Trade Practices Amendment (Telecommunications) Bill 2001

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

This submission is made by AAPT Limited to The Senate Environment, Communications, Information Technology and the Arts Committee to assist it in its consideration of the Trade Practices Amendment (Telecommunications) Bill 2001 ("the Bill"). Any questions in relation to this submission should be addressed to David Havyatt, Director - Regulatory, AAPT Limited on [redacted] or by email to [redacted].

SUMMARY

AAPT welcomes the Government's initiative in introducing the amendments to the Telecommunications Access Regime to further implement the Parliament's intent in the 1997 deregulation of telecommunications.

However, AAPT believes the amendments do not sufficiently address issues creating current delay.

AAPT proposes the Bill be amended to further clarify backdating provisions and rectify a legislative anomaly, act to simplify a current merits review, and require the ACCC to resolve disputes in accordance with its own principles.

BACKGROUND

AAPT Limited is a provider of voice and data telecommunications services in the Australian marketplace. AAPT first entered the market as a service provider in 1991, providing competition to Telstra. With the advent of the fully competitive regime in 1997 AAPT was one of the new carriers to be issued with a licence at the commencement of the regime on 1 July 1997.

To date, AAPT has been a participant in eleven arbitrations under the Telecommunications Access Regime established under Part XIC of the Trade Practices Act. Of the arbitrations, AAPT has been the Access Seeker in ten and the Access Provider in one. Of the eleven disputes, four are still current, one has been resolved via the issue of a final determination by the ACCC, and the remainder were withdrawn following negotiation between the parties. The matter which has been resolved via a final determination, PSTN Terminating and Originating Access, has been subject to appeal by Telstra and is currently before the Australian Competition Tribunal.

As a major competitor in the Australian telecommunications industry, and as a participant with a great degree of experience of the arbitration processes, AAPT welcomes the proposed amendments to the Trade Practices Act in the Bill.

However, AAPT remains concerned at the Parliament's continuing need to address a range of issues under the Telecommunications Access Regime that are by way of clarification of the regime. Meanwhile, the regime is not delivering on the original intentions of the Parliament. The PSTN Terminating and Originating Access Service is the most fundamental of the access services under the Access Regime. It is through the acquisition of this service that other telecommunications network service providers can interconnect with the Telstra network. Consequently, this service is of vital importance to any competitor offering long distance telephone calls or building their own local network service.

The Access Regime was not devised to create the ACCC as a regulator of telecommunications prices. In introducing the legislation Senator Alston said:

> *It is the clear policy intention that, as much as possible, both the determination of access rights and terms and conditions of access, be the result of commercial processes and industry self-regulation.*[1]

The Access Regime has been described as a "negotiate-arbitrate" model in recognition of this policy intent. To be effective in this regard, the Access Regime needs to be able to progress issues quickly to finalisation. The arbitration process is designed to supplement market processes and becomes most effective when concluded quickly so the pricing signals can be adopted by all participants in the market. If there are errors in the prices established via the regulatory process these will become apparent through the operation of the market and provide the appropriate incentives for price movements.

Unfortunately, the operation of the Access Regime has not worked in this way. A number of carriers, AAPT included, first notified disputes in relation to Telstra's PSTN prices in relation to the year 1998-99. Through a process of legislative amendment that we refer to later, the ACCC has been unable to determine the outcomes for the year 98-99. The final determination was made on 13 September 2000 (for the dispute notified on 11 December 1998). That dispute has since been appealed by Telstra in October 2000 and is currently before the Australian Competition Tribunal. It is at this time not envisaged that the Australian Competition Tribunal will make a decision in this matter before June 2002.

Consequently, for a regime that was introduced in July 1997 we have reached a point where for the most fundamental of access services there is no final resolution. Clearly four years is too long for such a process to operate. Instead of the "negotiate-arbitrate" model providing rapid decisions allowing for the market to readjust to the outcome, we have had the completely reverse outcome of one decision now going to determine the prices covering four years.

[1] Second Reading Speech, Trade Practices Amendment (Telecommunications) Bill 1996

The implications of this delay are both to place significant potential liabilities on the balance sheets of companies who continue to trade and interconnect with Telstra through that time, to create uncertainty about pricing for the current year and future years. As the principles applied to the PSTN Originating and Terminating Access Service will effect the pricing for the Unconditioned Local Loop service (which supports new xDSL technologies), the delay also creates significant uncertainty in pricing of broadband services. This uncertainty will result in Access Seekers not competing vigorously in this market.

The proposed amendments will enable arbitrations to be addressed more quickly than has been the case to date in the Access Regime. However, it is more important that the existing matter before the Australian Competition Tribunal is resolved. This is not only because the Tribunal's matter affects PSTN pricing, but also because a number of other decisions currently still with the ACCC will be utilising the same methodology as being considered under the tribunal and it is expected that these will also be taken to the tribunal for appeal and the tribunal will be unable to determine these matters until they have concluded the PSTN appeal.

PRODUCTIVITY COMMISSION INQUIRY

The Government in introducing the amendments in the Bill makes reference to the current inquiry being undertaken by the Productivity Commission into telecommunications competition regulation. In evidence to that inquiry, AAPT identified that the objective of promoting competition in telecommunications services is being progressed under the current regime, but competition still needs to broaden and deepen.[2] Fundamentally, the benefits of competition are still being principally felt by high users of telecommunications services in city markets. The continuation of that uncertainty and doubt will result in competition not extending beyond the current state of development, or perhaps even contracting.

In addition, evidence provided to the Productivity Commission by Access Economics has shown that the Access Regime has not resulted in any detrimental effect on investment in telecommunications infrastructure.[3] (This has been subsequently validated by a report prepared for the ACCC by BIS Shrapnel.)[4]

AAPT argued at a Productivity Commission public hearing and in our second submission to the inquiry, that there was a need to improve the processes of arbitration in the Access Regime.[5] The current legislative proposals address these

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[2] Frontier Economics, "*Competition in Telecommunications under the Current Regulatory Regime in Australia"* - included in AAPT Limited Supplementary Submission to the Productivity Commission inquiry into telecommunications specific competition regulation – November 2000 (available at http://www.pc.gov.au/inquiry/telecommunications/subs/sub041.pdf).

[3] Access Economics, "*Australian Telecommunications Investment Under the 1997 Regulatory Regime*" included in AAPT Limited Supplementary Submission to the Productivity Commission inquiry into telecommunications specific competition regulation – November 2000.

[4] BIS Shrapnel, Telecommunications Infrastructures in Australia 2001 (available at http://www.accc.gov.au/pubs/Telecommunication/bis_shrapnel/bis_shrapnel.htm).

[5] For a more complete discussion see Annexure D to AAPT's Fourth Submission to the Productivity Commission Review of Telecommunications Specific Regulation (available at http://www.pc.gov.au/inquiry/telecommunications/subs/subdr100.pdf).

requirements and reflect the necessary consequences for the Parliament's original intention in relation to the deregulation of telecommunications services in Australia to take effect.

It is important to note that the current proposals, as indeed the legislative amendments made in 1999 in association with the further privatisation of Telstra, are not changes in underlying telecommunications policy. Both sets of legislative amendments have been crafted to try to generate the outcomes originally envisaged from the legislative changes of 1997.

It is also important to note that at the time of the institution of competition in 1997, Telstra was a wholly owned Government corporation. In the process of both the first and second sale of Telstra shares, the Government was very clear in the prospectus that it was continuing government policy to promote the development of competition in this market.[6] Consequently, there can be no question of an infringement of property rights (or of sovereign risk) if the Commonwealth makes legislative changes, including retrospective legislative changes, that are consistent with the original policy intent.

AAPT'S DISPUTE WITH TELSTRA ON PSTN ACCESS

Section 152CM of the TPA permits an access seeker to notify the ACCC of the existence of a dispute if the access seeker is unable to agree with the provider on one or more aspects of access.

The dispute giving rise to the determination under review before the Australian Competition Tribunal was identified in a notification filed by AAPT as a dispute about the price of access to PSTN Originating and Terminating Access Services as and from 1 July 1998. No objection was raised as to the way in which AAPT described the dispute in its notification. AAPT notified this dispute in December 1998. This dispute was finally determined by the ACCC on 13 September 2000.

Between the date of the notification of the dispute in December 1998 and the date of its final determination, the Parliament legislated to clarify the powers of the ACCC in relation to the determination of disputes. The legislation introduced in 1997 clearly allowed for the ACCC to determine disputes, however, the legislation was phrased without making any recognition of the potential for supply of a service to commence prior to the determination of the dispute.

The 1999 amending legislation attempted to clarify this situation. This legislation was not presented as anything more than a clarification of the original intent of the Parliament in 1997. That amendment introduced the current arrangements whereby

[6] "Telstra is currently regulated by the Commonwealth under a number of statutes including the Telstra Act, the Trade Practices Act and the 1997 Act…Like other regulatory regimes, the Government does not expect the current regime to remain static…The Government or any future Government, however, may change its policy as to the regulation of the telecommunications industry, which may adversely affect the competitive position or results of operation of the Company.", *Telstra Share Offer 1997*, page 113.

the ACCC may make orders backdating the terms to the date of notification of the dispute.

The current amendments attempt to address the unintended consequences of this amendment, which is an incentive for an access seeker to notify a dispute. Therefore, parties who may be prepared to continue to negotiate have an incentive to notify the dispute purely because of the backdating provision.

The backdating provision as introduced in 1999 also included a transitional provision, that specified that the backdating power should only apply to disputes notified after the commencement of the Act. From conversations with the Department and others, it is clear that the intended purpose of this limitation was to ensure that there was no infringement of a right of a party created by this legislation having retrospective effect. However, the question of infringement of rights is not so clear, as the introduction of the amendment that the purpose of the amendment was only to clarify the original intention of the legislation, that the ACCC had the power to fully determine a dispute between the parties. The consequence of the amendment was to revise the power of the ACCC to determine AAPT's dispute.

It is of concern to AAPT that the current legislative changes fail to recognise that the original 1997 intent continues to be frustrated. The first of these is that the 1999 transitional provision is not being repealed. The price for PSTN Originating and Terminating Access, despite notification of a dispute by AAPT in December 1998 in relation to the period commencing 1 July 1998, has remained in an unregulated state. As it has been well stated, if it had been the Government's intention to deregulate telecommunications or develop competition in telecommunications from July 1999 it should have said that. However, it has always been both the Government and Parliament's intention that competition was being introduced from 1 July 1997.

In addition, the proposed transitional provisions relating to the new backdating provision create the same limitation in relation to backdating to the date of notification of a dispute. That is, that the power to backdate to the commencement of negotiations only applies if the dispute is notified after the commencement of the provisions.

What appears to be fairly historical consequences is relevant, due to the fact that the dispute that AAPT notified in December 1998 is still current, as the final determination issued by the ACCC in September 2000 is under review before the Australian Competition. Given that this dispute remains current, AAPT believes that it is still relevant for the Parliament to correct the legislative process and bring to bear the intent of the original 1997 legislation.

REVIEWS OF FINAL DETERMINATION BY THE AUSTRALIAN COMPETITION TRIBUNAL

The entire legislative scheme of the 1997 telecommunications regulations was based around the principle of commercial negotiation of terms of supply of declared services as a preferred outcome. Recognising that commercial negotiation would not always lead to outcomes, the legislation provided the capability for the ACCC to arbitrate. These processes of "negotiate-arbitrate" were designed to replicate the behaviour that

may actually occur in a market allowing for both parties to progress through to finding a set of prices that represented an equilibrium between their relevant costs and demands.

Unfortunately, as we have already discussed, the processes have not been effective in achieving this simulation of a market in operation, and we now have a matter progressing to the Australian Competition Tribunal that relates to a dispute notified in December 1998 for prices from July 1998 that will not be finally determined by the Australian Competition Tribunal until some time in 2002.

The Bill attempts to address the further delays the Competition Tribunal reviews can introduce into the process of agreeing terms and conditions by limiting the matters that can be considered by the Tribunal to those matters that were originally provided to the Commission. This would appear to be an uncontroversial consideration, given that the provision allows any matters that a party to the arbitration wishes to be considered in the arbitration to be provided to the Commission and therefore be available to the Tribunal. Consequently, it would not appear to limit in any way the evidence that would be available for the Tribunal. All it is attempting to do is to reduce the potential for new evidence being introduced to simply continue to delay the process.

There is some misunderstanding of the role of the Australian Competition & Consumer Commission in relation to final determination of arbitrations of telecommunications access issues. There is a view that the ACCC is acting as a regulator, and thus creating the usual considerations of the need to provide a review of the regulatory decision. However, this view ignores two key aspects of the regime. The first is that matters between the parties are firstly open to commercial negotiation, thereby creating the ability for the parties to agree on an outcome prior to arbitration. That means that the arbitration is not a regulatory event, it is meant to be a dispute deciding event. The second is the extent to which there are underutilised facilities in the regime to allow participants in the industry to use the Telecommunications Access Forum to agree on standard terms and conditions, including price, for the provision of declared services.

Therefore, there is a strong basis for arguing that there should be no right of review to the Australian Competition Tribunal for final determinations by the ACCC when arbitrating disputes.

It is also important to note that where the interests of an access provider are concerned, the regime provides for the filing of an access undertaking by that provider. In introducing the original legislation the Minister saw an important role for access undertakings, saying:

> *The Government will also be encouraging the larger access providers to submit an access undertaking for ACCC acceptance. This would both improve the certainty surrounding the terms and conditions on which those persons must comply with the access obligations and provide increased certainty for access seekers.*[7]

[7] Second Reading Speech, Trade Practices Amendment (Telecommunications) Bill 1996

In the current instance in the PSTN matter, the arbitration of the disputes was delayed twice by the provision by Telstra of access undertakings, both of which were rejected by the ACCC. The legislation provides for the rejection of undertakings to also be referred to the Competition Tribunal for review. Telstra has not satisfactorily explained why they did not take the rejections of the undertakings in both cases to the Tribunal.

The process of providing undertakings is a preferred outcome, and the process of the Tribunal's review of an undertaking would be appropriate because that is the instance in which there is only one previous stage in the assessment of the undertaking.

Consequently, AAPT is of the view that in the construction of the Australian telecommunications regulatory regime, the requirement for Tribunal review of final determinations is unnecessary as a means of ensuring against regulatory overreach. Most specifically, in so far as the review by the Tribunal relates to arbitrations, there has certainly been plenty of opportunity for both parties to introduce all the matters that may be relevant both through their negotiations and through the course of the arbitration, to require that no further evidence be available to the Tribunal. Consequently, the Government's proposed amendment 152DOA is a highly desirable development in the regulation of telecommunications.

Further, the relevance of 152DOA, and in fact the rest of the regulatory amendments, will have no impact on future disputes while ever the existing PSTN access dispute is before the Tribunal for consideration. Principally, this is because Telstra has made this review a "*cause celebre*" specifying that the need for the review is to determine underlying principles in relation to access pricing. Telstra has clearly signalled their intent to take both the ULL final determinations and local carriage resale pricing determinations to review by the Tribunal as soon as the ACCC finally determines those matters. Consequently, there will be no real progress made, until such time as the PSTN matter is finalised. AAPT believes that the currently proposed 152DOA should apply to all final determinations made in relation to access disputes. Therefore AAPT would recommend clause 23(5) be amended to specify that the amendment made by Items 17,18 and 19 applies in relation to applications for review that have not been concluded prior to the commencement of this Act.

APPLICATION OF ACCC PRICING PRINCIPLES

The current amendments propose an amendment at 152AQA(6) to require the Commission to have regard to a pricing principle determination if it is required to arbitrate an access dispute. This is a different requirement to that which applies to a ministerial pricing determination at 152CQ.

AAPT is concerned that the current construction will enable the Commission to make decisions in relation to an arbitration that are in fact different from its own pricing principle determination. This will potentially lead to confusion in the marketplace of access seekers not being aware that the Commission has deviated from its pricing principle. When this matter has been raised with the Government it has been indicated that whilst this potential is recognised, as the Commission has the power to

make information about determination of disputes available, then this information will be available to the public.

This response, however, ignores one of the reasons for this amending legislation. For a range of reasons the ACCC does not always do that which it may be expected to do. Consequently, if there is benefit in the Commission generating pricing principles to provide information and certainty to the market, then it must be incumbent upon the ACCC to only resolve disputes in accordance with these principles. If experience reveals that a pricing principle should be changed the ACCC will be able to vary or revoke the existing principles either under specific provision or by operation of Subsection 33(3) of the Acts Interpretation Act 1901. That is, where the Commission in resolving a dispute identifies a need to amend their pricing principles, that will not create any limitation in the ability of the Commission to resolve the dispute. It will, however, place an obligation on the Commission to separately notify a change to the pricing principles.

The necessary amendment to require the Commission to resolve disputes in accordance with it's pricing principles can be effected by an amendment to the current Section 152CQ(6) to require final determination, to be consistent with ACCC privacy principles.

CONCLUSION

AAPT supports the Government's initiative in moving to amend the Trade Practices Act so that a number of the current deficiencies in resolving disputes in telecommunications can be rectified. However, AAPT believes there are three areas in which the Government has not been sufficiently aggressive in resolving the intractable industry issues. These are:

1. In relation to the provisions for backdating of determinations,
2. In the provisions for streamlining reviews of matters before the Australian Competition Tribunal, and
3. In requirements for the ACCC to resolve disputes in accordance with it's own pricing principles.

Suggested amendments to the legislation to support each of these three themes are attached.

ANNEXURE – SUGGESTED AMENDMENTS

1. <u>To address backdating</u>:

- Schedule 1, at the end of Schedule, add:

Telecommunications Legislation Amendment Act 1999

25 Item 74 of Schedule 1

Repeal the item.

26 Application of item 25

The repeal effected by item 25 is taken to have come into effect on 5 July 1999, immediately after the commencement of the *Telecommunications Legislation Amendment Act 1999*.

2. <u>To address tribunal appeals</u>:

- Schedule 1:

In Item 23(5) add "or have not been concluded prior to the commencement of this Act."

3. <u>To address consistency</u>:

- Schedule 1,

6A At the end of subsection 152CQ(6)

Add "or with a determination made by the Commission under section 152AQA".