

23 October 2009

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Senate Standing Committee on Environment, Communications and the Arts  
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Dear Dr Holland,

**Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009**

The Trade Practices Committee of the Business Law Section of the Law Council of Australia (**Committee**) makes this submission to the Senate inquiry into the Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009 (**Bill**).

This submission has been endorsed by the Business Law Section. Owing to time constraints it has not been considered by the Directors of the Law Council of Australia limited.

**Executive Summary**

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Established principles of good government decision-making require that, other than in exceptional circumstances, government agencies should be subject to merits review, should afford procedural fairness and should not exercise unfettered discretion.

The Committee is concerned that the Bill:

1. does not provide any form of merits review of relevant decisions by the Australian Competition and Consumer Commission (**Commission**);
2. contemplates that the Commission can make certain decisions without providing procedural fairness; and

3. grants the Commission and the Minister extremely broad and unfettered discretionary powers.

The Committee submits that the Senate should carefully consider whether these measures are warranted and will achieve the desired outcomes, or whether the existing procedures and alternatives summarised here are more likely to do so.

## 1. Merits review

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The Committee submits that some form of merits review of decisions made by government agencies such as the Commission should be available in all but the most exceptional of circumstances.

Currently, the Commission's decisions to accept or reject access undertakings and exemptions are subject to merits review by the Australian Competition Tribunal (*Tribunal*).<sup>1</sup> Merits review of the Commission's determination in an access arbitration was also available to parties affected by the Commission's decision until the enactment of the *Telecommunications Competition Act 2002*. The removal of the option to seek merits review of access arbitration determinations was made contrary to the Productivity Commission's recommendation,<sup>2</sup> on the basis that 'there is a clear need to promote certainty and timeliness of access. This outweighs the risk of regulatory error, particularly given the exhaustive examination of issues in the initial decision making process.'<sup>3</sup>

The Committee recognises the Government's concerns about the timely provision of access to declared services. However, the Government has not put forward any evidence that the telecommunications regulatory regime has been made more accessible or timely as a consequence of the removal of the ability to seek merits review of the Commission's access arbitration determinations.

The Bill proposes to afford the Commission the power to set up front terms and conditions of access, including as to the price of declared services. The consequences of regulatory error in these circumstances are significant. The Commission itself has acknowledged the significant detriment to efficiency that can result from, for example, over-pricing a service.<sup>4</sup> The risk of regulatory error is increased by the Bill because it also removes the mechanism for the arbitration of disputes, thereby reducing the opportunities for examination of the issues. The absence of the ability to seek merits review of the Commission's decisions is less justifiable than when the Productivity Commission recommended the retention of merits review in 2002. Yet the Bill does not provide any option for affected parties to seek merits review of Commission decisions, including the Commission's decisions to set up front terms and conditions of access.

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<sup>1</sup> Sections 152AV and 152CE of the TPA.

<sup>2</sup> Productivity Commission (2001), *Telecommunications Competition Regulation*, Inquiry Report No 16, available: <http://www.pc.gov.au/projects/inquiry/telecommunications/docs/finalreport>.

<sup>3</sup> *Government response to productivity commission report on the review of telecommunications competition regulation*, available [http://www.pc.gov.au/\\_\\_data/assets/pdf\\_file/0020/86510/governmentresponse.pdf](http://www.pc.gov.au/__data/assets/pdf_file/0020/86510/governmentresponse.pdf), p 15.

<sup>4</sup> See, in the context of the price of the mobile terminating access service for example, ACCC, *Assessment of Vodafone's mobile terminating access service (MTAS) Undertaking*, Final Decision, March 2006, p 100.

The absence of merits review in the Bill is directly contrary to the position taken by the Council of Australian Governments under recent regulatory reforms in both the electricity and gas sectors.<sup>5</sup> Certain decisions made by regulators under Part IIIA of the *Trade Practices Act 1974 (TPA)* and the *Essential Services Commission Act 2001 (Vic)*<sup>6</sup> are also subject to some form of merits review.

The National Competition Council has recently indicated that:

providing for appropriate review of the decisions of regulators is good regulatory practice. As envisaged by the CPA, such review does not need to allow for a second bite of the cherry and can be tailored to allow for redress of decision making errors (such as where an error of law or a finding of fact that was not open to a decision maker is established)... In the Council's view this limited merits review appropriately balances the need for oversight of regulatory decision making and reduces scope for unacceptable delay.<sup>7</sup>

In relation to the desirability of merits review in relation to access pricing decisions in the energy sector, Stephen Gageler SC and Margaret Allars, have commented that:

We are strongly of the view that a merits review of the economic regulatory decision-making of the AER is appropriate and desirable.<sup>8</sup>

The Administrative Review Council<sup>9</sup> has recently concluded that 'with very limited exceptions, a decision of government that will or is likely to affect the interests of a person should be subject to merits review.'<sup>10</sup> The only relevant factor that the ARC identifies as justifying the unavailability of merits review of an access determination made by the Commission is that such review might involve an extensive inquiry process.<sup>11</sup> However, there are other mechanisms that might be

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<sup>5</sup> See Division 2 of the Schedule to the *National Gas (South Australia) Act 2008* and Division 3A of the Schedule to *National Electricity (South Australia) Act 1996*. See also, Explanatory Memorandum to Trade Practices Amendment Regulations 2008 (No 3) (SLI No 137 of 2008), regarding regulation 7B, which applies the procedural provisions applicable to the Tribunal decisions under the TPA to decisions under the National Gas and Electricity Laws. This provision was prepared in consultation with the Tribunal and other interested stakeholders.

<sup>6</sup> Section 55(2) of the *Essential Services Commission Act 2001 (Vic)*.

<sup>7</sup> National Competition Council (2009), *Water Industry Competition Act 2006 (NSW): Application for certification of the NSW water industry infrastructure services access regime*, Final Recommendation, available: [http://www.ncc.gov.au/images/uploads/Final\\_Recommendation\\_WICA.pdf](http://www.ncc.gov.au/images/uploads/Final_Recommendation_WICA.pdf), p 24.

<sup>8</sup> Stephen Gageler SC and Margaret Allars (2005), *Joint Opinion to the Ministerial Council on Energy Standing Committee of Officials review of decision-making in the gas and electricity regulatory frameworks Discussion Paper*, 10 October 2005, available: [http://www.ena.asn.au/udocs/ena\\_111005\\_114141.pdf](http://www.ena.asn.au/udocs/ena_111005_114141.pdf), p 21.

<sup>9</sup> The Administrative Review Council (**ARC**) is established by s48 of the *Administrative Appeals Tribunal Act 1975* (Cth). The Commonwealth Attorney General recently commented that the ARC 'plays an important role in monitoring and advising the Government on Commonwealth administrative law... through its reports and best practice guidelines, the [ARC] provides practical assistance in relation to Government decision making': [http://www.attorneygeneral.gov.au/www/ministers/RobertMc.nsf/Page/MediaReleases\\_2009\\_ThirdQuarter\\_6A](http://www.attorneygeneral.gov.au/www/ministers/RobertMc.nsf/Page/MediaReleases_2009_ThirdQuarter_6A) ugust2009-AppointmentstotheAdministrativeReviewCouncil.

<sup>10</sup> ARC (2008), *Administrative Accountability in Business Areas Subject to Complex and Specific Regulation*, [http://www.ag.gov.au/agd/WWW/rwpattach.nsf/VAP/\(CFD7369FCAE9B8F32F341DBE097801FF\)-d\\_ARC+Report+No.+49+Complex+Regulation.pdf/\\$file/d\\_ARC+Report+No.+49+Complex+Regulation.pdf](http://www.ag.gov.au/agd/WWW/rwpattach.nsf/VAP/(CFD7369FCAE9B8F32F341DBE097801FF)-d_ARC+Report+No.+49+Complex+Regulation.pdf/$file/d_ARC+Report+No.+49+Complex+Regulation.pdf), p ix.

<sup>11</sup> ARC (1999), *What Decisions should be Subject to Merit Review?*,

[http://www.ag.gov.au/agd/WWW/arcHome.nsf/Page/](http://www.ag.gov.au/agd/WWW/arcHome.nsf/Page/Publications_Reports_Downloads_What_decisions_should_be_subject_to_merit_review)

[Publications\\_Reports\\_Downloads\\_What\\_decisions\\_should\\_be\\_subject\\_to\\_merit\\_review.](http://www.ag.gov.au/agd/WWW/arcHome.nsf/Page/Publications_Reports_Downloads_What_decisions_should_be_subject_to_merit_review)

adopted to limit appropriately merits review to prevent regulatory gaming, including:<sup>12</sup>

- only permitting applications for merits review to be made with the leave of the Tribunal;
- only permitting applications to be made on the grounds of material error or errors of fact, incorrect exercise of discretion or unreasonable decision.
- only allowing an application for merits review to be made within 15 business days of a decision;
- requiring that the Tribunal only grant leave to appeal where there is a serious issue to be heard;
- generally requiring that parties only raise on review matters that were raised before the original decision maker – new material may be introduced by the original decision maker, but only if such material will assist the Tribunal and was not unreasonably withheld in the first instance;
- requiring that the Tribunal determine a review within a target period, such as 3 months, which can be extended with reasons;
- giving the Tribunal the power to refuse to consider serial appeals;<sup>13</sup>
- requiring that parties to merits review processes, and their representatives, certify that their application has reasonable prospects of success and is not frivolous or vexatious; and
- giving the Tribunal the power to make orders requiring a party to pay the costs of other parties, the original decision maker and/or interveners, including on an indemnity basis where the Tribunal is satisfied that the party's application was frivolous or vexatious or that there was no serious question to be tried.

In the complete absence of merits review, whether limited or otherwise, parties not content with the merits of a decision have in the past (and will likely in the future) seek judicial review in the Federal Court. In those circumstances, recourse to merits review is more appropriate and provides a greater check on government discretion. The Committee submits that the unavailability of merits review is a significant measure and that other options such as those above should be explored before such a measure is taken.

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<sup>12</sup> The Business Law Section notes that many of these mechanisms are included in the National Gas Law and the National Electricity Law. See, for example, ss245 to 253 and 258 to 260 of the *National Gas (South Australia) Act 2008* (SA).

<sup>13</sup> Similar to the power given to the Commission by proposed s152ATA(7) of the TPA.

## 2. Procedural fairness

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The ARC has also commented in relation to procedural fairness that:

In the most general sense, the requirements of procedural fairness are intended to ensure both that decision makers bring an impartial mind to the issues for determination and that those affected by decisions are aware of and have an adequate opportunity to respond to all the material that is to be considered by decision makers in reaching their decisions.<sup>14</sup>

The Committee submits that procedural fairness should be afforded to those affected by a decision-maker's decision in all but the most exceptional circumstances.

Under the *Trade Practices Act 1974 (TPA)* currently, while the Commission may make interim access determinations in an access arbitration without providing procedural fairness, the determination must be consistent with already determined pricing principles.<sup>15</sup> The Commission must have previously consulted with interested parties when determining those pricing principles.

However, if the Bill were enacted in its current form, the Commission would be able to make interim access determinations without providing the parties with procedural fairness and without regard to any pricing principles (as the requirement for those pricing principles is to be removed).<sup>16</sup> This is a significant extension of the Commission's power, particularly given there is no scope for merits review of the Commission's determination.

The Commission will also be given the power to make binding rules of conduct without providing procedural fairness to affected parties.<sup>17</sup> These binding rules of conduct can cover the same subject matter as an access determination and therefore may have a significant effect on access providers and access seekers. While the Explanatory Memorandum to the Bill indicates that binding rules of conduct will only be used on an urgent and temporary basis,<sup>18</sup> no such legislative restriction is imposed on the Commission. In theory, the Commission could set price terms and conditions of access to declared services without consulting the public, and without its decision being subject to review, using rolling binding rules of conduct.

The Committee submits that the Senate should very carefully consider whether the exclusion of principles of procedural fairness from the proposed telecommunications regulatory regime is warranted.

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<sup>14</sup> ARC (1995), *Better Decisions: Review of Commonwealth Merits Review Tribunals*, Report to the Minister for Justice (No 39), available:

[http://www.ag.gov.au/agd/WWW/rwpattach.nsf/viewasattachmentpersonal/\(CFD7369FCAE9B8F32F341DBE097801FF\)~ARC+REPORT+39.pdf/\\$file/ARC+REPORT+39.pdf](http://www.ag.gov.au/agd/WWW/rwpattach.nsf/viewasattachmentpersonal/(CFD7369FCAE9B8F32F341DBE097801FF)~ARC+REPORT+39.pdf/$file/ARC+REPORT+39.pdf), p 26.

<sup>15</sup> Made under s152AQA of the TPA: s152CPA(3) of the TPA.

<sup>16</sup> Proposed s152BCG(4) of the TPA and item 91 of Part 2 of Schedule 1 to the Bill.

<sup>17</sup> Proposed s152BD(8) of the TPA.

<sup>18</sup> Explanatory Memorandum to the Bill, pp 140 and 155.

### 3. Broad regulator discretions

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The Committee does not make any comment on the desirability or otherwise of structural separation. However, it submits that the discretion given to the Commission is unusually wide in this regard and that Parliament should not delegate unfettered discretions to government agencies other than in exceptional circumstances. A government agency decision that is not guided by legislative criteria or supported by written reasons will lack accountability.

Under the Bill the Commission may accept a written undertaking from Telstra about structural separation.<sup>19</sup> In deciding whether to exercise that discretion, the Commission is only bound to have regard to such matters as the Commission considers relevant and matters which will be set out (in the future) in writing by the Minister.<sup>20</sup>

The criteria to be taken into account by the Commission as to whether to accept undertakings given by Telstra are not set out in the Bill, in contrast to other undertakings which must be 'reasonable' having regard to:<sup>21</sup>

- (a) whether the terms and conditions promote the long-term interests of end-users;<sup>22</sup>
- (b) the legitimate business interests of the carrier and its investment in the facilities;
- (c) the interests of persons who have rights to use the service;
- (d) the direct costs of providing access;
- (e) the operational and technical requirements necessary for the safe and reliable operation of the service; and
- (f) the economically efficient operation of the service.

If the Commission rejects Telstra's undertaking, there is also no obligation on the Commission to provide the reasons for that rejection, contrary to its obligation to provide reasons for its acceptance or rejection of an ordinary access undertaking or a special access undertaking.<sup>23</sup>

In addition, the Minister may exempt Telstra from the requirement to provide an undertaking about divesting its interest in FOXTEL and/or its HFC network.<sup>24</sup> The only limit on this discretion is that Telstra's structural separation undertaking<sup>25</sup>

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<sup>19</sup> Proposed s577A of the Telecommunications Act 1997 (*Telecomm Act*).

<sup>20</sup> Proposed s577A(2) of the Telecomm Act.

<sup>21</sup> Section 152AH of the TPA.

<sup>22</sup> Having regard to the promotion of competition and the economically efficient investment in and efficient use of infrastructure.

<sup>23</sup> Sections 152BU and 152CBC of the TPA.

<sup>24</sup> Proposed ss577J(3) and (5) of the Telecomm Act.

<sup>25</sup> Under proposed s577A of the Telecomm Act.

must be sufficient to address concerns about the degree of Telstra's power in telecommunications markets before the Minister may grant such an exemption. What those concerns are and the materiality threshold of those concerns is not set out.<sup>26</sup> The basis for the Minister's determination of whether Telstra's undertakings are sufficient to address concerns about the degree of Telstra's power in telecommunications markets should therefore also be defined.<sup>27</sup>

The Committee has serious concerns about the level of discretion being granted to the Commission in its decision-making and submits that the Senate should very carefully consider whether it is necessary and desirable to grant the regulator and the Minister such broad powers.

If you have any questions in relation to this submission, in the first instance please contact the Committee Chair, Dave Poddar, on [02] 9296 2281.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'W Grant', written in a cursive style.

Bill Grant  
**Secretary-General**

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<sup>26</sup> Compared to, for example, the substantial lessening of competition test contained in, ss45, 47 and 50 of the TPA.

<sup>27</sup> Proposed ss577J(4) and (6) of the Telecomm Act.