**REVIEW OF TELECOMMUNICATIONS-SPECIFIC COMPETITION REGULATION**

**ATUG SUBMISSION TO PRODUCTIVITY COMMISSION ON IMPROVEMENTS TO PART XIC OF TPA**

## Introduction

The Australian Telecommunications Users' Group Ltd ("**ATUG**") provides this further submission to the Productivity Commission ("**Commission**") on Part XIC of the *Trade Practices Act* 1974 ("**TPA**"). This submission is in addition to our submissions dated 10 May 2001 and 8 June 2001, which contained general remarks, and commentary on Part XIB, respectively. In this submission, we seek to provide some additional comments on how the appeals and review provisions in Part XIC might be improved.

## Part XIC Appeals Processes

Appeal processes occupy a significant role in Part XIC. Most decisions that are made by the ACCC under Part XIC can be appealed to the Australian Competition Tribunal or the Federal Court, or both. Indeed, there are few administrative actions of the ACCC that cannot be reviewed by the Tribunal and or the Federal Court. An interim determination (issued under section 152) cannot be appealed. Even where there is no provision for review by the Tribunal, there would usually be potential for review to the Administrative Appeals Tribunal under the *Administrative Decisions (Judicial Review) Act* 1976 ("**AD(JR) Act**").

While the exceptions to merits review are few, those decisions that are subject to review under Part XIC can be subjected to comprehensive merits review by the Tribunal, and judicial review by the Federal Court. Decisions that can be subject to full merits review include final determinations[1], ACCC decisions on undertakings[2], and decisions regarding the giving of individual exemption orders from standard access obligations[3].

In a merits review, the Tribunal "stands in the shoes" of the ACCC. The Tribunal can, and must, re-consider all the evidence that the ACCC examined when making the final determination or assessing the undertaking. The Tribunal has all the powers and duties that the ACCC has.[4] A review is a hearing *de novo* – the evidence is considered afresh by the Tribunal, without constraint as to the ACCC' findings or the evidence that it examined. New evidence can be adduced and examined by the Tribunal. The Tribunal has no staff or technical expertise of its own and is thus reliant on the provision of assistance and documents from the ACCC.

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[1] Under section 152DO of TPA

[2] Under section 152CE of TPA

[3] Under section 152AV of TPA

[4] Under sub. 152DO(4) of TPA

The Commission has expressed concern about the overall administrative costs, inefficiencies and capacity for regulatory error in Part XIC appeal processes.[5] ATUG believes that a large part of this problem is caused by the provision of merits review for most major ACCC decisions made under Part XIC. We note that the Commission favours the retention of merits review for final determinations but opposes merits review for declarations and interim determinations.

Telstra is currently appealing two final determinations which were issued by the ACCC in arbitrations with Primus and AAPT[6]. The final determinations in these arbitrations (which concerned access to Telstra's PSTN service) were handed down in October 2000, nearly 20 months after AAPT notified its dispute, and 18 months after Primus notified its dispute. Telstra lodged notices of review of these final determinations within the statutory 21 day period.

There was a directions hearing in December 2000 (which resulted in a finding handed down in January 2001) and we understand that further directions hearings have taken place since then. We also understand that the substantive hearing in this matter will not take place until April 2002 at the earliest, some 18 months after the issue of the final determination. The substantive hearing will probably take several weeks or even months to complete, with a final Tribunal determination not being made until late in 2002 (ie, some two years after the ACCC issued its own final determinations).

**ATUG believes such delay goes against the Government's objective of a speedy and efficient access regime in Part XIC.**

**Alternative Review Processes**

ATUG accepts that the right to seek review of an administrative decision, whether that decision is made by the ACCC or any other administrative agency, is an important right. However, there are situations in which there can be too many opportunities to appeal against an ACCC decision. The fact that an ACCC decision to reject an undertaking can be appealed to the Tribunal would undoubtedly add to the administrative delay and lack of certainty that is already a feature of Part XIC. In the ACCC's assessment of Telstra PSTN undertakings throughout 1997 and 1998, Telstra and other industry participants had ample opportunity to comment on one another's submissions as well as ACCC draft reports on the undertaking. Industry participants did, in fact, extensively exploit this opportunity.

In ATUG's view, the provision for full merits review represents an unnecessary duplication of the ACCC's decision-making functions. The ACCC is recognised as an expert regulator and is given funding and powers that are appropriate for such a role. It is obliged under Part XIC and administrative law statutes to exercise its powers properly and impartially. Moreover, the ACCC's decision-making processes are characterised by a high level of participation by interested parties. The undertaking assessment process is lengthy, transparent and extremely thorough. It is usual and acceptable, for parties to make multiple submissions and for reports by economic and technical experts employed by these parties, to be submitted.

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[5] Commission, Draft Report, pp. 9.36

[6] Re Telstra Corporation Ltd A Comp T [2001] 1 (21 February 2001) for judgment of first directions hearing.

The ACCC frequently employs its own expert consultants. In the case of Telstra's PSTN undertaking, the National Economic Consulting Group (UK) provided economic modelling and advice. In short, the assessment of Telstra's several PSTN undertakings was far-reaching and afforded interested parties full opportunity to participate. The process was as meticulous and as fair as a Tribunal or Court hearing, arguably, even more so, because of the absence of evidentiary rules that would otherwise exclude hearsay or lay opinion evidence, for example. In other words, it is very doubtful that the Tribunal can add much in the way of technical or other expertise to the ACCC's decision, especially as the Tribunal must use ACCC resources to arrive at its decision.

The process involved in most arbitrations may not involve quite the same level of technical or analytical thoroughness that was involved in the assessment of Telstra's PSTN undertakings. Nonetheless, ATUG's own observation is that the ACCC consults with the parties in arbitrations and gives them ample time and opportunity to provide detailed economic and other evidence in support of their claims. This evidence can be, and often is, prepared by expert consultants retained by the parties. The lengthy duration of many arbitrations is indicative of the analytical and factual thoroughness that characterises them.

ATUG points to these processes as evidence that full merits reviews of ACCC decisions under Part XIC involve a significant duplication of decision-making processes, with an associated and inevitable time delay before a final decision is made. Nevertheless, ATUG would not propose that anyone be deprived of all rights to appeal a decision made under Part XIC. A right of appeal is a normal feature of a fair and transparent administrative process and helps to ensure proper accountability of executive bodies.

ATUG argues, however, that it is appropriate to restrict rights of appeal under Part IC when would-be appellants have had ample opportunity to provide evidence and submissions during the ACCC inquiry and/or arbitration phases. The possibility of full merits appeal to the Tribunal has the effect of causing further significant delay in the finalisation of important regulatory decisions under Part XIC with an inevitable impact on competition in the market. Furthermore, if parties know that they will have another opportunity to have a dispute entirely re-heard on the merits once the ACCC has made a final decision, it could reduce their incentive to participate openly and fully in the ACCC processes. Even once a Tribunal decision has been handed down, parties still have a right of appeal (on points of law) to the Federal Court.

ATUG believes that it is fair and practicable for merits reviews to be curtailed. This could be done by allowing parties to appeal only to the Federal Court on points of law. This would ensure that if there has been any defect in the ACCC's inquiries or decision-making processes, such as an improper exercise of power or a failure to consider a relevant matter, then an affected party could seek redress. Indeed, it is interesting to note that a challenge to an ACCC decision to declare pay TV services[7] was made in the Federal Court on AD(JR) Act grounds[8]. This matter was heard relatively swiftly and the applicant was able to present extensive grounds for review of the ACCC's decisions.[9] (The challenge was ultimately unsuccessful.) The issue of whether a declaration over-

[7] Under section 152AL of TPA.

[8] Under section 5, AD(JR) Act 1976

[9] *Foxtel Management Pty Ltd and Ors v ACCC* [2000] FCA 589 (8 May 1999). The applicants appealed against the ACCC's decision to declare the analogue pay TV broadcasting service and the deeming of that service under the Telecommunications (Transitional Provisions and Consequential Amendments) Act 1997.

rode protected contractual rights was also heard by the Federal Court, rather than the Tribunal.[10] (This action was also unsuccessful.) ATUG believes that this is useful evidence that judicial review, without an intervening phase of merits review, is both appropriate and workable.

If, on the other hand, the Commission believes that merits reviews before the Tribunal should be retained, ATUDG considers that, at least, there should be restriction of the grounds for review to the Tribunal. The emphasis should be on identification and correction of any significant ACCC errors in principle or methodology, rather than a full merits review. The Tribunal should be required simply to re-examine the evidence as it was presented to the ACCC, rather than to be able to receive new evidence. In short, any Tribunal hearing should not be a hearing *de novo*, but rather a strict re-examination of the evidence that the ACCC itself examined, with the Tribunal being required to form a view as to whether the ACCC's decision was reasonable and justified in light of the evidence presented to it. The emphasis would be on correction of clear and significant errors (if any occurred), rather than a detailed re-examination of the matter.

## Conclusion

ATUG believes that the appeal processes set out in Part XIC need to be reformed to ensure a more efficient, speedy and responsive access regime. ACCC decision-making processes are already thorough, fair and impartial. Interested parties already have the capacity to make extensive (and even multiple) representations and present their cases fully before the ACCC. In such a context, it seems inappropriate for interested parties in arbitrations, assessments of undertakings and other Part XIC processes, to be able to seek full merits review simply because they do not like and are not prepared to accept, the ACCC's decision and are hopeful of having it reversed by another body. In ATUG's view, these appeal options should be curtailed. Appeals should preferably be confined to points of law and be made directly to the Federal Court (as already happens when a party objects to a decision to declare a service.)

However, if the complete abolition of merits reviews by the ACT is not acceptable to the Commission, then ATUG would suggest that merits reviews be confined to evidence that was actually presented to the ACCC and that the focus should be on correction of any significant errors, rather than allowing the introduction of new evidence. This would promote efficiency and speed in Part XIC processes without wholly removing the right to seek review by the ACT of decisions made by the ACCC.

**ATUG believes, however, that its proposal to allow appeals only to the Federal Court on points of law, is superior to the alternative of allowing appeals to the Tribunal on a restricted basis.**

We trust that these comments will be useful for the Commission in arriving at its final recommendations in this enquiry.

Please contact us if you have any queries or would like further commentary.

**Australian Telecommunications Users Group**

**14 June 2001**

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[10] *Foxtel Management Pty Ltd v Seven Cable Television Pty Ltd* [2000] FCA 1159 (18 August 2000). This case did not concern the validity of the declaration per se, but rather whether the providers of the declared services enjoyed protected contractual rights and thus escaped the operation of the standard access obligations.