

# Telstra Corporation Limited

## Submission to Senate Environment, Communications, Information Technology and the Arts Legislation Committee

### *Trade Practices Amendment (Telecommunications) Bill 2001*

#### **1 Overview**

- 1.1 Telstra is supportive of what it understands to be the policy intentions behind the amendments to Part XIC of the *Trade Practices Act 1974* which have been proposed by the *Trade Practices Amendment (Telecommunications) Bill 2001*.
- 1.2 Telstra agrees that there is a pressing need to streamline the operation of the telecommunications access regime and to ensure that it works more effectively and efficiently than it has done to date. In particular, Telstra supports legislative action to actively further the objectives that:
- (a) wherever possible, access arrangements should be resolved by bilateral commercial negotiation; and
  - (b) failing commercial agreement, arbitrations of disputes notified to the Australian Competition and Consumer Commission should be resolved more expeditiously.
- 1.3 It is therefore of paramount importance to the efficient and equitable operation of the telecommunications access regime that the Bill give full and proper effect to the Government's worthy policy intentions. To this end, the proposed legislative provisions must be both facilitative of these goals and precise in their operation.
- 1.4 If appropriate, Telstra will provide to Committee Members, either at the forthcoming hearing or as soon as possible beforehand, further commentary on the provisions of the Bill.

#### **2 Background**

- 2.1 Part XIC was introduced into the Act in 1997 to provide a telecommunications-specific access regime separate from the general access regime set out in Part IIIA of the Act. Its fundamental purpose was to ensure that new entrants to the increasingly competitive Australian telecommunications market were able to secure access to the networks and services of existing carriers on equitable and economically efficient terms and conditions.
- 2.2 Telstra's experience of Part XIC since 1997 has increasingly led it to believe that the access regime as presently structured and as implemented by the ACCC is not meeting its original aims. As a result:
- (a) commercial agreements are not being reached as often or as early as they should because of the opportunities for, and benefits to be gained by, "regulatory gaming";

- (b) access disputes are being notified before commercial negotiations have been allowed to run their course, or even despite the fact that commercial agreements have in fact been signed; and
- (c) the ACCC is neither using effective case-management techniques nor finalising arbitrations on reasonable timescales.

2.3 Telstra understands that this assessment of Part XIC is generally shared within the industry and is increasingly recognised by the Government.

2.4 Telstra is therefore pleased that many of the changes to Part XIC that it advocated at the Ministerial / Industry roundtable conference on 30 May 2001 have been adopted in one way or another.

### **3 General support for legislative proposals**

3.1 There are many proposals for amendments to Part XIC included in the Bill that Telstra believes have a sensible and valuable policy objective. Telstra notes its general support for the amendments proposed by the following draft provisions:

- (a) section 152QA, requiring the ACCC to develop pricing principles at, or as soon as practicable after, the time at which new services are declared (Schedule 1, Item 1);
- (b) section 152BBD, requiring the ACCC to have regard to the desirability of the parties reaching commercial agreement in a timely manner, when exercising its existing powers to give directions in relation to, and to mediate at, commercial negotiations between the parties (Schedule 1, Item 2);
- (c) section 152CLA, requiring the ACCC to have regard to the desirability of resolving arbitrations in a timely manner, including through the use of alternative dispute resolution methods (Schedule 1, Item 3);
- (d) section 152CRA, allowing the publication of arbitration determinations and reasons in a form that suitably protects commercial confidentiality (Schedule 1, Item 7);
- (e) section 152CV and related provisions, allowing the Commission to be constituted by a single Commissioner for the arbitration of Part XIC disputes (Schedule 1, Items 8-11);
- (f) section 152DBA allowing the sharing of information between arbitrations in a manner that suitably protects commercial confidentiality (Schedule 1, Item 14); and
- (g) section 152DMA allowing for the conduct of joint arbitration hearings where separate dispute notifications raise common issues (Schedule 1, Item 15).

3.2 In relation to other proposed changes, while Telstra is supportive of the concepts and policy objectives underlying the following amendments, Telstra believes that the policy objectives could be better expressed. This applies to:

- (a) section 152DNA(2), which attempts to counteract any incentive for early dispute notification (Schedule 1, Item 16);

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- (b) section 152DOA, where we understand the objective is to reduce the length of appeals to the Australian Competition Tribunal by limiting the material which the Tribunal may consider in review of an ACCC determination to only that which was available to the ACCC (Schedule 1, Item 19); and
- (c) sections 152DPA and 152DR, which seek to achieve consistency for the status of a Tribunal decision during an appeal to the Federal Court with that of an ACCC determination during review by the Tribunal.
- 3.3 There are aspects of implementation of the Government's policy objectives which Telstra would want to ensure are optimally addressed by the detail of the proposed amendments. Amendments proposed by the Bill must operate to encourage both bilateral commercial settlement without recourse to arbitration and the timely resolution of notified disputes.
- 3.4 Of course, while the Government's policy objectives of encouraging persistent negotiation and discouraging premature dispute notification are clearly sensible, legislation alone cannot achieve these outcomes. Ultimately the way in which Part XIC operates will be highly dependent on the manner in which the ACCC undertakes its legislative functions in practice.
- 3.5 Telstra believes that the ACCC has not adopted best practice case management techniques in its handling of most of the dispute notifications that have been lodged to date. Accordingly, Telstra considers that pro-active and rigorous case management would make more efficient use of public resources and enable parties to achieve earlier commercial certainty.

#### **4 Conclusion**

- 4.1 Subject to the above comments, Telstra recommends that the Committee support the policy intention behind the *Trade Practices Amendment (Telecommunications) Bill 2001* and focus its attention at the forthcoming hearing on whether the specific amendments proposed in that Bill will achieve their objectives or require any drafting modification.

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