CHAPTER 3

REGULATORY MEASURES TO ENHANCE COMPETITION

3.1 The *Trade Practices Act 1974* (TPA) contains most of the relevant law against anti-competitive conduct. Parts XIB and XIC of the TPA contain detailed provisions relating to telecommunications. Part XIB of the *Trade Practices Act 1974* increases the ability of the Australian Competition and Consumer Commission (ACCC) to respond where there is evidence of anti-competitive conduct, particularly (though not limited to) predatory pricing behaviour. The ACCC does this for example, by making record-keeping rules, by ordering companies to supply details of their tariffs, or by issuing a 'competition notice' - that is, a finding of anti-competitive conduct which becomes *prima facie* evidence of the conduct in any court action to recover damages arising from the conduct.

3.2 Part XIC establishes an industry-specific regime for regulated access to carriage services. The legislation in that Part of the Act enables carriage services and services which facilitate the supply of carriage services to be declared by the ACCC. The consequence of declaration is that carriers and carriage service providers supplying declared services are, unless otherwise exempt, obliged to supply the declared services and specified ancillary services to requesting service providers. Where the parties cannot agree on the terms of access the ACCC may arbitrate.

3.3 The majority of submissions to the Committee (from Telstra's competitors and from ATUG) while supportive of the legislation, expressed concerns about the regulatory framework and its ability to deliver enhanced competition in the industry. For example, Macquarie Corporate Telecommunications :

> Overall, we would be supporting the thrust of the legislation. However, we see there is a significant opportunity to make the competitive framework actually work.[1]

3.4 This stance is supported by the Regulatory Manager for the AAPT who told the Committee that amendments are needed to make the legislation work in the way that the Parliament had intended it to work since July 1997. He argued that:

> Telstra's conduct to date has clearly indicated that it will do everything in its power to delay, resist and ultimately challenge any decisions or investigations that the ACCC engages in. We feel that, as a result of that conduct, a further strengthening of the regime is required.[2]

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1 Mr Krishnapillai, Evidence, p. 20, 3 February 1999

2 Mr Grant, Evidence, p. 12, 3 February 1999

3.5 The Committee notes that the legislation before it in this inquiry, in particular the provisions of the *Telecommunications Legislation Amendment Bill 1998*, addresses the concerns expressed by those same competitors of Telstra to the Committee's previous inquiry into the full privatisation of Telstra in May 1998. In the words of DOCITA:

> The ACCC has been given extensive information-gathering powers in relation to competition regulation...The Amendment Bill contains significant amendments which…will make a wider range of information available to industry participants, particularly cost data, thus enabling more informed access negotiations and scrutiny of pricing and other practices of competitors. As such the amendments respond to industry concerns about a lack of information about Telstra's underlying cost structures and their impact on Telstra's access prices. The amendments are also consistent with Recommendations 5 and 6 of the report of the Senate Environment, Recreation, Communications and the Arts Legislation Committee into the first Telstra (Transition to Full private Ownership) Bill.[3]

3.6 In particular, the Bills before the Committee, and the *Telecommunications Legislation Amendment Bill 1998* in particular, aim to enhance the competitive framework in the industry by:

- conferring a private right of action to individuals under Part XIB;
- enabling the ACCC to direct that negotiations be conducted in good faith;
- giving the ACCC the power to order disclosure of cost information maintained under Record Keeping Rules and allowing for publication of reports generated in accordance with these Rules;
- giving the ACCC a new power to make two new Codes relating to Network Information and consultation regarding Network Modifications;
- (making) rules protecting an Access Seeker's confidential information.[4]

3.7 The Committee notes that, in its submission, Telstra is very critical of the proposed enhanced powers of the ACCC in relation to the disclosure of accounting costs. It is particularly critical of amendments to section 151BUB of the TPA which would enable the ACCC to order disclosure of information held under the Record Keeping Rules, if satisfied that disclosure would promote competition in markets for listed services; or facilitate the operation of Part XIB and XIC of the TPA. In Telstra's view, the proposal is, "misconceived and poorly executed."[5] It believes that this measure,

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3 Submission no. 10 p. 30 (DOCITA)

4 Submission no. 21 p. 26 (Telstra)

5 Submission no. 21 p. 27 (Telstra)

> …is harmful to competition, because it would enable competitors to price at Telstra's costs, rather than their own, which is at odds with the primary aim of the access regime which is to promote the long term interest of end users.[6]

3.8 Telstra also argues that its competitors would "continue to clamour for more information" and it is seeking an amendment that would require the ACCC to "undertake a public benefit assessment before disclosing such information".[7]

3.9 Although seeking further enhancements, other carriers and service providers such as Optus and Macquarie Corporate Telecommunications are very supportive of the current legislation:

> This legislation should be passed irrespective of the fate of the further privatisation of Telstra. Ensuring the successful implementation of competition policy is a critical issue, whatever the ownership structure of Telstra.[8]

Time frames and Delays

3.10 ATUG argued strongly in its submission for the ACCC to have the power to impose stringent time frames in relation to negotiation between carriers or service providers:

> Delay has been unwelcome and an unhelpful element of the post'97 open competitive communications environment. ATUG is of the strong view that every effort should be made to reduce or eliminate delay.[9]

3.11 ATUG went on to suggest an amendment to section 152BBA(3) of the *Telecommunications Act 1997* to give the ACCC the power to direct the parties involved to complete negotiations within a specific time period of between 30 days and 90 days depending upon the ACCC's view of the complexity of the matter.[10]

3.12 AAPT sought to expedite matters in a different way. In its view, unnecessary delays were caused because under the present system the ACCC was required to conduct a series of arbitrations when disagreements occurred over access terms and conditions. AAPT therefore suggested an amendment to the *Trade Practices Act 1974* to enable the Minister to deem that a particular declared service is a service of "national significance". In AAPT's view,

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6 Submission no. 21 p. 5 (Telstra)

7 Submission no. 21 p. 27-29 (Telstra)

8 Submission no. 18 p. 1 (C &W Optus)

9 Submission no. 5 p. 2 (ATUG)

10 Submission no. 5 p. 2 (ATUG)

> The Ministerial determination would operate as a trigger for the ACCC to commence an inquiry into the service, for the purpose of determining the price of, and any other terms and conditions of access to, this service.[11]

3.13 The Committee is not convinced by the arguments put to it that delay is endemic in our telecommunications regulatory bodies and that legislative action is needed to address every aspect of delay in ACCC action. In this respect, the Committee notes the evidence presented by Mr Rod Shogren of the ACCC that the process has been slow because it is new. He argued that in many cases a second or subsequent investigation is not likely to take as long as the first:

> By and large we think the legislation is working satisfactorily…we think the legislative framework is adequate for the job.
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> …To a degree, you have to think about what has been happening in the last 18 months as the bedding down of a new regulatory framework, the doing of a lot of things for the first time and, in many cases, the doing of things that will not need to be done again or at least will not need to be done for three or five years.[12]

Possible anti-competitive conduct

3.14 Although Telstra's competitors shared ATUG's concern regarding delay in completing terms and conditions of access negotiations and other negotiations, another aspect of delay was revealed to be a major source of frustration for them. They all complained about the time lapse before the ACCC can reach a decision to issue a competition notice for possible anti-competitive conduct. Worse still in their view was Telstra's decision, now that the ACCC has issued such notices, to challenge the ACCC's decision in court. According to AAPT,

> The primary policy objective of part XIB is to act as a deterrent. It is to require a party to cease engaging in anticompetitive conduct... The ACCC's commercial churn competition notice, or set of notices, to which you are referring, took 14 months for the ACCC to get to the point of issuance. Now that Telstra has decided to challenge those, it will be at least a year, we believe, before the issue will finally be resolved.
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> It is quite clear that if the competition notice regime is working so that judicial enforcement of all those decisions is required, then it clearly cannot meet its objectives, because, as soon as you get to court with an extensive hearing with Telstra as your adversary in most cases, you have already lost that objective. So we feel that part XIB needs to be beefed up so the deterrent effect of the competition notice is strengthened.[13]

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11 Submission no. 7 p. 11 (AAPT)

12 Mr Shogren, Evidence, p. 65, 3 February 1999

13 Mr Grant, Evidence, p. 9, 3 February 1999

3.15 The solution sought by AAPT, and supported by others such as Optus and Macquarie Corporate Telecommunications, is for Part XIB of the *Trade Practices Act 1974* to be amended to enable the ACCC, if it thought it appropriate, to impose an interim "cease and desist" order requiring a party to cease engaging in conduct the subject of a Part XIB investigation for a limited period of time (for example 90 days). AAPT argued that only if it had such a power under the legislation, would the ACCC be able to act "expeditiously" in cases where anti-competitive conduct may have occurred.

3.16 The Committee notes the evidence from the Department of Communications, Information Technology and the Arts that it foresees difficulties in the suggested approach:

> In our view the actual proposals that have been put forward have a serious risk that they would involve the conferral on the ACCC of the judicial power of the Commonwealth contrary to chapter 3 of the Constitution…It would involve the giving of judicial power to an administrative tribunal.[14]

3.17 The Committee believes that the amendments to Part X1B of the *Trade Practices Act 1974* proposed in the *Telecommunications Legislation Amendment Bill 1998*, (proposed item 26 of Schedule 1 to the Bill) which would enable parties other than the ACCC to seek injunctive relief in regard to a breach of the competition rule contained in Part XIB of the TPA whether or not a competition notice has been issued in regard to the conduct, gives telecommunications industry competitors the possibility to act expeditiously against anti-competitive conduct by any carrier.

3.18 While the Committee acknowledges that the ACCC may be able to advise on some procedural changes to improve the effectiveness of the regulatory regime, the Committee is of the view that the legislation and the proposed amendments are satisfactory in terms of the regulatory environment.

14 Mr Buettel, Evidence, p. 17, 16 February 1999