TELECOMMUNICATIONS LEGISLATION AMENDMENT BILL 2000

MINORITY REPORT BY ALP SENATORS

Background

The Telecommunications Legislation Amendment Bill 2000 provides safety net mechanisms for the management of electronic addressing through the Australian Communications Authority (ACA) and the Australian Competition and Consumer Commission (ACCC). These safety net mechanisms are designed to be invoked in the event that attempts at self-regulation prove ineffective in managing electronic addressing.

The Government favours industry self-regulation for the management of electronic addressing services, which includes domain name allocation.[1] Consultative processes for the formulation a self-regulatory regime are presently being undertaken the .au Domain Administration, or auDA. Two panels of auDA, an industry self-regulatory body for the .au namespace, are investigating self-regulatory approaches to competition issues and naming policy issues through industry and public consultative processes.

Attempts at industry self-regulation over the last few years have consistently broken down or failed for various reasons.[2] In response to a question on notice from Senator Bishop at the public hearing,[3] Melbourne IT indicated that it has paid auDA $659,000 this financial year, pursuant to an agreement signed on 12 July 2000, to support costs incurred in the fulfilment of its role in industry self-regulation.[4] auDA has stated that this financial support will enable it "to continue to carry out its policy development role, and to continue with the Competition Model Advisory Panel process to introduce competition in the provision of domain names in .au."[5]

The safety net mechanisms in this Bill have the wide support of industry and Government, as evidenced by the absence of industry objections to the Bill when the inquiry was first advertised, and the limited number of concerns expressed when the inquiry was subsequently re-advertised and its timeframe extended.

The Bill comprises two schedules which implement these safety-net mechanisms. The first schedule provides the circumstances in which the ACCC or the ACA can intervene in the management of electronic addressing. The second schedule establishes an alternative mechanism by which the ACA can be given responsibility for managing a specified type of

---

1 Explanatory Memorandum, Telecommunications Legislation Amendment Bill 2000, p 2.

2 Senate Environment, Communications, IT and the Arts Legislation Committee, *Proof Hansard*, 30/10/00, p 2.

3 Canberra, Monday 30/10/00.

4 auDA homepage at http://www.auda.org.au, 7 November 2000.

5 ibid.

electronic addressing if direct ACA management is the only viable alternative to management by a self-regulatory body.[6]

Inquiry issues

Submissions to the Inquiry contained some criticisms of the Bill, which Labor Senators wish to note. Those criticisms relate to:

a) the Bill does not address the issue of existing domain name registries being monopolies;

b) the Bill does nothing to ensure competitive pricing;

c) competitive pressures will adequately regulate domain name allocation and naming policy, and consequently there is no need for this legislation;

d) the existence of the Bill's safety net measures might undermine the cooperative self-regulatory process;

e) the role of the ACA, and the clarity with which the circumstances for invoking the safety-net measures are defined.

Each of these criticisms is considered in detail below.

(a) domain name registries' monopoly

The Bill does not overcome existing monopolies of domain name registries. The industry panel of auDA is presently working through this issue so that it will be addressed by the self-regulatory scheme. For this reason the Electronic Frontiers Australia Inc (EFA) argued that the legislation is premature.[7] The legislation will not prevent anti-competitive conduct but its existence could undermine the self-regulatory processes that ultimately aim to overcome such conduct.

In evidence to the Committee Mr Heitman of Electronic Frontiers Australia Inc stated that:

> Each of the existing domain name registries is effectively a monopoly, notwithstanding that you can choose a domain name between those various registries. As a consequence, it is thought to be a way of moving forward to establish a means by which there can be multiple registries for each of the domain name spaces and to allow a number of different companies to compete in this market.[8]

The United States is moving towards a much wider competition policy where many stakeholders have the right to enter the market as a competitive domain name system.[9]

---

6 Explanatory Memorandum, Telecommunications Legislation Amendment Bill 2000, pp 2-3.

7 Mr Heitman, EFA, Senate Environment, Communications, IT and the Arts Legislation Committee, *Proof Hansard*, 30/10/00, p 12.

8 Mr Heitman, EFA, Senate Environment, Communications, IT and the Arts Legislation Committee, *Proof Hansard*, 30/10/00, p 12.

9 Mr Heitman, EFA, Senate Environment, Communications, IT and the Arts Legislation Committee, *Proof Hansard*, 30/10/00, p 12.

According to EFA the US approach indicates that, at this stage, there are no operational threats to Internet domain name addressing which require (or justify) legislative intervention.[10]

(b) competitive pricing

The Bill does not resolve, nor does it seek to address, the issue of competitive pricing of domain names. This issue is closely related to competition between domain name registries. Since each second-level domain in Australia is an effective monopoly, competition in pricing is contingent upon there being future competition between registries.

As regards Australian prices, Melbourne IT advised the Committee that:

> Wherever there is a lot of manual administration procedure the price is high – for example, in international domains that require a lot of policy checking and are roughly in the same order of price, particularly in Europe, where they tend to have policies fairly similar to Australia …[11]

Thus, the complexity of the regulatory environment in terms of naming policy is determinative of the price to the extent that it impacts upon the cost of providing the service.

Consequently in the United States, where the system is fully automated and there is virtually no policy except that seven swearwords are unavailable, the cost ranges from as little as $5.99 into the hundreds of dollars.[12] In Australia .com.au retail prices are around $140.[13]

The issue of competitive pricing will, to a large extent, be addressed by the implementation of a means for introducing competition to the provision of domain name services in Australia. The Opposition will watch this development with interest.

(c) domain name policies and competition issues

One submission to the inquiry that suggested domain name policies should reflect business name rules was met with some industry opposition.[14]

Instead of drawing an analogy between company and domain names and their means of regulation, industry favoured the introduction of effective competition into the Australian market. Ensuring there are multiple issuers of domain names and resultant competitive pressures is, according to industry, the more appropriate regulatory approach for domain names. Mr Heitman of EFA, stressed that:

---

10 Mr Heitman, EFA, Senate Environment, Communications, IT and the Arts Legislation Committee, Proof Hansard, 30/10/00, p.12.

11 Dr Tonkin, Melbourne IT, Senate Environment, Communications, IT and the Arts Legislation Committee, Proof Hansard, 30/10/00, p.7.

12 Dr Tonkin, Melbourne IT, Senate Environment, Communications, IT and the Arts Legislation Committee, Proof Hansard, 30/10/00, p.7.

13 Dr Tonkin, Melbourne IT, Senate Environment, Communications, IT and the Arts Legislation Committee, Proof Hansard, 30/10/00, p.7.

14 Mr Burton, Programmer Pty Ltd, Submission 2.

> …the decisions that we make in Australia about what is a valid Internet domain address are rather different from the decisions that we might make in Australia as to what is a valid Australian company name. Therefore the analogy between company registration and domain name registration is somewhat lessened by the fact we have this global aspect [to domain name policy].[15]

Domain name policy is not however, a matter with which the Bill is concerned. It will be an issue that the self-regulatory scheme will address based on the results of the relevant auDA panel's investigations.

Recent developments in North America and Europe have indicated a trend towards minimal regulation in naming policy. This is particularly relevant to the impending issue of personal domain names to individuals. Currently issuance of .com.au domain names is limited to companies in Australia and applications must meet a range of criteria.

In the United Kingdom the requirement for registration to be in a second-level domain is under review, mainly to open up current restrictions on registration in .co.uk, the second-level domain for commercial organisations.[16] In other European countries restrictions on registration within a country code have "been opened up quite often to allow companies that are not definitely resident in that country to have a name in that country".[17]

Although Melbourne IT indicated support for "some degree of policy in .com.au because … it creates a degree of trust in the consumer when accessing companies in .com.au" it supports "loosening the rules for the exact name you can choose in .com.au" which are presently complicated and administratively time-consuming and costly.

The self-regulatory processes being facilitated by auDA will determine whether there will be any changes to Australia's naming policy in the near future.

(d) the existence of the Bill's safety-net measures might undermine the self-regulatory process

Labor Senators note the concern that the presence of this safety net regulation could potentially undermine and jeopardise the cooperative environment necessary for self-regulation in this competitive environment.[18] This would be particularly so if the safety net was seen as a more favourable outcome than the self-regulatory scheme under development.

EFA complained that if the Bill is designed only as a stop-gap measure should auDA fail in self-regulatory management of electronic addressing, then it is premature and unnecessary.[19]

---

15 Mr Heitman, EFA, Senate Environment, Communications, IT and the Arts Legislation Committee, *Proof Hansard*, 30/10/00, p 13.

16 Dr Tonkin, Melbourne IT, Senate Environment, Communications, IT and the Arts Legislation Committee, *Proof Hansard*, 30/10/00, p 8.

17 Dr Tonkin, Melbourne IT, Senate Environment, Communications, IT and the Arts Legislation Committee, *Proof Hansard*, 30/10/00, p 8.

18 Senate Environment, Communications, IT and the Arts Legislation Committee, *Proof Hansard*, 30/10/00, p 23.

19 EFA, Submission 4, p 2.

Preferably, industry self-regulation should be allowed to continue on its course without the threat of legislation hanging over its head.[20] EFA argued that:

> 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.[21]

Mr Heitman of EFA commented "I think at this stage we have the position where the need for a safety-net has not been established."[22]

Conversely, Melbourne IT acknowledged that delays in the self-regulation process have occasioned the Bill:

> …the current problem is that 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. …the process up to date has been very slow, and … the regulatory organisations, or the self-regulatory environment, have been set up a number of times, have collapsed and had to be reformed.[23]

Melbourne IT indicated that ongoing failure to resolve some of the core issues justifies the Bill. If those issues do not get resolved within the next 12 months "it will be a very high cost to us as a company dealing with the complaints that occur over the current policies".[24]

NOIE advised the Committee that the motivation for the Bill is "prudent administration",[25] that is, anticipating and providing alternatives in case of self-regulatory failure and giving a greater degree of confidence and certainty to the players establishing the self-regulatory system.[26]

It would seem that evidence of recurrent failures in establishing a self-regulatory approach adequately justify the Government's decision to implement the changes contained in this Bill if they are appropriate to achieve the objective of providing a safety net.

---

20 EFA, Senate Environment, Communications, IT and the Arts Legislation Committee, *Proof Hansard*, 30/10/00, p 11.

21 EFA, Submission 4, p 2.

22 EFA, Senate Environment, Communications, IT and the Arts Legislation Committee, *Proof Hansard*, 30/10/00, p 12.

23 Dr Tonkin, Melbourne IT, Senate Environment, Communications, IT and the Arts Legislation Committee, *Proof Hansard*, 30/10/00, p 2.

24 Dr Tonkin, Melbourne IT, Senate Environment, Communications, IT and the Arts Legislation Committee, *Proof Hansard*, 30/10/00, p 4.

25 Mr Dale, NOIE, Senate Environment, Communications, IT and the Arts Legislation Committee, *Proof Hansard*, 30/10/00, p 18.

26 Mr Dale, NOIE, Senate Environment, Communications, IT and the Arts Legislation Committee, Proof Hansard, p.18.

(e) the ACA and the safety net measures

Labor Senators note the concerns raised with the Committee about the ACA's role in electronic addressing. Those concerns relate to the breadth of ACA powers under the provisions in the Bill, particularly under s474(3)(b), and the potential conflict of interest in the ACA's role.

Under proposed subsection 474(3)(b), the ACA will be able to declare a manager of electronic addressing if the person is not managing that kind of electronic addressing to the ACA's satisfaction.[27] The issue raised in submissions and in evidence to the Committee was the subjectivity of determining what is satisfactory and the absence of objectively ascertainable criteria to guide the ACA's determination.[28]

EFA argued that this clause is "far too broad" and gives the ACA:

> ..the ability to address quite minute matters of management which may be determined much more by the views of the Government of the day, rather than an acknowledged and international best practice standard.[29]

EFA considers this provision inappropriate because it would empower the ACA to give directions on matters outside mere good governance which relate to controversial policy matters.

In response, the National Office for the Information Economy (NOIE) indicated that the new s474(3)(b) is intended to be more workable and flexible than the existing provision. Contrary to the EFA's suggestion that the circumstances in which the section might be invoked should be restricted to "governance of the addressing in terms of its technical requirements",[30] NOIE expressed a need for the provision to go beyond technical governance issues.[31]

This need arises from the fact that:

> …there are more than simply technical issues here that are of concern to the industry as a whole and to users. So the government believes that to confine the ACA's ability to intervene in that way would, particularly in this area, perhaps not anticipate some of the very rapid industry and technical developments and constrain it unnecessarily.[32]

---

27 Explanatory Memorandum, Telecommunications Legislation Amendment Bill 2000, p 5.

28 Melbourne IT, Senate Environment, Communications, IT and the Arts Legislation Committee, *Proof Hansard*, 30/10/00, p 5

29 EFA, Senate Environment, Communications, IT and the Arts Legislation Committee, *Proof Hansard*, 30/10/00, p 14.

30 EFA, Senate Environment, Communications, IT and the Arts Legislation Committee, *Proof Hansard*, 30/10/00, p 14.

31 Mr Dale, NOIE, Senate Environment, Communications, IT and the Arts Legislation Committee, *Proof Hansard*, 30/10/00, p 16.

32 Mr Dale, NOIE, Senate Environment, Communications, IT and the Arts Legislation Committee, *Proof Hansard*, 30/10/00, p 16.

NOIE does not consider the ACA's role inappropriate because it "is a well-established statutory body, accountable to the parliament and to the executive ... and the bill contains procedures for oversight by the parliament…"[33].

The potential for a conflict of interest where the ACA has a role in making determinations in a process in which it may itself replace the body, was a concern raised in the submission from Finlaysons.[34] That submission raised further questions of the ACA's impartiality and accountability.[35]

Labor Senators note the issues raised by concerned parties relating to the general breadth and inappropriateness of the ACA's role pursuant to the provisions of the Bill. There is a perception that governmental interference could result, however no alternatives that we consider viable have been suggested. Some degree of clarification of the provisions is not unwarranted.

Conclusion

In light of the small number of submissions that were received by the Committee, and the fairly limited range of concerns raised therein, serious flaws in the Bill's approach are not apparent. The recurring failures of attempts at self-regulation do suggest a need for this legislation, and the measures it implements cannot be said to be unwarranted, although some provisions could be clarified and ambiguities removed.

Many of the concerns raised before the Committee relate to issues that will be addressed by the self-regulatory scheme being formulated by auDA. These concerns do not, therefore, amount to objections to the Bill.

SENATOR MARK BISHOP

(ALP, WA)

SENATOR THE HON. NICK BOLKUS

(ALP, SA)

33 Mr Dale, NOIE, Senate Environment, Communications, IT and the Arts Legislation Committee, *Proof Hansard*, 30/10/00, p 16.

34 Findlaysons, Submission 5, p 1.

35 ibid.