6.7 Optus Communications/Optus Vision (Optus) expressed concerns that the current drafting of clause 39 of the Bill might preclude the ACCC from including an eligible service which is brought within an existing access agreement between 13 September 1996 and 30 June 1997. Optus argued that there were good policy reasons to enable any further services to be included in the transitional declaration.³

6.8 The Committee concurs with the views expressed by Optus that where further services are incorporated into an access agreement during the period 13 September 1996 until 30 June 1997, the ACCC should have the flexibility to update or expand its written statement made under clause 39(1). It also notes that this is the apparent intent of the provisions as drafted.⁴

RECOMMENDATION 6.1

2 Explanatory Memorandum, Telecommunications (Transitional Provisions and Consequential Amendments) Bill 1996, p 17-20.

3 Optus Communications/Optus Vision, Submission 40, Vol 2 pp 371-372.

4 Explanatory Memorandum, Telecommunications (Transitional Provisions and Consequential Amendments) Bill 1996, p 18.

The Committee recommends that clause 39 of the Telecommunications (Transitional Provisions and Consequential Amendments) Bill 1996 be amended to ensure that further eligible services incorporated into an access agreement between the existing carriers in the period between 13 September 1996 and 30 June 1997 may be included by the Australian Consumer and Competition Commission in its initial list of declared services for the access regime.

Transitional access terms and conditions

6.9 The Service Providers Action Network (SPAN), an industry association representing the views and interests of Australian service providers, expressed concerns that transitional arrangements for existing service providers will have the potential for delaying effective competition for possibly a year or more. The submission noted proposed transitional arrangements for incumbent carriers which give some protection for existing access agreements. The submission argued that new access seekers will have their entry delayed by the requirement to initiate access negotiations with Telstra and, should that process fail to produce an agreement, to proceed through arbitration by the ACCC.⁵

6.10 SPAN recommended that new access seekers be provided with access to Telstra's network from 1 July 1997 on the same terms and conditions as incumbent carriers had on 30 June 1997.⁶ ATUG expressed support for the SPAN recommendation.⁷

6.11 Telstra and Optus have expressed opposition to the SPAN proposal. Telstra suggested that the automatic translation of existing, bilateral access agreements, which are specific to the operations of individual parties, to the requirements of new access seekers is impractical.⁸

6.12 Optus argued that the transitional arrangements should not:

establish a new industry status quo but ... allow for an orderly migration from one regime to the next.⁹

5 Service Provider Action Network, Submission 30, Vol 2, p 282-4.

6 Service Provider Action Network, Submission 30, Vol 2, p 284.

7 Australian Telecommunications Users Group, Submission 41a(S), Vol 4 p 778.

8 Telstra Corporation Ltd, Submission 43b(S), Vol 4, p 794.

9 Optus Communications/Optus Vision, Submission 40b(S), Vol 5, pp 1019.

6.13 In evidence given to the Committee, Mr Brian Perkins, Chairman, SPAN, noted that:

...we do not necessarily say that all the terms and conditions that are necessary translate directly [from the existing agreements to the requirements of new access seekers]. I am sure that is something that can be dealt with. The basic issue here is price and we do not have a price for 1 July. That is why we are asking for a transitional arrangement which will at least give us that level of certainty.¹⁰

6.14 The Committee notes that the transitional arrangements for the existing carriers do not guarantee the maintenance of their existing terms and conditions of access, including the price of access. Rather, those provisions provide that:

- (a) where existing agreements between the carriers provide for access beyond 1 July 1997, the repeal of the existing legislative arrangements cannot be used to argue that the agreement has been frustrated; and
- (b) protection from Part IV of the TPA is maintained for existing access agreements between the carriers for an initial period of six months, to enable those agreements to be revised to achieve consistency with Part IV.

6.15 The Committee also notes evidence given by Optus that their access agreement with Telstra does not provide for prices beyond 30 June 1997

We do not have a price beyond 1 July... Although the terms and conditions continue into the new regime, the prices do not.¹¹

6.16 The Committee is conscious of the concerns expressed by SPAN and its members. Excessive delays in determining the terms and conditions of access under the new regime may present significant difficulties for business planning. In addition, concerns held by service providers regarding uncertainty about the terms and conditions of access they will enjoy on 1 July 1997 do appear to have some legitimacy.

6.17 The Committee believes, however, that it would be inappropriate for the Parliament to set specific access terms and conditions as part of the transitional arrangements. In most, if not all cases, the terms and conditions on which Optus and Vodafone receive access to the Telstra network would not reflect the actual needs of other access seekers. Inappropriately imposed terms and

10 Mr Brian Perkins, Chairman, Service Providers Action Network, *Committee Hansard*, p 81.

11 Mr Paddy Costanzo, Manager Policy, Optus Communications, *Committee Hansard*, p 81.

conditions for access may well have a distortionary impact on the market which exceeds the intended benefits derived from those transitional arrangements. The Committee does not therefore recommend the adoption of the proposal made by SPAN.

6.18 The transitional arrangements proposed in the legislation enable access codes and undertakings to be approved or accepted by the ACCC and arbitrations to be undertaken by the ACCC from the date the Bill receives Royal Assent. The Committee is satisfied that, in general, these provisions establish a framework which will enable existing service providers to establish access arrangements early in the operation of the new regime. The Committee notes in particular that access rights are enforceable in the Federal Court independent of the determination of the terms and conditions of that access.¹²

6.19 The Committee is, nevertheless, of the view that some additional surety may be provided to existing service providers and carriers by providing that if the terms and conditions of access to a service becomes a matter for ACCC arbitration, the final determination should take effect on (and, if necessary, be backdated to) either 1 July 1997 or the date under the new regime on which the service was first supplied.

12 Proposed section 152BB, Trade Practices Amendment (Telecommunications) Bill 1996.

RECOMMENDATION 6.2

The Committee recommends that the Telecommunications (Transitional Provisions and Consequential Amendments) Bill 1996 be amended to provide that, if a person who was an eligible service provider or carrier on 30 June 1997 (within the meaning of the *Telecommunications Act 1991*) notifies the Australian Competition and Consumer Commission of a dispute regarding the terms and conditions of access to a declared service before 31 December 1997, any determination made by the Australian Competition and Consumer Commission in regard to that dispute has effect from:

- a) 1 July 1997; or
- b) if the service was first supplied at a later date, that date.

Tariff filing

6.20 Division 4 of Part XIB in the Trade Practices Amendment (Telecommunications) Bill 1996 enables the ACCC to direct carriers and carriage service providers to file tariff information with the ACCC if it is satisfied that they have a substantial degree of power in a telecommunications market. This mechanism will allow the ACCC to examine carrier and carriage service provider conduct in telecommunications markets.

6.21 Tariff information will only be made publicly available if the ACCC is satisfied that this would result in a net public benefit. The Explanatory Memorandum to the Trade Practices Amendment (Telecommunications) Bill 1996 notes that in cases where tariff information is released:

exposure of the information to public scrutiny, especially by other members of the telecommunications industry, will provide an opportunity for other parties with knowledge of industry cost structures and pricing practices to object to particular conduct on the grounds that it is anti-competitive and offer reasons to the ACCC as to why a competition notice should be issued.¹³

6.22 SPAN noted that under current regulatory arrangements, carriers are required to file and publish tariffs for their basic carriage services. Further, a carrier which is dominant in a market must charge consumers strictly in accordance with the filed tariff.

13 Explanatory Memorandum, Trade Practices Amendment (Telecommunications) Bill 1996, p 23.

6.23 SPAN expressed the view that moving to a discretionary power for the ACCC to require the filing of tariffs would

create an unhealthy level of uncertainty in the industry as well as unnecessarily and inappropriately imposing the burden on new entrants and consumers, of persuading the ACCC that it should issue a tariff filing direction to Telstra in the interests of fair competition and fair pricing.¹⁴

6.24 SPAN recommended the existing tariff filing obligations imposed on Telstra, including mandatory publication of tariff information, be continued until the ACCC decides to release it from that obligation.¹⁵

6.25 The ACCC advised the Committee that work is currently under way to identify which tariff filing obligations currently imposed should be maintained and to establish criteria against which decisions regarding tariff filing would be made. In addition, the ACCC noted its intention to seek industry comments on those processes before 1 July 1997.¹⁶

6.26 In evidence before the Committee, Telstra expressed the view that the adoption of SPAN's recommendation would put:

a lot of impost on us... significantly restricting what our commercial market behaviour might be. We think, subject to us being not anti-competitive, the clear policy intention is that we should not continue to be restricted.¹⁷

6.27 The Committee notes the intent of the package of legislation to provide greater freedom for all market participants to pursue competitive market strategies and engage in normal competitive conduct.¹⁸ It is also conscious that:

- (a) compliance with tariff filing obligations involve costs for both the regulator and a person subject to the obligation; and
- (b) there is a potential for the public release of tariff information to undermine price competition.

14 Service Providers Action Network, Submission 30, Vol 2, 289.

15 Service Providers Action Network, Submission 30, Vol 2, 289.

16 Mr David Lieberman, Commissioner, Australian Competition and Consumer Commission, *Committee Hansard*, p 89.

17 Mr Denis Hambleton, Director, Regulatory Affairs, Telstra Corporation Ltd, *Committee Hansard*, p 90.

18 Second Reading Speech, Trade Practices Amendment (Telecommunications) Bill 1996, *House Hansard*, 5 December 1996, p 7803.

6.28 The Committee believes that, in general, the discretionary tariff filing power given to the ACCC in the legislation provides adequate powers to enable the ACCC to impose tariff filing obligations where it considers that those obligations are appropriate. It is conscious, however, of concerns expressed in the industry that the removal of tariff filing obligations from Telstra may both increase industry uncertainty and potentially leave the ACCC without adequate information on which to act against anti-competitive conduct.

6.29 The Committee is of the view that the transitional arrangements will be assisted by clearly establishing the tariff filing obligations of Telstra under the new regime. It considers that, as a starting point, Telstra should remain under its existing tariff filing obligations for a period of up to two years. The ACCC should, however, have a discretion to release Telstra from tariff filing obligations in regard to some or all services if it considers that no useful regulatory purpose is being achieved.

6.30 The Committee is of the view that tariff information filed under these transitional arrangements should only be publicly released if doing so would result in a net public benefit (as described in proposed section 151BQ of the Trade Practices Amendment (Telecommunications) Bill 1996).

RECOMMENDATION 6.3

The Committee recommends that the Telecommunications (Transitional Provisions and Consequential Amendments) Bill 1996 be amended to require the Telstra Corporation Ltd to file tariffs with the Australian Competition and Consumer Commission until 30 June 1999 with regard to those services for which it is currently required to file tariffs with AUSTEL. The Commission should have the discretion to release Telstra from any or all of these obligations at an earlier date where it is of the view that continuing the obligation is no longer justified.

The Committee further recommends that the public release of information filed under these transitional obligations be subject to the public benefit test contained in proposed section 151BQ of the Trade Practices Amendment (Telecommunications) Bill 1996.

Numbering

6.31 Clause 444 of the Telecommunications Bill 1996 requires the ACA to undertake public consultation on the draft of a numbering plan. Clause 68 of the Telecommunications (Transitional Provisions and Consequential Amendments) Bill 1996 allows the requirement to be bypassed before 1 July 1997 in order to expedite the preparation of the first numbering plan (under the new Telecommunications Act) before that date.

6.32 Telstra has proposed that Clause 68 be amended to enable the current numbering plan (made under the *Telecommunications Act 1991*) to continue beyond 1 July 1997 so that public consultation can be undertaken on the new numbering plan. A cut-off date of 1 January 1998 was suggested.¹⁹

6.33 The Committee agrees that the requirements for consultation should apply consistently to numbering plans made under the Telecommunications Bill 1996.

RECOMMENDATION 6.4

The Committee recommends that clause 68 of the Telecommunications (Transitional Provisions and Consequential Amendments) Bill 1996 be deleted and replaced by a provision enabling the current numbering plan to remain in place for an appropriate period until a new numbering plan has been produced.

19 Telstra Corporation Ltd, Submission No. 43a, Vol. 4, p 788.