CHAPTER TWO

TELECOMMUNICATIONS LEGISLATION AMENDMENT BILL 2000

Structure of proposed amendments

2.1 The Bill consists of two schedules which, as outlined above at paragraph 1.5, amend two key legislative instruments in the telecommunications regulatory framework. Without compromising the objective of significant self-regulation for Australia's communications infrastructure, the amendments aim to provide safety net mechanisms for the management of electronic addressing.

Schedule 1: Role of the ACA and ACCC - *Telecommunications Act 1997*

2.2 Division 3 of Part 22 of the *Telecommunications Act 1997* (the TA - sections 474-477) deals with the regulation of electronic addressing. Although a mechanism for intervention through the ACA and the ACCC is currently available, the powers of intervention are limited and only available in specified circumstances. The amendments clarify the powers of intervention by the ACA and the ACCC.

Role of the ACA and the ACCC in declaring a manager of electronic addressing

2.3 Under subsection 474(1) of the TA, the ACA may currently determine a specified person or association to be the declared manager of electronic addressing in relation to a specified kind of listed carriage service such as the Internet. The ACA can only do so, however, where it is of the opinion that it is not being managed 'in accordance with generally accepted principles and standards' or where it has been directed to do so by the ACCC. The ACCC can only so direct if it is of the opinion that compliance with that direction will have a bearing on competition.[1]

2.4 The amendment proposed in item 1 of the Bill would mean that the ACA may declare a person or association to be a declared manager in relation to a specified kind of electronic addressing and a specified kind of listed carriage service. This would allow more than one declaration to be in existence at any one time and different declarations to be in force simultaneously in relation to different aspects of the kind of electronic addressing in question.[2]

2.5 The proposed amendments would also affect the circumstances in which the ACA can declare a manager of electronic addressing. Because the 'accepted principles and standards' of electronic addressing may be difficult to determine, item 2 proposes that the ACA have power to declare a manager if electronic addressing is not being managed to the ACA's satisfaction.[3] Suggested situations which may warrant the ACA's intervention include:

---

1 See subsections 474(3), (4) and (6) respectively

2 *Explanatory Memorandum*, Telecommunications Legislation Amendment Bill 2000, p. 5

3 Telecommunications Legislation Amendment Bill 1997, Item 2: New paragraph 474(3)(b). See also *Explanatory Memorandum*, Telecommunications Legislation Amendment Bill 2000, p. 5

> … non-compliance with material standards, or mismanagement which threatens the stability or integrity of the system. Given the growing public importance, in both social and economic terms, of certain kinds of electronic addressing (especially the Internet DNS), there may also be other situations where the ACA is not satisfied with the person's management.[4]

2.6 In addition, item 3 of the Bill proposes to widen the circumstances in which the ACCC can direct the ACA to declare the manager of electronic addressing. The amendment would enable the ACCC to give such a direction where the ACCC is of the opinion that compliance with such a direction is likely to have a bearing on competition or consumer protection.

The ACA's power to give directions to a declared manager

2.7 Under section 475(1) of the TA, the ACA can give the declared manager certain directions in relation to electronic addressing. Such directions can only be given, however, if the electronic addressing is of public importance and one of the things this is determined by is the extent to which it is of significant social and/or economic importance to service providers and end-users.[5]

2.8 The Bill proposes to amend section 475(1) to reflect the proposed wording in new subsection 474(1) so that different directions can distinguish between different kinds of electronic addressing and listed carriage services.[6]

2.9 More importantly, under proposed subsection 475(3), the ACA would not be limited to considering the extent to which electronic addressing is of social and/or economic importance to particular groups. The ACA will only have to consider whether the electronic addressing is of significant social and/or economic importance generally. It was suggested that indicators of that importance might include whether a particular kind of electronic addressing is used in the general community or in commerce, the purpose(s) for which a particular kind of electronic addressing is used and the significance of particular addresses to businesses or individuals.[7]

The ACCC's power to give directions to a declared manager

2.10 Section 476 governs the ACCC's power to give directions to the declared manager of electronic addressing and this corresponds with that given to the ACA under section 475.[8] The Bill seeks to re-enact subsection 476(1) so as to reflect the changes to subsection 474(1) so that different directions can distinguish between different forms of electronic addressing and listed carriage services.[9]

---

4 *Explanatory Memorandum*, Telecommunications Legislation Amendment Bill 2000, pp. 5-6

5 *Telecommunications Act 1997*, subsection 475(3). Subsections 475(6) and (7) also provide that the ACA must consult with the ACCC before giving a direction and that such directions, once given, are binding and non-compliance constitutes an offence. Directions are disallowable instruments: Subsection 475(8)

6 Item 4, proposed new subsection 475(1)

7 *Explanatory Memorandum*, Telecommunications Legislation Amendment Bill 2000, p. 6

8 This includes that directions are disallowable instruments and non-compliance will constitute an offence.

9 Telecommunications Legislation Amendment Bill 2000, Item 6, new subsection 476(1)

2.11 The more significant amendments are made to the circumstances in which the ACCC can issue directions to the manager. Under the current arrangements, the direction can only be issued if the ACCC considers that the electronic addressing is of public importance and compliance with the direction is likely to have an effect on competition. Proposed subsection 476(2) would widen those circumstances to include where the ACCC considers that the direction would affect consumer protection.[10]

2.12 Finally, the Bill proposes to change the circumstances in which the ACCC can give such directions so that the ACCC is not limited to considering the extent to which electronic addressing is of social and/or economic importance to particular groups. The ACCC will only have to consider whether the electronic addressing is of significant social and/or economic importance generally.[11] This corresponds to the amendment to subsection 475(3) outlined above at paragraph 2.9.

Schedule 2: The role of the ACA - *Australian Communications Authority Act 1997*

2.13 Under the *Australian Communications Authority Act 1997* (the ACA Act), the ACA is given a range of functions. Schedule 2 of the Bill gives the ACA additional functions to serve as a safety net mechanism in relation to electronic addressing. The amendments would enable the relevant Minister to give the ACA responsibility for managing a specified type of electronic addressing.[12]

2.14 Item 1 of Schedule 2 inserts a new definition of 'listed carriage service' into the ACA Act which is frequently referred to in other proposed amendments mentioned below. The expression is given the same meaning it has in the TA which is obtained by reading sections 7 and 16 together: a 'listed carriage service' is a service for carrying communications, by means of guided or unguided electromagnetic energy, between a point in Australia and one or more other points, in Australia or elsewhere.[13] A 'point' includes a mobile or potentially mobile point.[14]

2.15 Proposed new subsection 8(1)(aa) provides that the Minister may issue a written instruction to the ACA to prepare to provide for the management of a specified kind of electronic addressing. That instruction would be a disallowable instrument and the instruction may be revoked by the Minister's written notice, which would also be a disallowable instrument.[15]

2.16 In addition, proposed new subsection 8(1)(ab) provides that once such an instruction has been issued, the Minister may instruct the ACA to provide for the management of the kind of electronic addressing services specified in the first instruction (or of a subset of that

10 Telecommunications Legislation Amendment Bill 2000, Item 7, paragraph 476(2)(b)

11 Telecommunications Legislation Amendment Bill 2000, Item 8, subsection 476(3)

12 *Explanatory Memorandum,* Telecommunications Legislation Amendment Bill 2000, p. 3

13 *Explanatory Memorandum,* Telecommunications Legislation Amendment Bill 2000, p. 7

14 *Telecommunications Act 1997*, subsection 16(2)

15 Proposed subsections 8(4), (6) and (7) respectively

kind).[16] Such an instruction must be gazetted, may be revoked by the Minister's written notice, and such a written revocation must be gazetted.[17]

2.17 The provision of the power of the Minister to revoke either instruction relating to the preparation of or provision of management of electronic addressing services means that at an appropriate time, there can be a return to self-regulation.[18] In addition, proposed new subsection 8(9) expressly provides that the Minister retains the power to amend and vary an instruction as provided in section 33 of the *Acts Interpretation Act 1901*.

2.18 As the proposed amendments to the ACA Act are in terms of the ACA becoming 'a' manager not 'the' manager, the powers of direction under the TA Act may be exercised for the same form of electronic addressing for which the ACA may have been declared a manager under the ACA Act.[19]

2.19 Other amendments include that:

- before performing the function of preparing and providing management of electronic addressing services, the ACA must consult with the ACCC if any proposed action by the ACA would significantly impact on competition or consumer protection;[20] and
- the ACA may recover expenses involved in preparing to provide and in providing for the management of electronic addressing services. The ACA may charge an agreed amount.[21]

Issues raised by the Bill

2.20 In this section, the Committee addresses witnesses' concerns in relation to the Bill. The Committee records its appreciation for the advice provided by the National Office for the Information Economy (NOIE) in relation to those issues.

The Bill is premature

2.21 The principal concern of Electronic Frontiers Australia (EFA) is that the Bill is premature in the light of the Australian Domain Administration's (auDA's) efforts to improve certain aspects of the domain name industry. EFA is a non-profit national organisation that has as its charter the protection and promotion of civil libertarian interests associated with computer-based communications systems. The chair of EFA, Mr Kimberly Heitman, is also a member of auDA's Board of Directors. Mr Heitman advised that auDA is currently involved in a public consultation process to address competition and naming policy issues in relation to Internet addressing. Mr Heitman described auDA's consultative efforts as being consistent with industry self-regulation and he argued that the outcomes of auDA's processes would be preferable to any legislatively imposed solutions. He contended that the timing of

16 *Explanatory Memorandum*, Telecommunications Legislation Amendment Bill 2000, p. 8

17 Proposed subsections 8(5), (6) and (9) respectively

18 *Explanatory Memorandum*, Telecommunications Legislation Amendment Bill 2000, p. 9

19 *Explanatory Memorandum*, Telecommunications Legislation Amendment Bill 2000, p. 9

20 Proposed section 12A

21 New subsection 53(2A)

the Bill indicates that the Government intends to establish its control over the Internet and electronic addressing:

> To seek passage of such a Bill at this time indicates at best a propensity to threaten auDA into accepting policy dictates from the Government of the day, notwithstanding that an open and accountable public consultation process may well result in preferable outcomes.[22]

2.22 Mr Heitman informed the Committee about the two public consultation panels set up by auDA - the names policy panel and the competition policy panel. He advised that public consultation is needed to resolve issues in those areas because there are a large number of stakeholders in the Internet industry with competing interests:

> The proper working through of a balance between these competing interests will require public consultation in which the government is one important, but not necessarily the only stakeholder.[23]

2.23 Mr Heitman also argued that the need for a safety net has not yet been established and he commented that the Internet had been 'alive and well for 30 years without the need for legislation of this sort'.[24] In EFA's view, political interference in electronic addressing will discourage e-commerce, investment in Internet businesses and the development of electronic addressing policies that reflect world's best practice.[25]

Alternative views in relation to the timeliness of the Bill

2.24 Melbourne IT has been the sole administrator and registrar for the .com.au domain since 1996. Although the company started as a private company set up to explore revenue-raising opportunities for the University of Melbourne, the domain registration business grew to the point where the company was publicly listed in 1999. It was significant to the Committee, given its past experience in the industry, that Melbourne IT supported the Bill. Dr Bruce Tonkin, Melbourne IT's Chief Technology Officer, commented that:

> As the Internet has moved from a research tool to a commercial platform, domain names also have moved from being something managed by volunteers to being an essential infrastructure like the telephone service.[26]

2.25 Dr Tonkin contended that the .com.au domain has been administered in an unstable regulatory environment. In Dr Tonkin's view, the proposed legislation will provide an appropriate safety mechanism to industry self-regulation through the ACA and the ACCC, bodies which he described as having gained the respect of the telecommunications industry as industry regulators. Although Melbourne IT is a staunch supporter of the self-regulatory objective and of auDA - Melbourne IT provides 80 per cent of auDA's current funding and contributes expertise to auDA's advisory panels[27] - the company views the legislation as a

---

22 Electronic Frontiers Australia, Submission No. 4, p. 2

23 Senate, *Proof Committee Hansard,* 30 October 2000, p. 12

24 Senate, *Proof Committee Hansard,* 30 October 2000, p. 12

25 Electronic Frontiers Australia, Submission No. 4, p. 3

26 Senate, *Proof Committee Hansard,* 30 October 2000, p. 1

27 Melbourne IT, Submission No. 7, p. 3

necessary backup to auDA's processes because past attempts to self-regulate the industry had failed. Dr Tonkin said:

> … it has taken more than three years of activity to create a self-regulatory environment where issues such as names policy can be dealt with, and we are yet to have a new names policy. What we are saying is that the process up to date has been very slow, and that the regulatory organisations, or the self-regulatory environment, have been set up a number of times, have collapsed and failed.[28]

2.26 Referring to auDA's efforts to resolve the competition and naming policy issues, Dr Tonkin stated:

> … the community wants to see changes to the current domain name environment in Australia, and they have been wanting to see those changes to be made for the past three years. … we certainly hope that this current attempt will be successful. We are merely saying that, should that attempt not be successful, there be a mechanism in place to allow those core issues to be resolved.[29]

2.27 Dr Tonkin argued that the Bill is timely and consistent with the objective of Internet self-regulation. He said that if certain core issues in the Internet industry are not resolved within the next 12 months, Melbourne IT will bear a high cost in dealing with problems in relation to the current policies.[30]

2.28 A representative of NOIE, Mr Thomas Dale, confirmed that the Government's intention is to provide a safety net provision in case the existing processes under auDA and managed by the industry do not succeed.[31] Mr Dale told the Committee that:

> … the government would see it as a matter of prudent administration. Nobody thanks you for putting a safety net in place after the event. We have no reason to think that there will be an event between now and the middle of next year. On the other hand, we know that the current legislation could work better with some changes – and this is the feedback we received again from industry – a greater degree of confidence and some certainty to the players who were trying to work up a self-regulatory system. That is, indeed, the feedback we have had, including that from auDA who have indicated to the government their support for the legislation at this time.[32]

2.29 On balance, the Committee is of the view that the passage of the Bill at this stage will not interfere with the progress of auDA's consultation processes and the industry's drive towards self-regulation. Further, the Committee concurs with NOIE in that the provision of the safety net procedures reflects prudent administration.

---

28 Senate, *Proof Committee Hansard,* 30 October 2000, p. 2

29 Senate, *Proof Committee Hansard,* 30 October 2000, p. 3

30 Senate, *Proof Committee Hansard,* 30 October 2000, p. 4

31 Senate, *Proof Committee Hansard,* 30 October 2000, p. 16

32 Senate, *Proof Committee Hansard,* 30 October 2000, p. 18

Unwarranted government interference in electronic addressing and the Internet

2.30 EFA claims that the provisions of the Bill will constitute Government interference in the use and operation of the Internet, particularly in the area of electronic addressing. EFA asserted that the Government's desire to 'control the Internet' is demonstrated by provisions in the Bill that seek to treat the Government as the 'final authority' on Internet technical issues such as electronic addressing.[33] In EFA's view, such provisions indicate that the Government 'distrusts and fears' the Internet and the Internet self-regulation process.[34]

2.31 Part of EFA's concern stems from the proposed amendment to subsection 474(3)(b) of the TA 1997. As noted above at paragraph 2.5, the effect of the amendment is that the ACA will be able to issue a determination about the management of electronic addressing if the ACA considers that a particular service or kind of electronic addressing is not being managed to the ACA's satisfaction.[35] This differs from the current wording which allows the ACA to make a determination if electronic addressing is not being managed 'in accordance with generally accepted principles and standards'. At the hearing, Mr Heitman contended that the change means that the ACA will have the ability to address 'quite minute matters of management which may be determined by the views of the government of the day rather than in accordance with international best practice'.[36] EFA submitted:

> … this is a dangerous precedent and one that would adversely affect confidence in the integrity of the system. It opens up the potential for political interference in Internet addressing, and value judgements by the Minister as to what rules should apply. Since the ACA has the power to direct the manager of an electronic addressing system to "do, or refrain from doing, a specified act or thing" (under section 475(1)), this combination of powers may result in the Australian Government meddling in technical issues or making policies inconsistent with "generally accepted principles and standards".[37]

Alternative views in relation to government interference in the Internet and electronic addressing

2.32 Contrary to EFA's concerns about the effect of proposed subsection 474(3)(b), NOIE's representative, Mr Dale, advised that the Government had realised that the current wording of the section was out of step with industry reality. He said that when the section was initially drafted, it had been hoped that agreed industry standards and practices would be formulated. As there are still no such standards to date, the Government has moved to replace meaningless words with a workable provision that utilises the experience of the ACA.[38]

---

33 Electronic Frontiers Australia, Submission No. 4, p. 2

34 Electronic Frontiers Australia, Submission No. 4, p. 3; Senate, *Proof Committee Hansard*, 30 October 2000, p. 11 per Mr Heitman

35 This would replace current subsection 4743(b) of the Telecommunications Act 1997 that provides that the ACA can issue a determination if the ACA is of the opinion that the manager of electronic addressing is not acting in accordance with "generally accepted principles and standards".

36 Senate, *Proof Committee Hansard,* 30 October 2000, p. 14

37 Electronic Frontiers Australia, Submission No. 4, p. 2

38 Senate, *Proof Committee Hansard,* 30 October 2000, p. 16

2.33 On behalf of Melbourne IT, Dr Tonkin agreed that there are no 'generally acceptable standards' for the new industry and that the words in the current subsection 474(3)(b) should be changed to those proposed in the Bill. At the same time, however, Dr Tonkin acknowledged that the proposed expression 'to the ACA's satisfaction' had not been defined. He suggested that the industry itself could be involved in formulating criteria to assist the ACA in forming a view as to whether electronic addressing is being managed satisfactorily.[39]

2.34 In relation to the more general claim that the Bill enables government interference in electronic addressing, NOIE advised that the operation of the safety net provisions are confined to specific circumstances. Schedule 1 of the Bill empowers the ACA and the ACCC to declare and give directions to a manager of electronic addressing only if the ACCC is concerned about the levels of competition or consumer protection or if the ACA considers that management of an electronic addressing service is unsatisfactory.[40] Mr Dale referred to the examples of situations given in the *Explanatory Memorandum* where the ACA may not be satisfied. Examples include non-compliance with material standards or mismanagement that threatens the stability or integrity of the system. The Committee also notes the advice in the *Explanatory Memorandum* that, given the growing public importance of electronic addressing (especially the Domain Name System), there may be other situations where the ACA will not be satisfied with a person's management.[41]

2.35 The *Explanatory Memorandum* also states that the safety net mechanism proposed in schedule 2 of the Bill - that the ACA can assume direct management of a specified kind of electronic addressing - can only be invoked in exceptional situations where direct management by the ACA was the only viable alternative.[42] Another representative from NOIE, Dr Asa Masterman, said that in such cases, the Minister would 'come to a policy decision that something had gone seriously wrong with the administration of domain names'. Dr Masterman said that an example of an 'exceptional case' would be if auDA became insolvent.[43]

2.36 The Committee has considered the wording of the current subsection 474(3)(b) and the proposed replacement wording in the Bill. The Committee accepts the advice of NOIE and Melbourne IT that the current wording is inadequate and should be changed to reflect industry reality. In addition, the Committee favours the approach suggested by Dr Tonkin that industry representatives should be involved in the formulation of criteria against which the ACA can test whether a particular electronic addressing service is being managed to the ACA's satisfaction.

Inappropriate government interference in the allocation of domain names

2.37 Some submitters were concerned that the Bill attempts to regulate the allocation of .au domain names and argued that government involvement in that area is inappropriate and

---

39 Senate, *Proof Committee Hansard,* 30 October 2000, p. 5

40 Senate, *Proof Committee Hansard,* 30 October 2000, p. 22 per Mr Dale. See also *Explanatory Memorandum*, Telecommunications Legislation Amendment Bill 2000, p. 2 and Telecommunications Legislation Amendment Bill 2000, proposed sections 474-477

41 *Explanatory Memorandum,* Telecommunications Legislation Amendment Bill 2000, pp. 5-6

42 *Explanatory Memorandum,* Telecommunications Legislation Amendment Bill 2000, p. 2

43 Senate, *Proof Committee Hansard,* 30 October 2000, pp. 22-23

unnecessary. The submission of HunterTech asserts that as other areas involving a 'naming' process are not Government regulated, such as the naming of cars, businesses,[44] television shows, houses, and pedigree animals, nor should the allocation of domain names be so regulated.[45] A similar argument was raised in another submission:

> … registration of Internet domain names should not be seen to be open to political influence any more then someone being able to register their car, their business or join the local football club. The same type of rules should apply, and as we already mentioned, specific rules are already in place for business names.[46]

2.38 EFA told the Committee that the reorganisation of the allocation of domain names is progressing through the proper channels of industry self-regulation and that government interference proposed by the Bill is unnecessary. Mr Heitman said that the system of allocating domain names was already advancing from an 'amateur and university based delegation system to a rather more professional, transparent and accountable' one.[47] At the same time, however, Mr Heitman told the Committee that the model used to register company and business names in Australia is not appropriate for the registration of domain names because of the global nature of the Internet. In Mr Heitman's view, the global aspect of domain name addresses diminishes the analogy between company registration and domain name registration.[48]

Alternative views as to the Bill's effect on the allocation of domain names

2.39 On behalf of Melbourne IT, Dr Tonkin explained that the main focus of the names policy currently under examination by auDA is the determination of which criteria must be met in order for an organisation or individual to successfully apply for a particular domain name. He identified this issue as the primary concern of end users because they are frequently unsuccessful in applying for particular names.[49] Dr Tonkin, however, is of the view that the Bill does not deal with names policy as such:

> I think all the Bill is saying is that, if the current self-regulatory environment fails to make progress – let us say, over the next six months to 12 months – we believe it would be appropriate for the government to take a role in ensuring that progress is made.[50]

2.40 NOIE's representative, Mr Dale assured the Committee that NOIE is confident that the names policy panel will formulate effective arrangements for the allocation of domain names. He commented that the existing policy of linking com.au name allocations to business name registration has so far been effective, particularly in avoiding disputes, but that

---

44 HunterTech acknowledged that there are certain rules relating to the choice and allocation of a business name: HunterTech, Submission No. 3, p. 2

45 HunterTech acknowledged that there are certain rules relating to the choice and allocation of a business name: HunterTech, Submission No. 3, p. 2

46 Mr James Burton, Submission No. 3, p. 1

47 Senate, *Committee Proof Hansard,* 30 October 2000, p. 11

48 Senate, *Proof Committee Hansard,* 30 October 2000, p. 13

49 See for example Mr James Burton, Submission No. 2, pp. 2-3

50 Senate, *Proof Committee Hansard,* 30 October 2000, pp. 2-3

it may not be the most suitable arrangement in the future. According to Mr Dale, NOIE's role in the allocation of domain names has been confined to encouraging the industry to set up appropriate structures to deal with the issues itself.[51]

2.41 The Committee is of the view that the provisions of the Bill do not seek to enable the Government to regulate the allocation of domain names per se. The Bill merely provides adequate safeguards for situations where there may be a serious failure in the self-regulation process. Issues relevant to the allocation of domain names are currently under consideration by auDA's name policy panel and the provisions of the Bill will only come into operation in the event that the panel is unable to resolve those issues. The Committee also notes the advice of Dr Tonkin that the recommendations and decisions of the panel must be acceptable to industry.[52]

The role of the ACA

2.42 One submitter expressed concern about the role assigned to the ACA under the 'safety net' provisions of the Bill. It was claimed that, contrary to assertions that the provisions were a 'last resort'[53] option only, other elements of the proposed legislation appeared to suggest that the amendments provided a way for the ACA to establish itself as the body responsible for electronic addressing. Finlayson's submitted that this perception was reinforced by the following mechanisms in the Bill:

- The proposed amendments to section 53 of the ACAA enabling the ACA to recover costs in relation to its new functions, including the costs of delegating responsibility for the .com.au domain;[54]
- The proposed amendment to subsection 474(3)(b) of the TA (discussed above at paragraphs 2.5 and 2.30-2.32) that would allow the ACA to declare a manager of electronic addressing where the ACA considers that a form of electronic addressing is not being managed to the ACA's satisfaction:

  > The amendments appear to leave electronic addressing entirely at the discretion of the ACA and if it thinks it can better provide a service than an existing self-regulatory body it has the power and opportunity to manoeuvre itself into that body's place.[55]

- There is no mechanism provided in the Bill to compel the ACA to return a form of electronic addressing to a self-regulating body; rather, this is also at the ACA's discretion.[56] The Committee notes that the *Explanatory Memorandum* states that:

---

51 Senate, *Proof Committee Hansard,* 30 October 2000, pp. 18-19

52 Senate, *Proof Committee Hansard,* 30 October 2000, p. 3

53 Finlaysons, Submission No. 5, p. 1 - referring to the *Explanatory Memorandum* as the source for this statement. The actual words used in the *Explanatory Memorandum* are that the powers of intervention provided in the Bill are "for use in the event that self-regulation proved ineffective": *Explanatory Memorandum*, Telecommunications Legislation Amendment Bill 2000, p. 2

54 Finlaysons, Submission No. 5, p. 2. The submission cites the *Explanatory Memorandum* as authority for the proposition that the ACA could recover the costs of delegating the .com.cu domain.

55 Finlaysons, Submission No. 5, p. 2

56 Finlaysons, Submission No. 5, p. 2

> It is envisaged that there would be a return to self-regulation when it is considered that it would be more effective for a self-regulatory body to manage an electronic addressing service.[57]

- Notwithstanding the disallowable instrument provisions in the Bill, there are insufficient checks and balances and industry consultation procedures in the proposed safety net process to ensure proper accountability by the ACA in the exercise of its new powers.[58]

2.43 Concern was also raised that the role assigned to the ACA under the provisions of the Bill appeared to contain an inherent conflict of interest. Finlaysons questioned the efficacy of empowering the ACA to both determine that electronic addressing is not being managed satisfactorily and to assume the role of manager of electronic addressing itself. In Finlayson's view, it was unacceptable that the ACA should have a role in making determinations in a process in which it may itself replace the former managers.[59]

Alternative view in relation to the ACA's proposed role

2.44 The assertion that the Bill allows the ACA to establish itself as the body responsible for electronic addressing was emphatically rejected by NOIE. To the contrary, NOIE stressed that the Government's position was that the ultimate authority for electronic addressing services, as a public resource of economic and social significance, is vested in the Commonwealth Parliament – not the ACA. NOIE contended that, as such, it is appropriate that the Government retain powers of intervention to overcome problems of mismanagement, anti-competitive conduct or inadequate consumer protection.[60]

2.45 NOIE pointed to the fact that the ACA's ability to exercise its interventionist powers would be subject to the oversight of the Commonwealth Parliament by virtue of the disallowance provisions in the Bill.[61] In addition, NOIE advised that any authority exercised in relation to the management of electronic addressing 'would be carefully coordinated with the technical and standard-setting authority of relevant governing bodies such as the Internet Corporation for Assigned Names and Numbers (ICANN).[62]

2.46 In relation to the concern about the cost recovery provisions in the Bill, NOIE advised the Committee that the proposed provisions are designed as a safety net only, to be used in cases of serious problems in the administration of electronic addressing services. NOIE stated that:

> The Financial Impact Statement in the Explanatory Memorandum estimates the total cost establishing the ACA as the provider of an electronic addressing service

---

57 *Explanatory Memorandum*, Telecommunications Legislation Amendment Bill 2000, p. 3

58 Finlaysons, Submission No. 5, p. 2

59 Finlaysons, Submission No. 5, p. 1

60 NOIE, Correspondence, *Answers to Questions on Notice*, 3 November 2000, pp. 2 and 3

61 Directions from the ACA and the ACCC under sections 475 and 476 of the *Telecommunications Act 1997* are (and will continue to be) disallowable instruments. Similarly, Ministerial instructions issued under proposed section 8 of the *Australian Communications Authority Act 1997* would also be disallowable instruments.

62 NOIE, Correspondence, *Answers to Questions on Notice*, 3 November 2000, p. 2

> as less than $1 million. This is a conservative estimate intended to cover a number of contingencies. Precise costs would depend on the type of service that the ACA was instructed to provide. These initial costs would be recoverable under s53, as would the ongoing costs of providing the electronic addressing service.[63]

2.47 As stated above, it was claimed that proposed subsection 474(3)(b) appeared to give the ACA extensive powers in relation to deciding when an electronic addressing service was not being managed satisfactorily. Further, it was claimed that this power, when combined with the mechanism in schedule 2 of the Bill enabling the management of that service to be transferred to the ACA itself, contained an inherent conflict. NOIE advised the Committee, however, that the actual operation of the proposed provisions will not result in a conflict situation:

> The proposed subsection allows the ACA to declare a manager of electronic addressing with a view to issuing directions under section 475, rather than to transfer authority for this electronic addressing service to itself. The ACA could not use a declaration under section 474 to activate powers under schedule 2 of the Bill.[64]

2.48 Responding to the concern that there is no proposed provision to compel the ACA to return management of an electronic addressing service to a self-regulating body at an appropriate time, NOIE advised that the Minister can reverse the instructions issued under proposed subsection 8(7) of the ACA Act at any time. NOIE stated:

> It is important to provide for sufficient discretion and flexibility to ensure an orderly transition back to self-regulation. The Government supports effective self-regulatory solutions for the provision of electronic addressing services.[65]

2.49 In relation to the checks and balances on the exercise of the powers of the ACA under the Bill, NOIE confirmed that instructions issued by the Minister under proposed subsection 8(1)(aa) of the ACA Act directing the ACA to make preparations to take over the management of a service, would be disallowable instruments. The ACA cannot become a manager of an electronic addressing service without such an instruction having been previously issued. This means that the Minister's decision to direct the ACA to assume management will be subject to the scrutiny of the Parliament. In addition to that form of scrutiny, NOIE advised that there are other checks and balances in existence which affect the exercise of the ACA's exercise of its functions:

> The ACA is required under section 52 of its Act to establish a Consumer Consultative Forum to advise on its functions in relation to matters affecting consumers, including electronic addressing functions, should they be activated by instructions from the Minister. The ACA may also appoint advisory committees to assist it in the performance of its functions.[66]

---

63 NOIE, Correspondence, *Answers to Questions on Notice,* 3 November 2000, pp. 3-4

64 NOIE, Correspondence, *Answers to Questions on Notice,* 3 November 2000, p. 4

65 NOIE, Correspondence, *Answers to Questions on Notice,* 3 November 2000, p. 4

66 NOIE, Correspondence, *Answers to Questions on Notice,* 3 November 2000, p. 4

2.50 The Committee accepts the advice of NOIE in relation to the concerns about the role of the ACA as proposed by the Bill. In particular, the Committee considers that the cost recovery provisions are appropriate and that there is no inherent conflict in the role of the ACA when viewed in the context of the proper operation of the provisions. Further, the Committee accepts NOIE's advice that the Ministerial instructions are reversible and that that form of supervision over the ACA provides a necessary degree of flexibility. In respect of the concern about the sufficiency of the checks and balances, the Committee is confident in the veracity of the Parliamentary processes involved in the scrutiny of disallowable instruments. This process, combined with the available public consultative mechanisms required under the ACA Act, will provide more than an appropriate degree of checks and balances on the exercise of the ACA's powers.

'Electronic addressing' not defined

2.51 It was pointed out that although the expression 'electronic addressing' is used frequently in the Bill and the relevant legislation (the TA and the ACA Act), the expression has not been legislatively defined. The Committee was told that:

> Because it is not defined, it is not clear whether "electronic addressing" applies to alphanumeric addressing schemes as well as numeric schemes which are the focus of the Telecommunications Act in general. Nor whether it applies to abstract addressing schemes like DNS which are independent of specific telecommunications links.[67]

2.52 The Committee notes, however, that while there is no legislative definition of electronic addressing, the *Explanatory Memorandum* does provide guidance as to the scope of the term:

> Part 22 of the Act provides for the regulation of numbering and electronic addressing in relation to carriage services. Strictly, all numbering used for carriage services is a form, or subset, of electronic addressing. Electronic addressing is essentially a series of alphanumeric characters that enables a network to recognise the intended destination of a communication across the network, or to establish a connection between two or more points.
>
> In Part 22, numbering means any sequence of characters specified in the numbering plan made by the ACA under Division 2 of Part 22 (see section 455 in particular). On the other hand, electronic addressing is any other sequence used in the relation to communication by a carriage service, which is not specified in the numbering plan.[68]

2.53 In addition, the *Explanatory Memorandum* clearly treats the Internet DNS as an example of electronic addressing:

> Certain forms of electronic addressing, relating to the Internet, have assumed greater importance since the TA was enacted in 1997. These include the Internet Domain Name System (DNS).[69]

---

67 Mr David Keegel, Submission No. 1, p. 1

68 *Explanatory Memorandum*, Telecommunications Legislation Amendment Bill 2000, p. 1

69 *Explanatory Memorandum*, Telecommunications Legislation Amendment Bill 2000, p. 1

2.54 NOIE advised the Committee that a definition had not been included due to rapid technological change and the possibility that any definition might quickly become obsolete. In particular, the term 'electronic addressing' needs to be flexible enough to refer to any use of letters and/or numbers, abstract or otherwise, to connect points on a network. As NOIE stated, a definition would have limited this flexibility.[70]

2.55 The Committee considers that sufficient guidance is provided in the *Explanatory Memorandum* as to the meaning of the term 'electronic addressing' to enable the proper operation of the proposed legislation. In addition, the Committee accepts NOIE's advice that any legislative definition risks becoming obsolete in a short period of time due to technological developments.

ACA's power to transfer the management of electronic addressing services

2.56 A second issue raised is that the power of the ACA to transfer authority for electronic addressing to another body under the proposed legislation is unclear.

2.57 While the Committee notes the superficial validity of this concern, the issue has to be seen in context. The advent of the Internet has transcended the traditional boundaries of domestic responsibility by providing opportunities for individuals, companies and other organisations to access global markets. Electronic addressing services, such as the DNS, are a vital part of the operation of the Internet and governments around the world recognise the importance of their development to their economies and the need to have appropriate strategies in place to safeguard domestic interests in the event of 'serious problems'.[71] This does not mean that such strategies are contemplated in isolation from the involvement of the proper international bodies such as the Internet Corporation for Assigned Names and Numbers (ICANN).

2.58 NOIE informed the Committee that, in effect, the provisions of the Bill are not designed to actually transfer authority for electronic addressing services from one entity to another. Rather, they relate to the ACA's role as a statutory body. The ACA is restricted to performing only those functions listed in its governing legislation. Therefore, in order for the ACA to be able to provide assistance in the event of 'serious problems' in the management of electronic addressing services, its statutory functions have to be widened to include that specific function. Schedule 2 of the Bill proposes to merely add the management of electronic addressing to the ACA's statutory functions where it is subject to appropriate instruction by the Minister for Communication, Information Technology and the Arts:

> In other words, the Ministerial instructions can provide a statutory basis for the ACA to be granted responsibility for an electronic addressing service by the relevant authority. For example, for the ACA to assume responsibility for the .au Internet domain, the Minister would need to instruct the ACA under the legislation and, in addition, make an application to the Internet Corporation for Assigned Names and Numbers to transfer the delegation of authority for this domain. In this sense the Ministerial instructions would 'operate in concert with the governing

70 NOIE, Correspondence, dated 22 September 2000, p. 1

71 Senate, *Official Hansard*, 30 August 2000, p. 15547, second reading speech of the Telecommunications Legislation Amendment Bill 2000 per the Special Minister of State, Senator the Honourable Chris Ellison: " … it is important that these clear backstop provisions are in place in case serious problems arise".

> body transferring authority over that form of electronic addressing to the ACA,' as described in the EM.[72]

Specific names of relevant international bodies are not used in the Bill as these change over time and outdate the legislation.

2.59 NOIE also advised that the same principle in schedule 2 applies to schedule 1. The provisions in schedule 1 are not designed to transfer power in relation to the management of electronic addressing. The declaration would allow a manager of electronic addressing to be identified so that if need be, for example if serious problems arise, the ACA and/or the ACCC can give appropriate instructions to that manager.[73]

2.60 The Committee accepts NOIE's advice that the Bill does not of itself attempt to transfer the authority for electronic addressing services or suggest that such a transfer can take place without proper consultation with the appropriate international bodies.

Definition of 'listed carriage service'

2.61 A third issue raised is that the meaning of 'listed carriage service' in the Internet context is unclear. It is claimed that the lack of uncertainty arises from two statements in the *Explanatory Memorandum*. According to one submitter,[74] the first statement:

> In addition to specifying the kind of listed carriage service, for example the Internet, …[75]

appears to suggest that the Internet itself is a listed carriage service while the second statement:

> A listed carriage service may be used to access the Internet.[76]

suggests that the telecommunications links and networks that make up the Internet (or at least the Australian sections of it) would each be a 'listed carriage service'.

2.62 NOIE's advice to the Committee is that the Internet is used in both senses in the *Explanatory Memorandum*. On the one hand, it refers to the Internet as network infrastructure, and the Internet itself can be specified as a 'kind of listed carriage service' under the legislation. On the other hand, the Internet can also be referred to as an aggregation of content services (the World Wide Web) which can be accessed via a listed carriage service. As noted above at paragraph 2.14, a 'listed carriage service' is a service for carrying communications, by means of guided or unguided electromagnetic energy, between a point in Australia and one or more other points, in Australia or elsewhere. In relation to the operation of a declaration under amended section 474 of the TA, NOIE advised that:

---

72 NOIE, Correspondence, dated 22 September 2000, p. 2

73 NOIE, Correspondence, dated 22 September 2000, p. 2

74 Mr David Keegel, Submission No. 1, p. 2

75 See *Explanatory Memorandum*, Telecommunications Legislation Amendment Bill 2000, p. 5, last paragraph under item 1 of Schedule 1

76 *Explanatory Memorandum*, Telecommunications Legislation Amendment Bill 2000, p. 7, last sentence under item 1 of Schedule 2

> … the ACA would encompass whatever services are necessary for subsequent directions to have their intended effect.[77]

2.63 The Committee accepts that the use of the Internet in both senses in the *Explanatory Memorandum* in relation to the expression 'listed carriage service' will not undermine the operation of the proposed legislation.

Summary

2.64 The Committee accepts the advice from NOIE in relation to each of the concerns raised. The Committee Secretariat went to extensive lengths to secure submissions from interested parties. On two occasions, the Secretariat advertised the inquiry in national newspapers calling for submissions, and in addition contacted various organisations, including major telecommunications industry groups, who were considered likely to have an interest in the Bill. In the light of this, it is very significant that only seven submissions were received by the Committee, indicating a general paucity of concern from industry players in relation to the provisions of the Bill.

2.65 The Committee concludes that the Bill, if enacted, would achieve the aim of providing safety net mechanisms for the management of electronic addressing in the event that the industry self-regulatory regime should prove ineffective. The Committee also notes NOIE's assertion that:

> Government intervention of this type would only be necessary in extreme circumstances.[78]

Recommendation:

The Committee reports to the Senate that it has considered the Telecommunications Legislation Amendment Bill 2000 and recommends that the Bill proceed without amendment.

Senator Alan Eggleston

Chair

77 NOIE, Correspondence, dated 22 September 2000, p. 3

78 See NOIE's .au domain administration reforms project home page: NOIE, *Reforming the .au domain name administration*, http://www.noie.gov.au/projects/information_economy/domains_au/ (19/ 09/00), p. 2 of 3