The Senate

Environment, Communications, Information Technology and the Arts Legislation Committee

Provisions of the Telecommunications Competition Bill 2002

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TABLE OF CONTENTS

COMMITTEE MEMBERSHIP iii

CHAPTER 1 1

INTRODUCTION 1

Referral and conduct of the inquiry 1

The bill 1

Background to the legislation 2

Measures in the bill 4

Senate Scrutiny of Bills Committee comment on the bill 5

CHAPTER 2 7

DISCUSSION OF THE BILL'S PROVISIONS 7

Merits Review by the Australian Competition Tribunal 7

Model terms and conditions for core services 15

Accounting separation 17

Anticipatory exemptions and undertakings 27

Time limits imposed on ACCC and ACT decisions 35

Recommendation 36

MINORITY REPORT BY LABOR SENATORS 37

AUSTRALIAN DEMOCRATS SUPPLEMENTARY REPORT 47

APPENDIX 1 53

LIST OF SUBMITTERS 53

APPENDIX 2 55

LIST OF WITNESSES 55

Chapter 1

Introduction

Referral and conduct of the inquiry

1.1 On 25 September 2002 on the recommendation of the Selection of Bills Committee, the Senate resolved that the provisions of the Telecommunications Competition Bill 2002 (the bill) be referred to the Environment, Communications, Information Technology and the Arts Legislation Committee, immediately upon its introduction into the House of Representatives, for inquiry and report by 14 November 2002.[1] The reporting deadline was subsequently extended to 22 November 2002.

1.2 The Committee invited submissions on the bill in an advertisement in *The Australian* on Wednesday, 2 October 2002. It also wrote direct to a number of relevant organisations to invite submissions. The Committee received 23 submissions, including nine supplementary submissions, which are listed at Appendix 1. It also held public hearings in Canberra on Tuesday, 15 October; Tuesday, 22 October and Friday, 25 October 2002. A list of witnesses who appeared at the hearings is shown in Appendix 2.

1.3 The Committee thanks all those who assisted in its inquiry by preparing submissions and appearing at the hearings.

The bill

1.4 The bill was introduced into the House of Representatives on 26 September 2002, and into the Senate on 14 November 2002. The objectives of the bill are to:

- speed-up access to 'core' telecommunications services;
- facilitate investment in new telecommunications infrastructure;
- provide a more transparent regulatory market, particularly in relation to Telstra's wholesale and retail operations; and
- facilitate increased competition and investment in the telecommunications industry.[2]

1.5 This bill implements the Government's response to those recommendations in the Productivity Commission telecommunications competition report[3] that require

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1 Selection of Bills Committee, Report No. 9 of 2002, 25 September 2002.

2 Telecommunications Competition Bill 2002, Second Reading Speech, p 1.

3 Productivity Commission, *Telecommunications Competition Regulation*, Report No. 16, 21 September 2001.

legislative amendment. Of the 58 recommendations in the report, approximately half have been accepted.

1.6 The bill makes amendments to two parts of the *Trade Practices Act 1974*: part XIB which deals with anti-competitive conduct and record-keeping rules in the telecommunications industry, and part XIC, which deals with interconnection and access to telecommunications services. It also makes some amendments to the *Telecommunications Act 1997* and consequential amendments to the *Telecommunications (Carrier Licence Charges) Act 1997*.

Background to the legislation

1.7 In June 2000, the Productivity Commission was given a reference to inquire into telecommunications-specific competition regulation. Its terms of reference included anti-competitive conduct and record-keeping rules, preselection of carriage service providers, interconnection of facilities, and number portability. One of the key matters it was to inquire into was the access regime contained in Part XIC of the Trade Practices Act.

1.8 The Productivity Commission issued its draft report in March 2001 and the Government released the final report on 21 December 2001.

Consultation

1.9 There has been a significant amount of consultation with stakeholders relating to the matters covered by the bill. Since publication of the draft report, the Productivity Commission has had informal discussions with 24 organisations and considered more than 100 written submissions. Further public hearings were held in May 2001.

1.10 Following the release of the final report for public comment, the Department of Communications, Information Technology and the Arts accepted submissions up until February 2002. Two industry forums were held in March this year and on 24 April, the Communications Minister announced the measures that the Government would introduce in response to the Productivity Commission report. This was followed by further industry consultation on the implementation of these measures.[4]

Telecommunications access regime[5]

1.11 Part XIC of the *Trade Practices Act 1974* (the TPA) sets out a telecommunications access regime. The aims of the regime are to promote competition in markets for telecommunications services, to promote economically

4 Telecommunications Competition Bill 2002, Explanatory Memorandum, p. 8.

5 Parliamentary Library Bills Digest, Trade Practices Amendment (Telecommunications) Bill 2001, No. 39 2001-02, pp 1-2.

efficient use of and investment in the infrastructure used to supply these services, and to achieve **any-to-any connectivity**.[6]

1.12 The *Telecommunications Act 1997* distinguishes between 'carriers' and 'service providers', who may be either 'carriage service providers' or 'content service providers'. **Carriers** are the owners of telecommunications lines and cables, satellites, mobile phone base stations or certain fixed radiocommunications links. As at June 2001 there were 54 carriers in Australia. **Carriage service providers** supply services such as telephone or internet access to consumers. They use the services owned by carriers, but they may or may not themselves be carriers. There is a much large number of carriage service providers in Australia, including 88 telephone service providers, 53 providers of both telephone and internet services, and 909 internet service providers.[7] **Content service providers** supply content such as pay TV or online information and entertainment.

1.13 Basically, there is no general right of access to telecommunications services. But the Australian Competition and Consumer Commission (the ACCC) has power to declare certain services to be **declared services**. Once this is done, carriers and carriage service providers who provide the declared services must give other carriage service providers and content service providers access to the services in compliance with the **standard access obligations**.

1.14 So far, the ACCC has declared services such as local telephone carriage, analogue pay TV, STD and international telephone carriage to be declared services. This requires carriers and carriage service providers who supply these services to provide access to other service providers. However, it is the terms and conditions on which access is supplied which are contentious.

1.15 Part XIC of the Trade Practices Act provides three alternative means of settling the conditions of access: agreement between the parties, offering an access undertaking, or arbitration by the ACCC. In the first instance, it is hoped that the parties will be able to agree on the terms and conditions of access to the services. However, if agreement cannot be reached, the carrier or carriage service provider may offer an **access undertaking**. This must be accepted by the ACCC, which means the terms and conditions must either be consistent with the model terms and conditions set out in the telecommunications access code, or be reasonable and be consistent with the standard access obligations. If the parties cannot agree, and if no access undertaking acceptable to the ACCC is offered, the terms and conditions must be determined by the ACCC in arbitrating on an **access dispute**.

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6 Section 152AB of the Trade Practices Act. Any-to-any connectivity means that users of a particular service (such as mobile telephones) can communicate with any other user, even if the other user has a different supplier or is connected to a different network.

7 Productivity Commission, *Telecommunications Competition Regulation*, Report No. 16, 21 September 2001.

Measures in the bill

1.16 Schedule 1 of the bill proposes to amend the *Telecommunications Act 1997* to:

- shift responsibility from the Australian Communications Authority to the ACCC for determining which services should be subject to pre-selection requirements (Part 1);
- remove the requirement for Industry Development Plans in relation to carrier licensing (Part 2); and
- align the various procedures and obligations on service providers to provide information to enable efficient interconnection between networks, resulting in uniform obligations in relation to access to information (Part 3).

1.17 Schedule 2 of the bill proposes to amend the *Trade Practices Act 1974* by the following measures:

- require the ACCC to publish non-binding model terms and conditions of access for the following declared 'core' services (Part 1):
  - Domestic Public Switched Telephone Network (PSTN) Originating and Terminating Services;
  - Unconditioned Local Loop (ULL) Service; and
  - Local Carriage Service;
- remove merits review by the Australian Competition Tribunal (ACT) of ACCC final determinations (Part 2);
- allow for deferment of an access arbitration by the ACCC, so it can consider an undertaking that relates to the dispute (Part 3);
- introduce anticipatory exemptions from standard access obligations; extend provisions relating to access undertakings; and introduce time limits on ACCC and ACT decision-making processes for exemptions and undertakings (Parts 11 and 12);
- require the ACCC to consult with a carrier or carriage service provider before issuing a Part A competition notice. It also allows for the issue of an advisory notice of action that can be taken to avoid engaging in anti-competitive conduct (Part 15);
- enable the Minister to direct the ACCC to prepare or publish reports using its record-keeping rule powers under Part XIC (Part 16);

1.18 Other proposed amendments in Schedule 2 of the bill will:

- provide that a declaration must sunset after five years from the making of the declaration (Part 3);
- allow the ACCC to revoke a declaration of minor importance without holding a public inquiry (Part 4);

- provide that the relevant time for assessing 'reasonably anticipated requirements' under subsection 152CQ(1) is the time that a request for access to a declared service is made (Part 5);
- prevent the ACCC from making a determination that would have the effect of requiring a party to bear an unreasonable amount of the costs of extending or enhancing the capability of a facility or maintaining extensions to or enhancements of the facility (Part 6);
- clarify the provisions that prohibit a person from engaging in conduct for the purpose of preventing or hindering the fulfilment of a standard access obligation or an obligation imposed by a determination made by the ACCC (Part 7);
- clarify the ACCC's power to require a party to an arbitration to pay interest to another party on the whole or part of the money that the party is required to pay the other party under the determination. The ACCC will be required to publish guidelines on the use of this power (Part 8);
- require the ACCC to develop and publish guidelines on the use of its powers to regulate anti-competitive conduct under Part XIB (Part 9);
- repeal provisions relating to the Telecommunications Access Forum (Part 10);
- ensure that ordering and provision of a service are aspects of technical and operational quality under the standard access obligations (Part 13); and

ensure that the provisions in part XIB dealing with the powers and functions of the ACT on a review of an ACCC decision under Part XIB or XIC are consistent (Part 14).

1.19 Schedule 3 proposes amendments to the *Telecommunications (Carrier Licence Charges) Act 1997* that are consequential to the proposed repeal of the legal requirement for Industry Development Plans in Schedule 1.

Senate Scrutiny of Bills Committee comment on the bill

1.20 The Committee notes that the Senate Scrutiny of Bills Committee examined this bill in its *Alert Digest No. 11 of 2002* and made no comment.

Chapter 2

Discussion of the bill's provisions

2.1 Submissions were generally supportive of the majority of the bill's provisions. Accordingly, this report will concentrate only on the more contentious aspects that were raised in submissions and at the Committee's public hearings.

2.2 The issues that the report considers are as follows:

- merits review by the Australian Competition Tribunal including: removal of merits review for final ACCC determinations; merits review of access undertakings; and deferment of arbitrations to consider undertakings;
- model terms and conditions for core services;
- the accounting separation framework;
- anticipatory exemptions and undertakings; and
- time limits imposed on ACCC and ACT decisions.

Merits Review by the Australian Competition Tribunal

Removal of merits review for final ACCC determinations

2.3 Under the access regime, a party to a final determination made by the ACCC in relation to an access dispute may make a written application for a review of the final determination by the Australian Competition Tribunal (ACT). This review is a re-arbitration of the access dispute and is based on the information and evidence given, and the documents produced, to the ACCC in connection with the making of the final determination (and any other information referred to in the ACCC's reasons for the making of the determination).[1]

2.4 The Committee's 2001 inquiry into the Trade Practices Amendment (Telecommunications) Bill 2001 (the 'streamlining bill') was dominated by concerns of witnesses about the effect that merits review of ACCC arbitrations had on the access regime. Witnesses opposed to merits review referred to the significant delays from the review process; inefficiencies; potential for regulatory gaming; and the difficulties that new entrants seeking access to telecommunications infrastructure had in raising or committing capital during the review process due to the contingent liability of an unfavourable outcome via, for example, a backdated determination or review decision.

2.5 Despite the intention of that legislation to limit the matters to which the ACT could have regard in its review, many submissions had concentrated on the wider

1 Telecommunications Competition Bill 2002, Explanatory Memorandum, p 41.

issue of merits review itself, including advocating that it be abolished. At that time the Committee concluded that it would not be appropriate for fundamental changes to be made to the regime before the Government had considered the Productivity Commission report which was pending at the time.[2]

2.6 When the Productivity Commission released its final report, it did not recommend removing merits review for arbitrations. However, the Telecommunications Competition Bill 2002 contains amendments to remove this right in relation to final determinations made by the ACCC. These amendments will not affect the ability of a party to seek merits review of ACCC decisions under Part XIC to accept or reject an application for an exemption order (under section 152AT) or an access undertaking (under section 152BU), nor the ability to seek judicial review of a final determination.

2.7 The explanatory memorandum notes that removing merits review is intended:

> … to promote certainty for access seekers by streamlining the decision-making process. It will provide for consistency in decision-making and, in combination with the publication of model terms and conditions under proposed section 152AQB, it will further promote the likelihood that parties will reach commercial agreement on the terms and conditions for access.[3]

Response in submissions

2.8 The Committee does not intend in this report to canvass the arguments for and against merits review as this was done comprehensively in its report on the 2001 'streamlining' bill.

2.9 In relation to this inquiry, both Foxtel and Telstra expressed opposition to the removal of merits review of final determinations. Telstra considers these provisions in the Telecommunications Competition Bill to be a regressive step for the industry and a contradiction of the considered view of the Productivity Commission not only that merits review rights on arbitrations should be retained, but that such rights should be extended to include declaration decisions.[4]

2.10 Telstra argues that without merits review on arbitrations, the ACCC will have unfettered discretion to set access prices without the discipline represented by the possibility of independent review.[5]

2.11 Telstra draws on the Productivity Commission comment that the ACCC's current methodologies underestimate efficient long-run costs (and access prices) to

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2 Senate Environment, Communications, Information Technology and the Arts Legislation Committee, *Trade Practices Amendment (Telecommunications) Bill 2001*, Report, September 2001, pp 32 and 38.

3 Telecommunications Competition Bill 2002, Explanatory Memorandum, p 41.

4 Telstra, Submission 5, p 8.

5 Telstra, Submission 5a.

argue that removing merits review will provide a strong incentive for access seekers to initiate disputes and have the ACCC set prices rather than engage in good faith commercial negotiations.[6] However, according to the ACCC, Telstra's claims that it underestimates access prices are based on a very narrow reading of the Productivity Commission report and these claims do not appear to be substantiated by a close reading of the whole report:

> The Commission rejects any assertion that it is under pricing. Current pricing procedures do not result in pricing below long-run cost of supply in relation to Telstra's fixed network. Telstra's very high profits and history of high investment in recent years are signs of this.
>
> The ACCC's approach to pricing is consistent with approaches adopted in most other economies with liberalised telecommunications markets. Arguably, the ACCC has been generous in its pricing as it allows additional charges that other regulators do not.[7]

Transitional provisions

2.12 The majority of submissions were in favour of abolishing merits review and supported the related provisions in the bill. However, the transitional arrangements were a source of concern for the Seven Network and for Foxtel. These provisions preserve the right of appeal of parties to any final determinations made by the ACCC before the date of commencement of the provisions where an application for appeal has been lodged or where parties have a right of appeal at the time of commencement.

2.13 The Seven Network points out that the operation of the transitional arrangements would remove the option of merits review for disputes that were already on foot but for which the ACCC had not yet made a determination by the time the provisions commence. This would disadvantage both parties to the disputes and introduce an element of retrospectivity into the legislation.

2.14 However, it is only when the final determination is made by the ACCC that the right to merits review is created[8] and so technically the provisions as drafted are not retrospective in relation to disputes for which a determination has not yet been made. As the Department notes:

> The provisions as drafted are not legally retrospective, in the sense that they do not remove any legal rights to merits review that might have existed prior to commencement.[9]

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6 Telstra, Submission 5, p 8.

7 ACCC, Submission 9a.

8 Trade Practices Act, section 152DO; *see also* Mr Lyons, *Proof Committee Hansard*, Canberra, 22 October 2002, p 45.

9 Mr Lyons, *Proof Committee Hansard*, Canberra, 22 October 2002, p 44.

2.15 While there are currently no outstanding telecommunications disputes before the ACCC, there are two outstanding disputes that relate to pay television. Both the Seven Network and Foxtel are involved in these disputes. While the Seven Network supports the removal of merits review for future arbitrations, it opposes the removal of the review right in relation to access arbitrations that are already in train. It argues that:

> Seven entered into, and conducted, this arbitration in reliance on the existing access regime and procedural protections, including the opportunity to review the primary determination decision. For that appeal right to be removed now would be a great disadvantage to Seven.[10]

2.16 Furthermore, Seven points out that:

> Before the introduction of the Bill, there were no public statements by the Government that merits review would be removed in relation to current arbitrations, so there can be no expectations in the market for such a change. The ACCC has advised that the **only** access disputes still on foot under Part XIC are those relating to access to pay TV services. To quarantine current access disputes from the proposed removal of merits appeals would not be inconsistent with public policy statements on the Government's intended amendments to the access regime.[11]

2.17 Foxtel submits that any arbitration for which a dispute has been notified prior to the commencement of the legislation should attract a right of merits review.[12]

2.18 The Department explained to the Committee that the transitional provisions were intended to close any potential loophole that would encourage regulatory gaming. For example, without such transitional provisions:

> … there is a further type of gaming which could occur, and that is that people could suddenly notify a whole lot of disputes just so that they could then preserve the possibility of having a future merits review right. You could actually induce a new round of gaming between the introduction of the bill and the commencement of the new act.[13]

Merits review of access undertakings

2.19 While the bill removes the right of a party to seek merits review by the Australian Competition Tribunal in relation to final determinations made by the ACCC, the amendments will not affect the ability of a party to seek merits review of decisions of the ACCC under Part XIC to accept or reject an access undertaking under section 152BU (or an application for an exemption order under section 152AT.) The

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10 Seven Network, Submission 11, p 4.

11 Seven Network, Submission 11, p 5 [emphasis in original].

12 Foxtel, Submission 10, p 7.

13 Mr Cheah, *Proof Committee Hansard*, Canberra, 22 October 2002, p 44.

second reading speech notes that merits review of undertakings is being retained because of the voluntary nature of undertakings and their industry-wide application.[14]

2.20 According to Optus, retaining merits review for access undertakings will stall access and undermine the gains from removing merits review from arbitrations. It takes this view as a consequence of a perceived risk that the focus for Telstra's regulatory gaming, delays and uncertainty will merely shift from arbitrations to access undertakings, with no net gain to the timeliness of decision making.[15] According to Optus:

> Telstra has wasted little time in revealing the new gaming tactics that it will adopt under such a regime. In a briefing it gave to share market analysts on the proposed reforms, it indicated that it would lodge undertakings for the core access services (PSTN, LCR and ULLS) shortly after the passage of the Bill. Telstra's stated objective is to put these undertakings to the ACCC and then to appeal the ACCC's decision to the Competition Tribunal.[16]

2.21 Optus recommends that the merits review mechanism for ACCC decisions on ordinary access undertakings be removed from the Trade Practices Act, but it considers merits review should be retained for special access undertakings as an appropriate incentive to encourage access providers to make new investment.[17]

2.22 Telstra made the point that it makes no sense to allege that it will have an interest in prolonging disputes, because while a dispute is ongoing, an access-seeker only need pay the rates set by the ACCC. If the ACCC is subsequently found to have been wrong, the undertaking rate only applies to future sales. For this reason, Telstra must wear its losses. So Telstra has every incentive to *expedite* rather than delay the resolution of an undertaking.[18]

2.23 Optus does not agree with this conclusion. In combination with the bill's provisions that allow the ACCC to defer an arbitration while it considers an undertaking, it anticipates that:

> … Optus will be at the mercy of Telstra while the ACCC makes its decision on the Undertaking and while Telstra appeals each and every regulatory decision to the ACT and the Federal Court. Note that there would be *no* backdating of prices if the access dispute is deferred. Clearly, in this circumstance it is Telstra with the incentive to lodge vexatious undertakings and to delay regulatory decision-making.[19]

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14 Telecommunications Competition Bill 2002, Second reading speech, p 3.

15 Singtel Optus, Submission 3, p 4.

16 Singtel Optus, Submission 3, p 4.

17 Singtel Optus, Submission 3, p 4.

18 Telstra, Submission 5a.

19 Singtel Optus, Submission, 3a, p 2 [emphasis in original].

2.24 Telstra considers that with the abolition of merits review on arbitrations, the only safeguard against unfettered ACCC decision-making is the undertakings route.[20] In response to the suggestions from its competitors to remove merits review on undertakings, Telstra submits that access seekers are attempting to assure themselves an opportunity to game the regulatory system by manufacturing disputes in the expectation that ACCC intervention would deliver bargain prices that can never be disputed.[21] However, Optus disagrees with this. It asserts that there is nothing to be gained from lodging unnecessary access disputes as arbitrations are not a costless exercise and are not a means to winning 'low access prices':

> ACCC decisions on access disputes hold as much risk for Optus as they do for Telstra. … For Optus, arbitrations will always remain a mechanism of last resort.[22]

Deferment of arbitrations to consider undertakings

2.25 The bill will allow the ACCC to defer considering an access dispute, in whole or in part, so as to consider an access undertaking received by it that relates, in whole or in part, to the matter that is the subject of the dispute. Within six months of the commencement of the provisions, the ACCC must take all reasonable steps to formulate guidelines about this deferral.

2.26 In exercising this power the ACCC must have regard to:

- the fact that the undertaking will, if accepted, apply generally to access seekers, whereas a determination in relation to the access dispute will only apply to the parties to the determination;
- the guidelines in force in relation to the exercise of the power; and
- any other matters that the ACCC considers relevant.

2.27 These provisions are designed to encourage greater use of access undertakings rather than arbitrations. This is because undertakings have industry-wide application, compared with the bilateral operation of arbitration decisions.[23] The Government's view is that in most cases the ACCC should seek to consider a voluntary undertaking in advance of an arbitration,[24] but the provisions give the ACCC a discretion whether to defer consideration of the arbitration. There may be circumstances, such as in relation to the timing of the lodgement of an undertaking or in relation to the content of an undertaking, where it is appropriate to deal with an arbitration in advance of an undertaking.

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20 Telstra, Submission 5a.

21 Telstra, Submission 5a.

22 Singtel Optus, Submission 3a, p 2.

23 Telecommunications Competition Bill 2002, Second reading speech, p 3.

24 Telecommunications Competition Bill 2002, Second reading speech, p 3.

Response in submissions

2.28 AAPT Limited considers that the preference in the bill for measures that favour undertakings as a means of dealing with access issues, rather than negotiation and arbitration between the relevant parties, is likely to bring about undesirable outcomes involving regulatory gaming, delay and frustration of the broader objectives of the regime by access providers.[25]

2.29 Other submissions also raised concerns that these provisions are open to regulatory gaming with the resultant scope for delay and uncertainty:[26]

> The risk is that an access provider will try to thwart genuine arbitrations by lodging an undertaking late in an arbitration process or lodging multiple undertakings. The provisions in the Bill will effectively force the ACCC to consider the access undertaking before it can make a ruling on an arbitration.[27]

2.30 In support of its concern, Optus cited the example of Telstra lodging access undertakings for strategic purposes during the ACCC's assessment of the PSTN dispute. It suggests that Telstra already has a track record and the bills' provisions will increase its capacity to engage in this kind of conduct.[28]

2.31 According to AAPT, the relationship between the arbitral and undertaking processes in Part XIC of the Trade Practices Act has often proved a difficult aspect of the telecommunications specific access regime and these difficulties will be exacerbated by the ability of the ACCC to defer arbitrations to consider undertakings.

2.32 It notes that the optional nature of access undertakings and the requirement for public consultation as part of their assessment by the ACCC means they can take up more time than the arbitration process which involves the right to have a dispute determined in private and comparatively informally and quickly. Where vertically integrated and powerful access providers wish to delay and frustrate the securing of access on appropriate terms there are incentives for the processes to be gamed:[29]

> … undertakings make sense if they are offered and accepted before you get into arbitrations. They do not make sense as a circuitous route to cut off consideration of arbitrations. There may be circumstances in which the timing would suggest that there will be benefit in considering an undertaking because a number of arbitrations have been lodged at about the same time and the undertaking followed those very soon after. But, if I wanted to game the process, I would wait until the very last stage of an

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25 AAPT Limited, Submission 8, p 3.

26 Singtel Optus, Submission 3, p 5; *see also* Primus Telecom, Submission 6, p 3.

27 Singtel Optus, Submission 3, p 5.

28 Singtel Optus, Submission 3, p 5.

29 AAPT Limited, Submission 8, p 7.

> arbitral process before I lodged an undertaking and then draw out the undertaking assessment for as long as I could, even though I have argued for a six-month period. A lot of the timing on that assessment is in the access provider's hands, because the clock gets stopped in that timing whilst further elements of the information are provided. So there is some potential benefit in that regard.[30]

2.33 AAPT considers that the proposed amendments tip the balance in favour of the access provider and the resulting risk of regulatory gaming is unacceptably high. It therefore recommends that these provisions be removed from the bill.[31]

2.34 Primus suggests that if an access dispute is on foot then the access provider be given one opportunity only to submit a voluntary undertaking relating to that dispute.[32] It considers that this will act as a disincentive to the access provider submitting a vexatious undertaking and prevent it from deliberately delaying the consideration of the dispute.

2.35 In response to these concerns, the Department explained that while there is a policy preference for undertakings to be considered in the ordinary course of events, the ACCC is in no way constrained by the legislation to defer arbitrations to look at an undertaking and the bill does not create a presumption in favour of the consideration of undertakings. The ACCC will have a discretion to act depending on such things as the timing of when the arbitration was lodged and also the scope of both the arbitration and the undertaking.[33]

> … the ACCC should have regard to, not blindly follow, the fact that undertakings have an industry-wide application and be required to produce guidelines and identify other relevant matters that ought to be considered in deciding whether to defer an arbitration dispute or not. So there are other general principles the ACCC would be required to publish in guidelines which they would have to consult with stakeholders on. Firstly, the ACCC would be required to have regard to the individual merits of each case—so, regardless of the general principles, if there is a particular case where it would be appropriate to have an arbitration, to not suspend an arbitration but to continue with it. The classic example that is raised is: if the ACCC has been spending six or eight months and is just about to hand down an arbitration decision and then someone lodges an undertaking, the ACCC could, firstly, cover off on its guidelines and have regard to that. Secondly, the ACCC could look at the individual circumstances of each case. It may well be appropriate in that case not to. There is certainly no binding

30 Mr Havyatt, AAPT Limited, *Proof Committee Hansard*, Canberra, 15 October 2002, p 12.

31 AAPT Limited, Submission 8, p 11.

32 Primus Telecom, Submission 6, p 3.

33 Mr Lyons, *Proof Committee Hansard*, Canberra, 22 October 2002, pp 52 and 53.

> presumption, no legal operation, which would paint the ACCC in a corner and constrain them by law to suspend an arbitration.[34]

Committee's conclusion

2.36 The Committee supports the removal of merits review of ACCC final determinations and, while noting the concerns expressed by Optus and others, it is not persuaded by the arguments to also remove merits review in relation to undertakings. The Government will no doubt closely monitor the working of this provision and will consider its position should it become apparent that it is being used as a mechanism for gaming.

2.37 In relation to concerns raised about the transitional provisions, the Committee notes the Department's assurance that those concerns will be further considered by the Government.

Model terms and conditions for core services

2.38 The bill requires the ACCC to publish model terms and conditions of access for 'core' wholesale telecommunications services (PSTN, ULL and LCS[35]). While these terms and conditions would not be binding they would provide clear guidance about the regulator's views as to what fair terms and conditions for access would be. The list of core services can be expanded by regulation if necessary. As Mr Lyons explained:

> The purpose of the benchmark, or the model terms and conditions, is to send clear signals out to the market of what the likely decision would be on arbitration. … clearly in an individual arbitration the ACCC will continue to look at the merits of each arbitration and make a decision. It is just sending a signal about the likely general principles it would apply, its likely intention of price and non-price terms and conditions.[36]

2.39 The Department informed the Committee that the production of model terms and conditions for core services was to reduce the number of arbitrations and provide a tool for sensible commercial negotiation based on the likely outcome if the dispute were to go before the ACCC for arbitration.[37] The provisions are limited to core services on the basis that these are where there have been the most arbitrations and lengthy delays in arbitrations. Those services that have traditionally been associated with Telstra's fixed line network and for which there have either been lots of disputes

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34 Mr Lyons, *Proof Committee Hansard*, Canberra, 22 October 2002, p 52.

35 Domestic Public Switched Telephone Network (Originating and Terminating) Service
Unconditioned Local Loop Service
Local Carriage Service

36 Mr Lyons, *Proof Committee Hansard*, Canberra, 25 October 2002, p 67.

37 Mr Lyons, *Proof Committee Hansard*, Canberra, 22 October 2002, p 48.

or the potential for disputes have been included and the list takes into account the considerations of the industry.[38]

2.40 Vodafone supports moves to define a core set of telecommunications services as a means of refocussing the regulatory regime on durable market failures and with a view to reducing the scope of industry specific competition regulation.[39] It is opposed to expanding the core set of services:

> If you are going to apply a regulatory dimension in this market, it should be applied where the problems and durable market failures are—that is, defining a set of core services which, if I am correct, are defined in Telstra's fixed copper access network, basically. If there is any area of the market in telecommunications where there is potentially a problem, it is in that area of the fixed network. Our concern, and our comment in this submission, is really that the regime has extended beyond that to areas such as mobile, which we consider is fiercely competitive. Therefore, moving the regime back to focus on these basically fixed line services, where there is little competition at the infrastructure level, is appropriate.[40]

2.41 On the other hand, Optus, Primus and AAPT advocate that the list or core services be expanded.[41] Primus explains:

> Whilst the core services defined in the Bill are critical to downstream competitive services, there are other key bottleneck services such as fixed to mobile service which Primus believes are also important in the context of both model terms and conditions and accounting separation.[42]

2.42 In recognition of the burden that producing model terms and conditions for services in addition to core services might place on the ACCC's limited resources, AAPT suggests such terms and conditions could be made either on the application of a party or by the ACCC's own volition.[43]

2.43 By advocating that the list of core services be expanded, Optus acknowledges that:

> In many ways [the core services] are the services which have been the subject of the most intense battles so far, and there are no doubt intense battles to come. But there is a range of other services which in our view are just as much a topic of hot dispute between Optus and Telstra and no doubt between other smaller players and Telstra, and those include wholesale

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38 Mr Lyons, *Proof Committee Hansard*, Canberra, 22 October 2002, p 49.

39 Vodafone Australia, Submission 4, p 3.

40 Mr Kennedy, Vodafone Australia, *Proof Committee Hansard*, Canberra, 22 October 2002, p 24.

41 Singtel Optus, Submission 3, p 10; Primus Telecom, Submission 6, p 2; and AAPT Limited, Submission 8, p 15.

42 Primus Telecom, Submission 6, pp 2-3.

43 AAPT Limited, Submission 8, pp 15 and 16.

> transmission where we purchase transmission from Telstra, and indeed ISDN services. Even today, some five years after the regime was introduced, Optus does not get a discount on ISDN services. We pay at retail prices for ISDN services, which we then resell to our customers, so we have certainly suggested that ISDN should be included in this area of model terms and conditions, and so, too, should transmission.[44]

2.44 Mr Cheah explained that the bill attempts to improve the efficiency of the way the access regime operates but by the same token it needs to be focused and not create undue regulatory burdens.[45] From this standpoint there were two sets of guiding principles used to define the initial list of core services. First they are services that are strongly related to the customer access network; and second, they are focused on those areas where there have been disputes in the past.

2.45 Mr Lyons gave further explanation as to how the core services were chosen:

> The rationale was to focus on those elements related to Telstra control over the CAN, the fixed network, and areas where there had already been a significant number of disputes or there was evidence of clear potential for disputes. There had been a large number of disputes in relation to the PSTN; some of those had been resolved but there had been lengthy arbitrations in relation to the PSTN. Also, with local call services there had been disputes. In relation to the unbundled local loop, which is the third element that is fundamentally important to broadband type issues, there had been disputes notified to the commission. In the event, those disputes were resolved before they went to arbitration; nevertheless, clearly there had been potential for disputes. So that is the rationale for those three.
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> … there is provision for regulations to be made to address any further issues.[46]

2.46 The Committee considers that access to pay television services could be a potential area for future dispute and that there is a case for the Government to give consideration to using the mechanisms in the bill to extend the list of core services to include pay television.

Accounting separation

2.47 Concern has been expressed about the lack of transparency between Telstra's wholesale and retail services arising from the vertical integration between Telstra's wholesale and retail divisions. The perception is that Telstra's wholesale services may not be being provided to competitors on a non-discriminatory basis. The bill

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44 Mr Fletcher, Singtel Optus, *Proof Committee Hansard*, Canberra, 15 October 2002, p 18.

45 Mr Cheah, *Proof Committee Hansard*, Canberra, 22 October 2002, p 50.

46 Mr Lyons, *Proof Committee Hansard*, Canberra, 25 October 2002, pp 66-67.

therefore attempts to address these competition concerns and to improve the provision of costing and price information to access seekers and the market.[47]

2.48 The ACCC is empowered to make record-keeping rules under Part XIB of the Trade Practices Act, with which specified carriers and carriage service providers, or classes of carriers and carriage service providers, are required to comply. In addition, the ACCC has explicit powers to publish the information it collects under these rules.

2.49 By providing the ACCC with these disclosure powers it was intended that market participants, with their detailed knowledge of the telecommunications industry, could provide advice or comments to the ACCC, to assist it in determining whether conduct was anti-competitive. Additionally, negotiations under the access regime would benefit by all parties to those negotiations having a common information base.[48]

2.50 Although the ACCC has been developing a Telecommunications Industry Regulatory Accounting Framework (RAF) which sets out record-keeping rules, it is yet to publish information collected under the RAF. As the explanatory memorandum notes:

> Delay in implementing accounting transparency is likely to benefit the incumbent as it is subject to less industry scrutiny and its competitors are at more of a disadvantage in access negotiations.[49]

2.51 Consequently, without adding to the ACCC's powers, the bill enables the Minister to direct the ACCC in the use of its powers to encourage a more transparent regulatory market by requiring accounting separation of Telstra's wholesale and retail operations.

2.52 It is intended that accounting separation will assist in identifying whether Telstra is discriminating between itself and its competitors in relation to price or non-price terms and conditions of supply, particularly in relation to the core interconnection services over which it has effective monopoly control. It will also give Telstra both an incentive and an opportunity to demonstrate that its price and non-price arrangements promote efficient competitive outcomes and do not involve unfair discrimination or price squeeze behaviour.[50]

2.53 The proposed accounting separation framework requires that:

- Telstra prepares current (replacement) cost accounts (as well as existing historic cost accounts) to provide more transparency to the ACCC about its ongoing and sustainable wholesale and retail costs;

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47 Telecommunications Competition Bill 2002, Explanatory Memorandum, p 18.

48 Telecommunications Competition Bill 2002, Explanatory Memorandum, p 18.

49 Telecommunications Competition Bill 2002, Explanatory Memorandum, p 19.

50 Telecommunications Competition Bill 2002, Explanatory Memorandum, p 95.

- Telstra publishes current cost and historic cost key financial statements in respect of 'core' interconnect services but not underlying detailed financial and traffic data which is regarded as commercially sensitive;
- the ACCC prepares and publishes an 'imputation' analysis (based on Telstra purchasing the 'core' interconnect services at the price that it charges external access seekers) which will demonstrate whether there is any systemic price squeeze behaviour; and
- Telstra publishes information comparing its performance in supplying 'core' services to itself and to external access seekers in relation to key non-price terms and conditions. These will include faults / maintenance, ordering, provisioning, availability / performance, billing and notifications.[51]

2.54 The bill provides for the ministerial direction to the ACCC to be a disallowable instrument. It also makes provision for disclosure of reports that are prepared in response to a record-keeping rule made as result of the ministerial direction (Ministerially-directed reports).

2.55 It is anticipated that the proposed accounting separation framework will provide for publication of accounts relating to the 2002-03 financial year by the end of 2003.[52]

Response in submissions

2.56 While Telstra believes that arguments in favour of accounting separation are based on a misapprehension about the state of the competitive market and the impact of the existing policy framework, it does see some advantage in providing information on its costs and margins as a mechanism for assuaging market concerns about its conduct:[53]

> … there may be some advantages to the current accounting separation model because we do not think we have anything to hide. In fact, we think it will be very interesting when the current cost or replacement cost of some of our wholesale services is revealed: you will quickly realise that the ACCC has been underestimating the price of those services. I think some of our competitors are going to be a bit upset when they see that.

2.57 Telstra argues that the anti-competitive conduct provisions of Part XIB of the Trade Practices Act and in particular 'the most onerous set of penalties in Australian corporate law' are sufficient to deter it from setting its retail prices below its wholesale prices:[54]

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51 Telecommunications Competition Bill 2002, Explanatory Memorandum, p 4.

52 Telecommunications Competition Bill 2002, Explanatory Memorandum, p 20.

53 Telstra, Submission 5, pp 5 and 6.

54 Telstra, Submission 5, pp 5-6.

> Perhaps, arguably, we could favour Telstra retail in some other way, but we have the competition notice regime, which is the single most powerful weapon in the Trade Practices Act. It is a weapon that includes penalties of $1 million a day for breach. That means that over a period we could be up for $375 million in penalties. In the rest of the act the worst penalty you can get is a maximum of $20 million. So it is a really powerful weapon. That armoury is still there.[55]

2.58 Furthermore, the fact that the price of access to the Telstra network is largely determined by the ACCC which according to Telstra, tends to underestimate access prices, does not allow Telstra to monopoly price.[56]

2.59 Telstra believes that the mechanism proposed in the bill represents a pragmatic balance between either writing the detail of the accounting separation regime into the legislation, or affording the ACCC complete discretion to determine the regime's parameters.[57]

2.60 However, Telstra's competitors, whilst welcoming the provisions as a step in the right direction, do not consider that they go far enough. For example:

> Under the Government proposals Telstra may be required to publish "high-level" financial statements drawn from its RAF for the core services, but not the "underlying detailed financial and traffic data which is regarded as commercially sensitive." This carve-out is a very significant weakness in the Government's proposals. The underlying cost data is commercially sensitive because it is the very data that can inform a third party whether the price offered for a service is reasonable or not. Publication of the high-level accounts is largely a cosmetic change to the current arrangements and, in Optus' experience, will not materially advance commercial outcomes.[58]

2.61 Primus believes that a model which 'ring fences' the wholesale and monopoly components of Telstra's activities is necessary to create the right incentives to ensure prevention of anti-competitive behaviour.[59]

2.62 The Australian Consumers Association urges that the detailed accounting rules should aim to construct as 'rabbit-proof' a fence as possible between the wholesale and retail divisions of Telstra.[60] The aim should be to ultimately dispense with the access regime as the primary mechanism to generate competition. If the

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55 Dr Warren, *Proof Committee Hansard*, Canberra, 15 October 2002, p 5.

56 Telstra, Submission 5, p 5.

57 Telstra, Submission 5a.

58 Singtel Optus, Submission 3, p 7. See also, Primus Telecom, Submission 6, p 5; Hutchison Telecommunications, Submission 7, pp 2 and 5; and AAPT Limited, Submission 8, pp 3 and 12.

59 Primus Telecom, Submission 6, p 5.

60 Australian Consumers Association, Submission 2.

wholesale market were genuinely functional with Telstra retail purchasing in the same marketplace as its competitors, then the issues of regulatory risk, such as ACCC cost calculations, would be diminished.

2.63 The Seven Network argues that steps are necessary not only to address the level of vertical integration in Telstra's wholesale and retail services, but, in relation to Telstra's infrastructure and content activities and the provisions of the bill do not go far enough in this regard:

> It is not clear how these provisions will actually deliver improvements to competition. Telstra is already required to keep separate accounts. This has not stopped them from attempting to block competition on a range of fronts. This separation of the accounting function has been recognised in a number of EU countries where dominant telecommunication entities have been required to divest themselves of cable enterprises due to the anticompetitive effects of such vertical integration. The only long-term option to improve competition in pay television, communications, broadband and related services is to require structural separation within Telstra, both at the retail-wholesale level and the content infrastructure service arms.[61]

2.64 Hutchison Telecommunications focuses on the effect that anti-competitive bundling of services will have on single service providers who cannot compete with bundling that has the characteristics of cross-subsidy or price squeeze.[62] It expresses concern that the explanatory memorandum does not indicate greater scrutiny of Telstra's potentially anti-competitive activities. Hutchison advocates that all the services that are bundled or potentially could be bundled in the future are included in the imputation analysis; that the dominant provider be required to demonstrate fair pricing for services that are included in the bundles; and that there is full pricing and cost transparency in Telstra services at a wholesale and retail level.[63]

Ministerial direction

2.65 The only reference to Telstra and accounting separation is in the explanatory memorandum and not in the bill itself. The government intends that the detail be included in a ministerial direction which is not yet available, and this was of concern to some witnesses.[64] For example, Primus argues that there are four fundamental weaknesses in relation to the accounting separation provisions:

- the bill gives no direction on how the Minister will or should exercise his power;

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61 Mr Wise, Seven Network, *Proof Committee Hansard*, Canberra, 22 October 2002, p 29.

62 Mr Wright, Hutchison Telecommunications, *Proof Committee Hansard*, Canberra, 22 October 2002, p 37.

63 Mr Currie, Hutchison Telecommunications, *Proof Committee Hansard*, Canberra, 22 October 2002, pp 37 and 38.

64 See for example: Primus Telecom, Submission 6, p 5; Hutchison Telecommunications, Submission 7, p 1; AAPT Limited, Submission 8, p 12.

- the proposed section 151BUAA(1) gives the Minister complete directional control over the ACCC's exercise of its powers to make record keeping rules, and therefore could be used by the Minister to direct the ACCC to make a restricted record keeping rule, or no rules at all, rather than an expanded rule;
- although the Explanatory Memorandum contains some direction regarding the types of records that the Minister intends to direct Telstra to retain and disclose, the bill itself is silent on this issue; and
- the Explanatory Memorandum refers only to a Wholesale/ Retail accounting separation, not to natural monopoly (or "bottleneck") network elements, and neither the bill nor the Explanatory Memorandum seek to identify which network elements or services will be subject to accounting separation.[65]

2.66 Hutchison submits that:

> … there is no guidance within the legislation itself that sufficiently details what would be contained in the disallowable instrument and how the accounting separation provision will operate. We feel that the legislation is a positive step, but it is certainly not sufficient to address Hutchison's concerns about bundled services and, indeed, pricing transparency.[66]

2.67 Macquarie Corporate Telecommunications emphasises the importance of the ministerial direction being sufficiently comprehensive to be effective:

> It should specify that information is published that is sufficient to provide adequate evidence to allow the regulatory regime to operate and provide a degree of parity in the conditions by which Telstra Retail and its competitors obtain services on the Telstra network. Parity is key to competition because Telstra dominates the retail market. To compete in the market a provider must be able to compete with Telstra Retail. In addition, Telstra controls the only ubiquitous network and all providers are reliant on Telstra for access services.[67]

2.68 Additionally, AAPT favours industry consultation in relation to establishing the accounting separation rules:

> In AAPT's submission, it is not feasible for the ACCC to properly reflect the underlying objectives of accounting separation in a set of rules without industry consultation about these issues, particularly as industry players will be the ones scrutinising the accounting separation data generated by the framework to ensure that anti-competitive conduct is not being engaged in.[68]

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65 Primus, Submission 6, Attachment, p 6; *see also* AAPT Limited, Submission 8, p 12 for similar suggestions for improving the framework.

66 Mr Currie, Hutchison Telecommunications, *Proof Committee Hansard*, Canberra, 22 October 2002, p 37.

67 Macquarie Corporate Telecommunications, Submission 1.

68 AAPT Limited, Submission 8, p 12.

2.69 Furthermore, Primus recommends including in the bill provision for a review by the ACCC within two years of the bill's enactment. This review would assess the effectiveness of the accounting separation framework including the minister's written directions and would report to the Minister on the outcome of that review.[69]

2.70 Optus suggests that while the provisions in the bill will empower the Minister to issue a direction, there is nothing to require that he do so. This concern is echoed by AAPT.[70] Optus recommends that a requirement should be placed on the Minister to issue a direction within six months of the amendments coming into force.[71]

Response of Department

2.71 The regulation impact statement explains that:

> The direction provides a means of implementing accounting separation in a timely manner without duplication of existing regulatory powers and without the complexity and rigidity of specifying the detailed accounts in legislation.[72]

2.72 The Department told the Committee that there are already very broad powers to tackle anti-competitive behaviour and get information from carriers. However, the bill provides a significant boost to transparency:

> … there are specific things that must be done and must be done quickly to produce a more transparent costing framework for Telstra: automatic publication of certain accounts and a mechanism for access seekers to get access on an individual basis to further information which may assist them in, firstly, diagnosing for themselves any concerns they might have about anticompetitive behaviour; secondly, putting pressure on the ACCC to exercise its own anticompetitive behaviour powers; or thirdly, using that information to address information asymmetry and to have more informed negotiations with Telstra.[73]

2.73 In discussing the mechanism by which the ministerial direction will operate, Mr Lyons told the Committee:

> The mechanism in the bill is to give the minister a power to issue directions to the ACCC in relation to the use of its record keeping rule powers to achieve specified outcomes. … The alternatives that are open in a regulatory sense would be to either draft into the bill a very prescriptive piece of legislation identifying all those outcomes, which would get down to a very refined level of detail given that we are talking about accounting concepts

69 Primus, Submission 6, Attachment, p 7.

70 AAPT Limited, Submission 8, p 3,

71 Singtel Optus, Submission 3, p 9.

72 Telecommunications Competition Bill 2002, Explanatory Memorandum, p 20.

73 My Lyons, *Proof Committee Hansard*, Canberra, 22 October 2002, p 51.

> and accounting issues, or give the minister the power to issue directions with the safeguard that those directions themselves would be subject to scrutiny and disallowance by parliament, because a direction would be a disallowable instrument.[74]

2.74 According to Mr Lyons, very detailed descriptive legislation would have been extremely difficult and lengthy to draft and would also be inflexible. It could not be changed without putting another bill before Parliament, with attendant delays. The Government has therefore announced the key principles that would underpin accounting separation. Additionally, there would be extensive consultation with stakeholders on the details of the ministerial direction and then the direction itself would be subject to scrutiny by parliament.[75] The direction has not yet been drafted.

2.75 Specifically in addressing concerns about the bundling of services, Mr Lyons told the Committee that while there may be bundling that is anti-competitive, bundling of products itself is not anti-competitive and may well lead to clear benefits for consumers. The bill does not contain any proscriptive legislation that would prohibit bundling or create a negative statutory presumption against bundling. If bundling is anti-competitive, the ACCC has strong powers that it can call on to identify that situation and to take action against it.[76]

2.76 The provisions in the bill enable a framework to be implemented which would ensure that the regulatory accounts for Telstra move to a current costs basis, which will give the ACCC a better information base to deal with anti-competitive bundling issues. The bill also contains mechanisms that allow Telstra's competitors to get access to information under those regulatory accounts on a confidential basis if they have concerns in relation to bundling issues. The ACCC would determine whether the release of that information is appropriate.[77] Additionally:

> There is also automatic publication under the proposed accounting separation framework of financial statements in relation to the core services over which Telstra has the monopoly control through its control over the fixed line network. The ACCC has powers to make further record keeping rules to address bundling issues if it wishes to under part 11(b) and it can do individual investigations and imputation analysis in relation to bundling related issues. So we do not really think there is a need for any specific provisions along the lines that have been proposed.

2.77 In conclusion, Mr Cheah made the following comment:

> We think that the current package is a good package which will significantly improve transparency but, like any package, it is probably not going to be perfect and it will probably require additions in the future. If some of those

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74 Mr Lyons, *Proof Committee Hansard*, Canberra, 25 October 2002, p 67.

75 Mr Lyons, *Proof Committee Hansard*, Canberra, 25 October 2002, p 67.

76 Mr Lyons, *Proof Committee Hansard*, Canberra, 25 October 2002, p 64.

77 Mr Lyons, *Proof Committee Hansard*, Canberra, 25 October 2002, p 65.

> issues that, for example, Hutchison was raising before do turn out to be a problem and if we do not think that the ACCC is taking matters enough into its own hands, the current minister or a future minister may wish to have the ability to address that issue relatively quickly without necessarily having to come back to primary legislation. But there is always the safeguard at the end of the day that, if parliament does not like what the minister is trying to do, they can always disallow it.[78]

Core services in relation to accounting separation

2.78 Several submissions were concerned that by limiting the information that is to be published to 'core' interconnect services, the scope of the accounting separation framework is too narrow[79] and this will ensure the ongoing lack of transparency in relation to Telstra's monopoly services or facilities, for example Primus states that:

> … the accounting separation framework must also reference costs and revenues of the monopoly components of Telstra's business. In particular the customer access network. To not do so would mean that Telstra would potentially be able to exploit its control over critical monopoly facilities to advantage itself over its competitors.[80]

2.79 Primus believes that the ACCC should be given the power to determine other core services or at least be able to determine as core services, those which are essential to the proposed core services of ULLS, LCS and PSTN. For example the ACCC could determine that the CAN, as an essential element of LCS, should be deemed a core service in itself.[81]

2.80 Optus considers that the 'core' services should be extended to other services that are subject to monopoly supply, including transmission services, ISDN services and Digital Data Access services.

2.81 As noted above, Hutchison Telecommunications' major concerns are in relation to the effect that Telstra's bundling of services has on the transparency of its prices. Although Hutchison concedes that the imputation analysis may provide some exposure to anti-competitive product bundling, because the analysis only addresses core interconnect services, it does not expose the full suite of products that Telstra currently bundles, including fixed, internet, mobile and potentially pay TV.[82]

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78 Mr Cheah, *Proof Committee Hansard*, Canberra, 25 October 2002, p 68.

79 See Singtel Optus, Submission 3, p 10; Primus Telecom, Submission 6, p 6; Hutchison, Submission 7, p 5.

80 Primus Telecom, Submission 6, p 6.

81 Primus Telecom, Submission 6, p 6.

82 Hutchison Telecommunications, Submission 7, p 5.

2.82 AAPT considers that the accounting separation measures should apply in respect of the totality of Telstra's retail and wholesale operations and it does not consider that this will place undue administrative burdens on Telstra.[83]

Response of Department

2.83 The Department explained that the 'core' services concept in relation to accounting separation applies to the information that would automatically be published to the public at large. However, the ACCC itself has access to information on the full range of Telstra's wholesale and retail operations, both core and non-core:

> …[the ACCC] has the ability to drill down on those and effectively have whatever imputation rules it wants to have to really understand those costs. The commission will be required to do that looking at Telstra's services across both the historic cost methodologies it currently uses and a forward-looking costing methodology, and to reconcile those.
>
> The commission is going to be required to have a very comprehensive accounting framework. The only issue then is what gets published. There is probably a subset which gets published in a more aggregated form. Partly, though, that is linked to some genuine commercial-in-confidence issues about just how far down into Telstra's cost structures it is reasonable to go when you are publishing these kinds of accounts. We want the commission to have a very good and detailed understanding of what drives Telstra's costs. It is appropriate for a regulator to have that.[84]

2.84 Additionally, the bill contains provision for the disclosure of additional information:

> In fact, there is a specific mechanism in the bill for access seekers or members of the industry who want information that is contained in those regulatory accounts in relation to services other than the core services to seek access on a limited basis rather than it being released to the public at large. So there is an application or an extension beyond core services to that extent.[85]

Committee's conclusion

2.85 The Committee concludes that the accounting separation framework as outlined by the Department will adequately address the concerns raised by witnesses. While only information on the core services will be made public, the ACCC has access to the full range of Telstra's wholesale and retail arrangements and can conduct various analyses to ensure compliance with anti-competitive conduct legislation. There are also provisions in the bill for the disclosure of information additional to that which will as a matter of course be placed in the public domain. Additionally, the

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83 AAPT Limited, Submission 8, p 4.

84 Mr Cheah, *Proof Committee Hansard*, Canberra, 22 October 2002, p 50.

85 Mr Lyons, *Proof Committee Hansard*, Canberra, 22 October 2002, p 50.

industry and the Parliament will have input into the form of the ministerial direction during the consultation process.

Anticipatory exemptions and undertakings

Background

2.86 The bill includes amendments to facilitate investment in new telecommunications infrastructure. According to the Department these amendments will fill a gap in the telecommunications access regime that was identified by the Productivity Commission.[86]

2.87 At present, the ACCC can exempt certain parties from the standard access obligations for the supply of an active declared service. Exemptions may be subject to such conditions or limitations as specified by the ACCC in its exemption determination.

2.88 However, the ACCC cannot provide exemptions in relation to a service that is not an active declared service. This means that potential investors in telecommunications services cannot apply for exemption from the standard access obligations, and according to the explanatory memorandum, this provides a disincentive for investment because potential access providers cannot obtain regulatory certainty as to whether or not their service will be declared.[87] In particular, where 'risky investments' are subject to potential declaration, the investment may be rendered uneconomic as a result of this uncertainty.

2.89 Another aspect of regulatory uncertainty in the access regime which it is claimed may discourage investment, is that undertakings can only be submitted to the ACCC in relation to declared services. Potential investors in telecommunications services or infrastructure will not have the certainty that an undertaking can provide as to the terms and conditions that they would be required to provide access should their investment be declared some time in the future.

2.90 The bill provides two mechanisms to overcome these disincentives to invest in new telecommunications infrastructure. Firstly, it extends the current exemption mechanism by introducing anticipatory exemptions into the regime to allow the ACCC to determine that a class of carriers and/or carriage service providers, or a particular individual, are exempt from current and possible future standard access obligations in relation to a particular proposed service, even if that service is not in existence at the time that the exemption is sought.

2.91 The ACCC determination will be a disallowable instrument that may contain limitations and conditions or it may be unconditional. In granting the exemption, the ACCC must have regard to the extent to which such an exemption will promote the

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86 Mr Lyons, *Proof Committee Hansard*, Canberra, 22 October 2002, p 46.

87 Telecommunications Competition Bill 2002, Explanatory memorandum, p 62.

long-term interests of end-users of carriage services or services supplied by means of carriage services and section 152AB of the Trade Practices Act specifies the matters that it must consider in this regard. Additionally, the ACCC must have regard to any matters specified by the Minister in a disallowable instrument that is written for that purpose and made available on the internet.

2.92 Furthermore, the exemption determination must specify an expiry time, and in the event that the determination expires, the ACCC may make a fresh determination in the same terms, or, if the service has become an active declared service, it may determine exemption from the standard access obligations that would in that case be applicable.

2.93 In making its decision on an application for exemption, the ACCC will be subject to a time limit of six months or it will be deemed to have made an order in accordance with the terms of the application. So as to remove the potential of this time limit to be used for regulatory gaming, the ACCC may 'stop the clock' in certain circumstances. It may also extend, or further extend the six month period by three months.

2.94 As with applications for exemptions from the standard access obligations, persons whose interests are affected by a decision of the ACCC in relation to anticipatory exemptions, may apply to the ACT for a review of the decision.

2.95 Secondly, the bill allows the ACCC to accept undertakings from existing and potential access providers of all telecommunications services (including services provided by a particular piece of telecommunications infrastructure) irrespective of whether those services have or will be declared or are in existence at the time the undertaking is lodged. It creates two types of access undertakings: ordinary access undertakings, currently known under Part XIC as access undertakings, and special access undertakings. The latter will cover proposed services and services which may exist to some extent but are not yet declared and may be given by a person who is, or expects to be, a carrier or carriage service provider.

2.96 In addition to providing certainty to the investor as to the terms and conditions that it will be required to provide access in the future, the amendments allow the ACCC to rule on whether the terms of a proposed undertaking are acceptable prior to the investment being made.[88]

2.97 Unlike ordinary access undertakings that must expire within three years of the date that the undertaking comes into operation, special access undertakings are not subject to a maximum time limit, although they must specify some expiry time. According to the explanatory memorandum, this is intended to provide further certainty for investors and an additional incentive for access providers to submit a

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88 Telecommunications Competition Bill 2002, Explanatory Memorandum, p 70.

special access undertaking as these have the benefit of providing industry-wide access to the service on terms that are agreeable to the access provider and the regulator:[89]

> This would benefit access seekers to avoid costly arbitration proceedings by utilising the terms and conditions of access in the special access undertaking. The combination of the binding term and the capacity for the investor and regulator to come to agreement on the terms and conditions of the special access undertaking mean that this mechanism would allow the access provider and the regulator to enter into a type of regulatory compact.[90]

2.98 Once the special access undertaking is in operation and the service has come into existence, the bill effectively deems that the service is a declared service so as to apply the standard access obligations and associated machinery of Part XIC to the undertaking.[91] This does not prevent the ACCC from subsequently declaring a service that is covered by a special access undertaking in the ordinary way.

2.99 Similar time limits will be imposed on the ACCC in relation to its decision to accept or reject special access undertakings as those that will apply for applications for anticipatory exemptions. If at the end of the six month period the ACCC has not made a decision, it will be taken to have made a decision accepting the undertaking. 'Stop the clock' provisions and provisions to extend the period will also apply.

2.100 These amendments will bring the Part XIC provisions into line with the general economy-wide access regime in Part IIIA of the Act, which already allows an access provider to lodge an undertaking in relation to services which have not been declared.[92]

Response in submissions

2.101 Most submissions were supportive of these provisions in the bill:[93]

> One of the big issues we have in rolling out any investment is regulatory risk. When our CEO and GMDs went around the world recently they came back and said that one of the issues that overwhelmingly all the investors were asking them about was regulatory risk. The main part of that is part XIC, the access regime. The big problem is that under the current legislation—not under what is being proposed—there is no way to tell in advance whether or not a particular investment will be regulated and, if so, how. So we have no idea whether third party access will be required, and what terms and conditions the ACCC will decide to impose. What we think

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89 Telecommunications Competition Bill 2002, Explanatory Memorandum, p 71.

90 Telecommunications Competition Bill 2002, Explanatory Memorandum, p 71.

91 Telecommunications Competition Bill 2002, Explanatory Memorandum, p 72.

92 ACCC, Submission 9a.

93 See for example, Telstra, Submission 5, p 6; Vodafone, Submission 4, p 5; Primus Telecom, Submission 6, p 4; Foxtel, Submission 10, p 1.

> … is a very good idea about the proposals being put forward is that, before you sink one dollar, you will be able to go to the ACCC and say to them, 'How do you propose to regulate?' Then you will be able to take that information, come back and build that into your investment models. Hence the regulatory risk profile reduces and hence the cost to capital reduces. That is good for us because it means more projects pass their hurdle rate, and we think it is good for consumers because it means we get 3G and all these other good things rolled out to consumers well and truly ahead of where they would be under the current arrangements.[94]

2.102 While Vodafone welcomes the changes as giving infrastructure investors a greater degree of investment certainty over the regulatory treatment of planned infrastructure investment, it considers that they are a second best solution.

> We think there would be no need for a safe harbour regime if you had declaration criteria that were more reflective of some of the Productivity Commission regulations which align the declaration criteria with part 3 of the Act, which is the generic part of the Act. Generally, we think it would be a debate that we would like to have with the ACCC about the appropriate time period for exemption periods.[95]

2.103 Vodafone would prefer that the declaration criteria be reformed to provide greater certainty about the types of services that would be subject to regulation as well as the circumstances in which they would be regulated.[96]

Expiry times

2.104 Vodafone's concerns also relate to the expiry times and further review by the ACCC of anticipatory exemptions and special access undertakings. It takes issue with the burden of proof being placed on the provider of the service to justify the exemption or undertaking rather than on the ACCC to justify why such a service should be regulated. It considers that one implication of this reversed burden of proof is that it is more likely that regulation will be applied than not:

> Access providers will need to prove that not regulating a service promotes the long term interest of end users rather than the ACCC needing to prove that regulation is required.[97]

2.105 Foxtel also raises concerns about the expiry times and suggests there may be circumstances in which it is appropriate for an exemption to be open ended. It also submits that there are circumstances where it may be appropriate for anticipatory

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94 Dr Warren, Telstra, *Proof Committee Hansard*, Canberra, 15 October 2002, p 3.

95 Mr Kennedy, Vodafone Australia, *Proof Committee Hansard*, Canberra, 22 October 2002, p 27.

96 Vodafone Australia, Submission 4, p 6.

97 Vodafone Australia, Submission 4, p 6.

exemptions and special access undertakings to expire not on a particular date but upon the occurrence of a particular event.[98]

2.106 The Department explained that specifying expiry dates is related to the difficulty in trying to predict the future and the bill allows flexibility in this area because the time scale for returns on investments can be very different. By specifying that an undertaking will apply for a certain period, it enables the ACCC to review it at a mid-point and decide whether or not to allow the undertaking to continue.[99]

2.107 Mr Markus expanded on this point as follows:

> … it is very difficult to predict, particularly with new infrastructure, exactly how it will all pan out. There is a concern that, because of that uncertainty, perhaps the commission would be reluctant to approve an undertaking that was going to last for a considerable period of time. To better facilitate the chances that they might be prepared to approve something, the provision was made that the undertaking could have built into it a way in which it would be extended for a further period if certain objective criteria had been met at that time.[100]

Ministerial involvement

2.108 The possibility of ministerial involvement in granting an exemption was a matter of concern to some submitters. The Australian Consumers' Association notes that this creates a wild card that may or may not be beneficial to consumers:

> [The ministerial power] … may operate to improve the quality of the LTIE test from the consumer perspective. However, to the extent that it might be used to improve the investment outlook of business, it may not function to the benefit of consumers. Here we would be concerned that there should be the same transparency and process as required from the ACCC, so that due process and consultation would produce specifications that would have reason and justification of their relation to the public interest.[101]

2.109 AAPT also raises the issue of Ministerial involvement in the process of granting an exemption. It notes that this is in contrast to the existing provisions relating to the exemptions from standard access obligations which do not provide for Ministerial involvement. In AAPT's view, such involvement creates the unnecessary risk of politicising the process of determining exemptions and unnecessarily involving an additional party in the decision making process, and it should be removed from the bill, both in relation to anticipatory exemptions and special access undertakings:

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98 Foxtel, Submission 10, p 4.

99 Mr Cheah and My Lyons, *Proof Committee Hansard*, Canberra, 25 October 2002, p 63.

100 Mr Markus, *Proof Committee Hansard*, Canberra, 25 October 2002, p 63.

101 Australian Consumers' Association, Submission 2.

> Our concern is that you are moving an economic analysis and an analysis of the long-term interests of end users into the political sphere where the interests of politics and other interest groups, rather than the objects of the legislation, will come into play.[102]

2.110 Optus, however, considers that there is a role to be played by the Minister:

> Given the nature of the investments that are going to be contemplated and the fact that in many cases they are going to be very significant investments, we do think there is a case for some input at a policy level from the minister.[103]

Content sharing agreement between Foxtel and Optus

2.111 Since March 2002, the ACCC has been considering proposed arrangements between Optus and Foxtel which primarily provide for the supply of Foxtel subscription television content to Optus. It has a number of areas of concern with the proposed arrangements and in June concluded that the agreement was likely to breach the Trade Practices Act.

2.112 Where the ACCC comes to such a conclusion, the parties to the proposed transaction have the option of offering undertakings under section 87B of the Trade Practices Act, to try and overcome the ACCC's concerns. Foxtel, Optus, Telstra and Austar have provided the ACCC with draft section 87B undertakings that detail a series of measures designed to try to allay the ACCC's competition concerns regarding the proposed arrangements between Foxtel and Optus.

2.113 As part of its section 87B undertakings package, Foxtel has committed to supply a digital service if it can get an exemption from the application of Part XIC of the Trade Practices Act in relation to its subscription television services. According to Foxtel its section 87B undertaking is necessarily conditional because it:

> … requires certainty in the regulatory environment in which this investment is being made and the terms upon which FOXTEL will provide digital set-top unit services to third parties to be known before making such a large investment.[104]

2.114 The anticipatory exemption provisions contained in the Telecommunications Competition Bill 2002 are the means by which Foxtel can gain an exemption to the access provisions in Part XIC:

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102 Ms Aliprandi, AAPT Limited, *Proof Committee Hansard*, Canberra, 15 October 2002, p 13.

103 Mr Fletcher, Singtel Optus, *Proof Committee Hansard*, Canberra, 15 October 2002, p 19.

104 Foxtel, Submission 10, p 2.

> FOXTEL agreed not to seek industry-specific legislation exempting it from Part XIC and instead indicated that it was prepared to rely on the Government introducing generic legislation.[105]

2.115 Foxtel is broadly supportive of these provisions in the bill.

2.116 However, the Seven Network's major concern with the bill relates to these provisions and in particular to the legislation facilitating an anticipatory exemption being granted to Foxtel:

> In relation to digital pay television services/carriage services, there is no place for exemptions from standard access requirements. These services are of such importance and provide such scope for market dominance in pay television, telecommunications, broadcasting and related industries and to control the digital gateway to the home that they should never be exempted from the access regime.[106]

2.117 Seven submits that exemptions from the access framework are not necessary to provide pricing certainty which can be adequately addressed through the provision of undertakings. It considers that the provisions relating to anticipatory exemptions should be removed from the bill.[107] It summarises its objection as follows:

> … we should be clear about a key element of the bill, which is to comply with the requirements of the Foxtel partners as outlined in their undertakings currently being considered by the ACCC in relation to the proposed Foxtel-Optus deal. Those undertakings seek to deliver an unfettered monopoly to Foxtel in the provision of pay television content and services and to secure a permanent gateway advantage for Telstra and Foxtel over the digital gateway to the home. This is the gateway through which customers will access broadcasting, telecommunications, broadband related services and new and emerging services. The provisions of the bill aimed at exempting Telstra and Foxtel from the standard access obligations in relation to digital pay television carriage and set-top unit services would, if enacted, constitute a major setback for competition in the Australian communications industry. Exempting those services would also constitute a fundamental change of direction in the policy of both major parties.[108]

2.118 Seven's understanding is that the primary policy intention of the provisions that relate to anticipatory exemptions is to provide financial certainty for the Telstra/Foxtel partnership and to encourage the digitisation of the Telstra/Foxtel pay TV network.[109] However this perspective was not supported by the Department's

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105 Foxtel, Submission 10, p 2.

106 The Seven Network, Submission 11, p 9.

107 The Seven Network, Submission 11, p 9.

108 Mr Wise, Seven Network, *Proof Committee Hansard*, Canberra, 22 October 2002, p 28.

109 The Seven Network, Submission 11, p 9.

evidence which indicated that the provisions in the bill are a consequence of the Productivity Commission identifying a gap in the access regime during its inquiry:[110]

> There is nothing in the bill which automatically results in any exemption for pay TV digitisation. That is entirely a matter for the commission to look at, applying the existing criteria in terms of whether or not that is appropriate.[111]
>
> The proposed amendments in the bill make no reference to the Foxtel undertakings. They apply generically in any case where a telecommunications service provider is seeking regulatory certainty before making investment decisions about the supply of services that have not yet been declared by the ACCC. This could, for example, apply to investments in infrastructure for the carriage of 3G mobile services or investments in infrastructure for the carriage of digital pay TV services.[112]

2.119 Seven identifies deficiencies in the existing access regime and recommends that until these are rectified, Parts 11 and 12 dealing with anticipatory exemptions and special access undertakings should be deleted from the bill until the ACCC has made a final decision on the proposed Foxtel/Optus/Telstra deal.[113]

Committee's conclusion

2.120 The Committee is satisfied that it is entirely a matter for the ACCC on the one hand to decide whether to accept the section 87B undertakings by Foxtel and the other parties and on the other hand, in the event that this bill is passed unamended, it would also be another matter for the ACCC to determine whether it should grant any application by Foxtel for an exemption under the new anticipatory exemption provisions.

2.121 The Seven Network's fears that this legislation would effectively 'hand the whole chalice' of a monopoly service to Foxtel disregard the processes which need to be gone through if Foxtel applies for an anticipatory exemption or special access undertaking, the objects to which the ACCC must have regard in assessing such applications, as well as any conditions and limitations that the ACCC can place on such exemptions.

2.122 The ACCC confirmed that while the passage of the bill would provide an opportunity for the parties to seek an exemption or lodge an undertaking, this in no way guarantees that the exemption would automatically be granted:

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110 My Lyons, *Proof Committee Hansard*, Canberra, 22 October 2002, p 46. *See also* Mr Chea, *Proof Committee Hansard*, Canberra, 25 October 2002, p 56.

111 My Lyons, *Proof Committee Hansard*, Canberra, 22 October 2002, p 47.

112 Mr Cheah, *Proof Committee Hansard*, Canberra, 25 October 2002, p 56.

113 The Seven Network, Submission 11, p 9; *and* Submission 11a, p 3.

> If the Commission accepts the proposed section 87B undertakings and the Bill is passed, Foxtel and Telstra will then lodge further access undertakings and exemption applications with the Commission in accordance with the proposed 152ATA/CBA provisions. Equally, if the Commission rejects the undertaking and the legislation is passed, Foxtel and Telstra still have the ability to lodge anticipatory undertakings or seek special exemptions. These would be new and separate statutory processes to the previous consideration of the section 87B undertakings. The Commission would consider each proposal against the relevant criteria. The Commission's decisions in relation to the Foxtel/Optus Agreement are, therefore, not dependent on the passage of the Bill.[114]

Time limits imposed on ACCC and ACT decisions

2.123 In order to facilitate more timely access to basic telecommunications services, the bill introduces time limits on the ACCC and ACT decision-making processes. These time limits are detailed above in relation to applications for anticipatory exemptions and submissions of special access undertakings, and they will also apply more widely in relation to exemptions and undertakings generally.

2.124 Foxtel supports the deeming of ACCC decisions but considers that if ACT decisions are not made within the requisite time limits, the ACCC decision should be deemed to stand, and not set aside.

2.125 This position is supported by Optus. It cites the incongruity of a situation where the reasoned decision by the ACCC to reject an undertaking can be reversed by a process which may not be supported by any evidence or reasons, but simply because the six month time limit expired. It recommends that where the ACT has not made a decision within six months, the undertaking is deemed to be rejected:[115]

> Our third concern is a procedural quirk of the way the bill has been drafted whereby, when an undertaking rejected by the ACCC is appealed, if the appeal is not finalised within a particular period of time the undertaking automatically comes into force. To us, that seems to go in completely the wrong direction.[116]

2.126 However, AAPT considers that if the time limits expire, the outcome should be the opposite of what is proposed in the bill for both ACT and ACCC decisions. That is, the application for exemption, or submission of an undertaking, should be taken to have been rejected if the ACCC or Tribunal fails to make a decision within the appropriate time frame.[117] AAPT argues that the presumption should be in favour of continuing the applicability of the standard access obligations, until a case for their

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114 ACCC, Submission 9a.

115 Singtel Optus, Submission 3, p 6.

116 Mr Fletcher, Singtel Optus, *Proof Committee Hansard*, Canberra, 15 October 2002, p 20.

117 AAPT Limited, Submission 8, p 14.

non-application is proved. The onus should remain squarely on the applicant to prove that an exemption or undertaking is warranted.

Response of Department

2.127 The Department explained to the Committee that the time limits are being introduced in order to speed up the undertakings and exemption processes. However, rather than imposing absolute time limits on ACCC and ACT decisions, which could arguably lead to decisions not being properly informed, the bill puts the onus on the decision maker, if it cannot reach a decision within six months, to transparently demonstrate in a public statement why it cannot and the reasons for which it needs an extension:[118]

> We think that will provide a pretty powerful incentive for more timely decisions. It is obviously in the interests of parties to have that certainty. But these are such important decisions, with such industry wide ramifications, that a review mechanism is considered appropriate.

2.128 The Committee accepts this explanation.

Recommendation

The Committee recommends that the bill be passed without amendment.

Senator Alan Eggleston

Chair

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118 Mr Lyons, *Proof Committee Hansard*, Canberra, 25 October 2002, p 69.

Minority Report by Labor Senators

1.1 The Telecommunications Competition Bill 2002 seeks to enhance the level of competition and improve the investment climate in the telecommunications sector.

1.2 The Bill forms part of the Government's response to the Productivity Commission Report into Telecommunications Competition Regulation. The Bill improves access arrangements for 'core' telecommunications services; facilitates a greater degree of certainty for investors in new telecommunications infrastructure; provides for a slightly more transparent regulatory market, particularly in relation to Telstra's wholesale and retail operations; and codifies a level of accountability and transparency in the tackling of anti-competitive conduct.

1.3 Labor Senators are broadly supportive of the Bill as providing for some general improvements to the telecommunications competition regime. However, we disagree with the assessment of the majority report recommendation that the bill be passed without amendment. The ECITA Legislation Committee received many substantive submissions recommending enhancements to the Bill's purpose and effect. Labor Senators find it surprising that the Majority Report does not recommend even one amendment, as we believe there are a number of opportunities to strengthen the Bill. We hope the Government will consider our suggestions for improving the Bill in a constructive spirit.

Discussion of the bill's provisions

2.1 This minority report will focus on areas of contention. Whilst, concerns were expressed about the exclusion of ISDN from the definition of core services, the provisions of the Bill dealing with model terms and conditions are generally acceptable to Labor Senators.

2.2 Labor Senators also support the provisions of the Bill dealing with anti-competitive conduct. We note the ACCC's view that this codifies existing arrangements. The ACCC strongly contested Telstra's claims that the ACCC does not properly consult with carriers prior to issuing competition notices.[1]

2.3 Moving the responsibility of carrier preselection or the ability of customers to use other providers on their telecommunications service for certain types of calls, eg STD, from the ACA to the ACCC is a worthwhile reform. The Productivity Commission Report found that carrier preselection had significant competitive implications and was therefore best handled by the ACCC.

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[1] ACCC letter to Michael McLean, 11 November, 2002.

Removal of Merits Review for final ACCC determinations

2.4 A key problem in the existing telecommunications access regime identified by witnesses is the timeliness of access to telecommunications infrastructure. Many access seekers have faced delayed access through what they consider to be 'gaming' tactics.

2.5 The proposed removal of merits review of ACCC arbitrations was Labor policy prior to the last election and Labor Senators are pleased the Government has taken this on board. This should speed up the access regime in regards to arbitrations and is a worthy reform.

2.6 Again, Labor Senators**,** note the ACCC's letter to the Committee referring to less than accurate evidence by Telstra in relation to these provisions[2]. The ACCC has stated that Professor Fels has consistently supported removing merits review from ACCC arbitrations. Dr Tony Warren of Telstra stated before this Committee that:

Once of the great advocate of appeals—at least way back on 24 May last year—was Professor Fels.[3]

Dr Warren then goes on to partially quote Professor Fels from his Cairo speech. The ACCC have refuted Dr Warren's evidence as a misinterpretation of Professor Fels speech. This has previously been pointed out to Telstra.[4]

2.7 There has been a concern expressed in submissions to the Senate Inquiry into the Bill that as the ACT merits review process remains for access undertakings, gaming tactics will move from arbitrations to undertakings. Optus have stated that, "giving priority to undertakings will result in more Telstra game playing".[5] AAPT stated:

> The preference in the Bill's measures towards undertakings as means of dealing with access issues, rather than negotiation and arbitration between the relevant parties, is likely to bring about undesirable outcomes.[6]

2.8 Of further concern is the possibility that the interplay of the arbitration process with the access undertaking process could undermine the Bill's objectives to speed up access to telecommunications infrastructure. There could be increased delays from content providers who make access undertakings at a late stage in the arbitration process in order to defer that process whilst the undertaking is considered by the ACCC, and possibly reviewed by the ACT.

2.9 Whilst Labor Senators note these concerns we also note that the Department is of the view that these provisions will not necessarily lead towards further gaming and

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[2] ACCC letter to Michael McLean, 11 November, 2002.

[3] Dr Warren, *Proof Committee Hansard*, Canberra 15 October, 2002.

[4] ACCC letter to Michael McLean, 11 November, 2002.

[5] Optus Submission, p.5.

[6] AAPT Submission, p.3.

delay problems for those seeking access to telecommunications services. According to the Department:

> With regard to undertakings, an exemption of regulatory gaming incentives is not really of the same order because the access provider or the potential access provider is wanting to get that undertaking granted or that exemption granted with no inherent advantage in delay for the incumbent.[7]

These are complex provisions that will need to be tested. If regulatory gaming does switch from arbitration to undertakings, further amendments may be necessary in the future.

2.10 It is worth noting that gaming problems will always be inherent in complex access regimes dealing with horizontally and vertically integrated incumbent monopolists. The Productivity Commission Report, which this Bill responds to, was specifically precluded from dealing with Telstra's structure in its terms of reference.[8] These issues will be further considered in the section dealing with accounting separation.

2.11 Another concern is that under the current Bill the revocation of merits review for ACCC arbitrations applies retrospectively so that parties currently involved in access arbitrations with the ACCC will not be allowed to appeal. Such parties commenced their action on the assumption that they would be able to appeal. Seven's executive summary states:

> Seven strongly oppose the retrospective application of the removal of the review right in relation to access arbitrations that are already on foot. Seven has been engaged in arbitration since 2000 and entered into that process with the legitimate expectation of a right of appeal to the Competition Tribunal.[9]

2.12 The response of the Department to this legitimate request for legislative amendment by Seven was somewhat disingenuous. According to Mr Lyons:

> The provisions as drafted are not legally retrospective, in the sense that they do not remove any legal rights to merits review that might have existed prior to commencement.[10]

However, Seven's right to merits review of its arbitration currently underfoot would be removed once this Bill became law, assuming the Bill remained in its present form and Seven's arbitration had not concluded.

2.13 Mr Chea, of DCITA, went some way to explaining the rationale for the retrospective application of the removal of merits review of ACCC arbitrations:

> In fact there is a further gaming which could occur, and that is that people could suddenly notify a whole lot of disputes just so they could then preserve the possibility of having a future

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[7] Mr Lyons, *Proof Committee Hansard*, Canberra 25 October, 2002.

[8] Telecommunications Competition Regulation Inquiry Report, No 16, Productivity Commission, September 2001, p V.

[9] Seven Submission, p.2.

[10] Mr Lyons, *Proof Committee Hansard*, Canberra 22 October, 2002.

> merits review right. You could actually induce a new round of gaming between the introduction of the Bill and the commencement of the new Act.[11]

This problem is easily solved by backdating the retrospective application of the removal of merits review to the date of the bill's introduction to Parliament in September.

2.14 Labor Senators believe the Bill should be amended to backdate merits review retrospectivity only to the date of the Bill's introduction to Parliament. It is surprising that the Chair's Report did not recommend this relatively simple amendment and rather noted assurances that the Government would consider these concerns.

Accounting Separation

2.15 The Government created much controversy in April with its vague announcement that it would require accounting separation of Telstra's wholesale and retail operations.

2.16 The tabling of the Bill in September revealed a very much-watered down version of accounting separation where the Minister will be able to direct the ACCC regarding the detail of accounting separation reporting.

2.17 This ministerial direction would purportedly allow the Government to mandate the implementation of accounting separation in a more deliberative and probative manner.

2.18 However, it is arguably inappropriate for the Government, as majority owner of Telstra, to be dictating to the ACCC the detail of the day-to-day operation of the accounting separation regime.

2.19 Labor Senators believe that a transparent accounting separation framework for Telstra, administered by the ACCC, is a minimum requirement for a more competitive telecommunications sector.

2.20 The issue of the appropriate level of accounting separation of Telstra, be it in a stronger form of accounting separation or even some form of virtual separation, is still very much a key debate in our community. Seven takes the more radical view that Telstra should be structurally separated:

> The only long-term option to improve competition in pay television, communications, broadband and related services is to require structural separation within Telstra, both at the retail wholesale level and the content infrastructure service arms.[12]

2.21 Labor Senators note that Telstra does not seem too fazed by the mildly enhanced accounting separation provisions stating in their submission, "such information should

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[11] Mr Chea, *Proof Committee Hansard*, Canberra 22 October, 2002.

[12] Mr Wise, Seven Network, Proof Committee Hansard, Canberra, 22 October 2002, p.29.

put to rest once and for all the unsubstantiated allegations concerning Telstra's behaviour".[13]

2.22 Labor Senators support open and transparent networks in telecommunications. As the accounting separation provisions represent some minor improvement to the existing accounting separation provisions they should be supported.

2.23 It will be interesting to see whether these new accounting separation provisions allay concerns that Telstra's vertical integration is inhibiting access and competition in the Australian telecommunications market. Some witnesses argued that the accounting separation provisions are not strong enough to provide the level of scrutiny they require to be confident that Telstra is not unduly discriminating against access seekers.

2.24 Labor Senators will be watching the effects of this Bill in regards to accounting separation very carefully. We anticipate further policy development in this area by Labor.

Anticipatory Exemptions and Undertakings

2.25 Under the current Act a potential investor in telecommunications infrastructure is unable to gain an access undertaking or exemption for a non-declared service, which is not yet provided.

2.26 This acts as a disincentive for potential investors who face regulatory uncertainty as to future access arrangements for services yet to exist or be declared. The Productivity Commission report identified the lack of any provision for future services undertakings or exemptions as a weakness in the existing legislation. Such services can be of national importance and would include 3G mobile phone infrastructure, digital pay TV infrastructure and broadband infrastructure.

2.27 The amended access regime allows for 'special' undertakings and exemptions for non-declared future services, in the case of undertakings, binding the supplier of the service to standard access terms or other terms and conditions specified in the undertaking.

2.28 Seven have conducted a concerted campaign against the anticipatory undertakings and exemptions provisions of this Bill arguing that they would lead to an access holiday for a future digitised Foxtel pay TV network. Seven argue that the effect of the Bill would be to lock into the digital world what they consider has been a de facto access holiday for the analogue Foxtel network under the current Act. Seven consider that the current Act has been ineffectual in granting reasonable access to Foxtel's analogue network and this Bill would exacerbate these problems. They would prefer to see the current Act's access arrangements strengthened as a first course of action. Seven also point out that the Foxtel-Optus undertakings to the ACCC regarding the Foxtel-Optus content sharing arrangements are conditional upon the passage of this Bill.

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[13] Telstra Submission, p.6.

Seven are opposed to the possibility of exemptions for future digital pay televisions services:

> In relation to digital pay television services/carriage services, there is no place for exemptions from standard access requirements. These services are of such importance and provide such scope for market dominance in pay television, telecommunications, broadcasting and related industries and to control the digital gateway to the home that they should never be exempted from the access regime.[14]

2.29 The ACCC and the Department have refuted Seven's view. They argue that any decision regarding anticipatory access arrangements will be made by the ACCC using the normal tests the ACCC use for ordinary access arrangements for existing services. Further, it is argued that under the terms and conditions of the Foxtel-Optus content sharing deal Foxtel have committed to providing access to competitors on commercial terms within six months of the date of the commencement of Foxtel's digital pay TV network. According to the ACCC:

> It is important to note, however, that while the passage of the Bill would provide an opportunity for the parties to seek an exemption or lodge an undertaking, this in no way guarantees that the exemption would automatically be granted.[15]

And further:

> The Commission's decisions in relation to the Foxtel/Optus Agreement are, therefore, not dependent on the passage of the Bill.[16]

According to the Department:

> One other point is that the criteria that the ACCC applies in looking at an undertaking and an exemption are the same as under the current act for the ex ante, and it cannot accept an undertaking unless it is satisfied positively that the undertaking is consistent with the standard access obligations and that the terms and conditions of the undertaking are reasonable. And it cannot accept an exemption unless it is satisfied that if they grant that exemption it will be in the long term interests of end users. So it has to reach a positive view about the proposed undertaking or exemption.[17]

2.30 Labor Senators take the view that in effect the legislation is extending the ACCC's powers by enabling it to deal with access issues before an investment is made, on similar terms as it currently is empowered to deal with them after the investment is made.

2.31 However, Labor Senators are very concerned that there is one area of difference between ordinary undertakings and exemptions provisions and the new special anticipatory category. This is the provision that the ACCC would also be required to take into account the views of the Minister, by disallowable instrument, in determining whether or not to grant anticipatory undertakings or exemptions.

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[14] Seven Submission, p.9.

[15] ACCC letter to Michael McLean, 11 November, 2002.

[16] ACCC letter to Michael McLean, 11 November, 2002.

[17] Mr Colin Lyons, Proof Committee Hansard, 25 October, 2002.

2.32 AAPT expressed serious reservations about these provisions:

> This is in contrast to the existing provisions relating to the exemptions from standard access obligations which do not provide for Ministerial involvement. There is no apparent justification for providing for such Ministerial involvement. In AAPT's view, it creates the unnecessary risk of politicising the process of determining exemptions and unnecessarily involving an additional party in the decision making process. Such Ministerial involvement is not provided for under the existing provisions relating to exemptions, and nor, was such involvement recommended by the Productivity Commission in its review of telecommunications regulation in relation to measures designed to enhance new investment.[18]

The Australian Consumer's Association also expressed reservations regarding this provision:

> However, we have possible reservations about the installation of a ministerial power of specification in the question of exemption from standard access obligations. This creates a wild card that may operate to improve the quality of the LTIE test from the consumer perspective. However, to the extent that it might be used to improve the investment outlook of business, it may not function to the benefit of consumers.[19]

2.33 To ensure legislative parity between special (or anticipatory) and ordinary undertakings and exemption provisions, the Ministerial direction for the ACCC to have regard should be removed from the anticipatory undertakings and exemptions provisions. This reform would ease concerns that the regulator could be influenced by the short-term political considerations of the Minister rather than using the existing LTIE test as is currently the case for ordinary access decisions.

2.34 Labor Senators will seek further assurances from the ACCC and the Minister that the inter-relationship between the anticipatory access provisions of this bill and the terms and conditions of the Foxtel/Optus content sharing agreement do not inadvertently create additional opportunities for the creation of an access holiday for the new Foxtel digital pay TV network.

2.35 In particular, Labor Senators are concerned that the interplay between these provisions and the Agreement will provide opportunities for delaying access by competitors to the new digital pay TV network. Seven has claimed that 'access delayed is access denied' because of the ability for first movers in a new market to lock up market share. Given past criticisms of Telstra and Foxtel in relation to regulatory gaming, assurances that access to the digital Pay-television platform will be provided on reasonable terms after a certain defined period is desirable.

Declarations Five Year Sunsets

2.36 Seven expressed strong concerns about the automatic sunsetting of declarations after five years. They pointed out that this period is too short for investment decision making purposes, particularly considering many contracts in pay television run for over five years. Seven proposes the sunsetting period be doubled to ten years. According to Seven:

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[18] AAPT Submission, p. 13.

[19] Australian Consumers Association Submission, p. 2.

> Five years is a wholly insufficient time to allow a recouping of start-up costs and amortisation of service investments, particularly in relation to such services as pay TV which are cashflow negative for the first five years.[20]

2.37 Labor Senators believe that the Bill should be amended to support the sunsetting period being extended to ten years, particularly as the ACCC has the power to undeclare services in any case, as happened during the course of the current regime when the ACCC undeclared the mobile phone AMPS service. Investors and access seekers alike need a degree of regulatory certainty and the ACCC needs relief from constant regulatory reviews. Ten years is a more appropriate time frame for the automatic sunsetting provisions.

Industry Development Plans

2.38 The proposed removal of the requirement for carriers to submit industry development plans is of concern to Labor Senators. Whilst Labor acknowledges these provisions are somewhat burdensome on the growing number of carriers, it is consistent with Labor's approach to industry policy that carriers demonstrate a commitment to local industry.

2.39 Labor Senators believe that it is appropriate that carriers, particularly Telstra, be encouraged to fulfil their requirements in Australia whenever possible and remain accountable in this regard through the vehicle of an annual industry development report. These requirements should remain so as to ensure that the industry development programs of the major carriers can be monitored.

Conclusion

3.1 The Telecommunications Competition Bill represents incremental reform to the telecommunications competition regime. It has generally broad support amongst the telecommunications sector, although most witnesses identified weaknesses. The Bill is supported by the Australian Consumers Association.

3.2 Seven and Fairfax have expressed serious reservations about aspects of the Bill so further clarification will be sought regarding the inter-relationship between the provisions of this bill and the recently announced Foxtel/Optus content sharing deal so as to address these serious concerns.

3.3 The provisions to speed up the telecommunications access regime, particularly by removing merits review of ACCC arbitrations are generally positive. These provisions should not be made retrospective beyond the Bill's introduction to Parliament.

3.4 The mild enhancement of the accounting separation provisions represents an incremental reform, albeit an imperfect one with regard to the strong Ministerial involvement in the accounting separation framework.

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[20] Seven Submission, p.2.

3.5 Labor Senators support the concept of anticipatory undertakings and exemptions for future telecommunications services so as to ensure greater investment certainty for companies undertaking substantial investments in this area. It is important this principle is maintained despite the current controversy surrounding the proposed Foxtel-Optus content-sharing agreement. Assurances will also be sought to ensure this Bill does not inadvertently create opportunities for monopolistic behaviour by Telstra in the area of digital pay TV.

3.6 The provisions requiring the ACCC to have regard to any views of the Minister in regards to anticipatory undertakings or exemptions should be removed. The existing LTIE test is sufficient. Ministerial involvement should be removed to rule out the prospect of undue political interference in the access regime.

3.7 The automatic sunsetting of declared services should be extended from five years to ten years to provide for greater industry and regulatory certainty.

3.8 Provisions removing the legal requirement for carriers to have and report on current Industry Development Plans should be excised from the Bill. These reports are important in determining the level of industry development undertaken by carriers.

3.9 Labor Senators remain committed to genuine competition in telecommunications delivering real outcomes for consumers. This Bill represents a further small step in that direction and deserves support. We urge the Government to carefully consider the constructive amendments suggested in this Minority report, as they are designed to strengthen the broad purpose and intent of the Bill.

Senator Sue Mackay
Deputy Chair

Senator Kate Lundy

Australian Democrats

Supplementary Report

Introduction

1.1 In general terms, the Democrats support the *Telecommunications Competition Bill 2002*. Evidence to the Committee, suggests the legislation is broadly supported by carriers, although there would appear to be a range of divergent views on specific provisions.

1.2 A difficulty confronting the Senate is that while a number of amendments suggested by witnesses including Optus, Seven Network and AAPT appear plausible, some are likely to have significant consequences; intended or otherwise. The policy intent of some measures is quite targeted, for instance, privileging undertakings over negotiations. Accordingly, a significant change such as re-instating merits appeal rights for arbitrations, as desired by Telstra, runs the risk of unbalancing the intent of the core provisions in the Bill.[1]

General Policy Concern

1.3 Telecommunications presents quite complex policy difficulties trying to balance social objectives, the long-term interests of consumers and providing for fair competition.

1.4 The Democrats are concerned there is a tendency to privilege competition policy over a long-term strategic approach grounded in social policy objectives. That is not to say that social and competition policy is necessarily antithetical, however we make the general observation that not only has the balance not been achieved, but also, regulation that specifically goes to competition or social equity issues have been less than successful, in their own terms.

The Bill

1.5 The legislation implements the Government's response to the Productivity Commission's *Telecommunications Competition Report*.[2]

1.6 It should be noted that a number of the Productivity Commission's recommendations have not been adopted by the Government, including the recommendation to do away with long-term interests of end users test (LTIE). While assessing and encouraging future infrastructure investment is very difficult, the Democrats support the retention of the test.

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[1] Telstra, Submission No. 5, p. 8

[2] Productivity Commission, *Telecommunications Competition Regulation Inquiry Report*, Report No. 16, AusInfo, Canberra, 2001

1.7 The key elements of the Legislation are:

- Requiring the ACCC to produce model terms and conditions for core activities;
- Extension of provisions concerning exemptions and undertakings under part XIC of the TPA to services that are not yet declared or supplied;
- Allowing for accounting separation of Telstra's wholesale and retail operations;
- Removing merits review by the Australian Competition Tribunal of ACCC arbitrations;
- Permits the ACCC to defer consideration of an access dispute to consider an access undertaking relevant to the access dispute

The primary intention is to:

- Provide for more timely access to basic telecommunications services;
- Provide for greater regulatory certainty for investors in new telecommunications infrastructure; and
- Facilitate greater transparency in telecommunications regulation

1.8 While the Democrats are generally supportive of the Government's approach there are a number of measures that warrant further comment.

Removing Merits Review for Arbitrations

1.9 The policy intent of removing merits review on arbitrations but retaining them for access undertakings is to lessen access delays through gaming and shift the emphasis to undertakings as the prime mechanism to resolve access disputes. One advantage of this approach is undertakings apply generally to all access seekers not just the parties in an arbitration dispute.[3]

1.10 However, Optus argues the likely outcome is merely a shift in regulatory gaming from arbitrations to access undertakings; a view shared by Telstra, although for rather different reasons.[4]

1.11 The Democrats note the removal of merits reviews on arbitrations was not recommended by the Productivity Commission, nevertheless accept that the change in focus to undertakings may have benefits.[5]

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[3] *Explanatory Memorandum, Telecommunications Bill 2002*, p. 41

[4] Optus, *Submission No. 2*, p. 4, Telstra, *Submission No. 5*, p. 8, see also Foxtel, *Submission No. 10*, p. 7

1.12 One issue raised by the Seven Network and Foxtel was the provisions removing merit reviews on arbitrations had an impact on two arbitrations relating to pay television (the committee was advised that there are no outstanding telecommunications arbitrations).

1.13 The Seven network argued that it entered into a pay television arbitration based on the existing regime, "including the opportunity to review the primary determination decision."[6] However, the transitional arrangements would effectively deny them access to merits review of the two arbitrations that are in process but the ACCC has not made a determination.

1.14 The Department argued the transitional arrangements were meant to close a loophole whereby a range of disputes could be notified between the introduction of the Bill and passing of the Legislation.[7]

1.15 While the Democrats take that point, we believe the Department's response is pretty thin in respect to the specific Seven Network concern. We understand there is a proposal to amend the bill to 'grandfather' the provisions in relation to the pay television arbitrations. The Democrats believe that in the absence of stronger arguments to the contrary, such an amendment should be supported.

Accounting separation

1.16 As the accounting separation framework will be dependent on the scope of a Ministerial direction to the ACCC to exercise its record-keeping rules, rather than the legislation *per se*, it is difficult to comment in detail on the consequences of this approach to Telstra's market dominance.

1.17 The Democrats make the point that if separation is to be a valid instrument then non-price elements must be included. We note the Explanatory Memorandum explicitly states the intention is to ensure Telstra publishes information concerning its performance in supplying 'core' services to itself in relation to "key non-price terms and conditions. (These will include faults/maintenance, ordering, provisioning, availability/performance, billing and notification)."[8]

1.18 Some submittess expressed concern that the accounting separation measures where not in the legislation, as such, although this is clearly the intent, or were sufficiently broad to take in bundling.[9]

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[5] Recommendation 10.12, Productivity Commission, *Telecommunications Competition Regulation Inquiry Report*, *op cit*, p. 343

[6] Seven Network, *Submission No. 11*, p. 4

[7] Mr Lyons and Mr Cheah (DCITA), *Committee Hansard*, Canberra, 22 October 2002, p. 44

[8] *Explanatory Memorandum, Telecommunications Competition Bill 2002*, p. 96

[9] Primus, *Submission No. 6*, p. 5, Mr Currie (Hutchison's), *Committee Hansard*, Canberra, 22 October 2002, p. 37, see also *Explanatory Memorandum, Telecommunications Competition Bill 2002*, p. 95

1.19 In their submission, AAPT argue that the legislation should reflect the policy intent that Telstra should provide the ACCC with separate accounts for its retail and wholesale operations.[10]

1.20 AAPT are not arguing for fine-grained direction in the legislation and we note the Department's comments on the difficulties associated with establishing highly prescriptive legislation dealing with accounting concepts.[11] Nevertheless, there does seem to be some merit in placing the requirement that the Minister direct the ACCC to prepare separate accounts and time frames in the legislation as suggested by AAPT.

1.21 Given the 'take-it-or-leave-it' nature of disallowable instruments, we also make the point that the Government might be well advised to discuss the contents of the instrument with Opposition parties prior to tabling.

Industry Plans

1.22 The Bill enacts the Productivity Commission's recommendation (R:12.1) to scrap the requirement that a carrier develops and reports against an industry development plan.

1.23 This was widely supported by carriers who saw IDPs as essentially a compliance cost that had little relevance.[12]

1.24 The Democrats note the conclusion of the Productivity Commission that it could find no "compelling argument" for the continuing IDPs because commitments were, apart from R&D, formally voluntary and the benefits, including information on industry-wide investment and product development, are not the aim of the instrument.[13]

1.25 The Democrats accept these arguments but query as to whether the more appropriate response is to re-evaluate the criteria and purpose rather than scrapping IDPs completely. If they are not effective, why not, seems a more pertinent response than get rid of them. We note the Minister's press release of 21 June, 2002, outlining streamlined ICT industry development arrangements. While some of these measures are welcome and clearly overlap elements of the scope of the IDPs, we do not see them as a replacement as such.[14]

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[10] AAPT, *Submission No. 8*, p. 3

[11] Mr Lyons (DCITA), *Committee Hansard*, Canberra, 25 October, 2002, p. 67

[12] see, for example, Mr Kennedy (Vodaphone), *Committee Hansard*, Canberra, Tuesday 22 October 2002, p. 24

[13] Productivity Commission, *op cit*, p. 423 & 421

[14] http://www.dcita.gov.au/Article/0,,0_1-2_11-4_106947,00.html

Foxtel/Optus deal

1.26 In the process of the Committee inquiry, the ACCC announced that it would not oppose the arrangements that will allow Optus and Foxtel to share pay TV programming as they accepted the "undertakings proposed by Foxtel, Optus, Telstra and Austar (to) address the ACCC's concern about the potential anti-competitive effects of the planned pay-TV arrangements between Foxtel and Optus".[15]

The ACCC added that:

> Foxtel and Telstra have committed to 'digitise' the pay TV network, although this commitment is conditional on the passing of the *Federal Telecommunications Competition Bill* and further decision-making processes provided for in this proposed legislation. The proposed legislation allows potential investors to seek an exemption from the access regime which would otherwise apply if the services were regulated in the future.[16]

1.27 It should also be noted that, in correspondence to the Committee, ACCC stated:

> These would be new and separate statutory processes to the previous consideration of the section 87B undertakings.[17]

1.28 The Democrats believe that pay television should be subject to a rigorous legislative access regime that ensures that independent content providers and service providers have full access on reasonable terms to the platform. While we have concerns that the Trade Practices Act does not provide a sufficiently robust system (as evidenced by the C7 dispute), we note the issue of further access can be tested if Foxtel applies for a further anticipatory undertaking as a result of this Bill. We would expect the ACCC to apply its criteria rigorously to this in the future.

1.29 There are cultural as well as economic issues involved with access to the pay television platform. Diversity of views and content provision are clearly in Australia's interests, and the potential for the digital platform to deliver a boost to diversity in an already concentrated media market is substantial. It may be appropriate that the ABA, as the custodian of "cultural" aspects of media, should have a greater role in decisions relating to access to pay television, and the content shown on pay television. These are all issues for debate at a later time on a more appropriate bill.

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[15] ACCC, *ACCC Accepts Foxtel-Optus Pay TV Deal, Media Release*, 13 November, 2002 http://www.accc.gov.au/media/mediar.htm

[16] *ibid*

[17] ACCC, *Submission 9A*,

1.30 It is also noted that the Foxtel/Optus deal will result in a further need to consider structural and competition issues in communications. As Professor Fels stated in his press release:

> The ACCC continues to be concerns about the level of vertical integration in the pay TV industry, particularly given the position of Telstra as a major shareholder in Foxtel. This leaves the ACCC with concerns about the appropriate regulatory regime in both pay TV and telephony markets. These will be considered in a report to Senator Alston, who has requested advice on how emerging market structures are likely to affect competition across pay TV and telecommunications. This report will also include some of the concerns raised during the consultation process, which the ACCC did not consider relevant to the transaction being considered.[18]

1.31 The Democrats would have preferred to have this report at hand with the Government's response in the consideration of this bill, as the linkages between them are quite clear. However, given this bill is the culmination of a two year process, we would prefer the bill to proceed rather than delay it further. However, we would seek a commitment from government that it will consult all Senate parties on its response to the ACCC's policy report and bring an appropriate legislative response to the Parliament promptly. Leaving these issues up in the air is in many respects unsatisfactory, and leaves significant competition issues in the media industry in a continuing state of flux.

Senator Lyn Allison **Senator John Cherry**

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[18] ACCC, *Media release, op cit*

Appendix 1

List of Submitters

1	Macquarie Corporate Telecommunications, VIC
2	Australian Consumers' Association, NSW
3	Optus, NSW
3a	Optus, NSW
4	Vodafone Australia, NSW
5	Telstra, ACT
5a	Telstra, NSW
6	Primus Telecom, VIC
7	Hutchison Telecommunications, NSW
7a	Hutchison Telecommunications, NSW
8	AAPT Limited, NSW
8a	AAPT Limited, NSW
9	Australian Competition & Consumer Commission, VIC
9a	Australian Competition & Consumer Commission, ACT
10	Foxtel, NSW
10a	Foxtel, NSW
11	Seven Network, NSW
11a	Seven Network, NSW
11b	Seven Network, NSW
12	Mr Kidnapillai Selvarajah
13	Telecommunications Users Group, NSW
14	John Fairfax Holdings Ltd

Appendix 2

List of Witnesses

Canberra – Tuesday, 15 October 2002

Telstra

Dr Paul Paterson, Director, Regulatory
Mr Stephen Skehill, Special Counsel, Mallesons Stephen Jaques
Dr Tony Warren, Group Manager, Regulatory Strategy

AAPT Ltd

Ms Sonia Aliprandi, Regulatory Counsel
Mr David Havyatt, Director, Regulatory
Mr David Knight, General Counsel, Competition and Regulatory Strategy

Singtel Optus

Mr Paul Fletcher, Director, Director, Corporate and Regulatory Affairs
Mr David McCulloch, General Manager Government Affairs
Mr Andrew Sheridan, General Manager, Interconnect and Economic Regulation

Canberra – Tuesday, 22 October 2002

Vodafone Pacific Ltd

Mr Sean Kennedy, Manager Public Policy

Seven Network Limited

Ms Bridget Godwin, Manager, Regulatory & Business Affairs
Mr Steve Wise, Chief Executive Officer, New Media and Investment
Mr Alan Chalmers, Senior Associate, Freehills
Mr Desmond Sweeney, Partner, Freehills

Hutchison Telecommunications

Mr Brian Currie, Manager Regulatory Affairs
Mr Stephen Wright, Director, Stakeholder Relations

Department of Communications, Information Technology and the Arts (DCITA)

Mr Chris Cheah, Chief General Manager, Telecommunications
Mr Richard Desmond, Manager, Competition Policy, Telecommunications
Mr Colin Lyons, General Manager, Telecommunications Competition and Consumer Branch
Mr Don Markus, General Counsel

Canberra – Friday, 25 October 2002

Department of Communications, Information Technology and the Arts (DCITA)

Mr Chris Cheah, Chief General Manager, Telecommunications
Mr James Cameron, Acting Chief General Manager, Broadcasting and Intellectual Property
Mr Richard Desmond, Manager, Competition Policy, Telecommunications
Mr Colin Lyons, General Manager, Telecommunications Competition and Consumer Branch
Mr Don Markus, General Counsel