LABOR SENATORS' MINORITY REPORT

TRADE PRACTICES AMENDMENT (TELECOMMUNICATIONS) BILL 2001

1.1 Labor Senators do not oppose the amendments to the telecommunications specific regulation in the *Trade Practices Act 1974*, although the measures contained in the Bill are restricted and long overdue. They address problems that have been evident for a considerable length of time.

1.2 The Senate Committee process has elucidated one point of particular concern to Labor Senators. The Bill seeks to streamline the telecommunications access regime by (amongst other things) limiting the evidence available on appeals to the Australian Competition Tribunal (ACT) generally to that available to the Australian Competition and Consumer Commission (ACCC).[1]

1.3 The Senate Standing Committee for the Scrutiny of Bills noted[2] that the new section 152DOA "specifies the matters to which the ACT may have regard when it is conducting a review of a determination of the ACCC in arbitrating a telecommunications access dispute. At present, review by the Tribunal is a re-arbitration of the dispute, and the Tribunal may have regard to any information, documents or evidence which it considers relevant, whether or not those matters were before the ACCC in the course of making its initial determination. Proposed new section 152DOA will, in effect, limit the Tribunal to consideration of information, documents or evidence which were before the ACCC initially."[3]

1.4 The Explanatory Memorandum explains the need for this amendment by stating 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".[4]

1.5 Notably, in light of the evidence of witnesses to this Inquiry, the Explanatory Memorandum also states that:

> Although this option should reduce delay in the review of Commission decisions, it will reduce the extent of Tribunal review. On balance, it is considered that the limitations on the review are justified on the basis of the length and depth of the Commission's arbitration process.

1.6 A number of witnesses to this Inquiry have sought abolition of the merits review to the ACT, including the ACCC. The carriers AAPT Ltd, Optus, Primus Telecom and Macquarie Corporate Telecommunications collectively submitted that the Committee should recommend that:

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1 Item 19 of Schedule 1 to the Bill inserts new section 152DOA in the *Trade Practices Act 1974*.

2 In Alert Digest No. 10 of 2001.

3 Alert Digest No. 10 of 2001 at p.14.

4 Explanatory Memorandum, pp.13-14.

> … the bill be amended to prevent a complete rehearing of interconnect issues by the Australian Competition Tribunal [because] access pricing decisions are complex and take time. The problem is delay. The ACCC spends years making a decision and an unhappy party has the opportunity to have the matter completely reconsidered in another forum [the ACT]. To draw an analogy, it is like the players in a football game getting to the end of the game and the losing party being able to elect to replay the game.[5]

1.7 The carriers argue that to avoid unacceptable delay in a fast-moving market, it is only feasible for one body to consider the basic matters[6] and as long as there are two opportunities for hearings on the fundamental matters, the opportunity for delay remains.[7] They consider that the integrity of the ACCC process is adequately protected by the avenues of judicial review to the Federal Court or the High Court on matters of law, which is comprehensive and searching into the reasoning and analysis of ACCC decision making.[8]

1.8 Delay is a considerable concern for the industry, particularly as it relates to price determinations, because it creates lengthy uncertainty,[9] which delays investment decisions.[10] Furthermore, the joint carriers consider the ACCC better placed to determine these matters because it has the background expertise and experience, whereas the ACT has never considered a telecommunications pricing issue – the current rehearing will be its first consideration of these matters.[11]

1.9 The ACT has no resources of its own. The Federal Court manages funds appropriated to the tribunal. Administrative support for the Tribunal is provided by the Federal Court.[12] Section 43B does however provide for the employment of consultants to perform services for the Tribunal.

1.10 Arbitrations are conducted by three members of the Australian Competition and Consumer Commission. Unless the parties agree otherwise, arbitrations conducted by the Commission are in private.[13] Legal representation in such arbitrations is permitted.

1.11 The Commission has strong powers to give such directions as are necessary to facilitate these negotiations.[14] These include directions that relevant information be disclosed or research carried out. Like the ACT,[15] the Commission is not bound by the rules of

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5 Mr McCulloch (Optus) representing joint carriers, Proof Committee Hansard, 12/9/01, p.8.

6 Proof Committee Hansard, 12/9/01, p.8.

7 Proof Committee Hansard, 12/9/01, p.9.

8 Proof Committee Hansard, 12/9/01, p.8.

9 Mr Havyatt (AAPT) representing joint carriers, Proof Committee Hansard, 12/9/01, p.10.

10 Ibid. at p.12.

11 Ibid.

12 See http://www.federalcourt.gov.au/aboutct/aboutct_act.html

13 Section 152CZ, *Trade Practices Act 1974*.

14 Section 152CT, *Trade Practices Act 1974*.

15 The ACT is not bound by the rules of evidence: Federal Court of Australia, Annual Report 1999/2000, p.54.

evidence, and may inform itself of any matter relevant to the dispute in any way it thinks appropriate.[16]

1.12 Before making a determination in the arbitration of a Telecommunications access dispute the Commission must give a draft determination to the parties. When the Commission makes a determination it must give the parties reasons for making its decision.[17]

1.13 Under section 152DO, a review by the ACT is a re-arbitration of an access dispute. In a re-arbitration, the ACT has the same powers as the ACCC. Section 152DQ provides that a party to an arbitration can appeal to the Federal Court from the ACT on questions of law.

1.14 Another considerable concern for the witnesses representing the carriers was that the review de novo by the ACT can be utilised for 'regulatory gaming', that is, using the regulatory resources and muscle of the organisation at every opportunity to frustrate competitive entry through exploiting the regulatory regime to try to exhaust competitor resources.[18] The merits review by the ACT seems to be contrary to the interests of competition because delay in the pricing regime is detrimental to competitive interests.[19]

1.15 Optus indicated that there have been problems with the ACT process due to a lack of transparency, whereas the ACCC process has been "open and transparent", and the high costs in legal terms.[20]

1.16 In Australia, the length and detail of the first instance process by the ACCC questions the need for a merits review. It suggests that judicial review is sufficient.[21] Indeed this was the position of the ACCC.[22]

1.17 Primus Telecom argued that another concern with the merits review is that it may tend to have an intimidating effect on smaller access seekers. That is, if even relatively larger players are being taken to the tribunal, and the matter is being dragged out from scratch, the smaller access seekers will be deterred from even taking a matter to the commission.[23]

1.18 The merits review is presently as of right. There is no restriction of frivolous or vexatious matters for the de novo review. It has been suggested that this encourages 'regulatory gaming' as Telstra would be able to bring a review before the tribunal for a tactical or strategic delay to competitors and would-be access seekers.[24]

1.19 Vodafone supported the merits review. It stated that:

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16 Section 152DB, *Trade Practices Act 1974*.

17 Section 152CP, *Trade Practices Act 1974*.

18 Joint carriers, Proof Committee Hansard, 12/9/01, p.13.

19 Mr Havyatt, AAPT Ltd, Proof Committee Hansard, 12/9/01, p.21.

20 Mr Francis, Optus, Proof Committee Hansard, 12/9/01, p.15.

21 Proof Committee Hansard, 12/9/01, p.16.

22 Prof. Fels, ACCC, Proof Committee Hansard, 12/9/01, p.37.

23 Mr Nicholls, Primus Telecom, Proof Committee Hansard, 12/9/01, p.25.

24 Mr Nicholls, Primus Telecom, Proof Committee Hansard, 12/9/01, p.26.

> We are supportive of a robust appeals process, but we do recognise that the current process of being able to essentially start the whole process over again through the ACT probably goes a little further than necessary. We have suggested that we are reasonably relaxed about the bill's approach in limiting evidence to that which is initially provided to the ACCC. … We support the notion of being able to go to the ACT but, as we have said, we are relaxed about limiting the scope of being able to completely relitigate the issue in front of the ACT.[25]

1.20 Vodafone did not object to the restriction that the Bill places on the information that can be provided to the ACT to the information that was originally provided to the ACCC. It saw the change as a trade-off:

> [W]e are trying to shorten the time frame for the appeal process, and putting restrictions on the types of new information that can be provided actually stops parties potentially gaming the system by using the appeal process to extend the process. We see that reform as a trade-off: while we might lose some things by not being able to provide new information, it does get the process finished sooner so that the industry can get those issues out of the way and move forward.[26]

1.21 Furthermore Vodafone considers the enhanced appeals process (that is the merits review to the ACT) as being an important part of the framework that specifically regulates telecommunications companies and private investors like Vodafone.[27]

1.22 Telstra gave evidence that the Bill addresses the most immediate problems faced by the industry but does not ask for a premature overhaul of the industry prior to the finalisation of the Productivity Commission review.[28] Telstra questioned the motivations of its competitors in seeking such action which goes beyond the intent of the Bill.[29]

1.23 The Australian Council for Infrastructure Development (AusCID, the principal industry association representing the interests of companies and organisations owning, operating, building, financing, designing and otherwise providing advisory services to private investment in Australian public infrastructure) submitted to the Committee that:[30]

> AusCID considers that the removal of merits reviews are not in the interests of any of the industry players or consumers in the long term. To remove merits review would be akin to "throwing the baby out with the bathwater". … The provision for merits review acts as an effective "insurance policy" against any mistakes that may result from the regulatory system.

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25 Mr Stiffe, Vodafone, Proof Committee Hansard, 12/9/01, p.2.

26 Mr Kennedy, Vodafone, Proof Committee Hansard, 12/9/01, p.5.

27 Mr Stiffe, Vodafone, Proof Committee Hansard, 12/9/01, p.6.

28 Telstra, Proof Committee Hansard, 12/9/01, p.29.

29 Telstra, Proof Committee Hansard, 12/9/01, p.30.

30 AusCID, Submission 10, p.2.

1.24 Even though efficiency and timeliness are important in regulatory decision making processes, they are not the only objectives, and removal of the merits review might have some undesirable consequences, including:[31]

- Deterring investment in regulated or potentially regulated telecommunications infrastructure because of a perceived regulatory risk (thus increasing costs of raising capital and reducing expenditure on investment);
- Setting an damaging precedent for other infrastructure industries affected by regulated decisions;
- Introducing uncertainty about investment, or returns on investment, and reducing incentives for continued investment;
- Eroding the accountability of the decision maker (ie the ACCC) that should accompany discretion where the regulator has a wide scope in which to make decisions.

1.25 The Network Economics Consulting Group also supported retention of merits review of the ACCC's exercise of its powers because the scope of the ACCC's powers, the impact of its decisions and particularly the significant economic consequences, warrant a high degree of scrutiny and availability of merits review.[32] NECG's arguments supported those of AusCID. NECG's submission argued that merits review is warranted because:[33]

- The risk of error occurring in regulatory decision-making and the costs of such error are very high;
- Efficient investment decisions require an understanding of the approach that will be adopted by the regulator, so that investors can be confident that it will not be subject to ill-founded or arbitrary decision-making;
- Appeals on questions of law do not provide a sufficient foundation for the confidence necessary for investment.

1.26 The Department of Communications, IT and the Arts submitted that the reasons for including the amendment in the Bill limiting the information that can be brought before the ACT instead of the abolition of the appeal for the ACT are that:[34]

- The provision strikes a balance between competing interests;
- Merits review has, since its introduction in 1997, been considered an important element of the package as a whole;
- Merits review is a presumed right for administrative decisions, and is considered appropriate given the nature and breadth of the ACCC's powers;
- fundamental reforms such as abolition of the merits review will not be made prior to consideration of the Productivity Commission's findings.

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31 AusCID, Submission 10, pp.3-4.

32 Network Economics Consulting Group Pty Ltd (NECG), Submission 9.

33 Network Economics Consulting Group Pty Ltd (NECG), Submission 9, p.4

34 DCITA, Proof Committee Hansard, 12/9/01, pp.45-48.

Conclusions

1.27 On balance, Labor Senators are not persuaded, at this stage, to oppose the Government's legislation. Notwithstanding doubts regarding the merits review by the ACT, including the capacity and appropriateness of the ACT to fulfil that role and the timeliness of outcomes, Labor Senators consider it premature to make such a substantial change to the process prior to consideration of the Productivity Commission inquiries into Telecommunications Competition Regulation and the National Access Regime, both of which will report within the next month.

1.28 Clearly there is some dissatisfaction with the present system of merits review, however in view of the different positions of witnesses and submissions to the Inquiry, consideration of the Productivity Commission's detailed analysis of the issue would be worthwhile prior to deciding on the most appropriate course of action.

Recommendation

Labor Senators recommend that the issue of merits review by the Australian Competition Tribunal as a part of the telecommunications access regime be reconsidered in the context of the Productivity Commission's findings.

Senator Mark Bishop (A.L.P., W.A.)