CHAPTER 1

INTRODUCTION

Referral and conduct of the inquiry

1.1 On 22 August 2001, the Senate referred[1] the provisions of the Trade Practices Amendment (Telecommunications) Bill 2001 (the bill) to the Environment, Communications, Information Technology and the Arts Legislation Committee for inquiry and report by 17 September 2001.

1.2 The Committee advertised the reference on the Internet and wrote to a number of interested organisations inviting submissions. The Committee received 10 submissions which are listed at Appendix 1, and held a public hearing in Sydney on Wednesday, 12 September 2001. A list of witnesses appears at Appendix 2.

1.3 The Committee thanks all those who assisted in its inquiry by preparing submissions and appearing at the hearing.

The bill

1.4 The bill was introduced into the House of Representatives on 9 August 2001 and passed the House without amendment on 30 August 2001. The purpose of the bill is to streamline the telecommunications access regime and to speed up the resolution of telecommunications access disputes. To achieve this end, the bill amends Part XIC of the *Trade Practices Act 1974*.

Background to the legislation

1.5 Following the gradual deregulation of the telecommunications industry in the late 1980s, significant changes were made in 1997 with the enactment of the *Telecommunications Act 1997*. In order for there to be diversity of carriage and content services available to users, telecommunications companies need to be able to access each others networks.

1.6 The ultimate goal of competition is to achieve 'any-to-any' connectivity which allows end-users of a service to communicate with each other, regardless of the network to which they are connected. Therefore, as a part of the 1997 reforms, a telecommunications specific access regime was added to the Trade Practices Act in Part XIC. This regime applies to the telecommunications industry in addition to the generic access provisions in Part IIIA of the Trade Practices Act. It seeks to promote competition by allowing service providers access to the services and facilities of other providers.

1.7 Part XIC is administered by the Australian Competition and Consumer Commission (ACCC) which decides the services that are within the scope of the regime. Part XIC enables carriage services and related services to be declared by the ACCC ('declared services').

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1 Selection of Bills Committee Report, No. 12 of 2001, dated 22 August 2001.

Once a service is declared, access providers are subject to standard access obligations which, amongst other things, require them to offer the service to an access seeker. In doing so, the access provider must take all reasonable steps to ensure that the technical and operational quality of the service is equivalent to that which the access provider provides to itself. The standard access obligations apply on such terms and conditions as are agreed between the parties, or as otherwise specified in an Undertaking from a provider, that must first be accepted by the ACCC.

1.8 If no such Undertaking is in place, and parties cannot agree on terms and conditions of access, either party can request the ACCC to arbitrate, or to otherwise assist in resolving the dispute (eg by using its powers under Part XIC of the Act to mediate or to make a procedural direction that might require one party to provide information to the other). The outcome of the arbitration process is that the ACCC may make a binding private determination on the terms and conditions to apply between the two parties. This final determination can be re-arbitrated by the Australian Competition Tribunal on application by either party to the dispute.

1.9 As at February 2001, 13 services had been declared under Part XIC and these are likely to represent the bulk of the existing services to be declared. Of these services, eight were deemed to be declared by the ACCC as part of the transition from the previous to the current regulatory regime and the other five services were declared after a public inquiry. On average, it took around one year for the ACCC to decide whether or not to declare a service (not including the deemed services). Decision-making times ranged from one month to 22 months.

1.10 The intention of the telecommunications access regime is to promote commercial resolution of disputes between access seekers and access providers, with formal arbitration as a safety-net where commercial negotiation fails. In practice however, there has been a substantial reliance on ACCC arbitration to resolve significant disputes involving major carriers.[2] Although the Productivity Commission surmised that the majority (at least 80 per cent) of terms and conditions are commercially negotiated, it appears to be the high volume (and revenue) services which are more likely to go to arbitration.[3] The reason given for this is that access seekers that expect lower arbitrated access prices will target high traffic services to obtain the greatest overall gain.

1.11 The Explanatory Memorandum to the bill notes that, as at May 2001, of the 44 cases notified to the ACCC, 14 disputes had been resolved commercially (and withdrawn) and six finalised. Of the 24 disputes outstanding, interim determinations applied to 11, which enabled commercial operations to progress on a reasonable basis while a final determination is being prepared.[4]

1.12 Currently the ACCC has 20 arbitrations outstanding. Many of these have not been resolved within expected time frames. The ACCC stated in its submission that this is in part due to the need to consider threshold issues (eg pricing principles) and to the strategic

2 Explanatory Memorandum, Trade Practices Amendment (Telecommunications) Bill 2001, pp 3 and 7.

3 Productivity Commission, Telecommunications Competition Regime, Draft Report, p 7.8.

4 Explanatory Memorandum, Trade Practices Amendment (Telecommunications) Bill 2001, p 3.

behaviour by parties involved in the arbitrations.[5] The need to hold several, often simultaneous, bilateral arbitrations on the same issue is also a contributing factor.

1.13 In its submission, the ACCC informed the Committee that the 'negotiate, arbitrate, re-arbitrate' model established by Part XIC of the Act has proved to be problematic in practice.[6] Although the emphasis of the regime is to allow commercial negotiation in the first instance and to provide a 'safety-net' of arbitration only after the failure of negotiations, the large number of disputes notified to the ACCC for arbitration indicates that access providers and access seekers have been unable to negotiate mutually satisfactory conditions for many services.

1.14 Further, the ACCC submitted, there appears to be limited incentive for access providers and access seekers to conclude effective agreements concerning the terms and conditions of access where there is a market power imbalance between the access provider and the access seeker and where information asymmetries may be expected. Anecdotal evidence suggested that a 'take it or leave it' approach is common when the access seeker has no countervailing market power. In such circumstances, access seekers are likely to be negotiating in a vacuum, and may seek arbitration in an attempt to identify the parameters likely to be used by the regulator.[7] As no access Undertakings are in place to provide 'reference tariffs' against which to conduct negotiations, and if mediation and other processes are inappropriate or unsuccessful in resolving the dispute, arbitration is the necessary consequence.

1.15 These problems have increased the cost and decreased the speed of the arbitration provisions, which has moved the model away from being a 'light handed' safety-net as was originally intended. It has also reduced the incentives for commercial negotiation and encouraged regulatory dependence.

1.16 By way of illustration, Primus Telecommunications Pty Ltd (Primus) included its thoughts on the access regime in operation in its submission:

> Part XIC sets out a regime for arbitrating *inter alia* prices for declared services, in circumstances where the parties have been unable to reach agreement. Until a party files a notice of an access dispute with the Commission, the price it pays for the relevant service is effectively unregulated and therefore the access provider can engage in monopolistic pricing of that service. In Primus' experience, this has tended to encourage access providers to file access undertakings with the Commission which are patently unreasonable (within the meaning of section 152AH of the TPA) and to delay negotiations with access seekers and therefore the filing of a dispute notice by the access seeker. This outcome is contrary to the purpose and objects of Part XIC of the TPA and has, in Primus' experience, resulted in inefficient access prices, less competition in relevant markets and higher retail prices for end-users.
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> Further, access seekers such as Primus have, since the introduction of the Part XIC access regime on 1 July 1997, been forced to absorb monopolistic access prices on

5 Australian Competition and Consumer Commission (ACCC), Submission 8, p 6.

6 Australian Competition and Consumer Commission (ACCC), Submission 8, p 5.

7 While the ACCC has powers which could be used to reduce information asymmetries without recourse to arbitration, those processes, too, are time-consuming and do not necessarily eliminate such incentives.

> the wholesale side of the market for services such as domestic PSTN originating and terminating access, whilst being under increasing competitive pressure to reduce their prices to their customers on the retail side of the market. This has, in Primus' view, been the one of the most significant failings of the Part XIC access regime and has enabled access providers to reap arbitrage profits for the period between the commencement of negotiations for access prices between the parties and the filing of a notice of access dispute by the access seeker.[8]

1.17 In 2000, the Productivity Commission undertook an inquiry into telecommunications-specific competition regulation which included a review of Part XIC. It released a draft report in March 2001 with a final report to be released on 22 September 2001. The amendments in the bill implement some of the recommendations of the Productivity Commission in its draft report. The Productivity Commission found that:

> … the current regulatory processes for access to telecommunications facilities are slow and inefficient — with adverse consequences for parties seeking access. There are also potential pitfalls in the criteria that determine what services are subject to access and in determining access prices. There is a risk of reduced investment in core telecommunications infrastructure — with long run consequences for consumers and for Australia's overall economic efficiency.[9]

1.18 Against this, the Explanatory Memorandum to the bill suggests that there is some evidence to indicate that as the significant threshold issues have been considered and principles developed, there is scope to achieve quicker resolution of disputes.[10] In addition, the Productivity Commission notes that:

> … it appears as though most of the services likely to be declared (in the short to medium term) have been declared. The bulk of regulatory activity now surrounds the determination of access prices (and other conditions) and in the declaration arena most activity surrounds revocations and exemptions.[11]

1.19 The ACCC has also suggested that the efficiency of the regime will improve in the future:

> The high number of access disputes has been of some concern to the Commission and it has received far more notifications than was ever envisaged when the part XIC provisions of the Act were introduced. However, it is expected that the negotiation/arbitration model will become more effective as competition increases and as the Commission finalises its core work on access pricing — which will provide further guidance to industry on appropriate pricing benchmarks.[12]

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8 Primus Telecommunications Pty Ltd, Submission 5, p 3.

9 Productivity Commission, Telecommunications Competition Regulation, Draft Report, March 2001, p xxi.

10 Explanatory Memorandum, Trade Practices Amendment (Telecommunications) Bill 2001, p 3.

11 Productivity Commission, Telecommunications Competition Regulation, Draft Report, March 2001, p 7.20.

12 Telecommunications competitive safeguards *and* Telstra's compliance with the price control arrangements, Australian Competition & Consumer Commission, Report 1999-2000, p 5.

1.20 The Government decided that rather than awaiting the final report of the Productivity Commission in September 2001, and thus delaying reform of the telecommunications access regime till 2002, it would move to address the concerns of the industry with this bill.[13] It reasoned that it can benefit from the initial views, reasoning and consultation done by the Productivity Commission and, in addition, the introduction of new mechanisms to expedite the resolution of disputes under Part XIC will not limit the Government's ability to respond to issues subsequently raised by the Productivity Commission's Final Report. In his speech on the second reading of the bill in the House of Representatives, Dr Nelson, Parliamentary Secretary to the Minister for Defence, said:

> The package of measures that are before the parliament are designed to streamline [telecommunications access regime] processes. More fundamental changes to the access regime should be considered in the context of the Productivity Commission's final report on telecommunications competition regulation …[14]

Summary of submissions

1.21 In general, submissions to the inquiry were supportive of the policy behind the bill, but there were differing views as to how successfully the provisions in the bill would address the issues.

1.22 Additionally, although submissions acknowledged that the amendments in the bill would likely expedite the arbitration process, several considered that there are fundamental problems with the access regime itself which are not being addressed at this stage. AAPT submitted that:

> The proposed amendments will enable arbitrations to be addressed more quickly than has been the case to date in the Access Regime. However, it is more important that the existing matter before the Australian Competition Tribunal is resolved. This is not only because the Tribunal's matter affects PSTN pricing, but also because a number of other decisions currently still with the ACCC will be utilising the same methodology as [is] being considered under the tribunal and it is expected that these will also be taken to the tribunal for appeal and the tribunal will be unable to determine these matters until they have concluded the PSTN appeal.[15]

1.23 The joint carriers submission noted that:

> The provisions of the Bill together with the improvements to ACCC processes and procedures will provide assistance in streamlining the provision of access to declared services and help solve some procedural problems under Part XIC which currently cause delay.
>
> However, the benefits will be at the margins. The fundamentals of the regime remain. The complexity of the issues being considered, the importance of the determinations, and the resources at the disposal of many of the players

13 Explanatory Memorandum, Trade Practices Amendment (Telecommunications) Bill 2001, p 4.

14 House of Representatives Hansard, 30 August 1001, pp 30359-30360 [electronic].

15 AAPT Ltd, Submission 4, p 3.

> (particularly the incumbent) mean that access and pricing disputes will continue to be determined in a combative, protracted, and litigious manner.[16]

1.24 The issue which provoked most concern from submissions was that of Australian Competition Tribunal review of ACCC final determinations. The majority of carriers who submitted to the inquiry, as well as the ACCC, advocated that the review provisions be removed from the Act. Some carriers viewed the bill as an opportunity to amend the Act in this way. This issue and the issue of the pricing of the PSTN interconnect services, dominated the public hearing almost to the exclusion of the consideration of provisions of the bill itself.

1.25 The Committee understands that the Government has undertaken to respond to issues raised by the Productivity Commission's Telecommunications Competition Regulation Final Report at a later time, and issues such as Australian Competition Tribunal reviews and compulsory Undertakings will likely be considered at that time.

16 Optus, AAPT, Primus, and Macquarie Corporate Telecommunications, Joint Submission 7, p 3.