



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

Trade Practices Amendment (Telecommunications) Bill 2001

by
The Australian Council for Infrastructure Development
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Introduction

The Australian Council for Infrastructure Development is 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.

AusCID was established in 1992 and exists to identify and inform both Commonwealth and State/Territory governments of key issues where change is needed, in order to create an environment that enables efficient delivery of public infrastructure by the private sector. AusCID currently has 99 members (list attached).

AusCID membership is drawn comprehensively from all economic infrastructure sectors including electricity generation, transmission and distribution, gas transmission and distribution, roads, rail, telecommunications, water, airports and ports. As a result of our membership base, AusCID is in a unique position to consider the views of infrastructure owners, equity investors and debt financiers and combine them with the views of infrastructure operators.

AusCID's members control in excess of \$60 billion of infrastructure assets, much of which may be regulated by Commonwealth and State access regimes.

AusCID understands that, in the course of examining the provisions of the *Trade Practices Amendment (Telecommunications) Bill 2001*, the Senate Committee has heard extensive debate about the availability of merits review in relation to access pricing determinations of declared telecommunications services. Furthermore, during the course of the inquiry, several witnesses have suggested that the telecommunications industry is unusual, in that it allows for a full merits review of an arbitrated pricing determination by the Australian Competition and Consumer Commission ("**ACCC**"), to the Australian Competition Tribunal ("**ACT**"). As a result, those submitters have recommended that the availability of full merits review be removed from the regime.

AusCID does have sympathy for the very serious timing issues faced by those companies wanting to access infrastructure. It is in the interests of all of the participants in the industry, and consumers, to have considered, fair and timely regulated pricing decisions. However, 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 reviews would be akin to "throwing the baby out with the bathwater"

We commend the Committee for considering the importance of timeliness in regulatory decisions. Efficiency and timeliness should be among the objectives of the regulatory decision making process. They should not be the only objectives. The aim of regulatory systems should be to balance the needs of infrastructure providers (access providers), infrastructure users (access seekers) and consumers. This is a difficult process to undertake, and due to the complexities of the issues involved, the outcomes will not always be perfect. The provision for merits review acts as an effective "insurance policy" against any mistakes that may result from the regulatory system.

We also have serious concerns regarding the wider effects of removing merits reviews from regulated determinations in the telecommunications industry. If such a proposal is implemented for telecommunications, AusCID considers that it will not only deter investment in regulated or potentially regulated telecommunications infrastructure but will also set a very damaging precedent for other infrastructure industries affected by regulated decisions.

For these reasons, AusCID wishes to place its views on this matter on record before the Senate Committee.

The need for merits review to ensure sustainable investment

In the long run, the well being of Australian consumers will be best protected through adequate, sustainable investment in infrastructure. In the context of a highly regulated industry, such as telecommunications, AusCID considers that that this involves a careful consideration of the need for investors to receive a reasonable risk weighted return (and therefore to continue to invest in regulated assets), balanced against the need for consumers to receive efficiently priced, high quality reliable services.

The scope for uncertainty about investment, or returns on investment, can have a deleterious effect on incentives for continued investment. The Productivity Commission recognised this in its recent Position Paper on the *Review of the National Access Regime*.

The removal of merits review rights, and the uncertainty that that would entail for investors, would potentially have a damaging impact on investment in nationally significant assets. In this regard, the Productivity Commission recognised that the costs of failing to invest in essential infrastructure are likely to be larger than the costs of monopoly pricing of the services it provides.

AusCID considers, as a basic principle of regulatory practice, that discretion should be linked to accountability. Where a regulator has a wide scope in which to make decisions, there needs to be scope for that decision to be reviewed from first principles, on merit. The existence of a review from a first instance decision based only on legal questions, does not provide the appropriate level of checks and balances required.

Importantly, under an access regime – such as Part XIC or Part IIIA - which affords wide discretion to the decision maker, a number of outcomes are possible which may be legally correct, yet there is no guarantee that the decision which most appropriately enhances the long term interests of end-users will be made. Removing the entitlement to merits review would significantly erode the accountability of the administrative decision maker.

In any case, the availability of merits review under the telecommunications regime is consistent with the framework in the national access regime in Part IIIA of the *Trade Practice Act 1974 (Cth) (TPA)*. That is, under Part IIIA, if a nationally significant service is declared, then an ACCC pricing determination in relation to access to that service can be reviewed, on its merits, to the ACT. As in the case of Part XIC, such a review is review of the first tier administrative decision by the ACCC.

In this regard, arrangements under State-based or other access regimes without full merits reviews, are not relevant to the Senate Committee's considerations, as they are typically highly prescriptive and well-defined, as opposed to the national access regime, and telecommunications access regime, which allow substantially greater discretion to the regulator. Furthermore, AusCID has argued strongly against such schemes as deterring investment and advocated the introduction of merit based appeals.

AusCID further considers that the removal of merits reviews will increase the degree of regulatory risk perceived by investors in Australia. It is critical that regulated pricing determinations are subject to thorough, independent and fulsome review, to ensure that capital asset owners are assured that the returns on their investments will not be reduced due to misguided pricing determinations, whose merits cannot be appealed.

Several recent regulatory decisions in Australia have increased perceptions that regulatory risk is a real risk for investments. Foreign investors are increasingly concerned about sovereign risk issues when investing in Australia. Regulatory risk ranks high in this regard. Foreign investors from jurisdictions such as the United States, which has a long history of allowing merit based appeals and strong administrative law protections for property holders, derive some comfort from similar legal protections in this country.

Any derogation from the right to a merits review, particularly where the determination at first instance is made pursuant to a broad framework which allows wide discretion to the decision maker, greatly increases the risks that a pricing determination will not be the most appropriate to ensure sustainable investment and consumer welfare.

If the removal of merits review of pricing determinations relating to important infrastructure were to become common place in Australia under regimes where a number of outcomes are possible, the risk of inappropriate pricing decisions being made would be significantly increased with the effects that:

- investment funds will go to other, less risky jurisdictions or else require a premium for perceived regulatory risk. This will result in increased costs for customers in the long run;
- investment in new, innovative infrastructure projects and the upgrading of existing assets will be less likely to be approved by boards as there will be little or no perceived additional return for this risky expenditure; and
- capital raising for the expansion of existing businesses will be more expensive than necessary, again leading to increased costs for customers in the long run.

Without detailing the specific evidence in other jurisdictions, AusCID further considers that the existence of an appeal on both merits and procedure is consistent with world's best practice. AusCID would be happy to provide the Committee with further evidence in this regard.

Conclusions

AusCID commends the Government on its decision to review the telecommunications access regime and to enhance its efficiency.

AusCID, however, is greatly concerned that the proposal put to the Senate Committee to abolish merits review from the ACCC to the ACT on pricing determinations relating to significant telecommunications infrastructure, is misguided. If such a proposal is implemented for the telecommunications industry, it would set a very damaging precedent for other important industries affected by regulated pricing decisions which would be highly damaging to incentives to invest in major infrastructure

Accordingly, AusCID recommends that the Senate Committee reject any proposal to abolish a merits review from a final determination of the ACCC to the ACT under Part XIC of the TPA.

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SEPTEMBER 2001

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