Telstra Corporation Limited

Information on the availability on merits reviews in international jurisdictions

Senate Environment, Communications, Information Technology and the Arts Legislation Committee

Trade Practices Amendment (Telecommunications) Bill 2001

13 September 2001

1 INTRODUCTION

1.1 At the Senate Committee hearing on 12th September 2001 on the *Trade Practices Amendment (Telecommunications) Bill* 2001, the Chairman, Senator Eggleston, requested Telstra to provide the Committee with some written background material on international jurisdictions which incorporate merits reviews from administrative decision making into their laws.

1.2 Attached, in Appendix A, is material from Telstra's final submission to the Productivity Commission dated July 2001 which shows that merits review is provided for in telecommunications matters in countries such as the United Kingdom, the United States and Canada, and is due to be implemented in the European Union in the next few months.

1.3 The material shows that, contrary to the views of some of the witnesses who gave evidence to the Committee, merits based appeals are not out of character or unusual around the world, particularly when complex telecommunications issues are being determined.

1.4 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. Despite some parties' assertions to the contrary, 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 under Part XIC of the *Trade Practices Act* 1974. As outlined in the immediately following Section, it would also be inconsistent with the Guidelines of the Administrative Review Council ("ARC").

2 ADMINISTRATIVE REVIEW COUNCIL

2.1 Were the issue of merits review to be referred to the ARC, Telstra is confident that the ARC would consider that access pricing determinations by the ACCC are in the category of decisions that should be subject to full merits review. This is clear from reading the ARC's Guidelines.

2.2 According to the ARC's Guidelines, the ARC's primary position is that:

> "… an administrative decision that will, or is likely to, affect the interests of a person should be subject to merits review. That view is limited only by the small category of decisions that are, by their nature, unsuitable for merits review, and by particular factors that ***may*** justify excluding the merits review of a decision that otherwise meets the Council's test".[1]

2.3 There can be no doubt that a decision such as an arbitration determination under Part XIC meets the ARC's *prima facie* test - it clearly affects the interests of the parties. Furthermore, in Telstra's view, Part XIC decisions do not fall within any of the categories that the ARC considers actually ***are*** unsuitable for merits review.[2]

2.4 In this regard, the ARC Guidelines set out factors that ***may*** justify excluding merits review, being grouped as follows: "factors lying in the nature of the decision", "factors lying in the effect of the decision" or "factors lying in the costs of the review of the decision".[3]

2.5 Self-evidently, Part XIC decisions will not fall within any of the classes included within the first two groups. Moreover, a careful reading of the ARC's Guidelines, coupled with an examination of the example it cites, clearly demonstrates that Part XIC decisions would not fall within the third category either. The full text of that class reads as follows:

> "This exception covers decisions that are the product of processes that would be time-consuming and costly to repeat on review.
>
> Such processes include public inquiries and consultations that require the participation of many people. If review of the subsequent decisions was undertaken, the nature of the review process would be changed from the normal adjudicative decision-making process (of, say, the AAT), to a greatly expanded and time-consuming one.
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> For example, the Council has advised that decisions made under the *Australian Heritage Commission Act 1975* to enter, or not to enter, a place on the Register of the National Estate would be inappropriate for external merits review, if the Act was amended to provide for those decisions to be made by a process involving public hearings".[4]

2.6 The *Australian Heritage Commission Act* 1975 (Cth) example highlights the type of case that the ARC had in mind in postulating a possible ground of exclusion. In that case it was proposed that decisions should be made only after public hearings in which it was expected that there might be potentially many thousands of persons who would wish to make submissions. Part XIC decision-making is clearly not of that nature - generally there are very few people involved (usually just two parties represented each by a small number of personnel).

2.7 In any case, the ARC's clear preference is for merits review *whenever* an administrative decision will, or is likely to, affect the interests of a person. Telstra

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1 Administrative Review Council, *What Decisions Should be Subject to Merits Review?*, July 1999 (available at: http://law.gov.au/aghome/other/arc/arcnew/guidelines.html), paragraph 2.1.

2 As set out in Chapter 3 of the Guidelines.

3 Chapter 4 of the Guidelines.

4 Guidelines, paragraphs 4.53-4.55.

does not believe that there is anything in the nature of a Part XIC decision to detract from this rule.

3 NEGOTIATE - ARBITRATE – REARBITRATE MODEL?

3.1 From an administrative law perspective, the mandatory nature of an ACCC final determination in relation to a declared service is actually an 'administrative decision' rather than an arbitral one. That is, the parties to a dispute to not voluntarily submit to a commercial arbitral process, but instead the arbitration is the means by which the ACCC determines terms and conditions for declared services. This is no different in effect from a decision in respect of an Undertaking. It is an administrative decision by the ACCC.

3.2 Under a commercial arbitration, the parties voluntarily submit to an agreed process and bestow powers upon an arbitrator to make certain decisions based on a framework and parameters which the parties have imposed on the arbitrator. In contrast, under an administrative decision making process (such as the making of a final determination under Part XIC), the parties have no option about whether to participate in the process.

3.3 Moreover, the ACT's review of the ACCC's determination is a review of the ACCC's first tier administrative decision, although it is still appropriately characterised as a hearing de novo. These are very important distinctions.

4 INTERNATIONAL JURISDICTIONS

4.1 Appendix A provides details about the approach to merits review in other countries, including the European Union, the United Kingdom and the United States. That analysis shows that merits review is commonplace for regulators' decisions in other jurisdictions.

4.2 One further jurisdiction considered, is New Zealand. Telstra notes that, AAPT Limited, one of the submitters to the Senate Committee's current Inquiry, has strongly advocated the removal of merits review rights. Telstra finds these claims extremely surprising in view of the very different views expressed by its parent company, Telecom New Zealand, across the Tasman.

4.3 Telecom New Zealand recently made a *Submission in Response to the Draft Report* to the New Zealand Government's Ministerial Inquiry into Telecommunications, 24 July 2000, on the New Zealand access regime. It is important to reproduce Telecom New Zealand's comments on merits review at length. It stated (page 17):

> The process should involve a right of full merits appeal on final determinations. Lack of appeal rights is unprecedented and represents a fundamental departure from the long standing principle that decisions by the executive arm of Government that impact on the rights of citizens should always be subject to the scrutiny of an independent judiciary.
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> Telecom notes that in Australia … all decisions [under Part XIC] that involve the terms and conditions of access are subject to full merits review. … *It would be difficult to understand why any telecommunications regime should be subject to weaker scrutiny.* …
>
> … arbitration is a voluntary process between two private parties looking to breach a deadlock.

> There is a fundamental difference between such voluntary arrangements whose terms include the lack of appeal right and the unfettered powers of a Government agency.
>
> The proposed [New Zealand] regime is compulsory, and provides participants no control over the issues to be determined or the method of determination. The parties' circumstances under these conditions cannot therefore be properly compared to those prevailing in commercial arbitration.

4.4 Telstra finds it remarkable that Telecom New Zealand so strenuously supports the need for merits based appeal from access determinations in one jurisdiction, New Zealand, and indeed refer to the incorporation of merits review in the Australian telecommunications access regime so favourably, while at the same time in another jurisdiction, Australia, allow its subsidiary to refute the need for merits review from access determinations.

5 PART IIIA

5.1 Part IIIA of the *Trade Practices Act* 1974, which relates to all nationally significant infrastructure in Australia, is very similar to the existing telecommunications access regime in that both grant wide discretionary powers to the ACCC to make determinations in relation to access pricing. The telecommunications access regime in Part XIC, was enacted two years after Part IIIA, and draws heavily on the framework put in place under Part IIIA.

5.2 Part IIIA recognises that the ACCC should be accountable for its decisions in the form of a merits review of its pricing and other determinations to the Australian Competition Tribunal. There is no reason why merits review of the ACCC determinations on telecommunications should not be subject to the same checks and balances.

6 IN-CAMERA HEARINGS

6.1 Finally, Telstra notes that twice during the hearing on 12 September, the Committee conducted in-camera hearings with the parties who made the joint carrier submission, notably, Cable & Wireless Optus, AAPT Limited, Primus Telecommunications Pty Ltd and Macquarie Corporate Telecommunications Pty Limited.

6.2 Telstra requests that the nature of these in-camera hearings be made known to it so that if they relate to matters in which Telstra's has an interest, Telstra can then provide any relevant evidence to the Committee to assist it in its deliberations.

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Director, Regulatory

12 September 2001

Appendix A – Merits Review – Jurisdictional Analysis

EU and EU-based jurisdictions

In discussing the EU and EU-based jurisdictions, it is important to consider the current *Proposal for a Directive of the European Parliament and of the Council on a common regulatory framework electronic communications networks and services.*[5] This draft Directive has been approved by the European Council of Ministers and is now before the European Parliament for final approval.

The preamble to the proposed Directive states:

> "The existing legislative framework was primarily designed to manage the transition from monopoly to competition and was therefore focused on the creation of a competitive market and the rights of new entrants. It has been successful in achieving those aims. But in part because of the success of liberalisation at European level, the market is now changing with ever-increasing speed. This was foreseen by the current legislative framework, which required the Commission to review the operation of the Directives making up the regulatory framework in the light of developments in the market, the evolution in technology and the changes in user demand.
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> The new policy framework needs to take account of these developments, in particular the convergence between telecommunications, broadcasting and IT sectors. It seeks to reinforce competition in all market segments, while ensuring that the basic rights of consumers continue to be protected. It is therefore designed to cater for new, dynamic and largely unpredictable markets with many more players than today."

This Directive, to which all relevant European nations will be subject, provides for full review on the merits. Article 4 of the Directive relevantly states that:

> "1. Member States shall ensure that a mechanism exists at national level under which a user or undertaking providing electronic communications networks and/or services has the right of appeal against a decision of a national regulatory authority to a body that is independent of government and the national regulatory authority concerned. The appeal body shall be able to consider not only the procedure according to which the decision was reached, but also the facts of the case. …
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> 3. Where the appeal body is not judicial in character, written reasons for its decision shall always be given. Furthermore, in such a case, its decision shall be subject to review by a court or tribunal. …"

United Kingdom

Telstra notes that, under The Telecommunications (Appeal) Regulations of December 1999[6] - which came into force on 20 December 1999 - operators do have a right of appeal against a variety of decisions by the telecommunications regulator. Parties may appeal to the relevant court against certain decisions of the Secretary of State or the Director General of Telecommunications on grounds of error of fact, error of law, procedural error or other illegality.

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[5] European Commission, *Proposal for a Directive of the European Parliament and of the Council on a Common Regulatory Framework for Electronic Communications Networks and Services*, (2000/C 365 E/14), OJ C365 E/198, 19 December 2000 (available at: http://www.conformity-update.com/eu-framework-010105.pdf).

[6] Statutory Instrument 1999, No 3180.

Telstra considers that the regulations are broad enough to enable operators to appeal any type of decision and that this is precisely what has been done. Telstra understands that BT has been able to appeal major decisions to the former Monopolies and Mergers Commission and now the new Competition Commission.

New Zealand

The Telecommunications Bill 2001 (NZ) (the "Bill") – currently before the Commerce Select Committee – similarly recognises the need for review of pricing determinations.

Clause 17 of the Bill provides for an access seeker or access provider to apply to the Commerce Commission for a determination of all or some of the terms on which the relevant service must be supplied. Subpart 4 of Part 2 of the Bill allows a party to a determination to apply to the Commission for a review of that part of the determination that relates to the price to be paid for the service. Clause 49 of the Bill sets out very broad powers and requirements as to the processes in reaching determinations. Clause 56 of the Bill provides for appeals to the High Court of New Zealand in respect of any such determinations.

Two key features of the proposed New Zealand regime are notable:

(a) even in the extremely light-handed regulatory environment in place in New Zealand, the importance of providing for full review rights has been recognised; and

(b) such review rights have been considered important, even though the Bill provides for a significantly more prescriptive approach to the pricing of access services and therefore might otherwise be thought to be less contentious than the regime operating in Australia.

United States and Canada

It is not unusual in North American jurisdictions to submit cases to a complete re-hearing when the prior result is considered to be invalid.

For example, in *AT&T Communications of Ohio, Inc. v Public Utilities Commission of Ohio*, the Supreme Court of Ohio noted that appeals from the decisions of public utilities commissions are not unusual and that rules exist to deal with this possibility:

> "Appeals of commission decisions are subject to the standard of review contained in R.C. 4903.13, which provides: "A final order made by the public utilities commission shall be reversed, vacated, or modified by the supreme court on appeal, if, upon consideration of the record, such court is of the opinion that such order was unlawful or unreasonable."[7]

This standard, the Court held, has been consistently interpreted in case law and establishes that commission decisions as to questions of fact can be reversed by courts where there is not sufficient evidence to show that the determination is "manifestly against the weight of the evidence and is not so clearly unsupported by the record as to show misapprehension, mistake, or wilful disregard of duty."[8]

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[7] *AT&T Communications of Ohio, Inc. v Pub. Util. Comm.*, 728 N.E.2d 371 (S Ct Ohio, 2000), 376.

[8] *AT&T Communications of Ohio, Inc. v Pub. Util. Comm.*, 728 N.E.2d 371, 376, quoting *MCI Telecommunications Corp. v. Pub. Util. Comm.* (1988), 38 Ohio St.3d 266, 268, 527 N.E.2d 777, 780.

The ability to conduct full merits review is evident in United States statutes as well. In the portion of the Code of Federal Regulations governing the activities of the Federal Communications Commission (the "FCC"), parties that disagree with a decision may appeal directly to the FCC. For example, in the case of the standards-setting and certification process for telephone equipment, the FCC may conduct a *de novo* review of technical criteria when requested to do so by aggrieved parties.[9]

The Federal Power Act of 1920 (US),[10] which regulates the activities of the Federal Energy Regulatory Commission (the "FERC"), establishes that parties can apply for rehearing of orders:

> "… Until the record in a proceeding shall have been filed in a court of appeals … the [FERC] may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it ..."[11]

The provisions of the Federal Power Act of 1920 (US) allow for some modification of the facts presented, if there is good reason for their exclusion in the first instance:

> "The finding of the [FERC] as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the [FERC], the court may order such additional evidence to be taken before the [FERC] and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The [FERC] may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order.[12]

In Canada, although determinations on factual matters by the Canadian Radio-television and Telecommunications Commission (the "Commission") cannot be challenged in an appeal:

> "… the Commission may, on application or on its own motion, review and rescind or vary any decision made by it or re-hear a matter before rendering a decision."[13]

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[9] Federal Communications Commission, Report and Order, CC Docket No. 99-216 (released December 21, 2000), http://www.fcc.gov/Daily_Releases/Daily_Business/ 2000 /db1228/fcc00400.txt.

[10] 16 USC §791-828c, 10 June 1920.

[11] 16 USC §825I(a).

[12] 16 USC §825I(b).

[13] Telecommunications Act, Statutes of Canada, Chapter 38, ss 64(5), 62.