CHAPTER 2

TRADE PRACTICES AMENDMENT (TELECOMMUNICATIONS) BILL 2001

2.1 The amendments in the bill can be considered together in relation to their intended effect. Some amendments aim to encourage commercial negotiation on terms and conditions between access seekers and access providers so that agreement is reached and disputes do not get notified to the ACCC to activate the arbitration process, other amendments aim to expedite the ACCC's arbitration process following notification, as well as the review processes of these determinations.

Amendments which encourage commercial negotiation for access to services

Mandatory publication of pricing principles

2.2 Pricing principles provide the ACCC's views on various methodological issues surrounding the pricing of a service and can also give preliminary views about the various pricing claims that have been made in relation to a service. The pricing principles are currently published by the ACCC as a matter of administrative practice and there is no legislative recognition of them.

2.3 Item 1 of the bill, inserts a new section 152AQA into the Trade Practices Act (the Act) which will require the ACCC to determine principles relating to the price of access to a declared service. It must publish these pricing principles as soon as practicable after declaring a service or varying a declaration, and have regard to them when it arbitrates an access dispute. The new section will build on current ACCC practice by making the publication of principles mandatory.

2.4 Where pricing principles are established, the Explanatory Memorandum suggests that their more timely release will encourage commercial negotiation by providing increased certainty in regulatory outcomes.[1] In addition, the conduct of ACCC arbitrations should also be expedited.

2.5 New section 152AQA will only apply to services that are declared or varied after the provisions in the bill commence (item 23).

Response in submissions

2.6 Vodafone Pacific Limited (Vodafone) considered that it is vital for pricing principles to be considered and finalised before a declaration is made in order to avoid uncertainty in the market place and delay commercial negotiations.[2] In effect, this would mean that the pricing principles determination would be made at the same time as the service is declared by the

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1 Explanatory Memorandum, Trade Practices Amendment (Telecommunications) Bill 2001, p 9.

2 Vodafone Pacific Limited, Submission 3.

ACCC. Vodafone considered that proposed section 152AQA in the bill gives the ACCC too much flexibility in the timing of determining its pricing principles. Vodafone suggested that by providing leeway for the ACCC to make a determination 'as soon as practicable after' a service is declared (subsection 152AQA(3)), there is a risk of disconnecting the pricing principles from the declaration process:

> In our view, if pricing principles are not considered at the time a service is declared—in other words, nobody knows how this regulated service will be priced—then we are not sure how you can actually know whether the regulation is going to be in the interests of Australia.[3]

2.7 In addition, Vodafone noted that it is important for consideration to be given to the form of the pricing principle and included in the declaration analysis because different pricing principles could potentially sway the analysis on whether a service should be declared.

2.8 AAPT was concerned that the construction of the Act with the new subsection 152AQA(6) requiring the ACCC to have regard to its determinations of pricing principles when arbitrating an access dispute, in conjunction with a requirement in section 152CQ(6) preventing the ACCC from making a determination that is inconsistent with a Ministerial pricing determination, will enable the ACCC to make decisions in relation to arbitrations which are different from its own pricing principle determinations:

> The amendments proposed in the bill are that the ACCC be required to provide pricing principles when they declare a service but they are subsequently only required to have regard to those pricing principles when they determine disputes, whereas if it was a ministerial pricing determination they would need to apply those consistently.[4]

2.9 AAPT was of the view that if there is benefit in the ACCC generating pricing principles to provide information and certainty to the market, then it must be incumbent upon the ACCC to only resolve disputes in accordance with these principles.[5]

2.10 AAPT recommended that the bill be amended to require the ACCC to resolve access disputes in accordance with its pricing principles.[6] In response to this, the Department informed the Committee that:

> I think the principal purpose of this amendment [in the bill] is to encourage the ACCC to make its pricing principles as soon as practicable around the same time that it is making its declaration of service. I think the AAPT proposal is a much broader, more fundamental proposal—which, as I understand it, is that, rather than pricing principles being a tool where the ACCC sets out what its basic principles are and what it is likely to have regard to in making its final determinations, in

3 *Proof Committee Hansard*, Sydney, 12 September 2001, p 3.

4 *Proof Committee Hansard*, Sydney, 12 September 2001, p 22.

5 AAPT Ltd, Submission 4, p 8.

6 AAPT Ltd, Submission 4, p 8.

> effect those pricing principles would be binding upon the ACCC and, in a sense, would be like a standard pricing formula.[7]

2.11 The Department added that as a matter of good practice, it would be expected that the ACCC had regard to its pricing principles, but to make them binding would be fairly inflexible and not allow the ACCC to look at the particular merits of the arguments in the particular determinations before them.[8]

2.12 Further, the Department suggested that if the pricing principles were binding on the ACCC, it would arguably create additional grounds for appeal:

> So, once again, if they have to strictly abide by the pricing principles, there can be a range of different disputes about whether they have and the extent to which they have actually complied with their own pricing principles. If they have to have regard to them, you are less likely to run into problems with appeals on those grounds. As long as they have turned their minds to their pricing principles and thought through them from a legal point of view, that should be sufficient.[9]

2.13 Primus Telecommunications Pty Ltd (Primus) recommended an amendment to the bill to expand the application provisions so that the new section 152AQA would apply to services which have already been declared:

> As most of the services which are likely to be declared pursuant to Part XIC of the TPA have already been declared, proposed section 152AQA would be of little practical benefit to the industry if it did not apply to services which were declared *before* the commencement of the amending Act.[10]

2.14 Primus argued that its amendment would reduce the ability of a powerful incumbent to engage in regulatory gaming because any pricing principles which had been developed by the ACCC would form a clear starting point for existing access disputes. This would, to a large extent, prevent an access provider from seeking to have a matter reviewed by the Australian Competition Tribunal on the basis that the ACCC had applied the wrong pricing principles.[11]

2.15 Whilst the ACCC supported the amendment in the bill, it noted that compliance with the new provisions will require it to consider both the issues of declaration and pricing at same time, and this will lengthen its inquiry into the declaration of a service. This may require a reconsideration of the ACCC's indicative time frames for inquiry, although there will generally be efficiencies between the two processes.[12]

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7 *Proof Committee Hansard*, Sydney, 12 September 2001, p 44.

8 *Proof Committee Hansard*, Sydney, 12 September 2001, p 44.

9 *Proof Committee Hansard*, Sydney, 12 September 2001, p 44.

10 Primus Telecommunications Ltd, Submission 5, p 1.

11 Primus Telecommunications Ltd, Submission 5, p 1.

12 Australian Competition and Consumer Commission, Submission 8, p 10.

Resolution of disputes in a timely manner, including through alternative dispute resolution mechanisms

2.16 Greater use of alternative dispute resolution (ADR) mechanisms (eg conciliation, mediation and private arbitration) may reduce the time taken to resolve access disputes. Alternative dispute resolution can act as a 'filtering' process, resolving disputes more quickly, and reducing the areas of any remaining dispute. Greater use of alternative dispute resolution will also lessen the number of disputes in the formal arbitration process, thereby freeing up ACCC resources to more quickly resolve disputes that still require formal arbitration.

2.17 The current provisions in Part XIC give the ACCC power to direct parties to enter into mediation and require it to conduct arbitrations as speedily as proper consideration of the dispute allows. However, there is currently no guiding principle in Part XIC which encourages the ACCC to exercise its powers under that Part in a way which will encourage timely resolution of disputes and to have regard to alternative dispute resolution techniques that will achieve this outcome.

2.18 Items 2 and 3 of the bill make amendments to the Act, which specify that the ACCC, in exercising its powers prior to the notification of a dispute as well as during the resolution of disputes, has regard to the desirability of agreements on terms and conditions, and resolutions of disputes being done in a timely manner. The amendments therefore provide the ACCC with the flexibility to decide whether or not alternative dispute resolution would be appropriate for the particular circumstances at hand, taking into account the relative bargaining positions of the parties, and the issues raised.

2.19 Despite the benefits of alternative dispute resolution, there is a danger that where it is unsuccessful, it can result in further delays to the dispute resolution process, particularly where parties have limited areas of agreement or where there is a large difference in bargaining power between the parties. For this reason, while the amendments place a greater onus on the ACCC to refer appropriate disputes to alternative dispute resolution, they allow it to use its discretion in a manner that promotes the timely resolution of disputes. In addition, the amendments build on existing requirements of the ACCC to act expeditiously.

2.20 In order to facilitate negotiations, existing section 152BBA allows the ACCC to give a procedural direction if requested by either party to the negotiations. Examples of the kinds of procedural directions that may be given are provided in subsection 152BBA(3) and they include directions to engage in alternative dispute resolution.

2.21 Section 152BBC allows a representative of the ACCC to attend to mediate at negotiations if jointly requested to do so by the parties to the negotiation.

2.22 Item 2 of the bill, inserts a new section 152BBD into the Act which requires the ACCC, when exercising its powers under sections 152BBA and 152BBC, to have regard to the desirability of terms and conditions for access being agreed in a timely manner.

Publication of results of, and reasons for, interim and final determinations by the ACCC

2.23 Because ACCC arbitrations are private, the results of and reasons behind the arbitrations are also kept confidential.

2.24 Item 7 of the bill inserts a new section 152CRA into the Act which will alter this situation. New section 152CRA will allow the ACCC to publish a determination and the reasons for making the determination. Before it does so however, it must inform each party to the determination what it proposes to publish, and invite submissions on the proposition which it must consider in its decision to publish.

2.25 The aim of this amendment is to create a bargaining situation in the market such that economically efficient access prices will be realised.[13] Publication of arbitration outcomes would improve the public transparency of ACCC decision-making and enable the disclosure of key information to the market which would in turn promote commercial resolution of future disputes in relation to the same declared service. The Productivity Commission, in its draft report, considered that making public the full outcomes of arbitrations would encourage commercial negotiations between parties who may opt for the commercial confidentiality of negotiations.

2.26 According to the Explanatory Memorandum,[14] publishing the results of, and reasons for, arbitrations would help guide the future commercial negotiations between access seekers and access providers. By providing certainty with regards to the likely outcome of an ACCC arbitration, there is a greater chance that the parties will find a mutually acceptable price. This will reduce the need for arbitration, allow disputes to be resolved quickly, and is consistent with the philosophy of the access regime which is to promote commercial negotiation.

2.27 Item 23 provides that new section 152CRA applies only in relation to determinations made after commencement.

Response in submissions

2.28 The ACCC informed the Committee in its submission, that knowledge of previous determinations, their reasons, and pricing principles, is likely over time, to inform the private negotiations of access providers and access seekers and so reduce the uncertainties and/or strategic behaviour which currently result in so many disputes being notified.[15] Items 1 and 7 in the bill will therefore assist in breaking down some of the deficiencies in the existing arrangements for hearing disputes.

2.29 Whilst supporting the publication of determinations, Vodafone was concerned that the amendment would allow the ACCC to publish commercially sensitive input data that is provided to it by the parties to a dispute.[16] It considered that cost and other confidential company information should not be published without the agreement of the party providing the information.

2.30 The Committee notes that the consultation provisions in the new section provide that, prior to publication of a determination and its reasons, the ACCC must inform each party to the determination of what it proposes to publish, and it must have regard to any

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

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

15 Australian Competition and Consumer Commission, Submission 8, p 10.

16 Vodafone Pacific Ltd, Submission 3.

submissions from the parties which it receives in response. The Explanatory Memorandum informs that this will give parties an opportunity to raise issues of confidentiality with the ACCC.[17]

Backdating determinations

2.31 Currently, the ACCC can backdate the effect of a determination to a specified date, not earlier than the date of notification of a dispute. This provision is intended to remove incentives for parties to delay resolution of the dispute, but an unintended outcome is that it encourages access seekers to notify disputes to the ACCC at the earliest possible opportunity, thereby invoking a formal ACCC process and discouraging commercial resolution of the dispute.

2.32 Item 16 substitutes subsection 152DNA(2) so that the ACCC may backdate the effect of determinations to a date not earlier than when the parties commenced negotiations. Item 23 provides that the amendment will only apply in relation to access disputes that are notified after commencement.

2.33 The ACCC's power remains a discretion to backdate. The Explanatory Memorandum informs that this does not affect the discretion of the ACCC as to when, if at all, it shall backdate the effect of a determination.[18] In exercising its discretion, the ACCC could have regard to issues such as the date of supply of the service and the bona fides of negotiations.

2.34 The bill contains transitional provisions in relation to new subsection 152DNA(2) at item 24. The effect of this item is that where a dispute is notified prior to commencement, the ACCC retains its power to backdate to the date of notification of the dispute. Where a dispute is notified after commencement, the ACCC has a discretion to backdate to the date of commencement or the date that negotiations started, whichever is the later.

Response in submissions

2.35 AAPT is involved in an arbitration with Telstra about the price of access to PSTN originating and terminating services. This dispute was notified to the ACCC in December 1998 - a date preceding the date of commencement of the *Telecommunications Legislation Amendment Act 1999*, which contained the current backdating provisions. A final determination on the dispute was issued by the ACCC on 13 September 2000 and this determination is currently under review by the Australian Competition Tribunal.[19]

2.36 AAPT suggested in its submission that the consequence of the original backdating provisions was to revise the power of the ACCC to determine AAPT's dispute.[20] In addition, the fact that the dispute relating to the price for PSTN originating and terminating services is still not finally resolved, despite its status as a declared service, means that it remains in an

17 Explanatory Memorandum, Trade Practices Amendment (Telecommunications) Bill 2001, p 19.

18 Explanatory Memorandum, Trade Practices Amendment (Telecommunications) Bill 2001, p 22.

19 AAPT Limited, Submission 4, pp 1 and 4.

20 AAPT Limited, Submission 4, p 5.

unregulated state which belies the intent of the access regime introduced in 1997 (ie to deregulate telecommunications and develop competition).

2.37 AAPT's concerns in relation to the bill, were that the backdating provisions will not apply to its outstanding dispute. AAPT considered that this goes against the intention of the 1997 legislation that deregulated telecommunications:

> It is of concern to AAPT that the current legislative changes fail to recognise that the original 1997 intent continues to be frustrated. … it has always been both the Government and Parliament's intention that competition was being introduced from 1 July 1997. …
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> … the proposed transitional provisions relating to the new backdating provision create the same limitation in relation to backdating to the date of notification of a disputes. That is, that the power to backdate to the commencement of negotiations only applies if the dispute is notified after the commencement of the provisions.[21]

2.38 Given that its dispute remains current, AAPT believed that it is still relevant for the Parliament to correct the legislative process and bring to bear the intent of the original 1997 legislation. In addition, AAPT submitted that there are only two disputes which would be affected by widening the application of backdating provisions.[22]

2.39 Primus also advocated that the application provision relating to item 16 be widened to enable new subsection 152DNA(2) to apply to access disputes that are on foot at the time of commencement as well as to those notified after commencement.

2.40 Telstra agreed with the intent of this amendment but had concerns about the wide discretion conferred upon the ACCC:[23]

> Provided that that provision is implemented in a way where the ACCC, in exercising that discretion, gives reasons for where backdating does and does not occur and does not induce players not to finalise commercial deals in order to keep their backdating options open, it will work. However, if you wanted to improve upon it, you would require some recognition of the priority of commercial agreement to be inserted into that decision making process.[24]

Department's response

2.41 The Department was of the view that it would not be equitable to amend the law so that it would in effect apply in a retrospective fashion:

> To allow the ACCC to go back further [than commencement] would mean that people who had ordered their affairs in a certain way before commencement of this legislation on the basis of the law as it stands … would add a retrospectivity to the

21 AAPT Limited, Submission 4, p 5.

22 *Proof Committee Hansard*, Sydney, 12 September 2001, p 23.

23 *Proof Committee Hansard*, Sydney, 12 September 2001, p 34.

24 *Proof Committee Hansard*, Sydney, 12 September 2001, pp 34-35.

> operation of the law, which we think would be unfair and inequitable in terms of the behaviour of parties before the commencement of the legislation.[25]

Amendments to streamline the arbitration process and minimise delays

2.42 AAPT provided its view of the impact of delays in the operation of the regime:

> … delay in this regime can cause more damage to competition than a need to adjust the access price. Delay is the fatal error in the context of telecommunications. As we mentioned earlier, this is a fairly fast moving industry, and one of the reasons for wanting an access regime rather than relying upon general competition law was the fact that general competition law is about seeking damages to rectify events in the past and we need the ability to resolve disputes in near real time.[26]

2.43 The following amendments are intended to improve efficiencies and speed up the arbitration process.

Resolution of disputes about access

2.44 Similarly to item 2, item 3 of the bill inserts new section 152CLA which requires the ACCC, in exercising its powers under Division 8 (Resolution of disputes about access) to have regard to the desirability of access disputes being resolved in a timely manner, including through the use of alternative dispute resolution methods.

2.45 Although critical of the ACCC's case management techniques, Telstra was supportive of the provisions in the bill relating to the use of alternative dispute resolution:

> In Telstra's opinion, ADR and case management are the keys to quicker decision making and give less recourse to formal arbitration. More than any other single measure contained in this bill, case management and ADR tactics have the potential to transform the way in which disputes between carriers are managed. While we are strongly supportive of the proposed section 152CLA in the bill, we think that merely requiring the ACCC to have regard to use of alternative dispute resolution methods may not go far enough. Telstra believes the ACCC should also be positively required to adopt best practice case management techniques.[27]

2.46 Telstra informed the Committee that it has achieved more by locking people away in a room for a couple of weeks than that which would have taken several years of arbitration to achieve.[28]

Withdrawal of notification of a dispute

2.47 An access seeker, carrier or provider, may notify the ACCC that an access dispute exists under section 152CM of the Act, and this notification may only be withdrawn before the ACCC makes its final determination on the matter as specified in section 152CN.

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25 *Proof Committee Hansard*, Sydney, 12 September 2001, p 44.

26 *Proof Committee Hansard*, Sydney, 12 September 2001, p 21.

27 *Proof Committee Hansard*, Sydney, 12 September 2001, p 31.

28 *Proof Committee Hansard*, Sydney, 12 September 2001, p 33.

According to the Explanatory Memorandum to the bill, there is currently potential for strategic abuse of section 152CN by both access providers and access seekers.[29]

2.48 To remove the potential for regulatory gaming, the bill repeals and substitutes subsections 152CN(1) and (2) (item 4) to require the joint consent of both parties to a dispute for a notification to be withdrawn. Failing agreement by the parties, the ACCC will have a reserve power to terminate a dispute where it considers that one party is withholding consent unreasonably.

2.49 The amendment is designed to prevent strategic abuse of the notification and withdrawal provisions to either prolong disputes and delay access to declared services, or to gain price advantages.

2.50 Item 23 of the bill provides that these amendments will apply in relation to access disputes that are notified after commencement.

Response in submissions

2.51 The ACCC considered that the amendments are the least burdensome option for advancing any-to-any connectivity and competition objectives. For example, it is considered less burdensome than empowering the ACCC to reinstate an arbitration that has been terminated by the access seeker.[30]

2.52 However, the ACCC suggested that the solution to the problem may not be as simple as removing the ability of an access seeker to terminate an arbitration notified by an access provider. In most cases this will be a desirable outcome but the ACCC advocated that a further amendment should be included in the bill to address a potential limitation in the definition of 'access seeker' in section 152AG of the Act:

> It has been argued that a carrier cannot be characterised as an 'access seeker' where it has not sought, and does not want, access to a network, and that it would therefore fall outside the definition of 'access seeker' in section 152AG. If this interpretation is correct, a carrier may still be able to exploit the provisions of the Act to do, in effect, what it could not do in the reverse situation as an access provider (ie refuse to deal with another carrier or carriage service provider).[31]

Removal of an access seeker's right to object to the making of an interim determination

2.53 Under subsection 152CPA the ACCC can make an interim determination in relation to an access dispute which will have effect on the date specified. The ACCC first issues a draft determination and provides a period of at least 7 business days during which an access seeker can object to the determination. If the ACCC receives written notice of an objection within the specified period, it must not make the interim determination. This right of veto protects an access seeker from being subject to the determination.

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29 Explanatory Memorandum, Trade Practices Amendment (Telecommunications) Bill 2001, pp 12-13.

30 Australian Competition and Consumer Commission, Submission 8, p 13.

31 Australian Competition and Consumer Commission, Submission 8, p 13.

2.54 Item 5 of the bill repeals subsection 152CPA(3) in the Act which has the effect of removing the right of an access seeker to object to the ACCC making an interim determination. The Explanatory Memorandum explains that this amendment is consistent with a draft recommendation of the Productivity Commission[32] which advocated the provision's removal on the basis that it distributes unequal rights between the contesting parties.

2.55 Item 5 applies in relation to access disputes that are notified after commencement (item 23).

ACCC to be constituted by one or more members

2.56 Item 8 amends subsection 152CV(1) to allow the ACCC, for the purposes of a particular arbitration, to be constituted by one or more members of the Commission nominated by the Chairperson. This contrasts with the current situation where a telecommunications access dispute hearing is to be held by at least two Commissioners.

2.57 This change is to facilitate the speedy resolution of disputes. The decision on the constitution of the Commission for a particular arbitration would remain with the Chairperson of the ACCC, who would be able to prevent attempts by any individual party to a dispute to have an arbitration conducted by a particular Commissioner. In addition, the Chairperson would retain the discretion to use more than one Commissioner for significant and complex arbitration hearings.[33]

2.58 Items 9, 10 and 11 make amendments to the Act, consequential on the amendment made by item 8. These changes reflect the various scenarios whereby the Commission can be constituted by a single Commissioner, as well as by two or more Commissioners.

Provision of information between arbitrations

2.59 Unless the parties otherwise agree, access arbitrations must be conducted in private. The ACCC is currently restricted in its use of relevant information from one arbitration in another arbitration. This means that common information obtained through one arbitration cannot be provided to parties to another arbitration, even where that information is not confidential. The ACCC must consult all of the relevant parties prior to using the information and consider their submissions on whether the disclosure of the information will prejudice a party's commercial position. This process can take some time and there is the potential for gaming in the release of information.

2.60 Item 14 inserts a new section 152DBA into the Act which would allow the ACCC to provide information (including costings, methodology and price information) that has been obtained from an (ongoing or previous) arbitration, to a party to another arbitration. The ACCC may only use this power where it considered that the provision of information between separate arbitrations will enable the arbitrations to be conducted in a more efficient and timely manner.

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

33 Explanatory Memorandum, Trade Practices Amendment (Telecommunications) Bill 2001, p 12.

2.61 The new section requires the ACCC to consult with the contributor of the information or document before providing it, and specifies matters which the ACCC must consider before making the decision to provide the information (such as the contributor's submission with respect to the release of the information).

2.62 Item 23 provides that the new section 152DB applies in relation to access dispute that are notified either before or after commencement.

Response in submissions

2.63 Primus proposed that subsection 152DBA(2) be amended to add a requirement that the ACCC consider whether the exercise of its power under the section would result in the promotion of the object of Part XIC of the Act (that is, to promote the long-term interests of end-users of carriage services or of services provided by means of carriage services).[34]

2.64 Primus considered that this would give the ACCC broader scope for considering information from another access dispute where it is appropriate to do so, having regard to the long-term interests of end-users.[35]

2.65 The Committee suggests that the 'long-term interests of end-users' objective underpins the operation of Part XIC of the Act. It applies to all sections in the Part, regardless of whether or not it is explicitly stated in particular sections, and therefore Primus' suggested amendment may be unnecessary.

Joint arbitration hearings

2.66 Part XIC of the Act currently provides for the ACCC to conduct individual arbitrations of each notified dispute between an access provider and an access seeker. Separate hearings of common disputes result in a series of arbitrations which can slow down the resolution of disputes.

2.67 Item 15 of the bill inserts a new section 152DMA into the Act which permits the ACCC to conduct a joint arbitration hearing of two or more access disputes where one or more matters are common to the disputes and the Chairperson considers that a joint arbitration hearing would result in the disputes being resolved in a more efficient and timely manner.

2.68 Item 23 provides that new section 152DMA applies to access disputes that are notified either before or after commencement.

Response in submissions

2.69 Vodafone had concerns about the circumstances which might prompt the holding of a joint arbitration hearing. New subsection 152DMA(1) permits the holding of a joint hearing if 'one or more matters are common' to two or more access disputes being arbitrated

34 *Trade Practices Act 1974*, subsection 152AB(1).

35 Primus Telecommunications Pty Ltd, Submission 5, p 2.

at a particular time. Vodafone suggested that the disputes should be substantially the same in all material respects for a joint hearing to be held. This is because:

> Telecommunications issues are often complex and relatively small variations in either the context or the details surrounding a dispute will have a significant impact on the outcome.[36]

2.70 In its submission Vodafone provided a process which it believed should be followed by the ACCC before making a decision about holding a joint hearing.

2.71 The Committee is not persuaded by Vodafone's concern in relation to joint arbitration hearings. The Explanatory Memorandum states that:

> The joint arbitration hearing is a procedural mechanism that allows the Commission to hear matters common to more than one dispute at the same time. It is a joint hearing of matters common to more than one arbitration, not the joining of the parties into a single arbitration. At the end of each joint arbitration hearing, the parties will return to their particular arbitration proceedings and the Commission will make an appropriate determination in relation to each particular arbitration.[37]

2.72 In addition, the Department made it clear that it is not a case of the arbitrations themselves being joined:[38]

> The way the joint hearing provisions are intended to work is that the Commission would hear common matters—say, relating to the same dispute, relating to the same declared services—that it could hear common evidence. … It would hear those matters, take the evidence and the arbitrations would then separate. They would still retain their separate nature so that, if there were particular issues relating to a particular arbitration, they could be considered privately by the commission, but all the common issues … could be heard together and the separate issues heard separately afterwards just as a way of streamlining the process.[39]

Amendments relating to review of Australian Competition and Consumer Commission arbitration determinations and appeals of Australian Competition Tribunal reviews

Limiting the matters to which the Australian Competition Tribunal may have regard for the purposes of a review

2.73 Section 152DO of the Act enables a party to a final determination of an access dispute to apply to the Australian Competition Tribunal (the Tribunal) for a review of the determination. The review is a re-arbitration of the access dispute and the Tribunal has all the powers of the ACCC in this regard.

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36 Vodafone Pacific Limited, Submission 3.

37 Explanatory Memorandum, Trade Practices Amendment (Telecommunications) Bill 2001, p 21.

38 *Proof Committee Hansard*, Sydney, 12 September 2001, p 48.

39 *Proof Committee Hansard*, Sydney, 12 September 2001, p 48.

2.74 In order to reduce delay in the review of ACCC decisions, the bill inserts a new section 152DOA into the Act (item 19) to limit the matters which the Tribunal may consider in its review, so that it may only consider evidence, information or documents that were either given to the ACCC or referred to by the ACCC in its reasons for making the final determination. This will prevent a party to a dispute from introducing new evidence at the review, in an attempt to delay the process.

2.75 The Explanatory Memorandum justifies this limitation on the Tribunal by explaining that determinations by the ACCC 'involve a lengthy and complex hearing process' and that restricting the material which the Tribunal may consider 'will ensure that the Tribunal process involves a review of the Commission's decision, rather than a complete re-arbitration of the dispute'.[40]

2.76 The Committee finds it curious that the intention of the amendment is to prevent a 'complete re-arbitration of the dispute' and yet subsection 152DO(3) of the Act specifically states that '[a] review by the Tribunal is a re-arbitration of the access dispute'.[41]

2.77 The Committee notes that the Senate Scrutiny of Bills Committee had concerns that proposed new section 152DOA may be considered to trespass unduly on personal rights and liberties because it will reduce the extent of Tribunal review.[42] Whilst restricting the evidence to that which was before the ACCC is likely to speed up the resolution of access disputes insofar as delays are occasioned by the introduction of fresh evidence, it will not affect delays that are attributable to other causes.

2.78 In addition, it is unclear whether it will prevent 'gaming' by telecommunications companies, as there will be other opportunities to introduce delays into the process of determining access terms and conditions, for example, a party to an arbitration before the ACCC may seek to delay the arbitration process by deluging the ACCC with information on topics of peripheral relevance.

2.79 The Scrutiny of Bills Committee has requested advice from the Minister as to how the existing review processes have been abused and whether the Tribunal has been consulted about the proposed changes.[43] The Minister's response to this request will not be available before this Committee reports on the bill.

2.80 Item 23 provides that item 19 applies in relation to applications for review that are made after commencement.

Response in submissions

2.81 Notwithstanding the concerns of the Scrutiny of Bills Committee, opinions in submissions ranged from support for the amendment (Vodafone, Telstra) to suggestions that the opportunity for Tribunal review of ACCC determinations should be abolished altogether (Primus, Optus, joint carriers, ACCC).

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40 Explanatory Memorandum, Trade Practices Amendment (Telecommunications) Bill 2001, pp 13-14.

41 Trade Practices Act, subsection 152DO(3).

42 Scrutiny of Bills Committee, Alert Digest No. 10 of 2001, pp 14-15.

43 Scrutiny of Bills Committee, Alert Digest No. 10 of 2001, p 15.

2.82 Primus and other witnesses, strenuously urged the Committee to consider the abolition of merits review in relation to access disputes determined by the ACCC. They proposed that the provisions in Part XIC of the Trade Practices Act relating to the Australian Competition Tribunal reviewing final determinations of the ACCC ought to be repealed. Primus submitted that the review process has been misused by Telstra as a form of gross regulatory gaming, the apparent purpose of which is:[44]

> (a) tying-up its opponents [sic] legal and regulatory resources; and
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> (b) intimidating access seekers wishing to lodge an access dispute with the Commission, by making it clear that if they do so they will be likely to be subjected to a lengthy and costly arbitration process and then an even more length[y] and costly review process. As access seekers may therefore be reluctant to lodge access disputes, this may in turn effectively enable the incumbent to charge monopoly prices to access seekers for declared services, notwithstanding Part XIC.[45]

2.83 AAPT, whilst noting that there is a strong basis for arguing that there should be no right of review to the Tribunal because the ACCC arbitration is not a regulatory event, but a dispute deciding event,[46] recommended instead that the application of new section 152DOA be widened to encompass all final determinations made in relation to access disputes.[47] The effect of this would be that the Tribunal would be restricted in the evidence to which it could have regard in all reviews that have not concluded before commencement.

2.84 AAPT argued that if the application of the new section 152DOA is not widened to encompass all final determinations, the intention of the new section to reduce delays will not be realised:

> … the relevance of 152DOA, and in fact the rest of the regulatory amendments, will have no impact on future disputes while ever the existing PSTN access dispute is before the Tribunal for consideration. Principally, this is because Telstra has made this review a '*cause celebre*' specifying that the need for the review is to determine underlying principles in relation to access pricing. Telstra has clearly signalled their intent to take both the ULL final determinations and local carriage resale pricing determinations to review by the Tribunal as soon as the ACCC finally determines those matters. Consequently, there will be no real progress made, until such time as the PSTN matter is finalised.[48]

2.85 Failing the removal of merits review, Primus was concerned at the drafting of proposed section 152DOA. It considered that a party with substantial legal and regulatory resources at its disposal could take advantage of the new provisions by submitting as much

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

45 Primus Telecommunications Pty Ltd, Submission 5, pp 3-4.

46 AAPT Ltd, Submission 4, p 6.

47 AAPT Ltd, Submission 4, p 7.

48 AAPT Ltd, Submission 4, p 7.

information, documents and evidence as it possibly can during an arbitration before the ACCC, for the purposes of:

a) delaying the arbitration;

b) further regulatory gaming, by way of 'out-resourcing' its opponents;

c) broadening the scope of matters it may subsequently argue before the Tribunal; and

d) due to (b) above, restricting the submissions which its opponents may wish to make and the evidence which its opponents may wish to adduce before the Tribunal.[49]

2.86 Primus informed the Committee in its submission that it has already seen evidence of Telstra apparently attempting to behave in the above manner in at least one current arbitration before the ACCC.[50]

2.87 In addition, Primus was concerned that a strict reading of the new provisions may take away the right of a party to a Tribunal review to be able to rebut any matters on which another party makes submissions or cites as evidence.[51] Primus suggested an amendment to new section 152DOA to circumvent this problem.

2.88 Cable & Wireless Optus (Optus) advocated the abolition of merits review by the Tribunal, but should it be retained, raised issues about the rights of third parties joined to Tribunal proceedings.

2.89 As a general rule, Optus believed that the Tribunal should only have regard to information previously given to the ACCC or referred to by the ACCC.[52] However, it argued that new section 152DOA overly limits the information to which the Tribunal should have regard. Third parties joined to the Tribunal proceedings should be entitled to present their own evidence. By way of illustration, Optus explained its own situation:

> Optus has been joined to the Telstra ACT appeal in relation to determinations made in disputes between Primus and Telstra, and AAPT and Telstra. Given that Optus was not previously a party to the arbitrations, Optus should be entitled to present evidence to the Tribunal which we have necessarily not had the opportunity to present at arbitrations to which we were not a party.[53]

2.90 In addition, Optus considered that the Tribunal should be able to have regard to information deliberately withheld from the ACCC during an arbitration:

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49 Primus Telecommunications Ltd, Submission 5, p 2.

50 Primus Telecommunications Ltd, Submission 5, p 2.

51 Primus Telecommunications Ltd, Submission 5, p 2.

52 Cable & Wireless Optus, Submission 6.

53 Cable & Wireless Optus, Submission 6.

> For example, there may be internal transfer pricing information held by a party to the arbitration which was not disclosed to the Commission but which the Tribunal believes is relevant and should be disclosed.[54]

2.91 Optus suggested an additional subsection to new section 152DOA which would alleviate these concerns. As an alternative, Optus suggested the Tribunal be granted discretion to admit evidence that it considers appropriate, having regard to the principles suggested in the bill.[55]

2.92 The Department informed the Committee that it had considered these issues when the bill was drafted but an attempt was made to strike a balance between competing arguments.[56] Although Tribunal reviews of ACCC final determinations were not removed from the regime, this amendment tries to limit the review process and ensure that it is contained and does not go too far:

> You can probably think of a thousand different particular examples where someone could raise a situation where they would like to have it seek the discretion of the ACT to say, 'This new evidence should be introduced,' or 'That new evidence should be introduced'. The overall principle in this bill is a general principle of no new evidence on the basis that, if you have a power to introduce new evidence in a particular circumstance, you have the procedural delay of deciding whether or not the new evidence should be introduced, whether it meets the criteria and probably a likelihood that there will be a whole series of new evidence introduced through the backdoor, even though there was a prime facie provision against it.[57]

2.93 The joint carriers submission suggested that new section 152DOA will be of limited benefit in speeding up the resolution of access disputes. It forecast that the amendment will achieve the following result:

> … the parties will simply adduce every skerrick of evidence at the ACCC arbitration stage, slowing down the process at the front end. This has already occurred in the Local Carriage Service and Unbundled Local Loop arbitrations currently afoot.[58]

2.94 Telstra thought that in relation to this provision in the bill, the policy objective could be better expressed to permit the Tribunal to admit new evidence only in circumstances where it would lead to more expeditious outcomes.[59]

Stay of decisions

2.95 At present, a person who is aggrieved by a decision of the Australian Competition Tribunal, may apply to the Federal Court for an order of review in respect of the decision

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54 Cable & Wireless Optus, Submission 6.

55 Cable & Wireless Optus, Submission 6.

56 *Proof Committee Hansard*, Sydney, 12 September 2001, p 45.

57 *Proof Committee Hansard*, Sydney, 12 September 2001, p 45. [Lyons, DCITA]

58 Optus, AAPT, Primus, and Macquarie Corporate Telecommunications, Joint Submission 7, p 4.

59 *Proof Committee Hansard*, Sydney, 12 September 2001, p 36.

(section 5, *Administrative Decisions (Judicial Review) Act 1977).* This review does not consider whether the Tribunal made the correct decision on the merits of the case. Rather, it involves ascertaining whether proper procedures have been followed by the Tribunal, including consideration of all relevant matters and no matters which are not relevant to the Tribunal's task, giving proper weight to evidence and allowing all parties adequate opportunity to present their case.

2.96 Item 20 of the bill inserts a new section 152DPA into the Trade Practices Act, which prevents certain provisions of the *Administrative Decisions (Judicial Review) Act 1977* from operating in relation to a decision of the Australian Competition Tribunal under section 152DO of the Trade Practices Act, after application for a review. The effect of this is to prevent an order being made to suspend the operation of, or stay proceedings under, the decision of the Tribunal.

2.97 Similarly, if a person applies to the Federal Court under subsection 39B(1) of the *Judiciary Act 1903* for a writ or injunction in relation to a decision of the Tribunal under section 152DO of the Trade Practices Act, the Court is to have no power to stay the decision pending the finalisation of the application.

2.98 Item 23 provides that item 20 applies in relation to applications for review, or applications for a writ or injunction, that are made after commencement.

2.99 At present, if a person appeals to the Federal Court from the decision of the Tribunal under section 152DQ, the Court can issue orders in relation to that decision, pending the finalisation of the application. Item 21 repeals section 152DR and substitutes a new section specifying that the fact that an appeal is instituted, will not affect the operation of the Tribunal decision or prevent action being taken to implement that decision. In addition, the amended section prevents the Federal Court from making orders staying or otherwise affecting the operation or implementation of the decision pending finalisation of the appeal.

2.100 Another section of the Act (section 152DNB) already provides that a party who receives an unfavourable determination from the ACCC cannot have that decision stayed by the Federal Court. According to the Explanatory Memorandum, the amendments in the bill are to ensure the consistent operation of Part XIC in relation to applications and appeals in respect of Commission and Tribunal decisions; and to ensure that Tribunal, as well as Commission, decisions are not stayed by the Federal Court.[60]

2.101 Item 23 provides that item 21 applies in relation to appeals that are made after commencement.

2.102 The Committee notes that the Senate Scrutiny of Bills Committee raised concerns about new sections 152DPA and 152DR.[61] In its Alert Digest on the bill, it considered that preventing the Federal Court from making an order staying or otherwise affecting the operation or implementation of the Tribunal's decision is contrary to the normal practice when a judicial decision is taken on appeal.

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60 Explanatory Memorandum, Trade Practices Amendment (Telecommunications) Bill 2001, p 14.

61 Scrutiny of Bills Committee, Alert Digest No. 10 of 2001, pp 15-16.

2.103 The Scrutiny of Bills Committee has sought the Minister's advice on issues relating to the amendment, and pending that advice, has drawn Senators' attention to the provisions in the bill.

2.104 The Explanatory Memorandum suggests that this amendment, along with those at item 20, is a technical amendment which is designed to achieve consistency with procedures applying to Tribunal reviews of ACCC decisions (section 152DNB).

Response in submissions

2.105 Vodafone had concerns about the possible impact of new section 152DR. It suggested that there could be irreparable consequences for an access provider which must comply with a decision of the Australian Competition Tribunal that is subsequently overturned by the Federal Court:

> This is because a decision by the Tribunal might require fundamental changes to the operation of the access provider's network and impact on both its immediate and future capability to provide services to its customers.[62]

2.106 In the event of a Tribunal decision being overturned, Vodafone suggested that there needs to be some form of compensation available to parties who are forced to comply with the decision of the Tribunal:

> If you are going to enforce what is effectively an interim decision, then if the decision went the other way, through the appeal process, there would need to be some assurance that for either the access provider or the access seeker who has been disadvantaged there is some way of putting things right. The only way to do that, if you are going to force a decision to be implemented in the interim, is to allow them to claim back the losses that they would have suffered. Our concern is that, particularly in this industry where firms come and go, undertakings to damages by one of the parties may not provide the other party with sufficient comfort. It is a finely balanced issue, because there is a trade-off between the time taken to appeal a decision and a party's rights to be able to appeal.[63]

2.107 The Committee notes that the issue of compensation raised by Vodafone mirrors the concerns of the Scrutiny of Bills Committee in its Alert Digest.[64]

2.108 Vodafone advocated that item 21 be removed from the bill, pending further consideration, because it has implications that go beyond a simple streamlining of the dispute resolution process.[65]

Other issues

2.109 Other issues of substance relating to the telecommunications access regime were raised in submissions and by witnesses although they were not covered directly by

62 Vodafone Pacific Limited, Submission 3.

63 *Proof Committee Hansard*, Sydney, 12 September 2001, p 5.

64 Scrutiny of Bills Committee, Alert Digest No. of 2001, p 16.

65 Vodafone Pacific Limited, Submission 3.

amendments in the bill. It is likely that these issues will be considered by the Department of Communications, Information Technology and the Arts when it analyses the Productivity Commission's Final Report on Telecommunications Competition Regulation. The issues included: abolishing the Australian Competition Tribunal review of ACCC decisions; ministerial determination of the PSTN interconnect price; and compulsory Undertakings.

Abolition of Australian Competition Tribunal review of Australian Competition and Consumer Commission final determinations

2.110 When considering the amendments in the bill, several submissions, including the ACCC, were of the view that item 19 (inserting new section 152DOA) will not go far enough in resolving the problems of the protracted delays in the resolution of access disputes. They advocated that the bill provides an opportunity to abolish reviews of ACCC final determinations by the Australian Competition Tribunal (the Tribunal) altogether.

2.111 The argument against a Tribunal review is that it is a re-arbitration of the access dispute and as such, it adds further delays, uncertainty and opportunities for regulatory gaming to the regime. According to AAPT:

> … it is our contention that the merits review is so much available to gaming and it does not actually go to address any of the points of substance. If there are points of substance in those arbitrations, we believe we have plenty of ability to utilise existing administrative law processes to get those addressed. We do not need a re-arbitration to get those matters addressed.[66]

2.112 According to Primus:

> … the real issue that Primus has with the merits review as it is currently being conducted is that it ties up the parties' resources—legal and management and regulatory resources, in particular—and this is what has been described as regulatory gaming. In other words, there is no obvious benefit to rehearing the matter from a legal or forensic point of view. You are just running the same arguments over again.[67]

2.113 Primus was also concerned about the intimidating effect that merits review has on smaller access seekers:

> … there is a concern that smaller access seekers will see that even the relatively larger players are being taken to the tribunal and the matter is being dragged out for another two years, from scratch. This seems to have an intimidatory effect on smaller access seekers from even taking a matter to the commission, because they know that, if they do, the likelihood is that they are going to be dragged up before the tribunal as well.[68]

2.114 Professor Allan Fels, Chairman, ACCC, made the point that although the telecommunications access regime is often referred to as a 'negotiate-arbitrate' model, it is in

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66 *Proof Committee Hansard,* Sydney, 12 September 2001, p 21.

67 *Proof Committee Hansard,* Sydney, 12 September 2001, p 25.

68 *Proof Committee Hansard,* Sydney, 12 September 2001, p 25.

fact a 'negotiate-arbitrate-re-arbitrate' model and that this was achieved by Telstra lobbying in 1997 when the regime was introduced.[69] Unlike in normal arbitrations:

> Telstra and others have a right to a full rehearing, a full rearbitration, by the Australian Competition Tribunal—that is, a completely new de novo arbitration. That is unusual. Parties can raise new material, make new submissions and engage new experts. They can even withhold information from the first arbitration, saving it for the rearbitration. That mechanism of full rearbitration maximises delay and uncertainty.[70]

2.115 The joint carriers submission outlined, by way of illustration of the problems with the access regime, the history of the process followed by the ACCC in determining the price for interconnection to Telstra's Public Switched Telephone Network (PSTN).[71] The final determination made by the ACCC in the related access disputes is currently before the Tribunal following application by Telstra for a review. The joint carriers contended that:

> The ACCC has followed a thorough, rigorous and exhaustive process in determining the PSTN interconnect rates over the FY 1998-2002 period. Telstra, through its appeal to the ACT, seeks to overturn the ACCC decision, including extensive public and industry consultation and four years of analysis since November 1997. Telstra is seeking to increase prices to levels that are higher than the commercial prices that it negotiated when it lodged its first Undertaking with the ACCC in November 1997.[72]

2.116 Further, the ACCC explained some of the processes it went through to arrive at its final determination and why it took the time it did:

> There had to be complete modelling of Telstra's network to try to get at the costs and that had to be done independently. That essentially took a while. We say it is for that very reason that we did that so thoroughly and we did it in a public, consultative manner. Telstra had massive input and other people, within the limits of commercial-in-confidence information, got to comment on that. That is exactly why you do not then need to open all that up to the possibility of it being repeated—and I mean literally repeated—in a rearbitration where Telstra can come in and say, 'We would prefer to use a different model'.[73]

2.117 The joint carriers asserted that the uncertainty caused by failure to have a final price determined means that it is nearly impossible for competitive carriers to properly plan their pricing, investment decisions and business operations.[74] Because Telstra is also seeking to backdate charges previously paid by some carriers, to higher rates proposed in its application

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69 *Proof Committee Hansard*, Sydney, 12 September 2001, p 37.

70 *Proof Committee Hansard*, Sydney, 12 September 2001, p 37. [Fels, ACCC]

71 Service providers use PSTN services to supply long distance, fixed-to-mobile and mobile-to-fixed calls to end-users in Australia.

72 Optus, AAPT, Primus, and Macquarie Corporate Telecommunications, Joint Submission 7, pp 9-10.

73 *Proof Committee Hansard*, Sydney, 12 September 2001, p 39.

74 Optus, AAPT, Primus, and Macquarie Corporate Telecommunications, Joint Submission 7, p 11.

to the Tribunal,[75] companies who continue to trade and interconnect with Telstra are forced to carry significant potential liabilities on their balance sheets:[76]

> … there is a need at least to annotate the accounts to the extent that there is a matter still outstanding. It is a matter for every individual firm as to how much they quantify that as a contingent liability and how they deal with it, but it is certainly a matter that the companies have to have regard to.[77]

2.118 According to the ACCC, the Tribunal review of the PSTN dispute appears unlikely to be finalised before the second half of 2002, which would be up to five years after the original service declaration.[78] In addition, Telstra has indicated its intention to exercise its right of Tribunal review for other key services, even though the ACCC has yet to finalise its determinations on these services.[79]

2.119 The ACCC attributed many of the problems of the access regime with the re-hearing of disputes by the Tribunal:

> The access regime established under Part XIC of the Act sought to encourage commercial resolution of access issues, with arbitration of terms and conditions of access by the ACCC intended as a last resort. However, these objectives are being frustrated by the length of time to finalise matters, and the corresponding uncertainty this causes for industry. The complete re-hearing of arbitral decisions is, in the ACCC's view, a major cause of this delay and undermines the intention of the regime that the regulatory agency to be approached as a matter of last resort.[80]

2.120 The joint carriers argued that it is not only the delays and ongoing uncertainty from a review of the decision which is the problem, but that the Tribunal is not as well equipped as the ACCC to consider the issues.[81] The Tribunal is constituted by a Federal Court judge, as a presiding member, and two senior members drawn from a number of senior members who are appointed by the Government, usually on the basis of their expertise in competition matters generally. The members of the Tribunal do not need to have, and are not likely to have, a specific expertise in telecommunications access pricing issues. Further, the Tribunal has no institutionalised knowledge to draw on, unlike the ACCC. There is no secretariat or established resources from which to obtain advice and assistance.

2.121 Although section 43B of the Act provides for the employment of consultants to perform services for the Tribunal, and subsection 152DO(5) allows the Tribunal to request from the ACCC information, other assistance and the making of reports, Professor Fels suggested that it depends upon the Tribunal president whether these powers are used:

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75 Optus, AAPT, Primus, and Macquarie Corporate Telecommunications, Joint Submission 7, p 11.

76 AAPT Limited, Submission 4, p 3.

77 *Proof Committee Hansard*, Sydney, 12 September 2001, p 14. [Havyatt, AAPT]

78 Australian Competition and Consumer Commission (ACCC), Submission 8, p 7.

79 Australian Competition and Consumer Commission (ACCC), Submission 8, p 7.

80 Australian Competition and Consumer Commission (ACCC), Submission 8, p 7.

81 Optus, AAPT, Primus, and Macquarie Corporate Telecommunications, Joint Submission 7, p 17.

> The tribunal consists simply of three people who do not have a backup staff. Mr Justice Lockhart, the previous president of the tribunal—I have not discussed it with the present one—was not keen on having staff. In any case, even if they wanted it, you would have to have extensive resourcing.[82]

2.122 Telstra commented on the assertions made about the ability of the Tribunal to conduct these reviews as follows:

> Some parties have suggested that the Tribunal does not have the skills or experience to hear such cases. I do not know how much credence the Committee confers on that, but it strikes me as being a somewhat remarkable allegation to make, given that the Tribunal's members are drawn from economics and trade practices backgrounds. In this particular case, they comprise a professor of economics, a former head of Austel, which was the industry body in the 1990s up to 1997, and a Federal Court judge with broad experience in trade practices and competition law matters.[83]

2.123 The joint carriers informed the Committee that the setting of interconnect prices is a complex, resource intensive, and highly specialised area in which the ACCC has built up considerable expertise. In the case of the Telstra PSTN review, it will be the first time the Tribunal has considered telecommunications pricing of access decisions and there are no prior decisions of the Tribunal to assist in determining the way to proceed or the principles to apply.

2.124 The Tribunal review is a re-arbitration of the access dispute and not simply a review of the original ACCC decision for errors of fact and/or law. The joint carriers raised the question as to the point of having two bodies undertaking identical tasks, when those tasks are complex and lengthy, in a regulatory environment where relatively quick decisions are required.[84] At the public hearing this point came in for some lengthy discussion between the Committee and the Department as the Committee tried to get a clearer understanding of why the Government was not removing Tribunal review from the access regime. The Department referred the Committee to debate which took place when the access regime was established and later provided the following arguments in relation to merits review:

> On the one hand, arguments supporting its abolition are based on:
>
> - the significant public interest in taking rapid action to maintain investor confidence in the market;
>
> - the extensive nature of the inquiry processes and independent expertise of the Australian Competition and Consumer Commission (ACCC); and
>
> - the adversarial and legalistic nature of an Australian Competition Tribunal (ACT), compared to an ACCC arbitration that reflects the long term interests of end users as well as the views and submissions of the parties to the arbitration.

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82 *Proof Committee Hansard*, Sydney, 12 September 2001, p 42.

83 *Proof Committee Hansard*, Sydney, 12 September 2001, p 31.

84 Optus, AAPT, Primus, and Macquarie Corporate Telecommunications, Joint Submission 7, p 17.

> On the other hand, merits review was originally included in the 'check and balances' of the original 1997 telecommunications access regime because:
>
> - it is normal that administrative decisions involving significant rights of parties are subject to merits review (a key issue routinely raised by the Senate Scrutiny of Bill Committee);
>
> - it promotes rigour and accuracy in decision-making by the original decision-maker;
>
> - ACCC determinations about the long term interests of end users involves the exercise of significant discretions; and
>
> - other major decisions involving discretions of the ACCC are reviewable, including decisions made under s50 in relation to mergers, Part IV and Part IIIA of the *Trade Practices Act 1974*.[85]

2.125 The Committee understands that the bill is essentially a package of 'efficiency reforms' to the existing arrangements. More fundamental proposals to make significant changes to the telecommunications access regime might be more appropriately considered in the context of the Productivity Commission's final report into Telecommunications Competition Regulation, due to be provided to the Government in late September 2001.

2.126 In a note to their submission, the joint carriers suggested that if it was thought that the Tribunal is superior to the ACCC in making decisions on access pricing matters, then Part XIC arbitrations should proceed immediately to be determined by the Tribunal, by-passing the ACCC altogether, as there is no need for two separate processes to make a decision on the same access pricing dispute.[86] At the public hearing, this idea was put to the ACCC. Professor Fels was of the view that:

> … that would be another option if you want to have legal style hearings headed by a Federal Court judge with QCs doing the arbitration, but then there would be the question of where they get their expertise from. Personally, … I believe that, when you get into complex pricing matters, courts and tribunals with legal style procedures have extreme difficulty because of the high technical component in decisions that are necessary about pricing. The Tribunal simply does not have it. The Tribunal consists simply of three people who do not have a backup staff.[87]

2.127 Again, it is noted that ACCC Chairman Professor Fels advised the Committee that he had offered expert staff to advise the Tribunal but this offer was rejected.[88]

2.128 The ACCC informed the Committee that the nature of the re-arbitration can also cause delays. It stated that the process for the PSTN origination and termination review has involved greater legal representation, and greater diversion onto issues such as legal standing. In addition:

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85 Department of Communications, Information Technology and the Arts, Correspondence.

86 Optus, AAPT, Primus, and Macquarie Corporate Telecommunications, Joint Submission 7, p 23.

87 *Proof Committee Hansard*, Sydney, 12 September 2001, p 42.

88 *Proof Committee Hansard*, Sydney, 12 September 2001, p 42.

> It also does not appear to be able to replicate processes undertaken by the ACCC, such as the public consultation process on pricing principles that accompanies many arbitrations.[89]

2.129 The ACCC has compared the current arbitral review provisions of the telecommunications access regime with other review rights and found that it is unusual for a commercial arbitration to be completely re-heard by another body. Further, it provided research into the review of regulatory decisions in Australia and overseas showing that it is not the norm for there to be provisions providing for a full re-hearing on the merits by an appeals body of an access pricing decision.[90] Telstra, however, disputed these conclusions.[91]

2.130 In addition, the ACCC noted that the Administrative Review Council's guidelines on what Commonwealth decisions should be subject to merits review, acknowledge that certain factors may justify excluding a complete re-hearing of the matter. The guidelines provide an exception for decisions involving extensive inquiry processes, and the ACCC believed that the telecommunications access arbitration process falls within the scope of this extension, notwithstanding the argument of Telstra to the contrary.[92]

2.131 Despite witnesses advocating the repeal of reviews by the Tribunal, this view was by no means unanimous amongst carriers. Vodafone was supportive of the appeals process and satisfied with the amendments in the bill to limit evidence to which the Tribunal can have regard.[93] It considered that there is a balance to be achieved between making quick decisions and in making good decisions:

> Our concern is that, if you move too far towards making quick decisions compared with good decisions, the industry will actually be impacted more going into the future.[94]

2.132 Vodafone was of the view that the Tribunal review provisions are an integral part of the telecommunications specific access regime:

> … if you are going to have specific regulation that applies solely to telecommunications companies and private investors like Vodafone, we believe that the enhanced appeal rights or review process are actually an important part of that entire framework.[95]

2.133 Telstra suggested that the motives behind the joint carriers call for fundamental change to the regulatory regime is suspicious:

> [The bill] addresses the most immediate problems which are obvious to the industry and which were plain at our industry forum, but it does not ask the Senate

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89 Australian Competition and Consumer Commission (ACCC), Submission 8, p 7.

90 Australian Competition and Consumer Commission (ACCC), Submission 8, p 9; and Attachments A and B.

91 *Proof Committee Hansard*, Sydney, 12 September 2001, p 30.

92 Australian Competition and Consumer Commission (ACCC), Submission 8, p 9.

93 *Proof Committee Hansard*, Sydney, 12 September 2001, p 2.

94 *Proof Committee Hansard*, Sydney, 12 September 2001, p 5.

95 *Proof Committee Hansard*, Sydney, 12 September 2001, p 6.

> to prematurely overhaul the entire regulatory regime in the days that are left. Such an approach would be, to borrow the word of Senator Alston, 'fundamentalist'. This fundamentalist approach is, nonetheless, recommended to you by some of Telstra's competitors, perhaps at the urging of their parent companies. Their calls for change to the regulatory regime are well beyond the intent of this bill and, before the Parliament can see the Productivity Commission's report, which is due next week, are suspicious, to say the least. One could perhaps conclude that their eagerness to pre-empt the Productivity Commission's report is an attempt to snatch a market advantage before the Commission can expose their arguments as dubious and commercially self-motivated.[96]

2.134 The Productivity Commission, in its draft report, did not advocate that Tribunal reviews of final determinations be removed from the regime:

> … it could be argued that the care taken by the ACCC to set efficient terms and conditions could be reduced if there were no vehicle for full review of final determinations. Moreover, while the review process takes time, it does not prevent effective interconnection in the meantime given that the interim determination applies. The [Productivity] Commission considers that it is appropriate to retain provisions that allow a full merit review of final determinations by the Australian Competition Tribunal.[97]

2.135 However, the Committee notes that a party who is unhappy with an ACCC final determination retains rights to appeal the ACCC decision on matters of law, to the Federal Court. This right of judicial review ensures accountability and good decision-making by the ACCC. Judicial review is potentially wide ranging, having regard to such issues as proper procedure, correct interpretation and application of law, procedural fairness and unreasonableness.[98]

2.136 Telstra argued that the existence of merits reviews from administrative decisions is based on the universally accepted principle that natural justice or fairness requires there to be an impartial and complete review of regulatory decisions. Telstra suggested that it would be at odds with the approach taken internationally, for Australia to abolish merits review under the administrative decision making processes by which the ACCC makes final determinations.[99]

2.137 The Committee finds the arguments in favour of removing Tribunal re-arbitrations of ACCC final determinations from the telecommunications access regime to be worthy of further consideration. However, the Committee is aware that this option was considered, but rejected when the bill was framed:

> Particularly given the broader government policy implications, it is not proposed to proceed with this option at this time.[100]

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96 *Proof Committee Hansard*, Sydney, 12 September 2001, p 29.

97 Telecommunications Competition Regulation, Productivity Commission, Draft Report, March 2001, p 9.37.

98 Australian Competition and Consumer Commission (ACCC), Submission 8, pp 9-10.

99 Telstra, Submission 2(a), p 1.

100 Explanatory Memorandum, Trade Practices Amendment (Telecommunications) Bill 2001, p 14.

2.138 The Department informed the Committee that merits review was an important feature of the debate back in 1997 when the telecommunications access regime was introduced. It argued that the final determination of the ACCC:

> … is a decision by an administrative decision maker which has a very significant impact on the parties and is arguably in the public interest, in the sense that the ACCC is being asked to make judgments about matters which really go to public interest type discretions—the long-term interest of end users is the key one they use.[101]

2.139 When further pressed about why the Tribunal review should remain, the Department advised the Committee that it should be viewed in the following context:

> … this is an on-balance judgment about whether or not you think it is appropriate to have scrutiny of the kinds of decisions the ACCC makes, given the breadth of discretion that is involved because it is a decision of an administrative character and so on. Also, the reason why the government in this package has not taken that issue on is that it is a fundamental element of the regime. I do not think the Minister has necessarily ruled out looking at that issue again in the future, but he has basically said that at the moment he does not think it is appropriate to move ahead with this. I think the Minister would regard this package as being effectively an efficiency package of reforms designed to hopefully streamline the existing regime without making fundamental changes at this stage prior to the Productivity Commission report coming out.[102]

2.140 Despite the concern of the telecommunications industry in relation to the current appeal to the Tribunal about the PSTN interconnect price the Committee accepts the Department's reasoning that this bill is not the appropriate means for changing a fundamental element of the regime in the way advocated by submissions to the inquiry.

The need for Parliament or the Minister to act to set the PSTN interconnect price

2.141 As a corollary to the abolition of Tribunal reviews, some submissions advocated that in relation to the PSTN interconnect dispute which is currently before the Tribunal for review, the Minister should issue a pricing determination to set the PSTN price based on the ACCC findings, or alternatively, the price should be set in the bill.

2.142 Submissions argued that the PSTN Terminating and Originating Access Service is the most fundamental of the access services under the access regime.[103] It is through the acquisition of this service that other telecommunications network service providers can interconnect with the Telstra network. Consequently, it is of vital importance to any competitor offering long distance telephone calls or building their own local network service. In addition, the principles applied in determining access to the service, will affect access to other declared services across the regime:[104]

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101 *Proof Committee Hansard,* Sydney, 12 September 2001, p 46.

102 *Proof Committee Hansard,* Sydney, 12 September 2001, pp 47-48.

103 AAPT Limited, Submission 4, p 2.

104 AAPT Limited, Submission 4, p 3.

> … things like the pricing of the unconditional local loop service, which is an essential input to digital subscriber line technology and to the ability to provide broadband Internet access to a lot of homes in Australia. That is a set of decisions that is going to effectively sit in a queue behind whatever happens on PSTN pricing. So we have uncertainty affecting not only interconnection rates of PSTN but the development of new services in Australia.[105]

2.143 The joint carriers suggested that the determination of PSTN interconnect has been the first test of the access regime and as a result, the regime has been found wanting:

> Not only has it been the first issue but it is the most important interconnect issue. It is the building block of a competitive telecommunications environment. Four years have passed since liberalisation of the market, and the PSTN interconnect price has not been set. It looks as though we have at least two years to wait until the price is set. This delay is unacceptable.[106]

2.144 The PSTN access disputes were notified to the ACCC by AAPT on 14 December 1998 and by Primus on 5 March 1999. Since that time, the ACCC conducted the arbitration process (with a suspension of active steps in the arbitrations to consider Telstra's second access Undertaking between 24 September 1999 and 10 July 2000) and published its final determinations in September 2000. Telstra then applied to the Australian Competition Tribunal for a complete re-hearing of the ACCC's determinations.

2.145 The joint carriers submission stated that, based on an article in the *Australian Financial Review*, Telstra was seeking from the Tribunal a price of 3.6 cents per minute for access to its PSTN.[107] According to the joint carriers, this would be an increase on the ACCC rates of 200 per cent. However, at the public hearing, Telstra denied that it was seeking this price.[108]

2.146 Further, the joint carriers contended that the manner in which Telstra has attempted to appeal the ACCC decision has been deliberately designed to exert maximum delay and maximum pressure on others.[109] They asserted that if Telstra was concerned with the ACCC's methodology, it could have appealed the ACCC's decisions when its two Undertakings on the PSTN interconnect were rejected:

> Instead, they appealed arbitration decisions against two of the smaller players, AAPT and Primus, because they thought that, if they could establish a precedent against two smaller carriers that were not as well resourced, that would give them the maximum chance of winning. They did that in October 2000. So there was a year and a half when they did not appeal when the ACCC's decisions were perfectly transparent to them.[110]

2.147 Mr Havyatt from AAPT contended that:

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105 *Proof Committee Hansard*, Sydney, 12 September 2001, p 10.

106 *Proof Committee Hansard*, Sydney, 12 September 2001, p 8.

107 Optus, AAPT, Primus, and Macquarie Corporate Telecommunications, Joint Submission 7, p 9.

108 *Proof Committee Hansard*, Sydney, 12 September 2001, p 33.

109 *Proof Committee Hansard*, Sydney, 12 September 2001, p 13.

110 *Proof Committee Hansard*, Sydney, 12 September 2001, p 13.

> … if the access providers are grossly concerned about the need for review, they would be well advised to use the pathway of an access undertaking to get access to review and that what should be left to arbitration are relatively minor and simple issues that should not need the process of review.[111]

2.148 In its evidence to the Committee, Telstra argued that its Tribunal review was launched in accordance with legal rights conferred by the Parliament:

> Telstra has appealed the ACCC's decision on pricing in this case because we believe the regulator is wrong. In particular, we believe, based on legal and economic review and also on the effect of the decision on our ability to invest going forward, that the ACCC has failed to adequately take into account the true costs of operating large infrastructure in a country as large and thinly populated as Australia. As a result, we believe the decision does provide our competitors with access below their true and efficient costs. If we are right in this and if this does inhibit us going forward, the result is not only that we cannot recover our costs but that we cannot easily afford to invest in infrastructure.[112]

2.149 Further, Telstra suggested that it is pursuing the appeal because of the precedent that flows through into asset valuation and pricing methodology going forward. It considered that this is a necessary path that the industry has to go down to achieve certainty.[113]

2.150 The joint carriers argued that the consequences for the telecommunications industry should Telstra succeed in its appeal to the Australian Competition Tribunal are dire.[114] Interconnect prices would then be higher than they were in 1997 and the gains of the last four years from lower international telephony, national long distance, and fixed to mobile phones will be undone. Carriers and service providers will go out of business resulting in re-monopolisation of the copper network and an increase in Telstra's relative share of industry profits from 89 per cent to over 95 per cent.

2.151 However, Telstra submitted that:

> … the very reason that [the] protagonists are putting these matters forward at this time is that they feel that the court will find that the regulated prices being charged are not truly in the interests of end users. Were they to think otherwise they would have nothing to fear from this process. Ensuring prices that support investment is as important to Australian consumers as it is to Telstra's two million shareholders. A failure to do so will inevitably compromise and ultimately undermine Telstra's ability to provide the services the community demands and can legitimately expect.[115]

2.152 Under section 152CH of the Trade Practices Act, the Minister has the power to make a Ministerial pricing determination which sets out principles dealing with price-related terms and conditions relating to the standard access obligations. Such a determination is a disallowable instrument. The Minister has never exercised his power under this section of

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111 *Proof Committee Hansard*, Sydney, 12 September 2001, p 17.

112 *Proof Committee Hansard*, Sydney, 12 September 2001, p 30.

113 *Proof Committee Hansard*, Sydney, 12 September 2001, p 33.

114 Optus, AAPT, Primus, and Macquarie Corporate Telecommunications, Joint Submission 7, pp 12-14.

115 *Proof Committee Hansard*, Sydney, 12 September 2001, p 30.

the Act but Optus and the joint carriers recommended that he do so now in relation to PSTN interconnect prices.[116] They advocated that the price be set based on the ACCC's thorough consideration of the issues.[117]

> What we are arguing here today is that specific action is needed on the PSTN interconnect issue. The Minister has the power under the act to set the price, and we think that the broader interest requires him to exercise that right or for the parliament to do so.[118]

2.153 The joint carriers argued that the fact that the Minister's power exists, demonstrates Parliament's intention that the Minister should retain a degree of residual power in relation to pricing and access issues. They submitted that this is appropriate in order for determinations to be made in the broader public interest, in exceptional circumstances and that such a point has been reached in relation to PSTN interconnect dispute. They suggested that the current process has essentially failed, judged against Parliament's original intentions. Without intervention, instability and uncertainty in the industry will continue, with consequent harm to consumer welfare.[119]

2.154 However, the Productivity Commission's draft report suggests that the Minister's power in this respect:

> … is largely one that carried over from the prior regulatory regime for telecommunications, in which prescriptive pricing was a feature.[120]

2.155 Further, the Productivity Commission recommended the removal from the Trade Practices Act of the discretion for Ministerial pricing determinations on the following grounds:

> … [it] fails to meet good design criteria, since there is no specified requirement for consultation or public disclosure of reasons for any decision, nor any mechanisms — other than Parliament itself — to challenge such determinations. Nor is it clear why this single matter — access pricing — should be subject to discretionary Ministerial intervention, when the ACCC already performs this function as part of arbitrations.[121]

2.156 The ACCC informed the Committee that it does not generally support price setting by the Minister:

> I am a bit concerned that the Minister acquires that power: generally ministers then end up being lobbied by everyone. The whole point of having independent bodies

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116 Cable & Wireless Optus, Submission 6; Optus, AAPT, Primus, and Macquarie Corporate Telecommunications, Joint Submission 7, p 20.

117 *Proof Committee Hansard*, Sydney, 12 September 2001, p 8.

118 *Proof Committee Hansard*, Sydney, 12 September 2001, p 13.

119 Optus, AAPT, Primus, and Macquarie Corporate Telecommunications, Joint Submission 7, p 20.

120 Telecommunications Competition Regulation, Productivity Commission, Draft Report, March 2001, p 9.15.

121 Telecommunications Competition Regulation, Productivity Commission, Draft Report, March 2001, p 9.16.

> is to remove ministers and governments from having to get caught up in the detail of particular prices that are the subject of contention between interest groups. So in broad principle I would prefer to see these sorts of decisions being made by regulators, with certain rights of appeal to courts.[122]

2.157 As an alternative to the Minister exercising his power under section 152CH, the joint carriers suggested that the bill itself be amended to set the rate:[123]

> The time has come for the Minister to exercise the power that the Act grants to him to set the price; alternatively, this Committee should recommend that the current bill be amended to set the PSTN interconnect price based on the ACCC's thorough consideration of the issues.[124]

2.158 Whilst the Committee acknowledges the level of concern over Tribunal reviews and the dispute over the PSTN interconnect price, it recognises too that this bill is not the mechanism through which fundamental changes to the telecommunications access regime should be made. Further, the Committee considers that it would be inappropriate for it to recommend such actions as those requested by the joint carriers in isolation from a complete review of the regime and prior to the release of the Productivity Commission's final report.

Compulsory Undertakings in certain circumstances

2.159 In its submission, the ACCC discussed an additional amendment which it considered should be added to the bill to improve the access regime.[125] It suggested that it be allowed to impose compulsory Undertakings in relation to some services.

2.160 An access Undertaking (section 152BS of the Act) is, in essence, a document in which the carrier/carriage service provider states that it will do, or refrain from doing, certain things in relation to a declared service. This is set out in the terms and conditions of the Undertaking.

2.161 Currently, Part XIC of the Act provides for voluntary access Undertakings from access providers, which the ACCC must apply in a relevant arbitration. While intended to provide more flexibility to access seekers and reduce their exposure to arbitral determinations, voluntary Undertakings have, in practice, provided access providers with a further ability to delay access to services. The ACCC suggested that this is because of the optional nature of the Undertaking, which encourages access providers to submit unreasonable Undertakings. This has the effect of delaying other regulatory processes, including arbitrations.

2.162 Since the introduction of Part XIC of the Act, the ACCC has received four sets of Undertakings. All of the Undertakings were lodged by Telstra. Each of the Undertakings specified the terms and conditions on which Telstra was prepared to comply with its standard

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122 *Proof Committee Hansard*, Sydney, 12 September 2001, p 38.

123 Optus, AAPT, Primus, and Macquarie Corporate Telecommunications, Joint Submission 7, p 20.

124 *Proof Committee Hansard*, Sydney, 12 September 2001, p 8.

125 Australian Competition and Consumer Commission, Submission 8, pp 11-12.

access obligations in respect of the relevant service but all four were not accepted by the ACCC.

2.163 A possible amendment to the Act would allow the ACCC, in limited cases, to require a carrier or carriage service provider to submit an access Undertaking in relation to a declared service where it is in the long-term interests of end-users. In the event that the carrier or carriage service provider fails to comply with the direction, or the ACCC rejects the access Undertaking proposed by the carrier or carriage service provider, the ACCC may, after conducting a public consultation process, draft and accept an access Undertaking with which the carrier or carriage service provider must comply, provided that the conditions in subsection 152BV(2) are satisfied.[126]

2.164 The ACCC submitted that amendments in the bill which will introduce multilateral arbitration, information sharing and the publication of determinations, will assist in expediting the arbitral process, and somewhat increase the level of information available to the industry. However, they still mean that bilateral arbitrations must occur for terms and conditions that are essentially multilateral:

> … the problem that we are dealing with here is that a lot of the time you are dealing with fairly simple generic services that Telstra provides to a whole range of other carriers, basic interconnections—so many cents per minute to interconnect with Telstra's network or so many cents per minute to connect to the mobile network—or at what price Telstra sells local calls at a wholesale rate to other people.
>
> It has turned out that there is no particular reason why the price that Telstra charges for each of these services should differ between carriers. There might be some volume discounts but basically you are just dealing with a simple service. … We are saying that in these cases the price should get set across the range of all comers.[127]

2.165 The ACCC submitted that a compulsory Undertaking would provide additional benefits by promoting industry self-regulation and ensuring that issues that are of general concern to the industry are dealt with on a transparent basis. It would therefore not only lead to more timely outcomes, but promote greater certainty for interconnection pricing:

> In the ACCC's view, such a provision would have provided an efficient mechanism for settling the access price for the Domestic PSTN Originating and Terminating Services where the ACCC has both performed an extensive assessment of two undertakings proposed by Telstra and conducted a number of bilateral arbitrations in relation to the services. It would also have resulted in more expeditious outcomes in obtaining fair and reasonable conditions for access to the Unconditioned Local Loop service. [128]

2.166 The Committee suggests that the Government consider this amendment when it conducts its review of the Productivity Commission report.

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126 Subsection 152BV(2) provides for the procedures for considering an Undertaking and the matters to consider in accepting or rejecting an Undertaking.

127 *Proof Committee Hansard*, Sydney, 12 September 2001, p 38.

128 Australian Competition and Consumer Commission, Submission 8, p 11.

Conclusion

2.167 In the light of the pending Productivity Commission report on Telecommunications Competition Regulation, the Committee concludes that the bill should be passed by the Senate. The Committee urges the Government to consider the issues raised with respect to merits review which are more fundamental to the regime in association with its response to the Productivity Commission report.

Recommendation

The Committee recommends that the bill be passed without amendment.

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Senator Alan Eggleston

Chair