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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

TELECOMMUNICATIONS LEGISLATION AMENDMENT (COMPETITION AND CONSUMER ISSUES) BILL 2005

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Communications, Information Technology and the Arts, Senator the Hon. Helen Coonan)
OUTLINE

The Telecommunications Legislation Amendment (Competition and Consumer Issues) Bill 2005 (the Bill) introduces an operational separation framework for Telstra to provide equivalence and transparency of Telstra’s wholesale and retail operations. The Bill also makes changes to the telecommunications regulatory regime to maximise the regime’s capability to respond to market developments and emerging networks, as well as changing consumer needs. The Bill increases investment certainty, and improves the operation of telecommunications-specific anti-competitive conduct regulation and telecommunications access regulation. The Bill improves the ability of the Australian Communications and Media Authority (ACMA) to respond to consumer interests, repeals the requirements for carriers to have industry development plans and makes a range of other minor amendments, including to the numbering plan regime.

The Bill amends Parts XIB and XIC of the Trade Practices Act 1974 (TPA) and the Telecommunications Act 1997 (the Telecommunications Act). Part XIB of the TPA deals with anti-competitive conduct in the telecommunications industry and Part XIC deals with interconnection and access to telecommunications services.

The measures in the Bill make adjustments to the regulatory environment in order to maintain a sustainable and competitive telecommunications market, to promote future investment in the industry, and to produce real benefits for all consumers, by:

(a) providing for the operational and organisational separation of Telstra:
   - Schedule 11 amends Schedule 1 to the Telecommunications Act to insert a new Part 8 relating to the operational separation of Telstra, and makes related amendments to Parts XIB and XIC of the TPA;

(b) improving the operation of the telecommunications-specific competition regime in Parts XIB and XIC of the TPA:
   - Schedule 4 increases the penalty that may apply to a body corporate for a breach of the competition rule in Part XIB of the TPA;
   - Schedule 5 amends Part XIC of the TPA to allow the Federal Court to enforce the conditions and limitations that apply in respect of exemptions from the standard access obligations;
   - Schedule 6 inserts drafting notes into two provisions of Part XIC to highlight the ability of the ACCC to vary or revoke class exemptions from the standard access obligations;
   - Schedule 7 permits the Australian Competition and Consumer Commission (ACCC) to make procedural rules which it would apply in carrying out its functions under Part XIC of the TPA;
   - Schedule 9 amends the object of Part XIC of the TPA to clarify that, in considering whether a particular thing promotes the long-term interests of end-users, the ACCC must consider the incentives for, and the risks involved in, investment in new network infrastructure;
– Schedule 12 provides that the ACCC is not obliged to consult with the parties to an access dispute in certain circumstances when it makes an interim determination on that access dispute, and provides that the ACCC may extend the period of an interim determination;

(c) encouraging any-to-any connectivity:
– Schedule 8 amends Schedule 1 to the Telecommunications Act to impose an obligation on a carrier to acquire certain services from a carriage service provider where this is necessary to facilitate and ensure any-to-any connectivity;

(d) facilitating regulation of the telecommunications industry by the ACMA:
– Schedule 10 amends the Telecommunications Act to provide that a person may give the ACMA an enforceable undertaking that the person will take action to ensure the person does not contravene the requirements of the Telecommunications Act or the Telecommunications (Consumer Protection and Service Standards) Act 1999 (T(CPSS) Act);
– Schedule 13 amends the Telecommunications Act to provide that remedial directions issued by the ACMA are not legislative instruments for the purposes of the Legislative Instruments Act 2003 (LIA);

(e) making a number of other changes to the telecommunications regime:
– Schedule 1 repeals the requirement for carriers to have an industry development plan;
– Schedule 2 clarifies the ACMA’s enforcement powers in relation to industry codes;
– Schedule 3 amends the requirements for consultation on variations to the numbering plan made under section 455 of the Telecommunications Act.

Providing for the operational and organisational separation of Telstra

Telstra is a vertically integrated firm which retains a dominant market position in many telecommunications markets. Telstra also owns infrastructure which its competitors need to access and interconnect with in order to compete effectively against it.

Telstra’s control of this infrastructure, combined with its market position, creates an incentive and ability for it to favour its own retail business in the provision of access to important services provided over this infrastructure.

The current regulatory regime has enabled competition to develop in the telecommunications market, but it has not fully prevented Telstra from discriminating in favour of its own retail operations. Addressing this issue, at this time, is important to enable competition to continue to develop.

Schedule 11 to the Bill provides for the implementation of operational separation of Telstra by way of a standard carrier licence condition through amendments to Schedule 1 to the Telecommunications Act. Schedule 11 would also provide for the operation of the operational separation licence conditions to be reviewed by 1 July 2009 and a report of the review to be tabled in both Houses of Parliament and for the Minister to
make a declaration, after the report had been tabled, that Part 8 of schedule 11 ceases to have effect. However, the Minister’s declaration could not be expressed to have retrospective effect.

The aim of operational separation is to promote the principles of transparency and equivalence in relation to the supply by Telstra of wholesale and retail services. To achieve this, the Bill requires that Telstra must prepare and comply with an operational separation plan. The plan must be directed towards achieving this aim and a series of stated objectives. The draft operational separation plan must be approved by the Minister before it becomes a final operational separation plan. If Telstra contravenes a final operational separation plan the Minister can require it to prepare a rectification plan. Breach of a rectification plan would be a breach of Telstra’s carrier licence, and would enable enforcement action by the ACCC.

The Bill provides for the Minister to specify the contents of an operational separation plan. It is proposed that the plan will establish a comprehensive framework for operational separation comprising the following elements;

1. organisational and operational commitments, including separate retail, wholesale and key network services business units;
2. a commitment to equivalence in price and non-price terms and conditions for designated services, including through establishing internal wholesale prices and published internal contacts;
3. a commitment to improve the responsiveness in meeting wholesale customers’ needs for all wholesale services through a range of measures;
4. monitoring and reporting of compliance with the plan, including the development of performance measures and an annual compliance report.

This model of operational separation builds upon Telstra’s existing business model and is designed to meet the aim of equivalence and transparency without curtailing Telstra’s legitimate commercial operations, and its freedom to compete legitimately in the market.

The Bill does not confer any additional powers on either the Minister or the ACCC in relation to setting wholesale or retail prices.

Schedule 11 also amends Parts XIB and XIC to insert provisions that would require the ACCC, when performing its functions or exercising its powers under either Part XIB or XIC, to have regard to Telstra’s conduct in accordance with the licence condition relating to operational separation, to the extent that that conduct is relevant to the functions being performed or the power being exercised. These amendments provide a linkage between the operational separation licence condition and Parts XIB and XIC where Telstra’s conduct in accordance with the licence condition is relevant.
Improving the operation of the telecommunications-specific competition regime in Parts XIB and XIC of the TPA

The key priority for the Australian Government has been to promote an open, competitive telecommunications market as an essential means of providing innovative and cost effective services for Australian businesses and consumers. The telecommunications-specific competition regime has been the primary mechanism for achieving this outcome. The Australian Government has adjusted this regime as necessary so that it keeps pace with changing technology and market conditions. In 2005 the Government has examined the telecommunications competition regulatory regime again so that it remains adequate and appropriate to support and encourage competition. As a result of this review the Government is making amendments to telecommunications-specific competition regulation to encourage greater investment in telecommunications infrastructure and to increase the effectiveness of the regime, through a quicker and more predictable decision-making process and enhanced enforcement options.

Increasing the penalty for breach of the competition rule

Part XIB provides that carriers and carriage service providers must not breach the competition rule (section 151AK). Currently, the maximum pecuniary penalty for breach of the competition rule in section 151AK for a body corporate is $10 million for each contravention and $1 million for each day that the contravention continued (subsection 151BX(3)). Schedule 4 to the Bill amends section 151BX to provide for increased penalties for breach of the competition rule. The penalty for a body corporate would continue to be $10 million for each contravention and $1 million for each day for the first 21 days during which a breach continues. After 21 days, the penalty would be $3 million for each day the breach continues.

The existing penalties for a breach of the competition rule are not considered to provide sufficient deterrent because it is open to larger telecommunications providers to weigh the potential financial benefit of breaching the competition rule against the possible financial penalty, and to knowingly take action in breach of the competition rule if the financial benefit is greater than the financial detriment. Increasing the size of the penalty after 21 days will give the carrier or carriage service provider a greater incentive to rectify its conduct expeditiously in order to avoid the possibility of this significantly increased penalty. This increase in penalty is also broadly consistent with proposed increases in the penalty for contravention of Part IV of the TPA that are currently before the Parliament in the Trade Practices Legislation Amendment Bill (No. 1) 2005.

Enforcement of conditions and limitations that apply to exemptions from the standard access obligations

Currently, the Federal Court may make orders to enforce the standard access obligations (section 152BB). However, there is no provision for the Federal Court to enforce conditions or limitations that may apply to exemptions from the standard access obligations. In some cases the conditions attaching to exemption orders in effect establish an alternative access regime for the relevant declared service and there
is concern that compliance with such conditions cannot be enforced. Schedule 5 to the Bill therefore amends Part XIC to allow the Federal Court to enforce conditions of this kind.

It is appropriate that the Federal Court be given enforcement powers in respect of all conditions or limitations imposed by the ACCC, regardless of whether the relevant ACCC decision relates to an access exemption, an access undertaking, or an access dispute.

Revocation and variation of class exemptions from the standard access obligations

Currently, subsection 33(3) of the Acts Interpretation Act 1901 (AIA) applies to allow the ACCC to vary or revoke ordinary class exemptions from the standard access obligations (section 152AS), anticipatory class exemptions (section 152ASA), ordinary individual exemptions (section 152AT), and anticipatory individual exemptions (section 152ATA). Subsection 33(3) of the AIA requires the ACCC to exercise the power to vary (or to refuse to vary) or revoke (or to refuse to revoke) an exemption order in the same manner and subject to the same conditions as apply to the exercise of the power to make an exemption order.

There is a note at the end of section 152AT and section 152ATA observing that the variation and revocation of individual exemptions is dealt with by subsection 33(3) of the AIA. However, sections 152AS and 152ASA currently do not contain such a note. Schedule 6 to the Bill inserts a note in these terms into each of these sections in order to highlight the operation of subsection 33(3) of the AIA.

Procedural Rules

Despite the amendments made to the access regime in 2002, the operation of the access regime continues to be detrimentally affected by the problems of delay and “gaming” of the regulatory arrangements in relation to the procedures and processes of the ACCC, as well as substantive issues. This has meant that the indicative six month timeframe for the consideration of access exemption applications and access undertakings introduced in 2002 has rarely been met and is often extended by considerable periods because of these delays.

Experience with the access regime has also demonstrated that provisions in Part XIC that provide for the ACCC’s procedures can sometimes be used to frustrate the objective of timely decision making. Concerns have also been raised about a lack of certainty in the procedures the ACCC follows in considering access undertakings and resolving access disputes.

Schedule 7 to the Bill amends Part XIC of the TPA to provide that the ACCC may, following a public consultation period, make a set of Procedural Rules which it would apply in carrying out its functions and exercise its powers under Part XIC of the TPA. The amendments made by Schedule 7 insert a new Division 10A into Part XIC which permits the ACCC to make Procedural Rules in relation to a range of procedural and process-related matters, including:
- public consultation processes;
- the exercise of the ACCC’s discretions about considering access undertakings and resolving access disputes;
- matters affecting the period of time available to the ACCC to make decisions under different provisions; and
- a generic confidentiality regime to apply in consideration of access exemptions, access undertakings and access disputes.

Schedule 7 also makes a number of amendments to existing provisions of Part XIC to reflect that certain provisions in that Part currently dealing with procedural matters apply unless the ACCC has replaced or modified the requirements in those provisions in the Procedural Rules.

These amendments address concerns that the current provisions of the TPA do not provide the ACCC with sufficient discretion to determine its own processes and procedures and to respond to changing activities in the industry. The ACCC would also be able to determine in the Procedural Rules how it will prioritise consideration of related access undertakings or access disputes and the factors. Key procedural obligations will still be required by the legislation, such as the requirement to conduct a public inquiry before declaring a new service and the indicative timeframes for the consideration of access undertakings and exemption applications.

The Bill provides for the Procedural Rules to allow the ACCC to accept minor modifications to applications for exemptions or proposed undertakings, without having to re-start a full public consultation process.

The ACCC can also make Procedural Rules to displace or modify the currently open-ended provisions that deal with the provision of information to the ACCC to support an access exemption application, an access undertaking or a variation to an application or undertaking. The Bill provides for the Procedural Rules to empower the ACCC to set specific timeframes in which all information, or specific types of information are to be provided, or to provide for the way in which the ACCC may specify a timeframe. The ACCC will be able to refuse an exemption application or reject an undertaking if the additional information requested has not been provided to it in the specified timeframe.

Amendment to the object of Part XIC

Section 152AB provides that the object of Part XIC of the TPA is the long-term interests of end-users. Subsection 152AB(2) sets out the matters to which regard must be had in determining if a particular thing promotes the long-term interests of end-users. This includes the object of encouraging the economically efficient use of, and economically efficient investment in, the infrastructure by which listed services are supplied (paragraph 152AB(2)(e)). In turn, subsection 152AB(6) sets out the matters to which regard must be had in determining if something is likely to achieve the objectives in paragraph 152AB(2)(e), including the incentives for investment in the infrastructure by which the service is supplied.
Concerns have been raised that section 152AB does not make it clear that considering the long-term interests of end-users also requires consideration of the risk of investing in new network infrastructure as well as existing infrastructure. Schedule 9 amends section 152AB, for the avoidance of doubt, to ensure that the incentives for investment in new infrastructure by which services under consideration may be supplied, and the risk of making such an investment, is one of the matters to which regard should be had for the purposes of paragraph 152AB(2)(e).

Consultation by the ACCC in the making of interim determinations, and duration of interim determinations

Schedule 12 amends the TPA to provide that, in certain circumstances, the ACCC can make (or vary) an interim determination in relation to an access dispute without having to consult with the parties to an arbitration. The ACCC will not be required to consult with the parties to an access dispute when making (or varying) an interim determination if it has determined pricing principles or model terms and conditions in relation to the relevant declared service, and the price-related terms and conditions of the interim determination as made (or varied) are consistent with the price-related terms and conditions included in the pricing principles or in the model terms and conditions.

Since the ACCC must undertake consultation when it makes pricing principles and model terms and conditions, this amendment will streamline the process for making interim determinations by removing unnecessary and repeated consultation, but will still ensure that parties have a chance to express their views on price-related terms and conditions for a particular declared service to the ACCC.

In addition, Schedule 12 amends the TPA to allow the ACCC to extend the period of an interim determination for up to an additional 12 months after the initial period of the interim determination. Currently, the period of interim determinations is limited to a maximum of 12 months, and there is no scope for this period to be extended. The current 12-month limit hinders the ability of the ACCC to rely on an interim determination as a step in resolving arbitrations. If the terms and conditions that are mandated by an interim determination expire before the arbitration is resolved through a final determination, this provides a disincentive for parties to resolve their access disputes.

Encouraging any-to-any connectivity

There is currently no requirement on carriers who own, or supply carriage services over, large telecommunications networks to acquire declared services (in particular, terminating access services) from carriage service providers who supply carriage services over smaller networks, for the purpose of ensuring any-to-any connectivity for the end-users connected to those smaller networks. The practical effect of this is that it is possible for the carrier to deny any-to-any connectivity to end-users on a smaller network (such as a new fibre customer access network installed in new housing estates).
Schedule 8 adds a new Part to Schedule 1 to the Telecommunications Act to address this problem through a standard carrier licence condition. In summary, the condition imposes on a carrier an obligation to acquire certain services from a carriage service provider where this is necessary to enable the carrier’s customers to make calls to customers of the carriage service provider (in the case of terminating access). The general objective of Schedule 8 is to guarantee any-to-any connectivity of customers on different networks. Where parties cannot agree on terms and conditions, disputes can be resolved using the approach taken in other parts of Schedule 1 to the Telecommunications Act.

**Facilitating regulation of the telecommunications industry by the ACMA**

*Enforceable undertakings*

Schedule 10 of the Bill would allow the ACMA to accept enforceable undertakings. It provides that a person may give the ACMA an enforceable undertaking that the person will take specified action directed towards ensuring that the person does not contravene the Telecommunications Act or the T(CPSS) Act, or is unlikely to contravene those Acts, in the future.

The absence of voluntary arrangements for enforceable undertakings to comply with the Telecommunications Act or the T(CPSS) Act prevents the opportunity for more effective and focused compliance. The power to accept enforceable undertakings would complement the ACMA’s existing enforcement powers by providing the ACMA with a flexible and efficient means of addressing concerns about a person’s current and future compliance with the Telecommunications Act and the T(CPSS) Act. The ability to accept enforceable undertakings is also consistent with ACMA’s regulatory role which acknowledges that a range of balanced pro-active and reactive mechanisms is needed to bring about industry compliance and inform consumers about their rights.

The ACMA does not currently have an express power to accept enforceable undertakings from a person following breaches of the Telecommunications Act or the T(CPSS) Act. By contrast, the ACMA has an express power to accept enforceable undertakings in relation to certain matters under the *Spam Act 2003*.

*Remedial directions*

Schedule 13 makes amendments to provisions of the Telecommunications Act that give the ACMA a power to issue remedial directions to provide that such directions are not legislative instruments for the purposes of the *Legislative Instruments Act 2003* (LIA).

These amendments are necessary as a consequence of amendments made to the Telecommunications Act by Schedule 11 to the Bill that give the ACCC the power to issue remedial directions to Telstra in relation to breaches of a licence condition introduced by that Schedule. Directions given by the ACCC under the amendments in Schedule 11 are specified not to be legislative instruments for the purposes of the LIA (since the making of a direction subject to merits review would generally not be considered to be legislative in character for the purposes of the LIA). Schedule 13
makes similar amendments to the provisions of the Telecommunications Act that currently allow the ACMA to issue remedial directions.

**Other changes to the telecommunications regime:**

*Repealing the requirement for carriers to have an industry development plan*

Under Part 2 of Schedule 1 to the Telecommunications Act, the ACMA cannot grant a carrier licence to a person unless that person has given an industry development plan (IDP) to the Minister and the Minister has approved the IDP (subclause 4(1) of Schedule 1). The Telecommunications Act currently provides for certain carriers to be exempt from the requirement to have an IDP.

The Productivity Commission report “Telecommunications Competition Regulation”, Report No. 16, 21 September 2001, found that there was no compelling argument for continuing with the operation of IDPs and recommended that the legal requirement for IDPs be repealed. Schedule 1 to the Bill repeals Part 2 of Schedule 1 to the Telecommunications Act, thereby removing the requirement for carriers to have IDPs.

*Clarifying the ACMA’s enforcement powers in relation to industry codes*

Part 6 of the Telecommunications Act sets out a regime for the registration, replacement and enforcement of industry codes and industry standards that regulate participants in particular sections of the telecommunications or e-marketing industries. Part 6 of the Telecommunications Act contains two main enforcement provisions in relation to registered industry codes. First, the ACMA has the power, under section 122, to issue formal warnings to an industry participant who has contravened a registered code. Second, where the ACMA is satisfied that an industry participant has contravened a registered code, it can issue a direction to that person to comply with the code pursuant to section 121. Failure to comply with such a direction may result in the person being ordered by the Federal Court to pay a pecuniary penalty of a maximum of $50,000 for an individual and $250,000 for a body corporate.

Section 120 of the Telecommunications Act provides that changes to a registered industry code are to be achieved by replacing, rather than varying, the code. The amendments in Schedule 2 to the Bill will ensure that the ACMA can exercise its enforcement powers under sections 121 and 122 in relation to a breach of a former registered code that has been replaced with another code under section 120. The ACMA would only be able to issue directions or warnings to a relevant industry participant where the conduct in question would have contravened the replacement code, had that conduct occurred while the replacement code was registered.

*Amending the requirements for consultation on variations to the numbering plan made under section 455 of the Telecommunications Act*

Section 455 of the Telecommunications Act requires the ACMA to make a numbering plan which specifies the numbers that are for use in connection with the supply of telecommunications carriage services to the public in Australia. In accordance with
this section the ACMA has made the *Telecommunications Numbering Plan 1997*. The ACMA administers the numbering plan and makes variations to it as required.

Section 460 of the Telecommunications Act requires the ACMA to consult on variations to the numbering plan, and requires that interested persons have 90 days in which to give the ACMA comments.

These consultation requirements provide an unnecessary burden on the ACMA when it seeks to make minor variations to the numbering plan. Additionally, the period allowed for consultation has proven to be too long and inflexible, and as a result holds up ACMA processes. It can also result in lengthy delays to the availability of appropriate numbers for new services.

As a result, Schedule 3 to the Bill amends the Telecommunications Act to reduce the minimum period of public consultation about variations to the numbering plan from 90 days to 30 days, and to remove the need for public consultation if a proposed variation to the numbering plan is minor.

**FINANCIAL IMPACT STATEMENT**

The Bill is not expected to have any financial impact on Commonwealth expenditure or revenue.
REGULATION IMPACT STATEMENT

Introduction

The objective of the Australian Government (the Government) in the telecommunications sector is to maintain a sustainable and competitive telecommunications market that produces real benefits for all consumers, including lower prices, service choice and innovation. The development of a competitive market is the primary strategy for meeting this objective.

In 2005, in advance of the possible sale of Telstra Corporation Limited (Telstra), the Government examined the telecommunications competition regulatory regime to make sure it remained adequate and appropriate to support and encourage competition. The need for this examination was also driven by continually evolving technologies and an awareness of the new delivery platforms that are likely to emerge over the next five to ten years.

One of the objectives of conducting this examination at this time is to have a settled and effective regulatory regime in place well in advance of the possible sale of Telstra. This would provide certainty for the financial market in the lead-up to a possible sale and reassure those markets that the Government would not toughen up the regulatory regime post sale.

Purpose

This statement analyses the impacts of the proposed operational separation model and amendments to the competition regulatory regime. It also considers measures to enhance the enforcement powers of the Australian Communications and Media Authority (ACMA). The specific objectives addressed are:

1. facilitating a more ex-ante and transparent regulatory regime;
2. improving obligations to interconnect competing networks;
3. greater certainty for investment in future networks;
4. greater regulatory certainty and more timely access to bottleneck services;
5. greater incentives not to breach the competition rule;
6. minor changes to the telecommunications regime; and
7. improved compliance with the telecommunications regulatory regime.

Background

When open competition was introduced into the telecommunications industry in 1997 the former incumbent Telstra held significant market power in many telecommunications markets, particularly those that were related to its fixed line network. This market power, combined with its level of vertical integration meant that it had an ability and incentive to act in ways that may have limited the development of competition. To respond to this concern the Government supplemented the Australian Competition and Consumer Commission’s (ACCC’s) general anti-competitive conduct powers in Part IV of the Trade Practices Act 1974 (TPA) with Part XIB of the TPA.
Part XIB of the TPA enables the ACCC to issues competition notices to carriers and carriage service providers with substantial market power engaging in conduct with the purpose or effect of substantially lessening competition. Issuing a competition notice is designed to promptly stop anti-competitive conduct and opens the way for substantial penalties and damages.

Under Part XIB, the ACCC can also require a carrier or carriage service provider to file its charges (public tariffs and access agreements), enabling their scrutiny for anti-competitive purpose or effect. The ACCC can also make record-keeping rules requiring carriers or carriage service providers to keep both financial and non-financial information in a prescribed form and to publish this information. In 2002, the Government required the ACCC to exercise its record keeping rules (RKR) powers to introduce accounting separation of Telstra.

In 1997, the Government also recognised that in order to ensure competition in the telecommunications market, it was necessary to regulate access to certain bottleneck services and to ensure interconnection between services provided by competing service providers.

Part XIC of the TPA was introduced, based on Part IIIA of that Act, but containing additional features to improve the timeliness of access to bottleneck services. As with Part IIIA, the policy intention of Part XIC was that, as much as possible, both the determination of access rights and terms and conditions of access be the result of commercial processes and industry self-regulation.

The object of the telecommunications access regime in Part XIC is to promote the long-term interests of end-users (referred to as the ‘LTIE test’) of carriage services or services provided by means of carriage services. In determining whether something promotes the long-term interest of end-users, regard must be had to whether it is likely to result in:

- promoting competition;
- achieving any-to-any connectivity; and
- encouraging the efficient use of, and economically efficient investment in, infrastructure used to supply telecommunications services.

Under Part XIC, the ACCC has the power to ‘declare’ services for the purposes of the telecommunications specific access regime if it considers it would be in the LTIE. Carriers and carriage service providers are generally required to provide interconnection with, and access to, services declared by the ACCC (referred to as standard access obligations). In the first instance, terms and conditions of supply, including price, are commercially negotiated between parties or set out in an undertaking given by the access provider; if negotiations fail, the ACCC may determine terms and conditions through binding arbitration.

**Stakeholders**
The key stakeholders with an interest in the matters in this submission are:

- access providers;
- access seekers;
- carriers and carriage service providers;
- potential investors in telecommunications services; and
- end-users of telecommunications services.

**Consultation**

A significant degree of stakeholder consultation has informed the development of the policies in relation to the matters addressed in this submission.

On 11 April 2005 the Government released the telecommunications competition regulatory reform issues paper for public discussion and comment.

The Government received 33 submissions from a wide range of stakeholders including the telecommunications and broadcasting industries, State Governments, regulatory bodies, consumer groups and individuals.

Follow up meetings have occurred with a number of key industry stakeholders.

**Future review**

The Government proposes to review the changes and the broader efficacy of the regulatory regime in 2009. This will allow for the revised regime to become fully operational and give the market enough time to adjust to and absorb the changes before they are reviewed again.

1. **Facilitating a more ex-ante and transparent regulatory regime**

   **Problem identification**

   Telstra is a vertically integrated firm which retains a dominant market position in many telecommunications markets. Telstra also owns infrastructure which its competitors need to access and interconnect with in order to compete against it. Telstra’s control of this infrastructure, combined with its market position, creates an incentive and ability for it to favour its own retail business in the provision of access to this important infrastructure. Telstra’s vertical integration also creates a lack of transparency that makes it harder for the ACCC to effectively enforce the competition regulations.

   **Objective**

   The objectives of reforms in this area are to address concerns that arise from Telstra’s vertical integration, create an environment in which competitors have greater confidence that they are receiving equivalent treatment in the provision of wholesale services, and promote ex-ante resolution of competition issues.
Discussion of options and impacts

(a) Licence condition to implement an operational separation model tailored to Telstra’s business model

This option is based upon a model of operational separation that has been developed through a consultative approach between the Department of Communications, Information Technology and the Arts and Telstra, although the model goes further than Telstra would be willing to commit on its own. The aim of the model is to promote the principles of transparency and equivalence in relation to the supply by Telstra of wholesale services. The model takes into account Telstra’s existing organisational structure and business practices and commits Telstra to:

a. operational and organisational separation of the wholesale business unit and key network functions from the retail business units including, separate staff and premises and staff incentive programs to ensure equivalence is provided;
b. equivalence between the internal wholesale price faced by Telstra’s retail business units and the wholesale prices paid by Telstra’s competitors for designated services;
c. equivalent standards of service for designated services provided by Telstra to its retail business units and its wholesale customers, with published internal contracts to set out the conditions upon which Telstra’s network business units provide services to its wholesale and retail business units;
d. improved responsiveness to wholesale customer requirements, including but not limited to, regular reviews, information on network deployment, a wholesale service improvement plan and reporting on access to Telstra’s exchanges;
e. procedures and processes, including rules for how the separate business units interact and monitoring and reporting to verify that the above commitments are being met; and
f. an annual compliance report to Government setting out details of Telstra’s compliance. This report would include an external auditor’s report.

This option would improve equivalence of price and non-price treatment between Telstra’s retail business units and Telstra’s wholesale customers through organisational change, backed up by a rigorous compliance and reporting framework. It is targeted at the specific problems associated with Telstra’s vertical integration, including: delivering equivalent service quality and timeliness of service delivery between wholesale and retail customers; protecting confidential information of wholesale customers; providing equivalent information on network design and developments; and improving access to Telstra exchanges.

The model would be introduced through a licence condition that required Telstra to produce, implement and adhere to an operational separation plan. The commitments above would be reflected in the operational separation plan, and would be delivered through a comprehensive monitoring and enforcement regime, including an annual compliance report produced by Telstra and provided to the Government, and by ongoing enforcement of the licence condition by the ACCC and the Minister for Communications, Information Technology and the Arts (the Minister).
Telstra would be required to operationally separate its wholesale business unit and key network business units from its retail business units. Rules would be developed to establish the internal separation and compliance with these rules would be reflected in Telstra’s performance incentive scheme.

Telstra would have to prepare a draft operational separation plan for submission to the Minister for approval. The plan would have to contain provisions requiring it to provide regular compliance reports to the Minister, and publicly via its internet site. The plan would also require Telstra to maintain an audit trail available to the ACCC. In the event of Telstra contravening the final operational separation plan, it would then be required to draft and implement a rectification plan approved by the Minister.

On pricing matters Telstra would be required to develop a benchmark pricing schedule for designated services that are used by Telstra’s retail business units. The benchmark prices would reflect the actual wholesale prices paid to Telstra’s network business units by its non-Telstra customers, adjusted for cost efficiencies that arise on the basis of Telstra’s volume usage and vertical integration. Telstra would retain its current flexibility to vary its wholesale prices to non-Telstra customers, but be required to re-benchmark its internal prices to actual prices periodically.

A group that includes the ACCC, DCITA and Telstra (with an expert facilitator if necessary) would develop a set of principles for the establishment of the internal wholesale price. This group would also seek to establish a formal understanding about use of the internal wholesale prices in assessing whether anti-competitive behaviour exists.

This process would provide the internal wholesale price that the ACCC has identified as important to its role of enforcing compliance under Part XIB of the TPA. It would also generate a more realistic price for Telstra’s inputs in the imputation testing process which would recognise its legitimate economies of scale and scope. This would provide greater certainty for Telstra, and other wholesalers in setting margins between wholesale and retail prices, allowing them to reduce their regulatory costs and compete more effectively.

This model would promote equivalence in non-price terms and conditions through transparent rules of conduct and published internal contracts between Telstra’s network business units and Telstra’s wholesale and retail business units. These internal contacts would include non-price terms and conditions for supply of specified retail and wholesale services. The contract would provide for the equivalent supply of common support functions such as service activation and provisioning, and fault detection, handling and rectification.

This model would also improve Telstra’s responsiveness to meeting wholesale customers’ needs through a range of measures. These would include committing Telstra to provide wholesale customers with information on network developments, publishing a wholesale customer improvement plan, protecting the confidentiality of wholesale customer information, responding to wholesale customer complaints, and providing improved access to exchanges.
It is expected that the initial phase of the development of this model could be completed in less than six months. Telstra and the ACCC have already undertaken a considerable amount of work on imputation modelling and the remaining areas could be developed through a joint working group, facilitated by mediation.

This option builds upon many of Telstra’s existing internal processes. This would also allow implementation of the non-price commitments to be achieved within a short timeframe at reasonable cost.

There would be some moderate costs to Telstra, other carriers, the ACCC and the Government associated with implementation of this model. For Telstra this would include legal and regulatory costs of the operational separation plan. These costs would also include expert econometric advice to develop the pricing aspects of the framework. There would also be implementation costs, including setting up the reporting obligations. This includes setting up a director of equivalence, external audit, and the additional internal line reporting that would have to be implemented to allow for the timely release of the compliance report to Government.

An independent review would be carried out in 2009 of the licence condition’s operation. The review could take into account a number of considerations, including the prevailing state of competition in the market at the time, technological developments, Telstra’s commercial incentives for wholesaling, and the costs and benefits of operational separation.

Cost Recovery Impact Statement

There would be increased regulatory costs to the ACCC associated with the implementation and ongoing oversight of the operational separation framework. The ACCC estimates that these costs would be in the order of $4-5 million per annum. Funding for the ACCC’s existing telecommunications functions is recovered by the Australian Communications and Media Authority (ACMA) from licensed telecommunications carriers under the *Telecommunications (Carrier Licence Charges) Act 1997*. This is based on the principle that regulatory costs are a necessary component of maintaining an effective and competitive industry.

Operational separation would complement and is consistent with other regulatory activities that are currently cost recovered, such as anticompetitive conduct and access regulation. The ACCC’s existing cost recovery mechanism would provide an efficient and equitable means of recovering this expenditure. Therefore, increased funding for the ACCC would lead to a slight increase in carrier licence fees. Carriers contribute in proportion to their share of industry revenue. The details of how the cost recovery mechanism would work is currently being finalised by the Department of Finance.

All of the industry is directly or indirectly affected by this regulation and therefore it is appropriate that the costs of administering it are recovered from industry rather than funded from consolidated revenue. However, the benefits of competition derived from Telstra’s operational separation would also flow through to consumers.
(b) Legislative amendments to implement a more far reaching operational separation model

This option is to amend the TPA to require Telstra to implement a model that is focused on changing Telstra’s business incentives through imposing strict separation of Telstra’s wholesale and retail operations. The model would:

a. amalgamate Telstra’s existing Wholesale and Network business divisions;
b. establish separate profit and loss, and balance sheets for the Retail and Wholesale businesses;
c. establish separate management, work forces and systems;
d. introduce arms length trading and contracts between Network and Retail businesses on both price and non-price terms and conditions;
e. introduce detailed oversight and enforcement by the ACCC; and
f. tie Telstra’s staff remuneration to the performance of the relevant business.

The trading arrangements would require internal transfer prices, changing fundamentally the way that Telstra Retail interacts with Telstra Network. This new interaction has the potential to provide greater transparency to the ACCC of the prices that Telstra Retail pays for the underlying network services. This could improve the ACCC’s ability to enforce competition laws.

If the introduction of arms length trading results in Telstra Network being indifferent between selling services to Telstra Retail or to wholesale customers, then the concerns of wholesale customers of receiving a lower standard of service would be addressed. Substantiation of this treatment would still require monitoring and reporting obligations.

The model could provide commercial benefits to Telstra in terms of: better understanding its own cost structures and therefore being able, over time, to set more efficient prices for its services; potentially simplifying its corporate structure; providing it with better understanding of its business; and promoting a culture of accountability for outcome within the company.

There would be restructuring costs to Telstra as it changed the operation of its business units to develop completely separate Retail and Network units. There would be systems costs to establish separate accounts and separate management and billing systems. There would also be costs associated with setting up internal trading arrangements and ongoing transactions costs associated with maintaining these practices.

There would be increased costs to the Government, ACCC and industry associated with this model. The ACCC estimates that its increased costs would be in the order of $1-2 million per annum. Therefore, increased funding for the ACCC would lead to a slight increase in carrier licence fees. Carriers contribute in proportion to their share of industry revenue.

The biggest challenge with this model is the cost allocation of network services that is required to provide meaningful transfer prices. Developing this would be a complex and time consuming task. There would be significant costs to Telstra and the ACCC in
establishing the transfer pricing principles and conducting the cost allocation of assets to individual services.

These challenges would introduce a risk of delay in the delivery of competitive benefits to the industry as Telstra developed and implemented the new trading arrangements. Furthermore, even with greater transparency of Telstra’s transfer prices, it has not been clearly demonstrated how this would, of itself, would allow the ACCC to address competition issues more effectively, or improve the level of competition within the market.

(c) Provide the ACCC with greater powers in relation to ‘services of interest’
This option, instead of implementing organisational change of Telstra, would use stronger regulatory sanctions and powers under Part XIB of the TPA as a means of addressing the identified problems.

It would target these stronger regulatory powers towards services where Telstra either may act anti-competitively or may have an increased incentive to do so. These are likely to be particular services which:

a. are important to the development of competition;
b. have experienced rapid increases in demand; and
c. form a core part of product bundles.

The additional regulatory powers could be focussed on these services through a form of threshold test.

Once a service was identified by the threshold test, the ACCC could choose from a list of different obligations and powers that would be attached to the service. This would enable the ACCC to select the obligations and powers that were appropriate in each circumstance. These powers could include obligations to:

a. establish accounting and reporting rules for interconnection services and other access services provided to the carrier’s retail and wholesale operations;
b. establish cost based pricing for the service of interest;
c. seek ACCC approval before bundling the service; and
d. provide advanced notice of 21 days for price changes.

Depending on the specific powers provided to the ACCC, this approach may improve the transparency on which Telstra provides these services to its wholesale customers. By increasing the penalties or providing greater information gathering powers, it may also increase the incentive for Telstra to avoid anti-competitive behaviour.

However, this approach would still largely operate ex-post, rather than putting in place organisational arrangements that would reduce the prospect or possibility of discrimination in the first instance. The additional powers and sanctions would also create additional regulatory uncertainty for Telstra.
Consultation

The Government sought feedback from interested parties on operational separation and ways of providing greater transparency within the market in the issues paper. The submissions to this paper, to the extent that they touched on operational separation, focussed on the area of improving transparency within Telstra’s operations, and on the delivery of improved equivalence to Telstra’s wholesale customers.

As part of this process, the ACCC proposed a model of operational separation (Option (b) above) that would require internal arms length dealings between Telstra’s retail business and its wholesale business.

Access seekers were supportive of the model in Option (b). They shared the ACCC belief that such a model would create internal incentives for Telstra to improve the delivery of equivalent services. Parties consulted indicated that although it was not their preferred model they did agree that there would be competitive benefits (i.e. more equivalence in price and non price treatment, greater information, more accountability and improved transparency) delivered by Option (a).

The Government undertook a process of consultation directly with Telstra to develop a model that could be established within a reasonable timeframe, and that would improve transparency of its operations and deliver greater equivalence to its wholesale customers.

This approach was based on a view that, to be cost effective and successful, an operational separation model would need to take into account the practical business structures and processes of the organisation to which it was being applied.

Conclusion and recommended action

Option (a) would deliver fairly certain outcomes, and would be likely to be implemented within approximately six-twelve months. Option (b) would have an uncertain implementation timeframe, and would have uncertain outcomes. Option (c) would create some regulatory uncertainty, but this is not likely to be of a significant impact.

Each option would have costs associated with it, however these would vary considerably. Option (a) would have moderate implementation cost to Telstra and some ongoing compliance costs. Option (b) would require significant structural changes for Telstra that would have high associated costs. There would also be ongoing costs associated with maintaining transfer prices. As noted above, there may be some off-setting efficiencies as a result of Telstra more accurately managing its costs. However, Telstra does not believe that these benefits would outweigh the ongoing costs. The services of interest proposal may have some compliance costs for Telstra and the ACCC depending on the use of the provisions.

The benefits to the regulator, wholesale customers and consumers of each proposal would also vary. In terms of improving outcomes for non-price issues, it is likely that Options (a) and (b) would both improve equivalence between the services supplied to Telstra’s retail and wholesale customers. Option (c) has the potential to improve these
outcomes, but its success would be dependent on whether Telstra altered its behaviour in response to the threat of the ACCC utilising the provision.

On pricing matters the ACCC considers that Option (b) would deliver significant benefits. However, as noted above, completing the cost allocation of network services necessary to provide meaningful transfer prices would be a complex and time consuming task. It is probable that ongoing disputation on this matter between Telstra and the ACCC would undermine any potential benefits for pricing. Although Option (a) would require negotiation between the ACCC and Telstra on the pricing tool it is likely to be a more straightforward and more timely task than full cost allocation. This approach would provide more certainty for Telstra in relation to its pricing decisions and the development of internal wholesale prices would approximate the benefits of transfer pricing, for compliance purposes, without the same level of costs. The services of interest proposal has the potential to improve pricing outcomes, but as above, this would depend on how Telstra responded to the provision.

Overall, Option (b) would result in considerable impact upon Telstra’s operations and could not be implemented in a timely manner. It is also unclear whether it would improve competition beyond that which could be achieved by Option (a). Option (c) would be a lower cost option than (b), however, its effectiveness in improving competition is dependent on Telstra’s reaction to it and is therefore uncertain.

Option (a) would be likely to improve competition through delivering improved transparency of Telstra’s operations and improved equivalence to Telstra’s wholesale customers. This option could also be implemented relatively quickly without significantly impacting upon Telstra’s existing commercial activities. For these reasons, Option (a) is preferred.

2. Improved obligation to interconnect competing networks

**Problem identification**

Currently there is no obligation in Part XIC for network owners to acquire the terminating services of other networks. The interactive network characteristics of telecommunications are such that customers at the end of a telecommunications network need to be able to both receive services initiated on other networks and terminate services they initiate onto other networks. As such smaller networks need interconnection with larger networks, rather than simple access to those networks.

The practical effect of this is that it is possible for an operator of a large network to deny any-to-any connectivity to users on a smaller network (such as a new fibre customer access network installed in a new housing estate), particularly where the operator of the larger network has its own network infrastructure in the relevant area.

Facilitation of new competing network infrastructure is also an important issue in telecommunications at present given the emergence of a range of new network technologies. Various technologies, such as fixed-line fibre customer access networks (CANs) and wireless broadband networks are being trialled or implemented at present and it is expected that this trend will continue into the future.
Although the construction of such networks is at a very early stage, such networks have the potential to offer a significant competitive alternative to the existing copper CAN. Also, an increasing number of carriers or carriage service providers are beginning to offer their own retail broadband services, in competition with existing networks, using a combination of their own broadband technology and wholesale access to the existing copper CAN. Interconnectivity between these new networks and existing infrastructure must also be considered to ensure ongoing competition.

**Objectives**

Increase infrastructure-based competition and provide greater certainty to firms considering investing in new networks.

**Discussion of options and impacts**

(a) **Maintain the current position**

Option (a) is to leave unchanged the anomaly that allows large network operators to restrict any-to-any connectivity. Currently the regulatory regime, including Part XIC of the TPA, does not provide a mechanism for operators of larger telecommunications networks to be required to acquire services (and, in particular, originating and terminating access services) from operators of smaller networks.

The practical effect of this is that it is possible for an operator of a large network to deny any-to-any connectivity to users on a smaller network (such as a new fibre customer access network installed in a new housing estate), particularly where the operator of the larger network has its own network infrastructure in the relevant area.

In these circumstances, the lack of any-to-any connectivity would be a powerful disincentive to end users who might otherwise wish to connect to the smaller network. In turn, this would also be a strong disincentive to further investment in such networks.

(b) **Amend the Telecommunications Act 1997 to introduce a general obligation to require any-to-any connectivity**

Option (b) is to amend the *Telecommunications Act 1997* (TA) to introduce a general obligation to acquire services on carriage service providers to require any-to-any connectivity (or interconnection), and to provide a method for resolving any disputes that may arise in relation to this.

The obligation could be modelled on Schedule 1 of the TA which specifies standard carrier licence conditions. A provision to introduce an obligation to acquire services to require any-to-any connectivity could follow the same general structure:

- introduction of a general obligation (interconnection between operators of telecommunications);
- limits on that general obligation, i.e. details of the circumstances in which that obligation is to apply; and
- a method for determining terms and conditions under which the obligations must be met (either by agreement between the parties or by arbitration.)
The obligations could be worded in such a way that it would leave much of the detail in which any-to-any connectivity is to be achieved to the parties to determine.

**(c) Amendments to access regime, including giving the ACCC the ability to take the refusal to acquire services into account in an arbitration**

Option (c) would amend Part XIC so that, where required for the purposes of achieving any-to-any connectivity, the ACCC would be authorised to impose an obligation to supply, in the circumstances described above, when arbitrating an access dispute, rather than introducing a general statutory obligation to acquire services in such circumstances.

This approach would allow the ACCC to address this issue on a case by case basis through the access mechanism, but would put the onus on those network operators who wish to require larger network operators to acquire declared services from them to firstly lodge an access dispute and secondly convince the ACCC of the merits of their claim.

This proposal would go some way to ensuring that operators of new telecommunications networks are able to interconnect with operators of other networks, and to do so at rates that are regulated under the access regime.

However, it may not provide the degree of certainty required by potential investors in such networks that they would be able to provide any-to-any-connectivity to their end users, and could therefore influence the likelihood of such investment occurring.

**Consultation**

Consultation revealed concern, particularly from the ACCC, about the current lack of requirement to acquire services.

**Conclusions and recommended actions**

Option (a) leaves the problem unresolved. This is an unsatisfactory position, particularly as new networks develop. Option (c), while addressing the raised concerns, may be inconsistent with the current access regime, as it forces the purchase of a service, rather than focus on the supply of services in line with other provisions of Part XIC of the TPA. There is also concern that this option may not be sufficiently certain to settle such issues conclusively. Option (b) is consistent with other provisions in the TA that deal with shared facilities and access to those facilities. It would impose a simple and straightforward obligation while allowing for ACCC arbitration of disputes. It is recommended that Option (b) be adopted.

**3. Greater certainty for investment in future networks**

**Problem identification**

The existing Part XIC objectives focus on promoting the long term interests of end users by, in turn, promoting competition, any-to-any connectivity and the economically efficient operation and use of, and investment in, the infrastructure by which carriage services are provided. However, it is not spelled out that the current requirement obliges the ACCC to focus on the particular issues and risks associated with new network infrastructure, rather than those relating to existing network infrastructure.
Overall, the submissions to the telecommunications competition issues paper revealed a general consensus that, if applied correctly, the current mechanisms for setting access prices under the Part XIC access regime adequately address incentives for investment in new infrastructure that would be used to provide regulated services.

That said, there was some support for the view that it would be appropriate to make minor amendments to the access regime in order to give the ACCC more guidance to take infrastructure investment issues into account in setting access prices for regulated wholesale services.

**Objective**

The objective in making minor amendments to the access regime is to provide the ACCC with more guidance in considering the issues and risks associated with new network infrastructure when setting access prices for regulated wholesale services.

**Discussion of options and impacts**

(a) **Maintain the current position**

In regard to the objects of Part XIC, to leave the current situation unchanged may not fully take into consideration the level of uncertainty and therefore risk, which an investor in a new network faces when deciding whether or not to make such an investment. While the ACCC considered that the current position already requires it to fully consider the relevant issues for efficient investment, several carrier submissions made the point that the LTIE test should act to promote and encourage new network investment, as new networks have the potential to stimulate greater competition and, in the longer term, offer competitive benefits to consumers.

The view expressed in the submissions was that greater certainty was needed to encourage new network investment by ensuring the ACCC had regard to new network investment in its decision making. If lack of certainty of return results in under-investment, there is potential for significant impact on the economy through new services and technologies not being delivered to business and residential customers.

(b) **Include a reference to new network investment in the matters for which regard must be had under the LTIE test**

The degree of consideration given to new network investment under the current LTIE test is not certain. Major carriers, including Telstra and Optus, have argued that they are on the verge of making significant decisions on the deployment of next generation networks (NGN) and that the current LTIE test does not provide them with sufficient certainty of the return they would receive from that investment should it be subject to the access regime.

The risks attendant on investing in NGN are substantially greater than those of investing in recognised networks. NGN technologies are likely to have a greater level of uncertainty as to what technologies and services will be successful in the market place and this should be factored into the returns that would be received.
Investors argue that they need assurance that their assumption of risk, and the magnitude of their investment in NGN networks would be considered in the setting of access prices and access decisions.

This option aims to ensure that the application of the LTIE test does not act as a barrier to investment.

Providing more guidance on how the efficient investment limb of the LTIE test should be interpreted would provide clarification that the ACCC should have regard to the promotion of efficient development of new or enhanced telecommunications networks when applying the LTIE test. This would increase the probability of network investment proceeding, which has the potential to provide benefits to consumers through more innovation and potentially greater competition.

This would make more certain the ACCC’s already existing practice which is to consider enhancements to existing infrastructure and the establishment of new networks when considering the economically efficient operation and use of, and investment in, the infrastructure over which carriage services are provided. The nature of the amendment is to provide more guidance on the interpretation of the existing LTIE test, rather than to re-write the LTIE test. Therefore, it is not likely to over-emphasise the return to service providers or risk leading to inefficient investment.

**Amend the access regime to alter the LTIE test**

In regard to the objects of Part XIB, Option (c) would amend the LTIE test by replacing the current objects clause with a new objects clause, consistent with that proposed in the general reforms to Part IIIA of the TPA, along the lines of:

The object of this Part is to (a) promote economically efficient operation and use of, and investment in, telecommunications infrastructure and services; and (b) provide a framework and guiding principles to encourage consistent and predictable terms and condition for access to telecommunications infrastructure and services.

Such a clause would place primacy on the objective of promoting efficient investment but removes the objective of promoting competition from the objects test and deletes the requirement of any-to-any connectivity. Part XIC was created because it was identified that distinct characteristics and issues in the telecommunications industry required industry-specific regulation, and that application of the general access regime of Part IIIA was not appropriate.

The policy intention remains that eventually, as competition in the telecommunications industry is judged sustainable, the industry specific regulation in Parts XIB and XIC would be wound back. However, at this point it would be premature to adopt the drafting of Part IIIA.

**Consultation**

Several industry participants identified in their submissions the need for greater consideration to be given to investment in new networks in the applying the LTIE test for declaration and access pricing decisions. A number of other submissions noted
that the current LTIE test was appropriate for encouraging investment as it allowed for the appropriate balance of the interests of access providers and access seekers.

Conclusions and recommended actions
Option (a), while maintaining an already effective test, does not address the concerns of firms considering new network investment, and lacks certainty as to the consideration the ACCC should give to future network deployment in its decision-making. In regard to the proposal in Option (c), such focus on infrastructure and access would shift the focus to the interests of the network operators, rather than business and residential consumers, and deletion of any-to-any connectivity and competition is not appropriate (see issue 2). The current market environment does not warrant adopting this recommendation at this time. Option (b) clarifies the current ACCC practice and provides greater certainty to new investors. It is recommended that Option (b) be adopted.

4. Providing greater regulatory certainty and facilitating more timely access

Problem identification
Despite the amendments made to the access regime in 2002, the ACCC and several access seekers have reported that the operation of the access regime continues to be affected by the problem of delay, and by the problem of “gaming” of the regulatory arrangements (on legal process as well as substance) particularly by access providers. This has meant that the indicative six month timeframe for the resolution of access disputes and consideration of undertakings introduced in 2002 has rarely been met and is often extended by considerable periods.

In practice, regulatory uncertainty tends to favour access providers over access seekers. This is because the uncertainty results in the regulator adopting an overly cautious approach when interpreting its powers and following procedures. This leads to delay in regulatory decisions and hence delayed access to services. Such delays equate to higher access costs for access seekers, lower levels of competition and higher prices for consumers. If access is delayed significantly it may result in entrants leaving the market because they cannot sustain a viable business case.

For example, there is still no regulatory certainty in relation to the prices for wholesale mobile termination services, despite the ACCC having published indicative prices for these services in June 2004. Nor is there any regulatory certainty around the prices for access to Telstra’s unbundled local loop services (which is one of the key building blocks of broadband services provided by Telstra’s competitors).

The amendments that were made to the access regime in 2002 sought, among other things, to encourage access providers to lodge access undertakings covering the provision of services to all access seekers, rather than to engage in a multitude of bilateral “access disputes” with individual access providers. This was intended to speed up access to declared services by settling terms and conditions on an industry-wide basis. This intent is still supported.

The 2002 reforms have proven successful in stimulating the provision of access undertakings. Core service undertakings have been submitted by Telstra and approved
by the ACCC covering the public switched telephone network and line sharing service. However, experience with the operation of the regime since 2002 has shown that access providers can manipulate the undertakings process to prolong regulatory outcomes, including for both undertaking and arbitration decisions.

Identification of instances of gaming can be difficult. Gaming is given effect by parties exercising their rights under the TPA, using existing processes and procedures. Therefore, it is difficult to establish parties’ intent to the point of establishing whether or not they are behaving in a vexatious manner. For this reason the preferred approach is to focus on removing the opportunities for gaming.

**Objectives**

To provide for more timely access to declared services, while maintaining the rights of access seekers and providers and ensuring that the application of the access regime is transparent and consistent.

**Discussion of options and impacts**

(a) **Maintain the current position**

Option (a) is to leave unchanged the current degree of standardisation of ACCC processes. While the current processes are functional, there are concerns that the processes by which the ACCC currently considers access undertakings and resolves access disputes are not sufficiently clear or transparent, and that there is opportunity for regulatory gaming of these provisions. A number of issues with the current processes for lodging undertakings have been raised.

Currently, to vary a proposed undertaking, the undertaking must be withdrawn and a new undertaking lodged. The practical effect of the current provisions is that the ACCC must recommence its public consultation process, on the whole undertaking, each time a variation is proposed. This has the potential to result in very substantial (and unnecessary) delays in an undertaking being finally approved by the ACCC.

A number of submissions to the issues paper expressed a strong concern that the current provisions of Part XIC effectively require the ACCC to give priority to making decisions on access undertakings before resolving access disputes lodged by access seekers. There are claims that this has resulted in access providers gaming the access undertaking process by knowingly lodging incomplete or otherwise unacceptable access undertakings in order to delay ACCC consideration of access disputes, and therefore to delay binding ACCC decisions on access disputes in favour of access seekers.

Delay is also caused in instances where provision of information necessary for the ACCC to consider an undertaking is delayed. Currently the provisions that deal with the provision of information to the ACCC are open-ended and there is the potential for access providers to delay regulatory outcomes by lodging access undertakings that are not supported by all the necessary evidence.

(b) **Modify the current regime to improve the timeliness and procedural certainty of ACCC decisions**
This option is to further improve the degree of timeliness and procedural certainty of ACCC decisions. Central to this option would be an amendment to the TPA to enable a range of matters to be addressed through procedural rules and then the establishment of a power by which the ACCC could determine and amend, in consultation with industry, these procedural rules. These rules would be developed with the goal of achieving regulatory decisions within the indicative six month timeframe, hence resulting in more timely access. The matters covered by the procedural rules would include:

- public consultation processes;
- the exercise of the ACCC’s discretions about considering access undertakings and resolving access disputes;
- matters affecting the period of time available to the ACCC to make decisions under different provisions; and
- a generic confidentiality regime to apply in consideration of access exemptions, access undertakings and access disputes.

Under this approach the primary legislation would clearly set down the various heads of power that the ACCC has to determine access matters. However, the detailed procedural provisions of how these powers would be executed would be set out in the procedural rules. This would include what factors the ACCC would take into account in exercising its discretion in individual cases. The procedural rules would have the key objective of making decisions wherever possible in the indicative six month time limit. This would preserve access providers’ rights, while giving the ACCC more flexibility to exercise its powers, with a view to making more timely decisions.

Among other issues, this option addresses the lack of certainty that currently exists in the processes the ACCC would follow in considering access undertakings and resolving access disputes. The procedural rules would set out what factors would determine how the ACCC would prioritise matters in individual cases. Up front provision of this information is likely to assist in the resolution of these issues and is likely to expedite and simplify the steps involved in getting ACCC consideration of undertakings and access disputes.

This option would have benefits to both access seekers and access providers as it would allow clear articulation of ACCC processes and would likely reduce delays in obtaining ACCC decisions on access arrangements.

By making such procedural rules binding, both on the ACCC and on access providers and access seekers, there is potential to considerably reduce the scope for access providers and access seekers to game the ACCC’s existing processes.

This would also enable a number of the prescriptive procedural provisions in Part XIC of the TPA that set out how the ACCC must deal with access disputes or undertakings to be removed. Key obligations would remain, such as those to conduct public inquiries in certain circumstances. However the detailed procedures to be followed would be removed from the primary legislation and set out in a subordinate instrument.
The ACCC would have significantly greater flexibility to set out procedural rules to allow it to approve variations to undertakings, with the agreement of the parties, without having to re-start a full public consultation process each time an access provider lodged a new variation to an undertaking. Such flexibility would enable the ACCC to make final decisions on whether to accept or reject an undertaking much more quickly than is currently the case.

Under such rules the ACCC could address the currently open-ended provisions that deal with the provision of information to the ACCC to support an access undertaking. Procedural rules that empower the ACCC to set specific time frames in which all information, or specific types of information to be provided and specify that the ACCC may reject an undertaking on the grounds that all necessary information has not been provided to it in a specified timeframe would provide a strong incentive to ensure that access providers to do not attempt to delay regulatory outcomes in this way.

To complement the rules an amendment could be made so that if the ACCC has published model terms and condition or pricing principles that contain an indicative price for a declared service, the ACCC can make an interim determination that access to that service be provided at that price without the need for further consultation, as the ACCC would have already gone through a public consultation process in determining indicative rates. Further public consultation and detailed consideration would be necessary before making a final determination.

Procedural rules could also set out how the ACCC exercises its discretion in determining whether to prioritise consideration of access undertakings or access disputes. The ACCC would have the discretion to do so in such a way that the possibility of the ACCC making a determination of an access dispute would be a credible deterrent to access providers lodging access undertakings in order to delay a decision on an access dispute.

These changes recognise that time taken to resolve access disputes and consider access undertakings is a matter of concern to many participants in the telecommunications industry. The efficacy of this power will be reviewed in 2009.

(c) **Require the regulator to determine and enforce uniform terms and conditions of access for all access seekers of key declared services**

Under option (c), the ACCC would have the ability to require an access provider to submit an access undertaking setting out terms and conditions of access to the declared service. If the ACCC determines that the proposed undertaking does not satisfy the legislative criteria, then the ACCC may draft and approve its own undertaking to apply to the access provider. This centralised approach to setting access terms and conditions is adopted in many other countries, including Finland, France and Japan.

This approach could provide greater certainty and more timely access to declared services, particularly for smaller access seekers. It could also benefit the ACCC as it would reduce the number of disputes notified to the ACCC for arbitration.
However, this approach would be inconsistent with the underlying philosophy of the current regulatory regime that is focussed on the terms and conditions of access being established through commercial agreement, or being set out in access undertakings. A centralised approach to setting access arrangements would lead to uniform terms and conditions for access. Access seekers would lose the flexibility to obtain services on terms and conditions that reflect their specific circumstances or that are suitable for their customers. Access providers may be forced to alter their networks or supply services on terms and conditions not commercially viable.

A centralised approach to setting access terms and conditions may result in standardised access arrangements that may consequently lead to a dampening of competition and result in a loss of choice for consumers.

In implementing this option it would be difficult for the regulator, or the incumbent to set arrangements which would be flexible and suitable to the unique requirements of all access seekers and ultimately in the long-term interests of end-users.

**Consultation**

Consultation revealed a widespread concern over the speed at which regulatory decisions are made and the potential for gaming that results from delay.

A number of the practices that resulted in delay mentioned above were raised, including the priority between undertakings and arbitrations and the provision of information in support of undertakings.

There was almost unanimous agreement in the submissions that the ACCC be given greater flexibility to accept variations to access undertaking proposals.

**Conclusions and recommended actions**

Option (a) has gone some way to improving the timeliness of access processes, but it does not provide sufficient clarity of the ACCC’s regulatory process, and there may be unforeseen opportunities for gaming. Option (b) reduces the uncertainty surrounding the ACCC’s processes and thus offers improved clarity and would facilitate more timely access to services. Option (c) represents a significant departure from the current regulatory regime and has the potential to stifle competition. It is recommended that option (b) be adopted.

5. Revise the penalties for breach of the competition rule

**Problem identification**

A large number of submissions made the point that the recent experience with the competition notice issued to Telstra in March 2004 in relation to Telstra’s pricing for broadband services illustrates that the current competition notice regime is not an effective deterrent to anti-competitive conduct. In this instance the competition notice was in force for more than twelve months before the regulator was satisfied that the conduct was no-longer anti-competitive.
It was argued that this lack of incentive to change behaviour potentially enables a carrier or carriage service provider to continue to engage in anti-competitive conduct in the interim, to the detriment of competitive developments in relevant markets.

In particular, there are concerns that the size and profitability of some carriers means that the potential benefit to them of breaching the competition rule against the existing penalties does not provide a sufficient deterrent.

Since 1997 the ACCC has issued ten competition notices to Telstra, however, those competition notices effectively address four instances of anti-competitive conduct.

All competition notices to date have been settled between the ACCC and Telstra after a period of often prolonged negotiation.

The time taken to resolve each matter has varied significantly, from two months to two years, depending on individual factors, and similarly settled penalties vary. As the penalties accumulate over time, there is greater incentive for Telstra to change its conduct, and the accumulation may also encourage settlement, as opposed to legal proceedings.

**Objective**

To improve the disincentive for carriers and carriage services providers to engage in anti-competitive conduct.

**Discussion of options and impacts**

(a) **Maintain the current position**

Option (a) is to maintain the current position in relation to the penalties available for breach of a competition notice. Currently the penalty for each contravention is $10 million plus $1 million for each day the contravention is continued. It is argued that, for large telecommunications carriers, such a penalty is not an adequate deterrent or incentive to alter their conduct rapidly. Because of the ever-changing nature of the telecommunications industry, anti-competitive conduct can have a very rapid and detrimental impact on competition. The recent experience with the broadband competition notice indicates that the current penalties were not a sufficient deterrent to prevent the conduct in the first instance, nor were they sufficient to persuade the infringing party to rapidly alter its conduct.

(b) **Adopt a tailored version of the penalty in Part IVA of the TPA being proposed under the Trade Practices Amendment Bill (No 1) 2005**

Option (b) would see the penalty for breach of the competition rule change to $10 million plus $1 million per day for the first 21 days that the conduct continues, *plus* $3 million per day for each day the conduct continues after the first 21 days. Increasing the penalty after 21 days would retain the link between the size of the penalty and duration of the conduct. In the telecommunications industry the impact of anti-competitive conduct is cumulative and therefore any penalty should escalate to reflect the damage caused. Such accumulation would also provide incentive to expeditiously resolve the anti-competitive conduct in the first 21 days to avoid the possibility of the
later increase. This complements the legislative objective of using the issuance of a competition notice to stop anti-competitive conduct.

(c) **Align the penalty for breach of the competition rule to that in Part IVA of the TPA being proposed under the Trade Practice Amendment Bill (No 1) 2005**

The proposed amendments would increase the maximum penalties available for anti-competitive conduct under Part XIB of the TPA to $1 million per day for each day that the conduct continues plus the greatest of:

(a) $10 million;

(b) three times the benefit obtained by the carrier or carriage service provider from the contravention;

(c) if the court can not determine the value of the benefit to the carrier or carriage service provider, 10 per cent of the turnover of the body corporate during the period 12 months prior to and including the month in which the act or omission occurred.

For a large telecommunications companies this would result in an extremely substantial increase in the size of the maximum possible penalty. Both parts (b) and (c) above would clearly be excessive penalties. This option would also do away with the existing link between the maximum total available penalty (which increases at a daily rate) and the length of the period in which the relevant conduct has an anti-competitive effect in the relevant market. It could also be argued that, given that the test for anti-competitive conduct under Part XIB covers effect as well as purpose, the penalty regime should not be as strict.

**Consultation**

A number of submissions expressed the opinion that the penalties available to the Federal Court for breach of the competition rule were not a sufficient deterrent. Consultation has also been undertaken with the Attorney-General’s Department.

**Conclusion and recommended action**

Option (a) goes someway to providing a disincentive to anti-competitive behaviour but may not impact sufficiently on large access providers. Option (c) outlines very steep penalty rates but does not address the link between the penalty and the length of time over which the conduct continues. One of the main aims of the current penalty structure is that the penalty accumulates over time, thereby encouraging the recipient of the competition notice to resolve the conduct quickly. Option (b) retains the link between the acceleration of the penalty and the length of time over which the conduct continues, while being less onerous than option (c). It is recommended that option (b) be adopted.

6. Minor changes to the telecommunications regime including enforcement of conditions attached to exemptions, clarifying the role of model terms and conditions in the assessment of an access undertaking or access dispute and a general confidentiality regime.

**Problem identification**
Experience with the operation of the access regime since 2002, and particularly with the amendments to the regime that were made in 2002, has revealed that there are aspects of those amendments that could benefit from further clarification.

**Objectives**
To implement more robust regulatory arrangements by clarifying and improving the certainty of the current law where necessary.

**Discussion of options and impacts**

(a) **Make appropriate amendments to the regulatory framework**
This option would involve making minor amendments to the regulatory framework to make improvements and to rectify identified drafting omissions. These omissions have been identified internally and will not substantially affect the existing rights of parties and are clarificatory in nature. While the amendments could be approached in a number of ways, the amendments would generally do the following:

- Clarify that the ACCC must have regard to any existing model terms and conditions in deciding on an access undertaking or access dispute
- clarify that the Federal Court has power to ensure compliance with conditions attached to exemptions as it can with conditions attached to undertakings;
- Remove uncertainty in relation to the ACCC’s ability to vary or revoke an access exemption by making reference to the Acts Interpretation Act.

Amendments that address these issues would generally benefit all stakeholders. Those amendments that clarify or remove uncertainty should benefit access seekers and providers by removing scope for unnecessary confusion and thus costly delay. A number of amendments would reduce administrative costs for the ACCC and thus reduce the burden on the industry when these costs are recovered through carrier licence fees.

(b) **Retain the status quo**
Maintaining the current arrangements without change would mean that a number of the inefficiencies and uncertainties that have been identified would not be addressed. These arrangements could be continued on the basis that, while imperfect, they have not frustrated the objectives of the regime. Doing nothing may also save some administrative costs associated with instituting changes. The status quo may also benefit service providers to the extent that it hampers the development of competition and thus helps to maintain their market position.

**Conclusion and recommended action**
It is apparent that option (a) is a reasonable and preferred option, given the issues that have been identified. The package of proposed measures is consistent with the direction of existing regulation and deals with current concerns within the industry. It is recommended that option (a) be adopted.

7. Enabling the Australian Communications and Media Authority (ACMA) to accept enforceable undertakings towards ensuring compliance with the *Telecommunications Act 1997*
Problem identification

ACMA does not have an express power to accept enforceable undertakings from telecommunications carriers or carriage service providers to ensure compliance with the Telecommunications Act 1997 (TA) or the Telecommunications (Consumer Protections and Service Standards) Act 1999. By contrast, ACMA has express powers to accept enforceable undertakings for matters relating to its powers under the Spam Act 2003.

ACMA has a range of enforcement powers available to it through its administration of the Radiocommunications Act 1992, TA, Telecommunications (Consumer Protection and Service Standards) Act 1999 and subordinate legislation made under these Acts. The types of enforcement action available include (from the least to the most interventionist) giving advice, warnings, infringement notices, directions to comply, cancellation or suspension of licence, as well as court action involving civil and criminal penalties. The availability and use of these options depends on the regulatory arrangements involved.

A reference to the TA in relation to enforceable undertakings includes the Telecommunications (Consumer Protections and Service Standards) Act 1999.

Objectives

Improve and encourage compliance with the TA by enabling ACMA to respond with a more flexible and effective approach to ensuring the TA is not contravened.

Discussion of options and impacts

(a) Maintain the current position

Option (a) would leave ACMA with its existing enforcement powers. Currently ACMA does not have an express power to enable it to accept enforceable undertakings although it has enforcement powers to give advice, warnings, issue infringement notices, make directions to comply, cancel or suspend licences and initialise court action for failing to comply with the TA.

ACMA does have an express power to accept enforceable undertakings for matters relating to its powers under the Spam Act 2003, but only in relation to commercial emails and address-harvesting software.

Under Option (a) ACMA’s enforceability and compliance options for ACMA may be uneven for enforcing the telecommunications regulations, particularly for a serious breach where the only available enforcement may be redress though court action. The effect upon the regulatory arrangements is that delays and costs associated with court action may be incurred before an effective solution is found. Reliance on a court imposed solution to compliance issues may prevent ACMA from achieving the best outcome for all parties involved, including end-users of telecommunications services. The absence of voluntary arrangements for enforceable undertakings to comply with the TA prevents the opportunity for more effective and focused compliance.
(b) Amend the TA to introduce an express power to allow a person to give ACMA an enforceable undertaking about compliance with the TA.

Option (b) is to add to ACMA’s current suite of enforcement options an express power to accept enforceable undertakings from a person (including telecommunication carriers or carriage service providers) about compliance with the TA.

Undertakings about compliance would be written and would detail what specified action a person would take, or refrain from taking in order to comply with the TA. Written undertakings would also allow a person to take action to ensure against future contraventions of the TA.

The ability to accept enforceable undertakings would promote and generate better industry compliance with the TA by providing ACMA with a more efficient and flexible mechanism for current and future compliance. The ability to accept enforceable undertakings is also consistent with ACMA’s regulatory and compliance philosophy which acknowledges that a range of pro-active and reactive mechanisms is needed to bring about industry compliance and inform customers about their rights.

The introduction of enforceable undertakings to ACMA’s compliance options would still not detract from have the range of enforcement options available under the current regulatory arrangements. The decision to accept an enforceable undertaking over another enforcement option would be at the discretion of ACMA, and be considered by ACMA when it believes a breach has occurred, or is likely to occur, and that an administrative resolution offers the best solution. While ACMA could accept an enforceable undertaking instead of exercising one of its current enforcement options, the mechanism would provide a potentially flexible option to be used to achieve more focused outcomes which might not be available under other means. Due to the voluntary nature of the enforceable undertaking arrangements, persons providing it would need to offer details of the specified action a person would take under the TA.

The effect of Option (b) would be to enhance ACMA’s enforcement capability by providing an addition, yet voluntary enforceability and compliance option. This power would also give ACMA a legislative basis for negotiating administrative solutions and accepting undertakings that are enforceable by the courts.

Entering into an enforceable undertaking with ACMA is a voluntary option for carriers and carriage service providers and is less likely to threaten their commercial operations. A more effective outcome will result through negotiation between ACMA and carriers and carriage service providers of the terms of the undertakings provided and the range of specified actions involving compliance with the TA.

Part 6 of the Spam Act 2003 allows ACMA to accept enforceable undertakings in relation to commercial emails and address-harvesting software and possible contraventions of that Act. Section 87B of the TPA gives the ACCC the power to accept enforceable undertakings in relation to its functions and powers under the TPA. New powers for ACMA to accept enforceable undertakings would operate in a similar manner to these Acts and to ensure that a person does not contravene the TA. With these existing mechanisms a breach of an undertaking would allow ACMA to apply to the Federal Court for appropriate orders.
Consultation
Consultation has been held with ACMA on their current compliance and enforcement activities and the role of enforceable undertaking in relation compliance with to the TA. The Attorney-General’s Department and the Commonwealth Privacy Commissioner have also been consulted on the interaction of the TA, Telecommunications (Consumer Protection and Service Standards) Act 1999 and the Privacy Act 1988.

Conclusions and recommended actions
Option (a) leaves ACMA with the enforcement powers it has under the current regulatory arrangements. For breaches of telecommunications regulations, ACMA could still take appropriate enforcement action, however, in the case of serious contraventions ACMA may be ably to only rely on court action. Option (b) extends ACMA’s powers to enable it to accept enforceable undertakings. This would provide a more effective, flexible and focused mechanism to respond to contraventions by carriers and carriage service providers of their regulatory obligations. Enabling ACMA to accept enforceable undertakings towards ensuring compliance with the TA would bring its powers closer into line with what is already available under the Spam Act 2003. Option (b) adds to the enforcement options available to ACMA, giving greater flexibility in its enforcement options which will improve compliance with TA. It is recommended that Option (b) be adopted.

8. Amendment to the public consultation periods required to vary the numbering plan made under section 455 of the Telecommunications Act 1997
The Office of Regulatory Review has advised that a Regulatory Impact Statement is not required for the amendments to the Telecommunications Act 1997 to amend the consultation period for changes to the numbering plan as the proposed variations are of a minor and machinery nature, and do not substantially alter existing arrangements.

9. Repeal of the requirement for carriers to develop and report on industry development plans
The Office of Regulatory Review has advised that a Regulatory Impact Statement is not required for the repeal of the requirement for carriers to develop and report on industry development plans in the Telecommunications Act 1997.

10. Clarification that ACMA’s powers to enforce an industry code are unaffected by the replacement of the code by a code that is substantially similar
The Office of Regulatory Review has advised that a Regulatory Impact Statement is not required for amendments to the Telecommunications Act 1997 to clarify that ACMA’s powers to enforce an industry code are unaffected by the replacement of the code by a code that is substantially similar as the proposed variations are of a minor and machinery nature.
ABBREVIATIONS

The following abbreviations are used in this explanatory memorandum:

ACMA: Australian Communications and Media Authority
ACCC: Australian Competition and Consumer Commission
ACT: Australian Competition Tribunal
AIA: Acts Interpretation Act 1901
Bill: Telecommunications Legislation Amendment (Competition and Consumer Issues) Bill 2005
Carrier Licence Charges Act: Telecommunications (Carrier Licence Charges) Act 1997
LIA: Legislative Instruments Act 2003
Minister: Minister for Communications, Information Technology and the Arts
T(CPSS) Act: Telecommunications (Consumer Protection and Service Standards) Act 1999
Telecommunications Act: Telecommunications Act 1997
TPA: Trade Practices Act 1974
NOTES ON CLAUSES

Clause 1 – Short title

Clause 1 provides that the Bill, when enacted, may be cited as the *Telecommunications Legislation Amendment (Competition and Consumer Issues) Act 2005*.

Clause 2 – Commencement

Clause 2 of the Bill provides for the commencement of the Act.

Clauses 1 – 3 of the Bill would commence on the day on which the Bill receives Royal Assent.

The provisions of Schedule 2 of the Bill relate to the enforcement of registered industry codes by the ACMA. Schedule 2 would commence 28 days after the Bill receives the Royal Assent, to allow adequate time for participants in sections of the telecommunications and e-marketing industries, whose conduct is regulated by registered industry codes, to become aware of the ACMA’s extended powers under sections 121 and 122 in relation to conduct which would be a contravention of a replacement code.

Items 4, 13 and 20 of Schedule 7 of the Bill would commence on the earlier of Proclamation, or six months from Royal Assent. The remainder of Schedule 7 of the Bill will commence on the day after Royal Assent. Schedule 7 of the Bill will allow the ACCC to make procedural rules relating to the processes it will follow in executing its functions under Part XIC of the TPA. The majority of the items in this Schedule will operate even in the absence of procedural rules made by the ACCC. However, items 4, 13 and 20 assume the existence and operation of procedural rules made by the ACCC to address certain topics. For this reason, these items would have delayed commencement. Delayed commencement is appropriate for these amendments because the ACCC will need time to make the procedural rules.

Schedule 11 would commence on the earlier of Proclamation, or six months from Royal Assent. Schedule 11 includes amendment to the Telecommunications Act and the TPA to provide for the operational separation of Telstra. Item 4 of Schedule 11 would insert proposed Part 8 into Schedule 1 of the Telecommunications Act. Proposed clauses 50A and 51(1)(d) would permit the Minister for Communications, Information Technology and the Arts to make legislative instruments that are required for the operation of proposed Part 8. For this reason, this Schedule would have delayed commencement. Delayed commencement is appropriate for this Schedule to allow the Minister sufficient time to make the necessary legislative instruments prior to the commencement of Schedule 11, relying on subsection 4(1) of the AIA. Instruments made by the Minister for the purposes of the amendments made by Schedule 11 would commence at the same time as Schedule 11, and would not commence earlier than that Schedule.

The remainder of the Bill (Schedules 1, 3, 4, 5, 6, 8, 9, 10, 12 and 13) will commence on the day after Royal Assent.
Clause 3 – Schedule(s)

Clause 3 provides that each Act that is specified in a Schedule to the Bill is amended or repealed as set out in that Schedule and any other Item in a Schedule has effect according to its terms. There are thirteen Schedules to the Bill, with the provisions of the Bill being divided into different Schedules according to the subject matter and effect of the provisions.

Schedule 1—Industry development plans

The Telecommunications Act requires carriers to have an approved industry development plan (IDP) at all times, unless the carrier is exempt from the requirement to have an IDP. The amendments in Schedule 1 repeal the legislative basis for the requirement that carriers have an IDP and provide for transitional arrangements in relation to reporting by carriers and the Minister in relation to IDPs.

Telecommunications Act 1997

Item 1 – Part 2 of Schedule 1

Item 1 repeals Part 2 of Schedule 1 to the Telecommunications Act. Under Part 2 of Schedule 1 to the Telecommunications Act, the ACMA cannot grant a carrier licence to a person unless that person has given an industry development plan (IDP) to the Industry Minister and the Industry Minister has approved the IDP (subclause 4(1) of Schedule 1). For the purposes of Part 2 of Schedule 1 to the Act, “Industry Minister” is defined in clause 3 to mean the Minister for Industry, Science and Tourism. However, as a result of the Acts Interpretation (Substituted References) Order 1998 and the Acts Interpretation (Substituted References – Section 19B) Amendment Order 2001, “Industry Minister” in clause 3 means the Minister for Communications, Information Technology and the Arts or the Minister for the Arts and Sport.

A carrier is required to have a current IDP plan at all times (subclause 4(2)), unless the ACMA has issued an exemption certificate to the carrier in which case Part 2 of Schedule 1 does not apply to the carrier (clause 5). Subclause 4(3) of Schedule 1 provides that for the purposes of subclause 4(2), a carrier has a current IDP if the carrier has given the plan to the ‘Industry Minister’ and the ‘Industry Minister’ has approved the plan.

Carriers are required to make a summary of their IDPs publicly available and must report annually on their IDP achievements to the ‘Industry Minister’. The ‘Industry Minister’ must table annual reports in Parliament on IDP achievements. The aim in requiring carriers to prepare and publish IDPs was to assist the development of the Australian telecommunications industry by encouraging carriers to undertake activities that contributed to the growth of the industry.

IDPs deal with a carrier’s strategic commercial relationships, research and development activities, export development and employment and training. All
commitments, other than those in respect of research and development, are, in a formal sense, voluntary.

The Productivity Commission’s Inquiry Report on Telecommunications Competition Regulation (Report No. 16 of 2001) recommended that the legal requirement for IDPs be repealed, concluding that there is no compelling argument for continuing with the operation of IDPs because:

- established carriers have had individual plans in place for many years and therefore any possible market failures would have been substantially overcome;
- IDPs of a limited number of new carriers that are essentially resellers or serving a regional or limited telecommunications market are likely to have very little impact on the local equipment industry overall;
- there are some costs to carriers of preparing, obtaining approval and reporting annually on the progress of IDPs: there is also a small administrative cost to government; and
- with the exception of commitments in relation to research and development, other commitments made by carriers in IDPs, are in a formal sense, voluntary.

As IDPs have little impact on industry practice and represent a cost burden to carriers in their preparation, it is proposed to remove the requirement for IDPs in relation to carrier licensing.

**Item 2 – Transitional – clauses 14 and 15 of Schedule 1 to the Telecommunications Act 1997**

Item 2 is a transitional provision that relates to the requirements of clauses 14 and 15 of Part 2 of Schedule 1 to the Telecommunications Act. Clause 14 requires carriers with current IDPs to give the Industry Minister, within 90 days of the end of each financial year, a report setting out the carrier’s progress in implementing its IDP for the year and to make a summary of this report available to the public. Clause 15 requires the Industry Minister, within 6 months of the end of each financial year, to prepare, and table in both Houses of Parliament, a report relating to the progress made by carriers in implementing current IDPs during the financial year.

Item 2 provides that clauses 14 and 15 of Schedule 1 will continue to apply as if each reference to a financial year in those clauses were a reference to a “pre-commencement reporting period” and the amendment in Item 1 (which proposes to repeal clauses 14 and 15) had not been made. A “pre-commencement reporting period” is a financial year that began on or after 1 July 1997 and ended before the commencement of this item (ie. item 2 of Schedule 1 to the Bill) or, if this item does not commence on a 1 July, the period at the start of the financial year in which this item commenced and ending immediately before this item commenced.

This will mean that the transitional provision in Item 2 effectively requires carriers and the ‘Industry Minister’ to prepare a final report on the implementation of IDPs in respect of the period that has not been the subject of reports by carriers and the ‘Industry Minister’ but had ended with the commencement of item 1 of Schedule 1 to this Bill.
Schedule 2—Industry codes

The amendments made by Schedule 2 clarify the ACMA’s enforcement powers in relation to industry codes registered under Part 6 of the Telecommunications Act.

Telecommunications Act 1997

Item 1 – After subsection 121(1A)

Item 1 would amend section 121 of the Telecommunications Act by inserting new proposed subsection 121(1B).

Part 6 of the Telecommunications Act sets up a regime for the registration, replacement and enforcement of industry codes. Under this Part, bodies and associations that represent sections of the telecommunications or e-marketing industries may develop industry codes, which may be registered by the ACMA. Compliance with relevant registered codes by participants in sections of the telecommunications and e-marketing industries is voluntary unless, where the ACMA is satisfied that a particular participant has contravened a registered code, the ACMA directs the participant to comply with the code under section 121. Section 121 is a civil penalty provision so that breach of a direction to comply can give rise to a civil penalty of up to $50,000 for an individual and $250,000 for a body corporate (see ss.121(4) and 570).

Proposed new subsection 121(1B) would expand the circumstances in which the ACMA may exercise its power to issue a direction to comply with a registered code. If, at a time when an industry code was registered under Part 6 of the Telecommunications Act, a direction to comply with the code could have been given to a person under section 121, and that code has been replaced (under section 120) by another code registered under Part 6, then the ACMA would be able to give the person a direction to comply under section 121 in respect of the replacement code. The ACMA would only be able to give a direction under subsection 121(1) in reliance on proposed subsection 121(1B) where the conduct which contravened the original code would also have contravened the replacement code, had it occurred at a time when the replacement code was registered.

The proposed amendment is designed to address uncertainty as to whether section 121 currently allows the ACMA to exercise its power to issue a direction in relation to a breach of a former code that has been replaced with another code dealing with the same matter or matters as the original code, even where the replacement code contains an identical provision to that breached in the former code.

Item 2 – At the end of section 122

Item 2 would amend section 122 of the Telecommunications Act by inserting new proposed subsection 122(4). Section 122 allows the ACMA to give a formal warning
to a person who contravenes a registered industry code. Section 122 is not a civil penalty provision.

Similarly to the proposed amendment in item 1, proposed subsection 122(4) would expand the circumstances in which the ACMA may exercise its power to issue a formal warning in relation to a contravention of a registered industry code. If, at a time when an industry code was registered under Part 6 of the Telecommunications Act, a formal warning could have been given to a person under section 122, and the original code has been replaced by another code registered under Part 6, then the ACMA would be able to give the person a formal warning under section 122 in respect of the replacement code. The ACMA would only be able to give a warning under subsection 122(2) in reliance on proposed subsection 122(4) where the conduct which contravened the original code would also have contravened the replacement code, had it occurred at a time when the replacement code was registered.

The proposed amendment is designed to address uncertainty as to whether section 122 currently allows the ACMA to exercise its power to issue a formal warning in relation to a breach of a former code that has been replaced with another code dealing with the same matter or matters as the original code, even where the replacement code contains an identical provision to that breached in the former code.

**Item 3 – Application of amendments**

Item 3 provides that the amendments made by items 1 and 2 would not apply to conduct that occurred prior to the commencement of item 3.

This would mean that a contravention of a code that occurred before item 3 commences could not be the subject of a direction in reliance on proposed section 121. It would also make it clear that proposed subsection 121(1B) would not apply in respect of a contravention that commenced before item 3 commences, unless it continued after item 3 commences.

**Schedule 3—Numbering Plans**

Schedule 3 makes amendments to the Telecommunications Act in relation to variations of the numbering plan made by the ACMA under section 455 of that Act. The proposed amendments would reduce the minimum time for public consultation on variations from 90 to 30 days and would remove the requirement for public consultation in relation to variations that the ACMA has determined, by legislative instrument, are minor in nature.

The current 90 day public consultation period is inflexible and has led to significant delays in the release of new number ranges for the provision of new services. In addition, the ACMA has received only 32 submissions from telecommunications industry groups and four submissions from members of the public on 16 variations. The shorter public consultation period will continue to enable the public to provide comments to the ACMA while improving the efficiency of the variation process. In addition to the public consultation required under the Telecommunications Act, the
ACMA routinely consults with industry through the Numbering Advisory Committee which is established under section 58 of the Australian Communications and Media Authority Act 2005.

**Telecommunications Act 1997**

**Item 1 – Paragraphs 460(3)(a)**

Section 455 of the Telecommunications Act requires the ACMA to make a numbering plan which specifies the numbers that are for use in connection with the supply of telecommunications carriage services to the public in Australia. In accordance with this section the ACMA has made the *Telecommunications Numbering Plan 1997*. The numbering plan was made by the Australian Communications Authority but by virtue of section 10 of the *Australian Communications and Media Authority (Consequential and Transitional Provisions) Act 2005*, the plan was taken to have been made by the ACMA from 1 July 2005. The ACMA administers the numbering plan and makes variations to it as required (for example, to provide for new services), relying on subsection 33(3) of the AIA.

Subsection 460(3) of the Telecommunications Act requires that the public be offered an opportunity, by way of a notice in a newspaper circulating in a State, the Australian Capital Territory or the Northern Territory, to make comments about a proposed variation to the numbering plan if the ACMA is of the opinion that:

(a) the variation will affect a number issued to a customer of a carriage service provider; or
(b) it is in the public interest that the public be consulted.

Item 1 would repeal the current paragraph 460(3)(a) and replace it with new proposed paragraph 460(3)(a). The effect of proposed paragraph 460(3)(a) would be that the public consultation process provided for by subsection 460(3) would not apply where a proposed variation to the numbering plan is taken to be a minor variation in a written declaration made by the ACMA under proposed subparagraph 460(3)(a)(ii). The written declaration would be a legislative instrument for the purposes of the LIA (see item 3 of Schedule 3 to this Bill).

The ACMA would be able to make a declaration that a particular variation to the numbering plan is taken to be a minor variation or, relying on subsection 13(3) of the LIA, it could specify a class of variations which are taken to be minor variations. The ACMA might make one or more declarations that variations to the numbering plan are minor where the variation will not affect a substantial number of end-users, will not significantly affect some end-users, or will not significantly affect some holders of numbers such as carriers or carriage service providers. A declaration might also provide that a variation which specifies a number range for the first time is a minor variation.
Item 2 – Subparagraphs 460(3)(c)(ii) and (iv)

Subsection 460(3) deals with the requirement for public consultation in relation to a proposed variation of the numbering plan made under section 455 of the Telecommunications Act. The ACMA is required to publish a notice in a newspaper circulating in a State, the Australian Capital Territory or the Northern Territory, which specifies that the ACMA has prepared a draft of the variation and that invites persons to make submissions to the ACMA in relation to the draft variation within 90 days after the publication of the notice (subparagraph 460(3)(c)(iv)). The draft variation must also be available for inspection and purchase by members of the public during normal office hours for the period of 90 days after the publication of the notice (subparagraph 460(3)(c)(ii) and paragraph 460(3)(d)).

Item 2 would amend subparagraphs 460(3)(c)(ii) and (iv) to reduce the period during which the draft variation must be available for inspection and purchase, and the minimum period for the making of submissions in relation to a draft variation, from 90 to 30 days. This will increase the efficiency of the public consultation processes undertaken by the ACMA, while continuing to provide the public with an opportunity to comment.

Item 3 – After subsection 460(4)

Item 3 would insert new proposed subsection 460(4A) after subsection 460(4) of the Telecommunications Act. Proposed 460(4A) is related to the amendment in item 1 of Schedule 3 to the Bill, (which would allow the ACMA to make a declaration that a variation is a minor variation for the purposes of proposed subparagraph 460(3)(a)(ii)), and would provide that such a declaration is a legislative instrument for the purposes of the LIA. This would mean that the declaration would need to be registered on the Federal Register of Legislative Instruments and would be subject to Parliamentary disallowance.

Item 4 – Application of amendments

Item 4 would provide that the amendments in Schedule 3 do not apply to a variation to the numbering plan if a notice had been published in accordance with paragraph 460(3)(c) in relation to the variation before the commencement of the amendments in Schedule 3. This would ensure that public consultation would be undertaken, even if the ACMA considers the draft variation to be minor, and would preserve the requirements that the draft variation be available for inspection and purchase for 90 days and that persons be able to make submissions to the ACMA during the period of 90 days after the publication of the notice relating to the draft variation.
Schedule 4—Penalties for breaches of the competition rule

Trade Practices Act 1974

The amendments made by Schedule 4 would increase the maximum penalty that the Federal Court may impose on a body corporate that has contravened the competition rule in breach of section 151AK of the TPA.

Item 1 – Paragraph 151BX(3)(a)

Subsection 151BX(1) of the TPA provides that where the Federal Court is satisfied that a person has contravened, or has attempted to contravene, or has been involved in a contravention of, the competition rule, a tariff filing direction, a record-keeping rule or a disclosure direction, the Court can order the person to pay to the Commonwealth such pecuniary penalty as the Court deems appropriate.

Subsection 151BX(3) provides for the maximum amount that is payable by a body corporate under subsection 151BX(1) in relation to a contravention of the competition rule (paragraph 151BX(3)(a)), a contravention of a tariff filing direction (paragraph 151BX(3)(b)), or a contravention of a record-keeping rule or of a disclosure direction (paragraph 151BX(3)(c)).

Paragraph 151BX(3)(a) provides that the penalty imposed by the Court under subsection 151BX(1) for a body corporate in relation to a contravention of the competition rule is not to exceed the sum of $10 million and $1 million for each day that the contravention continued.

Item 1 of Schedule 4 would repeal and replace paragraph 151BX(3)(a). The effect of proposed paragraph 151BX(3)(a) is that the penalty imposed by the Court under subsection 151BX(1) for a body corporate in relation to a contravention of the competition rule could not exceed the sum of $10 million and $1 million for each day that the contravention continued, up to the twenty-first day of the contravention. If the contravention continued for longer than 21 days, then on tops of this, the Court would be able to impose a penalty of $3 million per day from the twenty-second day.

The existing penalties for a breach of the competition rule are not perceived to provide an effective deterrent, because it is open to larger telecommunications providers to weigh the potential benefit in the market of breaching the competition rule against the possible size of the financial penalty, and to knowingly take action in breach of the competition rule. Increasing the size of the penalty after 21 days would give the carrier or carriage service provider a greater incentive to rectify its conduct expeditiously in order to avoid the possibility of such an increase.

Item 2 – Application of amendment

Item 2 of Schedule 4 is a provision that deals with the application of the amendment made by Item 1. Item 2 would clarify that the amendment made by Item 1 only applies
to contraventions of the competition rule that occur, or begin, after the commencement of Schedule 4.

Item 2 specifically provides that:

- In the case of a non-ongoing contravention of the competition rule (i.e. a one-off contravention), the amendment made by Item 1 would apply if the contravention occurs after the commencement of Schedule 4.
- In the case of an ongoing contravention of the competition rule (i.e. a contravention that continues for a period of two or more days), the amendment made by Item 1 would only apply to the contravention if the period during which the contravention occurs begins after the commencement of Schedule 4.

Schedule 5—Enforcement of conditions and limitations of exemption determinations and orders

The ACCC is able to exempt a class of carriers or carriage service providers, or an individual carrier or carriage service provider, from the standard access obligations in section 152AR of the TPA. Such exemptions may be unconditional or subject to conditions or limitations. Currently, if a condition or limitation applying to an exemption is breached, the exemption is no longer effective from the time of the breach and a breach of the standard access obligations would arise. Compliance with the standard access obligations can be enforced by the Federal Court under section 152BB.

Schedule 5 contains amendments to provide an additional power to the Federal Court to allow the conditions and limitations applying to exemptions to be enforced, as an alternative to enforcing the standard access obligations under section 152BB.

Trade Practices Act 1974

Item 1 – At the end of subsection 152AS(2)
Item 2 – At the end of subsection 152ASA(2)
Item 3 – At the end of subsection 152AT(5)
Item 4 – At the end of subsection 152ATA(4)

Items 1 to 4 contain amendments consequential to new proposed section 152BBAA (see item 6, below). Proposed section 152BBAA would allow the Federal Court to enforce a condition or limitation applying to an exemption from any or all of the standard access obligations (which are set out in section 152AR of the TPA) under section 152AS, 152ASA, 152AT or 152ATA. Section 152AS of the TPA deals with ordinary class exemptions from the standard access obligations and section 152ASA provides for anticipatory class exemptions from the standard access obligations. Section 152AT provides for ordinary individual exemptions from the standard access obligations and section 152ATA provides for anticipatory individual exemptions.

Subsections 152AS(2), 152ASA(2), 152AT(5) and 152ATA(4) allow the ACCC to make an exemption order subject to a condition or limitation. Items 1 to 4 would
insert at the end of each of these subsections a drafting note highlighting new proposed section 152BBAA.

**Item 5 – At the end of section 152BB**

Section 152BB provides for the enforcement of the standard access obligations (set out in section 152AR) by the Federal Court. The Federal Court may make orders directing a carrier or carriage service provider to comply with the standard access obligations or to provide compensation to another person who has suffered loss as a result of contravention of the standard access obligations, or any other order that the Federal Court thinks is appropriate.

New proposed section 152BBAA (see item 6) would allow the Federal Court to enforce compliance with a condition or limitation applying to an exemption from the standard access obligations.

Item 5 would insert proposed subsection 152BB(3) into section 152BB to provide that section 152BB does not limit proposed section 152BBAA. The purpose of the proposed amendment is to make it clear that the existence of section 152BB does not affect the operation of proposed section 152BBAA. For example, if a person did not comply with a condition of an exemption from the standard access obligations, this would be a breach of the standard access obligations because the exemption would no longer apply. Whilst compliance with the standard access obligations could be enforced by the Federal Court under section 152BB (upon the application of the ACCC or a person whose interests are affected by the contravention), proposed subsection 152BB(3) makes it clear that the existence of this option does not preclude the ACCC, or a person affected by breach of a condition of an exemption, from applying to the Federal Court under proposed section 152BBAA seeking orders to enforce compliance with the condition as an alternative to seeking enforcement of the standard access obligations. Such an option might be preferred when the condition applying to an exemption in effect provides for access to declared services on specified terms and conditions, in lieu of application of the access regime under Part XIC.

**Item 6 – After section 152BB**

**Proposed section 152BBAA – Judicial enforcement of conditions and limitations of exemption determinations and orders**

Item 6 would insert new proposed section 152BBAA into the TPA. Proposed section 152BBAA would allow the ACCC, or a person affected by a breach of a condition or limitation in an exemption determination under section 152AS or 152ASA or an order made under section 152AT or 152ATA, to apply to the Federal Court seeking orders to enforce compliance with the condition or limitation.

If the Federal Court were satisfied that a person has contravened such a condition or limitation, the Court would be able to make any or all of the following orders:

- an order directing the person to comply with the condition or limitation;
- an order directing the person to compensate another person who had suffered loss or damage as a result of the contravention; or
- any other order that the Court considers is appropriate.

Proposed subsection 152BBAA(2) would allow the Federal Court to discharge or vary an order granted under proposed section 152BBAA.

Similarly to the amendment in item 5, proposed subsection 152BBAA would provide that section 152BBAA does not limit section 152BB. The purpose of this amendment is to make it clear that the existence of proposed section 152BBAA would not affect the operation of section 152BB. For example, if a person did not comply with a condition of an exemption from the standard access obligations, this would be a breach of the standard access obligations because the exemption would no longer apply. The existence of proposed section 152BBAA would not prevent an application being made to the Federal Court under section 152BB for the enforcement of the standard access obligations, rather than an application being made under proposed section 152BBAA for enforcement of the condition that was breached. This is intended to make it clear that proposed section 152BBAA is an additional power to that in section 152BB.

**Schedule 6—Variation and revocation of exemption determinations**

Sections 152AT and 152ATA deal with ordinary and anticipatory individual class exemptions, respectively, from the standard access obligations. At the end of each of these sections there is a note highlighting that variation of those exemptions is dealt with by subsection 33(3) of the AIA. The amendments made by Schedule 6 would insert notes in the same terms at the end of subsections 152AS and 152ASA.

*Trade Practices Act 1974*

**Item 1 – At the end of section 152AS**

**Item 2– At the end of section 152ASA**

Item 1 would insert a new note after section 152AS. Section 152AS allows ordinary class exemptions from standard access obligations to be made by the ACCC. Subsection 152AS(1) provides that the ACCC is able to make a written determination that, in the event that a specified service or a proposed service becomes an active declared service (ie. the service is declared and is being supplied), members of a specified class of carrier or carriage service provider are exempt from any or all of the standard access obligations, to the extent that those obligations relate to the active declared service. A determination made by the ACCC under subsection 152AS(1) is a disallowable instrument for the purposes of section 46A of the AIA (subsection 152AS(6)). This means that it is a legislative instrument for the purposes of the LIA (see paragraph 6(d) of the LIA).

The ACCC must not make a determination unless it is satisfied that the exemption will be in the long-term interests of end-users of carriage services or services supplied by means of carriage services (subsection 152AS(4)). Subsection 152AB(2) specifies the
matters to be considered in determining whether a particular thing promotes the long-term interests of end-users of carriage services or services supplied by means of carriage services.

Subsection 152AS(5) contains a requirement for public consultation on a draft determination if the ACCC is of the opinion that the making of a determination is likely to have material effects on the interests of a person.

Item 1 would insert a note at the end of section 152AS to highlight that variation and revocation of instruments made by the ACCC under subsection 152AS(1) is provided for by subsection 33(3) of the AIA. That subsection provides that where an Act confers a power to make, grant or issue an instrument, the power shall (unless otherwise indicated) be construed as including a power that is exercisable in the same manner and subject to the same conditions to repeal, rescind, revoke, amend or vary that instrument.

For the purposes of section 152AS, this means that the ACCC may vary or revoke an ordinary class exemption from the standard access obligations. When the ACCC exercises its power to vary or revoke an exemption, it must do so subject to the same conditions that apply to the ACCC’s power to make a determination under subsection 152AS(1). This means that when the ACCC revokes or varies an exemption determination it must:

- do so in a legislative instrument;
- be satisfied that the variation or revocation of the determination will promote the long-term interests of end-users of carriage services or of services supplied by carriage services (subsection 152AS(4)); and
- undertake the public consultation process that is specified in subsection 152AS(5) prior to revoking or varying the instrument, if it considers that the variation or revocation of the determination is likely to have a material effect on the interests of a person.

Item 2 would make a corresponding amendment to section 152ASA, which deals with anticipatory class exemptions. Item 2 would include a note at the end of that section that highlights that the variation and revocation of instruments made under subsection 152ASA(1) is provided for by subsection 33(3) of the AIA.

**Schedule 7—Procedural rules**

Schedule 7 contains amendments to allow the ACCC to make rules, to be known as Procedural Rules, providing for the practice and procedure of the ACCC in performing its functions and exercising its powers under Part XIC, including matters incidental to the ACCC’s practice and procedure. The existing provisions in Part XIC that provide for the practice and procedure of the ACCC under that Part would continue apply unless and until the ACCC makes Procedural Rules that modify or displace the operation of the current provisions.
The purpose of the proposed amendments in Schedule 7 is to address concerns that the current provisions in Part XIC do not provide the ACCC with sufficient discretion to determine its own procedures, to avoid delays caused by procedural obligations and to respond to changing activities in the industry.

The operation of the access regime is detrimentally affected by the problems of delay and “gaming” of the regulatory arrangements in relation to the procedures and processes of the ACCC, as well as substantive issues. This has meant that the indicative six month timeframe for the consideration of access exemption applications and access undertakings introduced in 2002 has rarely been met and is often extended by considerable periods because of these delays.

Experience with the access regime has also demonstrated that provisions in Part XIC that provide for the ACCC’s procedures can sometimes be used to frustrate the objective of timely decision making. Concerns have also been raised about a lack of certainty in the procedures the ACCC follows in considering access undertakings and resolving access disputes.

The Procedural Rules would enable the ACCC to determine how to prioritise consideration of access disputes and access undertakings and the factors it would consider in doing so. The Procedural Rules would not affect the current provisions in Part XIC that provide for decisions to be made in relation to access exemptions and undertakings in the indicative six month time limit wherever possible.

**Trade Practices Act 1974**

**Item 1 – Subsection 25(1)**

Section 25 of the TPA provides that the ACCC may, by resolution, delegate certain powers that it has under certain Acts to an individual member of the ACCC. The powers that the ACCC may delegate in this way are specified in subsection 25(1). The ACCC may delegate any of its powers under:

- the TPA (other than Part VIIA, which deals with prices surveillance);
- the Telecommunications Act;
- the T(CPSS) Act;
- Rules of Conduct under Part 20 of the Telecommunications Act; or
- the Australian Postal Corporation Act 1989.

However, the ACCC may not delegate the power of delegation under section 25, or its powers to grant, revoke or vary an authorisation.

Item 1 would amend subsection 25(1) to provide that:

- the ACCC may not delegate its power to make Procedural Rules under proposed section 152ELA (inserted by Item 28 of this Schedule); and
- the ACCC may delegate its powers under the Procedural Rules that are made.
The effect of this would be that, while the ACCC may not delegate to an individual member of the ACCC the power to make Procedural Rules, where those Procedural Rules confer on the ACCC an additional power, the ACCC may delegate that power to an individual member of the ACCC.

**Item 2 – Section 152AC**

Section 152AC defines a number of terms referred to in Part XIC. Item 2 would insert a definition of ‘modifications’ into section 152AC to include additions, omissions and substitutions. The amendments in items 5, 6, 11, 12, 17 and 19 refer to a ‘modification’.

The amendments in items 5 and 6 would allow an applicant for an individual ordinary or anticipatory exemption order to make modifications to its application, so long as the modification is given in writing to the ACCC and the modification is one that is taken to be minor in nature under Procedural Rules made by the ACCC. The effect of the amendment in item 2 would be that the modifications that an applicant could make to an original application would include adding something to the application, omitting something from the application or substituting something new for something already in the application.

Similarly, the amendments in items 11, 12, 18 and 19 would allow a person who has given the ACCC an ordinary or special access undertaking, or a variation to an ordinary or special access undertaking that is in operation, to give the ACCC a modification to the proposed undertaking or proposed variation, provided that the modification is taken to be minor in nature under Procedural Rules made by the ACCC. The effect of the amendment in item 2 would be that the modifications that a person could make to an ordinary or special access undertaking, or to a variation to an ordinary or special access undertaking, would include adding something to the undertaking or the variation, omitting something from the undertaking or the variation, or substituting something new for something already in the undertaking or variation.

**Item 3 – Section 152AC**

Item 3 would insert a definition of ‘Procedural Rules’ into section 152AC for the purposes of Part XIC. ‘Procedural Rules’ would be defined to mean Procedural Rules made under proposed section 152ELA (see item 28).

**Item 4 – Subsection 152AO(3)**

Section 152AL allows the ACCC to declare that a specified eligible service is a declared service, with the result that the standard access obligations in section 152AR will apply to that service. Section 152AO provides for the variation and revocation of a declaration under section 152AL by providing for the modified application of subsection 33(3) of the AIA. These modifications include the requirement that the ACCC must hold a public inquiry under Part 25 of the Telecommunications Act about a proposed variation, except where the proposed variation is minor in nature (subsection 152AO(3)). This requires the ACCC to form an opinion, based on the
ordinary meaning of the term ‘minor’, as to whether a proposed variation can be considered to be minor in nature.

Item 4 would amend subsection 152AO(3) to provide that the requirement to hold a public inquiry would not apply where a proposed variation is taken to be minor in nature under the Procedural Rules (which may be made by the ACCC under proposed section 152ELA (see item 28)). The proposed amendment would provide certainty for the ACCC and persons who may be affected by a proposed variation to a declaration by allowing the ACCC to specify in the Procedural Rules that a particular variation is taken to be minor in nature or, relying on subsection 13(3) of the LIA, that particular kinds of variations are minor in nature. Unless a variation is taken to be minor in nature under the Procedural Rules, the requirement to hold a public inquiry would apply.

As subsection 152AO(3), as amended by item 4, assumes the existence of Procedural Rules that specify the variations or kinds of variations that are taken to be minor in nature, item 4 would have delayed commencement (see clause 2 of the Bill) to enable the ACCC to make Procedural Rules in relation to this matter that would commence at the same time as item 4 (see ss.4(1) of the AIA).

**Item 5 – After subsection 152AT(2)**

Section 152AT allows a carrier or carriage service provider to apply to the ACCC for a written order exempting the carrier or carriage service provider from any or all of the standard access obligations under section 152AR. Such orders are known as ordinary individual exemption orders.

Currently, the carrier or carriage service provider cannot make a modification to an application once it has been given to the ACCC. Instead, the carrier or carriage service provider would need to withdraw the application and make a fresh application, which would result in the consideration of the application commencing again, including consultation processes (subsection 152AT(9)) and the decision-making period (subsections 152AT(10) to (12)). This has the potential to result in very substantial and unnecessary delays in the ACCC making a decision about an application.

Item 5 would amend section 152AT to allow an applicant to modify an application, at any time before the ACCC makes a decision to make the order sought in the application or to refuse the application, provided that the modification is one that is specified in the Procedural Rules to be minor in nature. Under proposed section 152ELA, the ACCC would be able to make Procedural Rules (see item 28).

As the amendment in item 5 would commence on the day after the day on which the Bill receives the Royal Assent (see clause 2 of the Bill), it would not be possible for a modification to be made to an application unless and until the ACCC has made Procedural Rules dealing with the time limit for making modifications and specifying the modifications which will be taken to be minor in nature. Under proposed section 152ELC, the ACCC would be required to publish a plan on its website, within 6 months of the commencement of the amendments in Schedule 7, that provides an
outline of the Procedural Rules that the ACCC proposes to make and an indicative timetable for the making of those rules (see item 28).

The proposed amendment in item 5 would give the ACCC flexibility to consider an application that has been altered by way of a modification that is considered to be minor in nature, without having to re-start a full public consultation process. It is intended that the ACCC would be able to specify in Procedural Rules, where it considers it appropriate to do so, that a modification will be taken to be minor provided that an abbreviated consultation process is undertaken, as specified in the Procedural Rules. Such flexibility would enable the ACCC to make a decision whether to make the order sought in an application, or to refuse an application, much more quickly than is currently the case.

This proposal would also have the effect of deterring some regulatory “gaming” by access providers, as they would be aware that the length of delay which could be created by making modifications to an application would potentially be far shorter than is currently the case.

**Item 6 – After subsection 152ATA(2)**

Section 152ATA allows a person who is, or expects to be, carrier or carriage service provider to apply to the ACCC for a written order, that in the event that a specified service or a proposed service becomes an active declared service, the person is exempt from any or all of the standard access obligations under section 152AR. Such orders are known as anticipatory individual exemption orders.

Currently, an applicant for an anticipatory individual exemption order cannot modify an application once it has been given to the ACCC. Instead, the person would need to withdraw the application and make a fresh application, which would result in the consideration of the application commencing again, including consultation processes (subsection 152ATA(11)) and the decision-making period (subsections 152ATA(12) to (14)). This has the potential to result in very substantial and unnecessary delays in the ACCC making a decision about an application.

Item 6 would amend section 152ATA to allow an applicant to modify an application, at any time before the ACCC makes a decision to make the order sought in the application or to refuse the application, provided that the modification is one that is specified in the Procedural Rules to be minor in nature. Under proposed section 152ELA, the ACCC would be able to make Procedural Rules (see item 28).

As the proposed amendment in item 6 would commence on the day after the day on which the Bill receives the Royal Assent (see clause 2 of the Bill), it would not be possible for a modification to be made to an application unless and until the ACCC has made Procedural Rules dealing with the time limit for making modifications and specifying the modifications which will be taken to be minor in nature. Under proposed section 152ELC, the ACCC would be required to publish a plan on its website, within 6 months of the commencement of the amendments in Schedule 7, that provides an outline of the Procedural Rules that the ACCC proposes to make and an indicative timetable for the making of those rules (see item 28).
The proposed amendment in item 6 would give the ACCC flexibility to consider an application for an anticipatory individual exemption order that has been altered by way of a modification that is considered to be minor in nature, without having to re-start a full public consultation process. It is intended that the ACCC would be able to specify in Procedural Rules, where it considers it appropriate to do so, that a modification will be taken to be minor provided that an abbreviated consultation process is undertaken, as specified in the Procedural Rules. Such flexibility would enable the ACCC to make a decision whether to make the order sought in an application, or to refuse an application, much more quickly than is currently the case.

This proposal would also have the effect of deterring some regulatory “gaming” by access providers, as they would be aware that the length of delay which could be created by making modifications to an application would potentially be far shorter than is currently the case.

Item 7 – After subsection 152AU(2)

Section 152AU allows the ACCC to request further information from an applicant for an ordinary individual exemption (see section 152AT) or an anticipatory individual exemption (see section 152ATA) from the standard access obligations. The ACCC may refuse to consider an application until the applicant gives the ACCC the requested information (subsection 152AU(3)).

Item 7 would insert proposed subsection 152AU(2A) into section 152AU to allow the ACCC to refuse an application for an ordinary or anticipatory individual exemption if the Procedural Rules provide for a time limit in which the additional information is to be given to the ACCC and the applicant does not do so within the time limit. The applicant would need to be notified in writing of the refusal.

The ACCC would be able to make Procedural Rules under proposed section 152ELA (see item 28). The Procedural Rules could specify a time limit for the provision of additional information in response to a request under section 152AU or the Procedural Rules could provide for the ACCC to determine a time limit in relation to a particular application (for example, the Procedural Rules might allow the ACCC to specify a time limit within specified limits). It would also be possible for the ACCC to set specific time frames in which all information, or specific types of information, is to be provided.

Proposed subsection 152AU(2B) would make it clear that an application could be refused under proposed subsection 152AU(2A), despite any provision in Division 3 of Part XIC that suggests that the ACCC could not do so.

The proposed amendment would remove the incentive for access providers to delay regulatory outcomes by making applications that are not supported by all necessary evidence. It is therefore likely to lead to improvements in the speed of ACCC decision-making.
Item 8 – Subsection 152AU(3)

Item 8 amends subsection 152AU(3) as a consequence of the proposed amendment in item 7. Item 8 would amend subsection 152AU(3) to provide that if the Procedural Rules do not provide for a time limit for the giving of (additional) information to the ACCC in relation to an ordinary or anticipatory individual exemption application, the ACCC may refuse to consider the application until the information is provided. The Procedural Rules could specify a time limit for the provision of additional information in response to a request under section 152AU or the Procedural Rules could provide for the ACCC to determine a time limit in relation to a particular application.

The effect of the proposed amendment is that subsection 152AU(3) would apply as a default rule in the event that the ACCC has not made Procedural Rules under proposed section 152ELA (see item 28) dealing with time limits for the provision of additional information under section 152AU or in the event that there are no Procedural Rules in force.

Item 9 – After subsection 152BT(2)

Section 152BT allows the ACCC to request further information from a carrier or carriage service provider who has given the ACCC an ordinary access undertaking (section 152BS). The ACCC may refuse to consider the undertaking until the carrier or carriage service provider gives the ACCC the requested information (subsection 152BT(3)).

Item 9 would insert proposed subsection 152BT(2A) into section 152BT to allow the ACCC to reject the ordinary access undertaking if the Procedural Rules provide for a time limit for the additional information to be given to the ACCC and the carrier or carriage service provider does not do so within the time limit. The carrier or carriage service provider would need to be notified in writing of the rejection of the undertaking.

The ACCC would be able to make Procedural Rules under proposed section 152ELA (see item 28). The Procedural Rules could specify a time limit for the provision of additional information in response to a request under section 152BT or the Procedural Rules could provide for the ACCC to determine a time limit in relation to a particular undertaking (for example, the Procedural Rules might allow the ACCC to specify a time limit within specified limits).

Proposed subsection 152BT(2B) would make it clear that an undertaking could be refused under proposed subsection 152BT(2A), despite any provision in Division 3 of Part XIC that suggests that the ACCC could not do so. In addition, proposed subsection 152BT(2C) would provide that if the ACCC makes a decision to reject an undertaking under proposed subsection 152BT(2A), subsection 152BU(5) would have effect as if the decision to reject the undertaking had been made under subsection 152BU(2). Subsection 152BU(5) provides for the ACCC to be deemed to have rejected an undertaking if it has not made a decision to accept or reject the undertaking within the time limit provided for by subsections 152BU(5) to (7). The purpose of proposed subsection 152BT(2C) is to avoid the conflicting operation of subsection...
152BU(5) and proposed subsection 152BT(2A) in the event that the ACCC rejects an undertaking because information requested under section 152BT has not been provided by the relevant deadline.

The proposed amendment would remove the incentive for access providers to delay regulatory outcomes by lodging access undertakings that are not supported by all necessary evidence. It is therefore likely to lead to improvements in the speed of ACCC decision-making.

Item 10 – Subsection 152BT(3)

Item 10 amends subsection 152BT(3) as a consequence of the proposed amendment in item 9. Item 10 would amend subsection 152BT(3) to provide that if the Procedural Rules do not provide for a time limit for the giving of (additional) information to the ACCC in relation to an ordinary access undertaking, the ACCC may refuse to consider the undertaking until the information is provided. The Procedural Rules could specify a time limit for the provision of additional information in response to a request under section 152BT or the Procedural Rules could provide for the ACCC to determine a time limit in relation to a particular request for additional information.

The effect of the proposed amendment is that subsection 152BT(3) would apply as a default rule in the event that the ACCC has not made Procedural Rules under proposed section 152ELA (see item 28) dealing with time limits for the provision of additional information under section 152BT or in the event that there are no Procedural Rules in force.

Item 11 – After subsection 152BU(1)

Section 152BU applies where a carrier or carriage service provider has given the ACCC an ordinary access undertaking in which the carrier or carriage service provider specifies the terms and conditions on which it undertakes to comply with the standard access obligations that apply to the carrier or carriage service provider (see section 152BS). Subsection 152BU(2) requires the ACCC to accept or reject the undertaking.

Currently, the carrier or carriage service provider cannot make a modification to an ordinary access undertaking once it has been given to the ACCC. Instead, the carrier or carriage service provider would need to withdraw the undertaking and submit a new undertaking, which would result in the consideration of the undertaking having to commence again, including the decision-making period (subsection 152BU(5) to (7)) and any public consultation that may be required under section 152BV. This has the potential to result in very substantial and unnecessary delays in the ACCC making a decision about an undertaking.

Item 11 would amend section 152BU to allow a carrier or carriage service provider to modify an undertaking, at any time before the ACCC makes a decision to accept or reject the undertaking, provided that the modification is one that is specified in the Procedural Rules to be minor in nature. Under proposed section 152ELA, the ACCC would be able to make Procedural Rules (see item 28). As the amendment in item 11 would commence on the day after the day on which the Bill receives the Royal Assent
(see clause 2 of the Bill), it would not be possible for a modification to be made to an undertaking unless and until the ACCC has made Procedural Rules dealing with the time limit for making modifications and specifying the modifications which will be taken to be minor in nature. Under proposed section 152ELC, the ACCC would be required to publish a plan on its website, within 6 months of the commencement of the amendments in Schedule 7, that provides an outline of the Procedural Rules that the ACCC proposes to make and an indicative timetable for the making of those rules (see item 28).

The proposed amendment in item 11 would give the ACCC flexibility to consider an undertaking that has been altered by way of a modification that is considered to be minor in nature, without having to re-start a full public consultation process. Such flexibility would enable the ACCC to make final decisions whether to accept or reject the application, much more quickly than is currently the case.

This proposal would also have the effect of deterring some regulatory “gaming” by access providers, as they would be aware that the length of delay which could be created by making modifications to an undertaking would potentially be far shorter than is currently the case.

It is intended that the ACCC would be able to specify in Procedural Rules, where it considers it appropriate to do so, that a modification will be taken to be minor provided that an abbreviated consultation process is undertaken, as specified in the Procedural Rules.

**Item 12 – After subsection 152BY(2)**

Under section 152BY, a carrier or carriage service provider may give the ACCC a variation to an ordinary access undertaking that is in operation. Subsection 152BY(2) requires the ACCC to accept or reject the variation.

Currently, the carrier or carriage service provider cannot make a modification to a variation once it has been given to the ACCC. Instead, the carrier or carriage service provider would need to withdraw the variation and submit a new variation, which would result in the consideration of the variation having to commence again, including the decision-making period (subsections 152BY(7) to (9)) and any public consultation that may be required under section 152BV. This has the potential to result in very substantial and unnecessary delays in the ACCC making a decision whether to accept or reject a variation.

Item 12 would amend section 152BY to allow a carrier or carriage service provider to modify a variation at any time before the ACCC makes a decision to accept or reject the variation, provided that the modification is one that is specified in the Procedural Rules to be minor in nature. Under proposed section 152ELA, the ACCC would be able to make Procedural Rules (see item 28). As the amendment in item 11 would commence on the day after the day on which the Bill receives the Royal Assent (see clause 2 of the Bill), it would not be possible for a modification to be made to a variation unless and until the ACCC has made Procedural Rules dealing with the time limit for making modifications and specifying the modifications which will be taken to
be minor in nature. Under proposed section 152ELC, the ACCC would be required to publish a plan on its website, within 6 months of the commencement of the amendments in Schedule 7, that provides an outline of the Procedural Rules that the ACCC proposes to make and an indicative timetable for the making of those rules (see item 28).

The proposed amendment would give the ACCC greater flexibility to consider proposed variations to undertakings, as altered by means of a modification that is considered to be minor in nature, without having to re-start a full public consultation process. It is intended that the ACCC would be able to specify in Procedural Rules, where it considers it appropriate to do so, that a modification will be taken to be minor provided that an abbreviated consultation process is undertaken, as specified in the Procedural Rules.

The proposed amendment would also have the effect of deterring some regulatory “gaming” by access providers, as they would be aware that the length of delay which could be created by making modifications to a variation would potentially be far shorter than is currently the case.

**Item 13 – Subsection 152BY(4)**

Under section 152BY, a carrier or carriage service provider may give the ACCC a variation to an ordinary access undertaking that is in operation. Subsection 152BY(2) requires the ACCC to accept or reject the variation.

Subsection 152BY(4) provides that paragraph 152BV(2)(a) applies to a variation, except where the proposed variation is minor in nature. If a variation is not minor in nature, the ACCC must undertake a public consultation process in relation to the proposed variation. Subsection 152BY(4) effectively requires the ACCC to form an opinion, based on the ordinary meaning of the term ‘minor’, as to whether a proposed variation can be considered to be minor in nature.

Item 13 would amend subsection 152BY(4) so that the requirement to undertake public consultation would not apply where a proposed variation is taken under the Procedural Rules (which may be made by the ACCC under proposed section 152ELA (see item 28)), to be minor in nature. The proposed amendment would provide certainty for the ACCC and persons who may be affected by a proposed variation to a declaration by allowing the ACCC to specify in the Procedural Rules a particular variation minor to be in nature or, relying on subsection 13(3) of the LIA, particular kinds of variations to be minor in nature.

As subsection 152BY(4), as amended by item 13, assumes the existence of Procedural Rules that specify the variations or kinds of variations that are taken to be minor in nature, item 13 would have delayed commencement (see clause 2 of the Bill) to enable the ACCC to make Procedural Rules in relation to this matter that would commence at the same time as item 13 (see ss.4(1) of the AIA).
Item 14 – After subsection 152BZ(2)

Section 152BZ allows the ACCC to request further information from a carrier or carriage service provider who has given the ACCC a variation to an ordinary access undertaking (section 152BY). The ACCC may refuse to consider the variation until the carrier or carriage service provider gives the ACCC the requested information (subsection 152BZ(3)).

Item 14 would insert proposed subsection 152BZ(2A) into section 152BZ to allow the ACCC to reject the variation if the Procedural Rules provide for a time limit for the additional information to be given to the ACCC and the carrier or carriage service provider does not do so within the time limit. The applicant would need to be notified in writing of the rejection.

The ACCC would be able to make Procedural Rules under proposed section 152ELA (see item 28). The Procedural Rules could specify a time limit for the provision of additional information in response to a request under section 152BZ or the Procedural Rules could provide for the ACCC to determine a time limit in relation to a particular undertaking (for example, the Procedural Rules might allow the ACCC to specify a time limit within specified limits).

Proposed subsection 152BZ(2B) would make it clear that a variation could be rejected under proposed subsection 152BZ(2A), despite any provision in Division 3 of Part XIC that suggests that the ACCC could not do so. In addition, proposed subsection 152BZ(2C) would provide that if the ACCC makes a decision to reject a variation under proposed subsection 152BZ(2A), subsection 152BY(7) would have effect as if the decision to reject the variation had been made under subsection 152BY(3). Subsection 152BY(7) provides for the ACCC to be deemed to have rejected a variation if it has not made a decision to accept or reject the variation within the time limit provided for by subsections 152BY(7) to (9). The purpose of proposed subsection 152BZ(2C) is to avoid the conflicting operation of subsection 152BY(7) and proposed subsection 152BZ(2A) in the event that the ACCC rejects a variation because information requested under section 152BZ has not been provided by the relevant deadline.

The proposed amendment would remove the incentive for access providers to delay regulatory outcomes by lodging variations to an ordinary access undertaking that are not supported by all necessary evidence. It is therefore likely to lead to improvements in the speed of ACCC decision-making.

Item 15 – Subsection 152BZ(3)

Item 15 amends subsection 152BZ(3) as a consequence of the proposed amendment in item 14. Item 15 would amend subsection 152BZ(3) to provide that if the Procedural Rules do not provide for a time limit for the giving of (additional) information to the ACCC in relation to a variation to an ordinary access undertaking, the ACCC may refuse to consider the variation until the information is provided. The Procedural Rules could specify a time limit for the provision of additional information in response to a
request under section 152BZ or the Procedural Rules could provide for the ACCC to determine a time limit in relation to a particular request.

The effect of the proposed amendment is that subsection 152BZ(3) would apply as a default rule in the event that the ACCC has not made Procedural Rules under proposed section 152ELA (see item 28) dealing with time limits for the provision of additional information under section 152BZ or in the event that there are no Procedural Rules in force.

**Item 16 – After subsection 152CBB(2)**

Section 152CBB allows the ACCC to request further information from a person who has given the ACCC a special access undertaking under section 152CBA. The ACCC may refuse to consider the undertaking until the person gives the ACCC the requested information (subsection 152CBB(3)).

Item 16 would insert proposed subsection 152CBB(2A) into section 152CBB to allow the ACCC to reject a special access undertaking if the Procedural Rules provide for a time limit for the additional information to be given to the ACCC and the person who submitted the undertaking does not do so within the time limit. The person would need to be notified in writing of the rejection.

The ACCC would be able to make Procedural Rules under proposed section 152ELA (see item 28). The Procedural Rules could specify a time limit for the provision of additional information in response to a request under section 152CBB or the Procedural Rules could provide for the ACCC to determine a time limit in relation to a particular undertaking (for example, the Procedural Rules might allow the ACCC to specify a time limit within specified limits).

Proposed subsection 152CBB(2B) would make it clear that an undertaking could be rejected under proposed subsection 152CBB(2A), despite any provision in Division 3 of Part XIC that suggests that the ACCC could not do so. In addition, proposed subsection 152CBB(2C) would provide that if the ACCC makes a decision to reject an undertaking under proposed subsection 152CBB(2A), subsection 152CBC(5) would have effect as if the decision to reject the undertaking had been made under subsection 152CBC(2). Subsection 152CBC(5) provides for the ACCC to be deemed to have rejected an undertaking if it has not made a decision to accept or reject the undertaking within the time limit provided for by subsections 152CBC(5) to (7). The purpose of proposed subsection 152CBB(2C) is to avoid the conflicting operation of subsection 152CBC(5) and proposed subsection 152CBB(2A) in the event that the ACCC rejects an undertaking because information requested under section 152CBB has not been provided by the relevant deadline.

The proposed amendment would remove the incentive for access providers to delay regulatory outcomes by lodging access undertakings that are not supported by all necessary evidence. It is therefore likely to lead to improvements in the speed of ACCC decision-making.
Item 17 – Subsection 152CBB(3)

Item 17 amends subsection 152CBB(3) as a consequence of the proposed amendment in item 16. Item 17 would amend subsection 152CBB(3) to provide that if the Procedural Rules do not provide for a time limit for the giving of (additional) information to the ACCC in relation to a special access undertaking, the ACCC may refuse to consider the undertaking until the information is provided. The Procedural Rules could specify a time limit for the provision of additional information in response to a request under section 152CBB or the Procedural Rules could provide for the ACCC to determine a time limit in relation to a particular application.

The effect of the proposed amendment is that subsection 152CBB(3) would apply as a default rule in the event that the ACCC has not made Procedural Rules under proposed section 152ELA (see item 28) dealing with time limits for the provision of additional information under section 152CBB or in the event that there are no Procedural Rules in force.

Item 18 – After subsection 152CBC(1)

Section 152CBC applies where a person gives the ACCC a special access undertaking in which the person specifies the terms and conditions on which it undertakes to comply with the standard access obligations in relation to the supply of a listed carriage service (or a service that facilitates the supply of a listed carriage service) in the event that the person becomes a carrier or a carriage service provider (see section 152CBA). Subsection 152CBC(2) requires the ACCC to accept or reject the undertaking.

Currently, the person cannot make a modification to a special access undertaking once it has been given to the ACCC. Instead, the person would need to withdraw the undertaking and submit a new undertaking, which would result in the consideration of the undertaking having to commence again, including the decision-making period (subsection 152CBC(5) to (7)) and any public consultation that may be required under section 152CBD. This has the potential to result in very substantial and unnecessary delays in the ACCC making a decision about an undertaking.

Item 18 would amend section 152CBC to allow a person to modify an undertaking, at any time before the ACCC makes a decision to accept or reject the undertaking, provided that the modification is one that is specified in the Procedural Rules to be minor in nature. Under proposed section 152ELA, the ACCC would be able to make Procedural Rules (see item 28).

As the amendment in item 18 would commence on the day after the day on which the Bill receives the Royal Assent, it would not be possible for a modification to be made to an application unless and until the ACCC has made Procedural Rules dealing with the time limit for making modifications and specifying the modifications which will be taken to be minor in nature. Under proposed section 152ELC, the ACCC would be required to publish a plan on its website, within 6 months of the commencement of the amendments in Schedule 7, that provides an outline of the Procedural Rules that the
ACCC proposes to make and an indicative timetable for the making of those rules (see item 28).

The proposed amendment would give the ACCC greater flexibility to consider a special access undertaking, as altered by a modification that is taken to be minor, without having to re-start a full public consultation process. It is intended that the ACCC would be able to specify in Procedural Rules, where it considers it appropriate to do so, that a modification will be taken to be minor provided that an abbreviated consultation process is undertaken, as specified in the Procedural Rules.

The proposed amendment would also have the effect of deterring some regulatory “gaming” by access providers, as they would be aware that the length of delay which could be created by making modifications to an undertaking would potentially be far shorter than is currently the case.

**Item 19 – After subsection 152CBG(2)**

Under section 152CBG, a person may give the ACCC a variation to a special access undertaking that is in operation. Subsection 152CBG(2) requires the ACCC to accept or reject the variation.

Currently, the person cannot make a modification to a variation once it has been given to the ACCC. Instead, the carrier or carriage service provider would need to withdraw the variation and submit a new variation, which would result in the consideration of the variation having to commence again, including the decision-making period (subsections 152CBG(7) to (9)) and any public consultation that may be required under section 152CBD. This has the potential to result in very substantial and unnecessary delays in the ACCC making a decision about a variation.

Item 19 would amend section 152CBG to allow a person to modify a variation, at any time before the ACCC makes a decision to accept or reject the variation, provided that the modification is one that is specified in the Procedural Rules to be minor in nature. Under proposed section 152ELA, the ACCC would be able to make Procedural Rules (see item 28).

As the amendment in item 19 would commence on the day after the day on which the Bill receives the Royal Assent, it would not be possible for a modification to be made to an application unless and until the ACCC has made Procedural Rules dealing with the time limit for making modifications and specifying the modifications which will be taken to be minor in nature. Under proposed section 152ELC, the ACCC would be required to publish a plan on its website, within 6 months of the commencement of the amendments in Schedule 7, that provides an outline of the Procedural Rules that the ACCC proposes to make and an indicative timetable for the making of those rules (see item 28).

The proposed amendment would give the ACCC greater flexibility to consider a variation to a special access undertaking, as altered by a modification that is taken to be minor, without having to re-start a full public consultation process. It is intended that the ACCC would be able to specify in Procedural Rules, where it considers it
appropriate to do so, that a modification will be taken to be minor provided that an abbreviated consultation process is undertaken, as specified in the Procedural Rules.

The proposed amendment would also have the effect of deterring some regulatory “gaming” by access providers, as they would be aware that the length of delay which could be created by making modifications to a variation would potentially be far shorter than is currently the case.

**Item 20 – Subsection 152CBG(4)**

Under section 152CBG, a person may give the ACCC a variation to a special access undertaking that is in operation. Subsection 152CBG(2) requires the ACCC to accept or reject the variation.

Subsection 152CBG(4) provides that paragraph 152CBD(2)(d) applies to a variation, except where the proposed variation is minor in nature. If a variation is not minor in nature, the ACCC must undertake a public consultation process in relation to the proposed variation. Subsection 152CBG(4) effectively requires the ACCC to form an opinion, based on the ordinary meaning of the term ‘minor’, as to whether a proposed variation can be considered to be minor in nature.

Item 20 would amend subsection 152CBG(4) so that the requirement to undertake public consultation would not apply where a proposed variation is taken under the Procedural Rules (which may be made by the ACCC under proposed section 152ELA (see item 28)), to be minor in nature. The proposed amendment would provide certainty for the ACCC and persons who may be affected by a proposed variation to a declaration by allowing the ACCC to specify in the Procedural Rules a particular variation minor to be in nature, or (relying on subsection 13(3) of the LIA), particular kinds of variations to be minor in nature.

As subsection 152CBG(4), as amended by item 20, assumes the existence of Procedural Rules that specify the variations or kinds of variations that are taken to be minor in nature, item 20 would have delayed commencement (see clause 2 of the Bill) to enable the ACCC to make Procedural Rules in relation to this matter that would commence at the same time as item 20 (see ss.4(1) of the AIA).

**Item 21 – Subsection 152CBH(3)**

Section 152CBH allows the ACCC to request further information from a person who has given the ACCC a variation to a special access undertaking (section 152CBG). The ACCC may refuse to consider the variation until the provider gives the ACCC the requested information (subsection 152CBH(3)).

Item 21 would insert proposed subsection 152CBH(2A) into section 152CBH to allow the ACCC to reject a variation to a special access undertaking if the Procedural Rules provide for a time limit for the additional information to be given to the ACCC and the person who submitted the variation does not do so within the time limit. The person would need to be notified in writing of the rejection.
The ACCC would be able to make Procedural Rules under proposed section 152ELA (see item 28). The Procedural Rules could specify a time limit for the provision of additional information in response to a request under section 152CBH or the Procedural Rules could provide for the ACCC to determine a time limit in relation to a particular variation (for example, the Procedural Rules might allow the ACCC to specify a time limit within specified limits).

Proposed subsection 152CBH(2B) would make it clear that a variation could be rejected under proposed subsection 152CBH(2A), despite any provision in Division 3 of Part XIC that suggests that the ACCC could not do so. In addition, proposed subsection 152CBH(2C) would provide that if the ACCC makes a decision to reject a variation under proposed subsection 152CBH(2A), subsection 152CBG(7) would have effect as if the decision to reject the variation had been made under subsection 152CBG(2). Subsection 152CBG(7) provides for the ACCC to be deemed to have rejected a variation if it has not made a decision to accept or reject the variation within the time limit provided for by subsections 152CBG(7) to (9). The purpose of proposed subsection 152CBH(2C) is to avoid the conflicting operation of subsection 152CBG(7) and proposed subsection 152CBH(2A) in the event that the ACCC rejects a variation because information requested under section 152CBH has not been provided by the relevant deadline.

The proposed amendment would remove the incentive for access providers to delay regulatory outcomes by lodging variations to special access undertakings that are not supported by all necessary evidence. It is therefore likely to lead to improvements in the speed of ACCC decision-making.

Item 22 – Subsection 152CBH(3)

Item 22 amends subsection 152CBH(3) as a consequence of the proposed amendment in item 21. Item 22 would amend subsection 152CBH(3) to provide that if the Procedural Rules do not provide for a time limit for the giving of (additional) information to the ACCC in relation to a variation to a special access undertaking, the ACCC may refuse to consider the variation until the information is provided. The Procedural Rules could specify a time limit for the provision of additional information in response to a request under section 152CBH or the Procedural Rules could provide for the ACCC to determine a time limit for a request.

The effect of the proposed amendment is that the rule in subsection 152CBH(3) would apply as a default rule in the event that the ACCC has not made Procedural Rules under proposed section 152ELA (see item 28) dealing with time limits for the provision of additional information under section 152CBH or in the event that there are no Procedural Rules in force.

Item 23 – After section 152CD

Item 23 would insert new proposed section 152CDA after section 152CD. Proposed section 152CD would allow the ACCC to make Procedural Rules authorising the ACCC to defer consideration of an access undertaking or a variation to an access undertaking. This would cover ordinary and special access undertakings, and
variations to both kinds of access undertakings (see the definition of ‘access undertaking’ in section 152AC). Proposed subsection 152CDA(2) would make it clear that the Procedural Rules could authorise deferral of consideration of an access undertaking despite any provisions that might suggest otherwise in Division 5 in Part XIC.

The proposed amendment made by item 23 is the counterpart to the proposed amendment in item 24, which would allow the Procedural Rules to authorise the ACCC to defer consideration of an access dispute. In combination, the proposed amendments in items 23 and 24 would give the ACCC the ability to determine in the Procedural Rules the circumstances in which it will defer consideration of an access undertaking and/or the circumstances in which it will defer consideration of an access dispute, if it chooses to provide for this in the Procedural Rules.

**Item 24 – At the end of section 152CLA**

Subsections 152CLA(2) to (7) deal with the deferral of consideration of an access dispute.

Subsection 152CLA(2) gives the ACCC a discretion, where it receives an access undertaking that relates, in whole or part, to a matter that is the subject of an access dispute that has been notified to the ACCC, to defer consideration of an access dispute in order to consider the undertaking. This discretion operates despite anything to the contrary in Division 8 of Part XIC, for example, the requirement in section 152CP that the ACCC make a determination in relation to an access dispute (subsection 152CLA(3)). Subsection 152CLA(4) specifies the matters to which the ACCC must have regard in deciding whether to defer consideration of an access dispute, which includes the guidelines which the ACCC was required to formulate and publish on its Internet site in relation to the exercise of its power to defer consideration of a dispute (see subsections 152CLA(5) to (7)).

Item 24 would amend section 152CLA to insert three new subsections dealing with Procedural Rules made by the ACCC under proposed section 152ELA (see item 28). Proposed subsection 152CLA(8) would allow the ACCC to make Procedural Rules that modify or displace the current provisions dealing with deferral of consideration of an access dispute. Proposed subsection 152CLA(9) and (10) would expressly allow the Procedural Rules to authorise the ACCC to defer consideration of an access dispute in whole or in part if the ACCC wished to provide for this under the Procedural Rules. However, the ACCC would be free to specify in the Procedural Rules the circumstances in which it would defer consideration of an access dispute, or consideration of an access undertaking, and in doing so could completely displace subsections 152CLA(2) to (7) and the existing guidelines made under subsection 152CLA(5). Subsections 152CLA(2) to (7) would continue to apply as default rules in the event that the ACCC has not made Procedural Rules displacing or modifying subsections 152CLA(2) to (7) or in the event that there are no Procedural Rules in force.

The proposed amendment made by item 24 is the counterpart to the amendment in item 23, which would allow the Procedural Rules to authorise the ACCC to defer
consideration of an access undertaking. In combination, the proposed amendments in items 23 and 24 would give the ACCC the ability to determine in the Procedural Rules the circumstances in which it will defer consideration of an access undertaking and/or the circumstances in which it will defer consideration of an access dispute, if it chooses provide for this in the Procedural Rules.

There are concerns that access providers are gaming the access undertaking process by knowingly lodging incomplete or otherwise unacceptable access undertakings in order to delay ACCC consideration of access disputes and therefore the possibility of binding ACCC decisions on access disputes in favour of access seekers.

The proposed amendments in items 23 and 24 would allow the ACCC to exercise its discretion to prioritise undertaking or arbitrations in the Procedural Rules in such a way as to deter access providers from lodging access undertakings in order to delay a decision on an access dispute.

Item 25 – At the end of section 152DB

Section 152DB deals with the procedure of the ACCC in relation to an access dispute. Specifically, section 152DB provides that the ACCC:

- is not bound by technicalities, legal forms or rules of evidence (paragraph 152DB(1)(a));
- must act as speedily as possible to resolve access disputes, having regard to the need for fairness and careful consideration of all matters relating to a dispute (paragraph 152DB(1)(b));
- may inform itself on any matter relevant to a dispute in any way it thinks fit (paragraph 152DB(1)(c));
- may determine periods for the presentation of cases of the parties to a dispute and require the cases to be presented within those periods (subsection 152DB(2));
- may require evidence or argument to be presented in writing or orally and decide the matters on which it will hear oral evidence and argument (subsection 152DB(3)); and
- may determine that an arbitration hearing is to be conducted by telephone, closed circuit television or any other means of communication (subsection 152DB(4)).

Item 25 would amend section 152DB to insert new subsection 152DB(5) dealing with Procedural Rules made by the ACCC under proposed section 152ELA (see item 28). Proposed subsection 152DB(5) would allow the ACCC to make Procedural Rules that modify or displace paragraph 152DB(1)(c), or subsections 152DB(2) to (4). For the avoidance of doubt, proposed paragraph 152ELA(3)(c) would make it clear that the ACCC could make Procedural Rules dispensing with the need for an oral hearing in relation to the arbitration of an access dispute under Division 8. The proposed amendment would enable the ACCC to set out in its Procedural Rules its procedures in relation to hearings in relation to access disputes. For example, it may specify the circumstances in which it would require evidence to be presented orally, or alternatively the circumstances where it would require evidence only in writing.
The existing provisions would continue to apply as default rules in the event that the ACCC has not made Procedural Rules displacing or modifying the provisions or in the event that there are no Procedural Rules in force that deal with that matter.

**Item 26 – At the end of section 152DK**

Section 152DK allows a party to an arbitration to request the ACCC to keep specified information in a document confidential and not to provide that information to another party to the dispute. Subsection 152DK(1) specifies the things that the requesting party must do to make such a request and subsections 152DK(2) to (4) specify the things that the ACCC must do (including consulting with the other parties to the dispute) before deciding whether to agree to the request.

Item 26 would amend section 152DK to insert new subsection 152DK(5) dealing with Procedural Rules made by the ACCC under proposed section 152ELA (see item 28). Proposed subsection 152DK(5) would allow the ACCC to make Procedural Rules that modify or displace subsections 152DB(1) to (4). This would enable the ACCC to specify in the Procedural Rules modifications to the current procedure for dealing with confidential information or to specify completely different procedures, thereby displacing the current provisions. Subsections 152DK(1) to (4) would continue to apply as default rules in the event that the ACCC has not made Procedural Rules displacing or modifying those subsections or in the event that there are no Procedural Rules in force in relation to these matters. It would be possible for the Procedural Rules to modify or displace any or all of the subsections.

The proposed amendment would provide a mechanism to overcome some delays that have recently been caused by disputes over access to and supply of confidential information. This could for example enable the ACCC to specify a generic confidentiality regime to apply in consideration of access exemptions, access undertakings and access disputes. Such a regime would be expected to speed up consideration of access undertakings.

**Item 27 – At the end of section 152DMA**

Subsection 152DMA(1) allows the Chairperson of the ACCC to decide to hold a joint arbitration hearing in relation to two or more access disputes that are currently before the ACCC and which have one or more common matters. Subsections 152DMA(2) to (7):

- specify the circumstances in which the Chairperson may decide to hold a joint arbitration hearing;
- allow the Chairperson to give written directions to the member of the ACCC presiding at the joint hearing;
- provide that provisions in Part XIC dealing with the constitution of the ACCC for a hearing and the procedure of the ACCC for an arbitration apply in the same way to the joint hearing;
- allow the ACCC, as constituted for the joint hearing, to have regard to any record of proceedings for any dispute which is to be held jointly; and
allow the ACCC, as constituted for the purposes of each dispute, to have regard to the record of proceedings for the joint hearing and adopt any findings of fact made by the ACCC as constituted for the purposes of the joint hearing.

Item 27 would amend section 152DMA to insert new subsection 152DMA(8) which would deal with Procedural Rules made by the ACCC under proposed section 152ELA (see item 28). Proposed subsection 152DMA(8) would allow the ACCC to make Procedural Rules that modify or displace subsections 152DMA(1) to (7). This would enable the ACCC to specify in the Procedural Rules modifications to the current procedures applying to joint hearings. Subsections 152DMA(1) to (7) would continue to apply as default rules in the event that the ACCC has not made Procedural Rules displacing or modifying them or in the event that there are no Procedural Rules in force in relation to these matters. It would be possible for the Procedural Rules to modify or displace any or all of the subsections.

Item 28 – After Division 10 of Part XIC

Item 28 would insert proposed Division 10A into Part XIC to provide for the making of Procedural Rules by the ACCC.

Proposed Division 10A—Procedural Rules

Proposed section 152ELA – Procedural rules

Proposed subsections 152ELA(1) and (2) allow the ACCC to make written rules, that would be known as ‘Procedural Rules’ and specify the kinds of rules that the ACCC may make. The ACCC’s rule-making power would be broad in scope, so that the Procedural Rules could deal comprehensively with the procedures to apply to the ACCC and third parties in connection with matters arising under Part XIC. The ACCC would be able to make Procedural Rules covering all matters of practice and procedure relating to the ACCC’s performance and exercise of powers under Part XIC (proposed paragraph 152ELA(1)(a)) and all things and matters incidental to such practice and procedure (proposed paragraph 152ELA(1)(b)). The Procedural Rules may also prescribe such matters that any provision in Part XIC requires or permits to be prescribed (proposed paragraph 152ELA(1)(c)).

Proposed subsection 152ELA(3) specifies some examples of the matters in relation to which the ACCC may make Procedural Rules, such as confidentiality of information or documents given to the ACCC by an applicant for an exemption order, a person who gives the ACCC an access undertaking or a party to an arbitration dispute (see also item 26 above). The Procedural Rules could also specify the matters to which the ACCC will have regard in deciding whether to make an interim determination in an access dispute or the form and content of applications, undertakings, variations and other documents given to the ACCC under Part XIC. As discussed in relation to item 25, the Procedural Rules would be able to dispense with the need for an oral hearing in relation to the arbitration of an access dispute. However, the examples given in proposed subsection 152ELA(3) would not limit the matters that could be dealt with by the ACCC under Procedural Rules. All that would be required is that the Procedural Rules fall within the scope of proposed subsection 152ELA(1).
Proposed subsection 152ELA(5) would permit the Procedural Rules to provide for a matter by giving the ACCC the power to make administrative decisions in relation to that matter. This would provide additional flexibility for the ACCC in deciding how to provide for its practices and procedures under Part XIC. As the ACCC may be constituted under section 152CV by one or more members for the purposes of a particular arbitration, proposed subsection 152ELA(6) would enable the Procedural Rules to require a power conferred on the ACCC by the Procedural Rules in relation to an arbitration to be exercised by the ACCC as constituted for that arbitration. However, the matters dealt with by proposed subsections 152ELA(5) and (6) are not intended to limit the scope of the ACCC’s power to make Procedural Rules as provided by proposed subsection 152ELA(1).

Procedural Rules made by the ACCC would be a legislative instrument for the purposes of the LIA (proposed subsection 152ELA(8)). This would mean that the Procedural Rules would be registered on the Federal Register of Legislative Instruments and would be subject to Parliamentary disallowance.

The Procedural Rules could be varied or revoked by the ACCC, relying on subsection 33(3) of the AIA. The variation or revocation would be a legislative instrument. The public consultation process required by proposed section 152ELB would apply to a proposed variation or revocation of the Procedural Rules.

The introduction of Procedural Rules is intended to confirm the scope of the ACCC’s existing discretions in relation to the exercise of its powers and the performance of its functions under Part XIC. It is also intended to provide greater certainty about the procedures and practice that will apply to the ACCC’s exercise of powers and performance of functions under Part XIC. The Procedural Rules would not affect the indicative six-month time limit for the making of decisions in relation to access exemptions and undertakings. The introduction of Procedural Rules would therefore strike an appropriate balance between access providers’ concerns for timely decision-making and the need for flexibility and certainty in relation to the procedures applying to the ACCC’s performance of its functions, and exercise of its powers, under Part XIC.

**Proposed section 152ELB – Public consultation**

Proposed new section 152ELB would require the ACCC to undertake public consultation before making Procedural Rules. The ACCC would be required to publish a draft of the Procedural Rules on its Internet site, invite people to make submissions in relation to the draft Procedural Rules, and consider, before making the Procedural Rules, any submissions received within the time limit it specified when publishing the Procedural Rules (proposed subsection 152ELB(1)). The ACCC would be required to specify a minimum public consultation period of 30 days (proposed subsection 152ELB(2)).
Proposed section 152ELC – Plan for the development of Procedural Rules

Proposed subsection 152ELC(1) would require the ACCC to publish a plan, within 6 months after the commencement of the proposed section, that details its proposals to make Procedural Rules and an indicative timetable for the making of these rules. The plan would be published on the ACCC’s Internet site. The purpose of the plan is to give the industry an indication of when Procedural Rules will be drafted and in relation to which matters. This would encourage more effective public consultation in relation to the draft rules.

If the ACCC did not meet an indicative timeframe or comply with any other matter specified in the plan, it would not affect the validity of the any Procedural Rules that it makes (proposed subsection 152ELC(2)).

Proposed subsection 152ELC(3) would provide that the plan is not a legislative instrument for the purposes of the LIA.

Schedule 8—Any-to-any connectivity

There is currently no requirement on carriers who own, or supply carriage services over, large telecommunications networks to acquire declared services (in particular, terminating access services) from carriage service providers who supply carriage services over smaller networks, for the purpose of ensuring any-to-any connectivity for the end-users connected to those smaller networks. The practical effect of this is that it is possible for the carrier to deny any-to-any connectivity to end-users on a smaller network (such as a new fibre customer access network installed in new housing estates).

Schedule 8 would amend Schedule 1 to the Telecommunications Act to address this problem through a standard carrier licence condition. In summary, the condition would impose on a carrier an obligation to acquire certain services from a carriage service provider where this is necessary to enable end-users connected to the carrier’s network to make calls to end-users connected to the network over which a carriage service provider provides carriage services to those end-users (ie. to facilitate any-to-any connectivity). Where parties could not agree on terms and conditions on which the service would be supplied, disputes would be arbitrated by the ACCC.

Telecommunications Act 1997

Item 1 – At the end of Schedule 1

Proposed Part 7—Any-to-any connectivity

Item 1 inserts proposed Part 7 into Schedule 1. Proposed Part 7 relates to any-to-any connectivity.
Proposed clause 44A – Simplified outline

Proposed clause 44A would provide a simplified outline of new Part 7 of Schedule 1 to the Telecommunications Act. Proposed Part 7 provides that if a carriage service provider’s network is connected with a carrier’s network, the carrier must obtain a designated interconnection service from the carriage service provider for the purposes of ensuring any-to-any connectivity.

Proposed clause 45 – Definitions

Proposed clause 45 would define a number of terms referred to in proposed Part 7. A ‘designated interconnection service’ would be defined to have the meaning in proposed clause 47. Proposed clause 47 would provide that the Minister could declare a specified eligible service to be a designated interconnection service for the purposes of proposed Part 7. ‘Eligible service’ would be defined in proposed clause 45 to have the meaning in section 152AL of the TPA (which defines ‘eligible service’ as a listed carriage service (within the meaning of the Telecommunications Act) or a service that facilitates the supply of an listed carriage service). This would mean that the Minister would be able to declare as a designated interconnection service, a service that would be capable of being declared by the ACCC under section 152AL of the TPA.

Proposed subclause 47(3) provides that the Minister would be required, before declaring a service other than an ‘active declared service’ to be a designated interconnection service, to request a report from the ACCC in relation to whether the declaration would promote the achievement of any-to-any connectivity (see below).

Proposed clause 45 would provide that the term ‘active declared service’ has the same meaning as in section 152AR of the TPA (an active declared service is a declared service that a carrier or carriage service provider supplies to itself or other persons).

Proposed clause 46 – Carriers must obtain designated interconnection services from service providers for the purpose of ensuring any-to-any connectivity

Proposed clause 46 would create an obligation for a carrier to acquire designated interconnection services from a carriage service provider, so that end-users connected to the carrier’s network could make and receive calls from end-users connected to the network over which a carriage service provider supplies carriage services (and vice versa), and would specify the circumstances in which the obligation would arise.

The obligation would arise where the network owned by a carrier (or over which it supplies a carriage service) and the network over which a carriage service provider provides a carriage service are interconnected, are to be interconnected or the carriage service provider is seeking to have the network over which it supplies services interconnected with the carrier’s network. If any of these conditions apply, the carrier would be obliged to acquire a designated interconnection service from the carriage service provider where requested to do so by the carriage service provider to ensure any-to-any connectivity between an end-user connected to the network over which the carriage service provider supplies carriage services and an end-user connected to the carrier’s network.
An example of a ‘designated interconnections service’ might be an active declared service such as the PSTN terminating access service. That service enables end-users connected to one network to communicate (by making a telephone call on a fixed line) with an end-user (who receives the call) on another network. In such circumstances, if the two networks are or will be interconnected, or if the carriage service provider want to interconnect with the carrier’s network, if the carriage service provider requests the carrier to acquire a designated interconnection service, the carrier must do so. This is to enable an end-user connected to the carrier’s network to communicate (by making a telephone call) with an end-user (who receives the call) connected to the service provider’s network. The obligation would ensure that all end-users, irrespective of the network to which they are connected, would be able to communicate (by originating and receiving communications) with any other end-user in Australia.

If the obligation applies, the carrier is to acquire the designated interconnection service on such terms and conditions as are agreed by the carrier and the carriage service provider, or, if the parties cannot reach agreement on those terms and conditions, as are determined by an arbitrator appointed by the parties. If the parties cannot agree on an arbitrator, the ACCC would be the arbitrator (see proposed subclause 46(2)). Proposed subclause 46(3) would allow regulations to be made providing for and in relation to the conduct of arbitrations by the ACCC. This would be consistent with the existing regulation-making powers in Schedule 1 relating to ACCC arbitrations in connection with access to supplementary facilities (see clause 18 of Schedule 1) and access to network information (clause 27 of Schedule 1). Proposed subclause 46(4) would allow the regulations to provide for the constitution of the ACCC for the purposes of an arbitration conducted under proposed clause 46, but this would not limit the matters that may be dealt with by the regulations (proposed subclause 46(5)).

**Proposed clause 47 – Designated interconnection services**

Proposed clause 47 would provide that the Minister could declare a specified eligible service to be a designated interconnection service for the purposes of Part 7. ‘Eligible service’ would be defined in proposed clause 45 to have the meaning in section 152AL of the TPA (which defines ‘eligible service’ as a listed carriage service (within the meaning of the Telecommunications Act) or a service that facilitates the supply of an listed carriage service). This would mean that the Minister would be able to declare as a designated interconnection service, a service that would be capable of being declared by the ACCC under section 152AL of the TPA or that already has been declared by the ACCC.

A declaration made by the Minister under proposed subclause 47(1) would be a legislative instrument for the purposes of the LIA (proposed subclause 47(6)). This would mean that the declaration would be registered on the Federal Register of Legislative Instruments and would be subject to Parliamentary disallowance.

Before declaring a service other than an active declared service to be a designated interconnection service, the Minister would be required to request a report from the ACCC in relation to whether the declaration would promote the achievement of any-to-any connectivity (proposed subclause 47(3)). The ACCC would have 30 days in which to provide a report to the Minister after receiving a request (proposed
subclause 47(4)). Before making a declaration, the Minister would need to have regard to the report, however, the Minister could also have regard to such matters as the Minister considers relevant (proposed subclause 47(5)).

**Schedule 9—Long-term interests of end users**

Section 152AB provides that the object of Part XIC of the TPA is the long-term interests of end-users.

Concerns have been raised that section 152AB does not make it clear that considering the long-term interests of end-users requires consideration of the risk of investing in new network infrastructure in addition to existing infrastructure. Given the uncertainties inherent in new network investment, the risks of providing services over new networks are considered to be greater than those of investing in existing networks. New technologies are likely to imply a greater level of uncertainty in regard to costs, operational efficiency and the possibility of ‘stranded’ technology. Such risks should be factored into consideration of the returns that should be received from such networks. Schedule 9 amends section 152AB, for the avoidance of doubt, to ensure that the incentives for investment in infrastructure by which services may be supplied in the future, and the risk of making such an investment, are matters to which regard should be had for the purposes of paragraph 152AB(2)(e).

The amendments made by Schedule 9 would clarify the meaning of the long-term interests of end-users in two ways:

- by making it clear that it is necessary for the ACCC to consider the encouragement of investment in future infrastructure, and alternative infrastructure, in addition to current infrastructure (Items 1 – 5); and
- by making it clear that when the ACCC considers the incentives for investment in infrastructure, it must also consider the risks that are involved in such investment (Item 6).

**Trade Practices Act 1974**

**Item 1 – Paragraph 152AB(2)(e)**

Subsection 152AB(2) defines what is meant by the promotion of the long-term interests of end-users for the purposes of subsection 152AB(1), and sets out (in paragraphs 152AB(2)(c) – (e)) the matters to which regard must be had in determining if a particular thing promotes the long-term interests of end-users. These matters are:

- the objective of promoting competition in markets for listed services;
- the objective of achieving any-to-any connectivity in relation to carriage services that involve communication between end-users; and
- the objective encouraging the economically efficient use of, and economically efficient investment in, the infrastructure by which listed services are supplied.
Item 1 would repeal and replace paragraph 152AB(2)(e). The amendments made by Item 1 would make it clear that the promotion of the long-term interests of end-users is concerned not only with the economically efficient use of and investment in the infrastructure by which listed services are currently supplied, but also the economically efficient use of and investment in other types of infrastructure by which listed services are capable of being supplied, or are likely to become capable of being supplied.

This amendment would clarify that it is necessary, when considering the long-term interests of end-users, to consider investment in alternative infrastructure, or future infrastructure where this is relevant.

Item 2 – Paragraph 152AB(6)(a)
Item 3 – Subparagraph 152AB(6)(a)(i)
Item 4 – Subparagraph 152AB(6)(a)(i)

Subsection 152AB(6) sets out the matters to which regard must be had in determining if something is likely to achieve the objectives in paragraph 152AB(2)(e). One of these matters, in paragraph 152AB(6)(a), is the extent to which the supply of services is technically feasible. Since Item 1 would make changes to paragraph 152AB(2)(e) to clarify that it is necessary to consider the incentives for investment in future, as well as current, infrastructure, Items 2, 3 and 4 would make amendments to paragraph 152AB(6)(a) that are necessary to reflect the proposed amendment to paragraph 152AB(2)(e).

Item 5 – Paragraph 152AB(6)(c)

Item 5 would repeal and replace paragraph 152AB(6)(c) to take account of the proposed amendment made by Item 1 to paragraph 152AB(2)(e). Paragraph 152AB(6)(c) currently requires the ACCC to have regard to the incentives for investment in the infrastructure by which services are supplied. To reflect the change made by Item 1, Item 5 would insert a new paragraph 152AB(6)(c) to require the ACCC to have regard to the incentives for investment in the infrastructure by which services are supplied, or are capable of being supplied, or are likely to become capable of being supplied.

Item 6 – After subsection 152AB(7)

Item 6 would insert proposed subsections 152AB(7A) and (7B). Proposed subsection 152AB(7A) provides that, when the ACCC is determining incentives for investments for the purposes of paragraph 152AB(6)(c), it must have regard to the risks that are involved in making the investment. This proposed amendment would make it clear that, when considering the incentives for investment in infrastructure as a part of determining the extent to which a particular thing is likely to result in the promotion of the long-term interest of end-users, the ACCC must have regard not only to the benefits and incentives for investment, but must also take into account the risks of investment in such infrastructure.
Proposed subsection 152AB(7B) would provide that proposed subsection 152AB(7A) does not limit the matters to which the ACCC must have regard when determining incentives for investment.

Schedule 10—Enforceable undertakings

Schedule 10 would amend the Telecommunications Act to give the ACMA the ability to accept undertakings to ensure compliance with the Telecommunications Act and the T(CPSS) Act. Once accepted by the ACMA, undertakings would be enforceable by the Federal Court.

Currently, the ACMA has a range of enforcement and compliance powers for dealing with circumstances in which the ACMA believes a person has contravened or is contravening the Telecommunications Act or the T(CPSS) Act, including the power to issue formal warnings and remedial directions and the power to commence proceedings in the Federal Court for the recovery of civil penalties. The power to accept enforceable undertakings would complement the ACMA’s existing enforcement powers by providing the ACMA with a flexible and efficient means of addressing concerns about a person’s current and future compliance with the Telecommunications Act and the T(CPSS) Act. The acceptance of an undertaking could be used as an alternative, or in addition to, the exercise of other enforcement powers and would provide the ACMA with a flexible option to respond to breaches by carriers and carriage service providers of their regulatory obligations, and to ensure ongoing compliance with those obligations into the future.

Providing the ACMA with the power to accept enforceable undertakings in relation to compliance with the Telecommunications Act and the T(CPSS) Act would be consistent with the enforcement regime that is available to the ACMA in its role under the Spam Act 2003. That Act provides that the ACMA has express powers to accept enforceable undertakings in connection with specified matters relating to spam. In addition, giving the ACMA the power to accept enforceable undertakings would mirror the ACCC’s enforcement regime under the TPA. Section 87B of the TPA allows the ACCC to accept enforceable undertakings.

Telecommunications Act 1997

Item 1 – Section 6 (after table item 9)

Section 6 provides a main index of the Parts of the Telecommunications Act. Item 1 would insert a new row into the table at section 6. The new row would be item 10 in that table, and would account for the insertion into the Telecommunications Act by Item 2 of this Schedule of a proposed Part 31A to provide for enforceable undertakings.
Item 2 – After Part 31

New Part 31A—Enforceable undertakings

New section 572A – Simplified outline

Proposed new section 572A provides a simplified outline of the proposed new Part 31A. Proposed new Part 31A provides that a person may give the ACMA an enforceable undertaking about compliance with the Telecommunications Act or the T(CPSS) Act.

New section 572B – Acceptance of undertakings

Proposed new section 572B would provide that the ACMA may accept an undertaking from a person, and sets out the types of undertaking that the ACMA may accept. Proposed new subsection 572B(1) describes three types of undertakings that the ACMA would be able to accept. The ACMA may accept a written undertaking given by a person that the person will:

- take specified action in order to comply with the Telecommunications Act or the T(CPSS) Act (proposed paragraph 572B(1)(a)); or
- refrain from taking specified action in order to comply with the Telecommunications Act or the T(CPSS) Act (proposed paragraph 572B(1)(b)); or
- take specified action directed towards ensuring that the person does not contravene the Telecommunications Act or the T(CPSS) Act, or is unlikely to contravene these two Acts, in the future (proposed paragraph 572B(1)(c)).

The effect of proposed new subsection 572B(1) would be that the ACMA may accept an undertaking from a person that the person will rectify past conduct that was in breach of the requirements of the Telecommunications Act or the T(CPSS) Act (proposed paragraphs 572B(1)(a) and (b)). The ACMA could also accept an undertaking from a person relating to their compliance with these two Acts in the future, even where that person has not breached the requirements of those two Acts (proposed paragraph 572B(1)(c)).

The person who gives the undertaking may withdraw or vary the undertaking at any time, but the ACMA must consent to the undertaking being varied or withdrawn (proposed new subsection 572B(3)). Permitting persons who give undertakings to the ACMA to vary or withdraw them will ensure that the enforceable undertakings scheme instituted by new Part 31A is a flexible enforcement mechanism. The requirement for ACMA consent to the variation or withdrawal of an undertaking will ensure effective oversight by the ACMA of compliance with telecommunications regulations.

The ACMA would be able to cancel an undertaking at any time by giving a written notice to the person (proposed new subsection 572B(4)). This would allow the ACMA to cancel an undertaking when it is no longer required to be met by the person who gave it, or if it is no longer of any benefit. Equally, it will allow the ACMA to cancel an undertaking given by a person if that undertaking is no longer effective – this would mean that the relevant person could either give the ACMA a new undertaking
or that the ACMA could pursue other enforcement action against that person, if necessary.

Proposed new subsection 572B(5) would provide that the ACMA may publish on its Internet site an undertaking that it accepts from a person under proposed new subsection 572B(1). Allowing publication of the undertakings accepted by the ACCC will permit public scrutiny of the operation of proposed new Part 31A.

Proposed new subsection 572B(6) would provide that in proposed new subsection 572B, the Telecommunications Act includes the T(CPSS) Act. (Equivalent provisions are currently contained in clause 1 of Schedules 1 and 2 to the Telecommunications Act.) This would mean that the ACMA could accept undertakings in relation to compliance with the requirements of Telecommunications Act or the T(CPSS) Act.

**New section 572C – Enforcement of undertakings**

Proposed new section 572C would provide that undertakings under proposed new section 572B are enforceable in the Federal Court. Proposed new subsection 572C(1) would provide that the ACMA may apply to the Federal Court for an order if a person has given the ACMA an undertaking under proposed new section 572B, and the undertaking has not been withdrawn or cancelled, and the ACMA considers that the person has breached the undertaking.

Proposed new subsection 572C(2) would provide for the sorts of orders that the Federal Court may make in relation to an application by the ACMA under proposed new subsection 572C(1). These are the same types of orders provided for by subsection 39(2) of the Spam Act and subsection 87B(4) of the TPA. If the Federal Court is satisfied that the person has breached the undertaking, it may make any or all of the following:

- an order directing the person to comply with the undertaking;
- an order directing the person to pay to the Commonwealth an amount up to the amount of any financial benefit that the person has obtained directly or indirectly and that is reasonably attributable to the breach;
- any order that the Court considers appropriate directing the person to compensate any other person who has suffered loss or damage as a result of the breach; or
- any other order that the Court considers appropriate.

**Schedule 11—Operational separation of Telstra**

Telstra is a vertically integrated firm which retains a dominant market position in many telecommunications markets. Telstra also owns infrastructure which its competitors need to access and interconnect with in order to compete effectively against it. Telstra’s control of this infrastructure, combined with its market position, creates an incentive and ability for it to favour its own retail business in the provision of access to important services provided over this infrastructure.
The current regulatory regime has enabled competition to develop in the telecommunications market, but it has not fully prevented Telstra from discriminating in favour of its own retail operations. Addressing this issue, at this time, is important to enable competition to continue to develop.

Schedule 11 to the Bill provides for the implementation of an Australian model of operational separation by way of a standard carrier licence condition through amendments to Schedule 1 to the Telecommunications Act. It is intended that these provisions would be used to implement a model of operational separation that has been developed in consultation with Telstra. This model builds upon Telstra’s existing business model, is tailored to Australia’s unique regulatory environment and market conditions and is designed to provide the industry, including Telstra, with greater regulatory certainty that Telstra is treating its wholesale customers appropriately.

The Bill does not confer any additional powers on either the Minister or the ACCC in relation to setting wholesale or retail prices.

The aim of operational separation is to promote the principles of transparency and equivalence in relation to the supply by Telstra of wholesale and retail services. To achieve this aim new Part 8 of Schedule 1 to the Telecommunications Act would require Telstra to prepare, and give to the Minister, a draft operational separation plan which must be directed towards the achievement of the aim and objects of Part 8 and deal with such matters as are specified by the Minister.

If the Minister approves the draft operational separation plan, it will become a final operational separation plan. If Telstra has contravened, or is contravening, a final operational separation plan, the Minister would be able to require Telstra to prepare, and give to the Minister for approval, a draft rectification plan. If the Minister approves the draft rectification plan, it would become a final rectification plan. Telstra would be required to comply with the final rectification plan. The ACCC or the ACMA would be able to give Telstra a direction to comply with the rectification plan if Telstra has contravened, or is contravening, the rectification plan. Alternatively, or after having issued a remedial direction, the ACCC, the ACMA or the Minister would be able to commence proceedings in the Federal Court seeking recovery of a civil penalty in relation to Telstra’s failure to comply with a condition of its carrier licence.

Schedule 11 requires the Minister to cause a review of the operation of Part 8 of Schedule 1 to the Telecommunications Act to be conducted before 1 July 2009. A report of the review must be tabled in both Houses of Parliament and following the tabling of the report in the Parliament, the Minister would be able to declare, by written instrument, that Part 8 of Schedule 1 ceases to have effect on a specified day.

Schedule 11 would also amend Parts XIB and XIC to insert provisions that would require the ACCC, when performing its functions or exercising its powers under either Part XIB or XIC, to have regard to conduct that Telstra’s engages in order to comply with a final operational separation plan, to the extent that that conduct is relevant to the functions being performed or the power being exercised. These amendments would provide a linkage between the operational separation plan and Parts XIB and XIC where relevant.
Item 1 – Section 61

Item 1 would make a minor amendment to section 61, consequential to item 2 which would insert proposed subsection 61(2) into section 61.

Item 2 – At the end of section 61

Item 2 would add new proposed subsection 61(2) at the end of section 61 to allow the Minister to make a declaration providing for the conditions of Telstra’s carrier licence relating to operational separation, as provided for by part 8 of Schedule 1 to the Telecommunications Act (see item 7), to cease to have effect.

Under proposed section 61A (see item 3), the Minister would be required to cause of a review of the operation of Part 8 of Schedule 1 to be conducted before 1 July 2009. A report of the review would need to be prepared and tabled in both Houses of Parliament within 15 sittings days of each House after the completion of the report. Under proposed subsection 61(2), the Minister would be able to declare, in a legislative instrument, that Part 8 of Schedule 1 ceases to have effect on a specified day, provided that the declaration is made after the report of the review of Part 8 of Schedule 1 has been tabled in both Houses of Parliament and the declaration does not specify a date that is earlier than the last day on which a resolution disallowing the declaration could have been passed by a House of the Parliament under section 42 of the LIA (this would prevent the declaration from having retrospective effect).

If a declaration were made under proposed subsection 61(2), so that Part 8 of Schedule 1 ceases to have effect, sections 7 and 8 of the AIA would apply as if Part 8 had been repealed (see section 8B of the AIA). As the Minister’s declaration would be a legislative instrument and subject to Part 6 of the LIA, the effect of section 7 would be that if the Minister’s declaration ceases to have effect, this would not have the effect of the reviving the operation of Part 8 of Schedule 1. As Part 8 of Schedule 1 does not replace any existing provisions that would be repealed by the Bill, paragraph 8(a) would not be relevant but the effect of the remainder of section 8 of the AIA would be that the making of the declaration under proposed subsection 61(2) would not affect the previous operation of Part 8 or any right, privilege, obligation or liability acquired, accrued or incurred under Part 8 or any legal proceedings, remedies (which would include remedial directions) or penalties in respect of those rights.

Item 3 – After section 61

Proposed section 61A – Review before 1 July 2009 of conditions relating to operational separation of Telstra

Item 3 would insert new proposed section 61A after section 61 of the Telecommunications Act. Proposed section 61A would provide for a review of the licence conditions relating to the operational separation of Telstra to be conducted before 1 July 2009.
Proposed subsection 61A(1) would require the Minister to cause a review of the operation of Part 8 of Schedule 1 (see item 7) to be conducted before 1 July 2009. Proposed subsection 61A(2) would specify the matters to which regard must be had in conducting a review of the operation of Part 8 of Schedule 1. These matters would be:

(a) the state of competition in telecommunications markets;
(b) whether Telstra has a substantial degree of power in any telecommunications market (proposed subsection 61(5) would provide that the terms ‘telecommunications market’ and ‘substantial degree of power’ have the same meaning as in Part XIB of the TPA (see sections 151AF and 151AH of the TPA);
(c) technological developments that have, or might reasonably be expected to have, a significant impact on competition in telecommunications markets;
(d) Telstra’s commercial incentives for supplying wholesale eligible services (proposed subsection 61A(5) would provide that the term ‘eligible service’ would have the same meaning as in section 152AL of the TPA. Section 152AL provides that an ‘eligible service’ is a listed carriage service (within the meaning of the Telecommunications Act), or a service that facilitates the supply of a listed carriage service); and
(e) costs and benefits of the operation of Part 8 of Schedule 1.

The Minister would be required to cause a report of the review to be prepared (proposed subsection 61A(3)) and tabled in both Houses of Parliament within 15 sittings days of each House after the completion of the preparation of the report (proposed subsection 61A(4)).

Item 4 – After section 69

Proposed section 69A – Remedial directions – breach by Telstra of certain conditions relating to operational separation

Proposed section 69A would give the ACCC the power to give Telstra a remedial direction where Telstra has contravened, or is contravening, a standard licence condition set out in proposed Part 8 of Schedule 1 to the Telecommunications Act. For example, the ACCC could give Telstra a direction to comply with a final rectification plan that is in force (the Minister would be able to direct Telstra to prepare a draft rectification plan where Telstra has contravened or is contravening the final operational separation plan and which the Minister could approve as a final rectification plan). However, as compliance with a final operational separation plan is not a licence condition (see proposed subclause 65(3)), the ACCC could not issue a direction to Telstra if Telstra did not comply with the plan.

Telstra would be required to comply with a remedial direction given to it by the ACCC (proposed subsection 69A(4)). Failure to comply with the direction would be a breach of the standard licence condition in clause 1 of Schedule 1 to the Telecommunications Act that requires a carrier to comply with the Telecommunications Act. As compliance with a condition of a carrier licence is a civil penalty provision (see section 68), the ACCC could commence proceedings in the Federal Court seeking recovery of
a civil penalty if Telstra did not comply with a remedial direction (see Part 31 of Telecommunications Act). The maximum penalty that could be imposed on Telstra for failure to comply with a carrier licence condition would be $10 million for each contravention (subsection 570(3)). The ACCC could also institute proceedings for recovery of a civil penalty where Telstra has contravened a condition set out in proposed Part 8 of Schedule 1, as an alternative to issuing a remedial direction (the Minister and the ACMA would also be able to commence such proceedings – see section 571 of the Telecommunications Act).

The ACCC’s power to give remedial directions would be similar to the ACMA’s existing power to give remedial directions under section 69 in relation to contraventions of a carrier licence condition. As ACMA is able to give a remedial direction under section 69 in relation to a contravention of a carrier licence condition, the ACMA would also have the power to issue a remedial direction in relation to a contravention by Telstra of the standard licence conditions in new Part 8 of Schedule 1.

A direction given to Telstra by the ACCC under proposed subsection 69A(2) would be declared not to be a legislative instrument for the purposes of the LIA. A remedial direction under proposed subsection 69A(2) would be subject to merits review by the ACT and generally would not be considered to be legislative in character for the purposes of the LIA (see also regulation 7 and Item 21 of Part 1 of Schedule 1 to the Legislative Instruments Regulations 2004).

Proposed subsection 69A(6) would make it clear that limitations on the ability of the ACCC to give a remedial direction are not intended to imply a similar limitation in relation to the ability of the ACMA to give remedial directions under section 69 of the Telecommunications Act.

**New section 69B – Review by the Australian Competition Tribunal of remedial directions given by the ACCC**

New section 69B would allow Telstra to apply to the ACT for merits review of the ACCC’s decision to give it a remedial direction under proposed section 69A. This would be consistent with the availability of merits review of a decision of the ACMA to issue a remedial direction under section 69 (see section 555 and paragraph 1(b) of Schedule 4 to the Telecommunications Act and section 562).

New section 69B provides that Telstra would need to make an application to the ACT within 7 days of being given a remedial direction under proposed section 69A (proposed subsection 69B(2)).

Proposed subsections 69B(3) and (4) provide for the ACT to review the remedial direction and to make a decision affirming the direction, setting aside the direction, setting aside the direction and making a new direction under proposed section 69A in substitution for the direction given by the ACCC, or varying the direction. A decision of the ACT would be taken to be a decision of the ACCC for the purposes of the Telecommunications Act (for example, the requirement in proposed subsection 69A(2) that Telstra comply with a direction (that has been given by the ACCC) would apply
equally to a direction that has been affirmed or varied by the ACT, or a direction that
has been made by the ACT in substitution for the direction originally made by the
ACCC).

Proposed subsections 69B(6) and (7) provide for the conduct of the review by the
ACT, including the provision of information to the ACT by the ACCC and the ability
of the ACT to have regard to the information, documents and evidence given to the
ACCC in connection with the making of the direction under review. To avoid doubt,
proposed subsection 69B(8) provides that Division 2 of Part IX of the TPA would
apply to the proceedings before the ACT in relation to a remedial direction.

**Item 5 – After paragraph 70(5)(b)**

Section 70 allows the ACMA to give a formal warning to a carrier if the carrier
contravenes a condition of its carrier licence. The ACCC also has the power to give a
formal warning to a carrier under section 70 in relation to contravention of a carrier
licence condition in Part 1, 3 or 4 of Schedule 1 to the Telecommunications Act or the
conditions in section 152AZ of the TPA (which requires a carrier to comply with the
standard access obligations, and any ancillary obligations, that are applicable to the
carrier).

Item 5 would amend section 70 to allow the ACCC to give a formal warning to Telstra
if Telstra contravenes the licence conditions in proposed Part 8 of Schedule 1. The
ability to give a formal warning to Telstra would be an alternative to the ACCC issuing
a remedial direction or commencing proceedings in the Federal Court for recovery of a
civil penalty in relation to the contravention.

**Item 6 – At the end of section 70**

Item 6 would insert a new subsection into section 70. Proposed subsection 70(6)
would make it clear that limitations on the ability of the ACCC to give a formal
warning are not intended to imply a similar limitation in relation to the ability of the
ACMA to give a formal warning under subsection 70(1) of the Telecommunications
Act.

**Item 7 – At the end of Schedule 1**

**Proposed Part 8 – Operational separation of Telstra**

**Division 1 – Introduction**

**Proposed clause 48 – Aim and objects**

Proposed clause 48 would set out the aim and objects of proposed Part 8. The aim
and objects would be relevant to the Minister’s approval of Telstra’s draft operational
separation plan (or a variation to a final operational separation plan), as the Minister
would be required to have regard to the extent to which the draft plan is likely to
achieve the aim and objects of Part 8, before approving the plan or the variation (see
new clauses 54 and 56).
The aim of proposed Part 8 would be to promote the principles of transparency and equivalence in relation to the supply by Telstra of wholesale eligible services. ‘Eligible service’ would be defined in proposed clause 50 to have the meaning in section 152AL of the TPA. Section 152AL provides that an ‘eligible service’ is a listed carriage service (within the meaning of the Telecommunications Act), or a service that facilitates the supply of a listed carriage service. In essence, an eligible service would be a service that has been declared by the ACCC under section 152AL of the TPA or is a service that is capable of being declared under that section. The principle of equivalence does not necessarily mean equal treatment. There are a number of legitimate reasons why Telstra may be justified in providing itself with a different type of service or a service at a different price. For example, Telstra’s retail business units are likely to purchase a more integrated service than is needed by its wholesale customers. Alternatively, Telstra may legitimately be entitled to charge itself a lower price for a service if there are economies of scale in the supply of that service and Telstra is the largest purchaser of that service.

Proposed subclause 48(2) specifies seven objects of new Part 8.

*Equivalence in the supply of designated services to Telstra’s wholesale and retail customers (proposed paragraph 48(2)(a))*

The first object is to promote the principle of equivalence in relation to Telstra’s supply of designated services to its wholesale customers and its retail business units. Importantly, the point for measurement of equivalence is between Telstra’s wholesale customers and Telstra’s retail business units. Telstra operates a wholesale business unit which acts as an interface between Telstra’s network business and Telstra’s wholesale customers for the sale of network services. Telstra’s wholesale customers then utilise network services to provide retail services for sale to their retail customers. Telstra’s retail business units utilise services provided by Telstra’s network business in order to provide retail services to Telstra’s retail customers. Establishing equivalent service provision to Telstra’s wholesale customers and to Telstra’s retail business units means that Telstra’s wholesale customers are in a position to compete on a fair basis with Telstra for retail customers.

Designated services would be those eligible services that the Minister has specified in a written determination for the purposes of proposed Part 8 (see proposed clause 50A). In the first determination that the Minister makes under proposed clause 50A, the Minister would be able to specify such eligible services as the Minister considers appropriate, irrespective of whether or not those eligible services are services that are active declared services, within the meaning of section 152AR of the TPA (active declared services are subject to the standard access obligations in Part XIC of the TPA). In making the first determination under proposed clause 50A, the Minister would be required to consult with Telstra. However, the Minister would not be able to specify in subsequent determinations made under proposed clause 50A, or in a variation to any determination made under that clause, an eligible service that is not an active declared service unless Telstra had given written consent to the making of the determination or the variation (see proposed paragraph 50A(2)(b) and subclause 50A(4)).
Proposed subclause 48(3) would provide that, in determining the principle of equivalence for the purposes of proposed paragraph 48(2)(a), regard must be had to terms and conditions relating to price or a method of ascertaining price or other terms and conditions (this would include a price). This is intended to identify that the operational separation provisions are intended to achieve equivalence of both price and non-price terms and conditions of supply. For completeness, other matters could be taken into account in determining the principle of equivalence (proposed subclause 48(4)).

While the details of how equivalence is to be achieved will be specified in Telstra’s operational separation plan, it is envisaged that at least two key mechanisms will be established to address this objective.

Telstra would establish notional contracts for the supply of key elements of designated services between the operationally separated key network support unit and the wholesale business unit, and the retail business unit. These notional contracts would establish service level agreements between the separated units which would underpin the delivery of equivalent service levels. Equivalence would be measured by comparing the level of support, availability, timeliness, technical and operational quality of common support functions supplied to wholesale and retail businesses.

Telstra would also deliver equivalence between the internal wholesale price faced by Telstra’s retail business units and the wholesale prices paid by Telstra’s competitors for designated services. It is intended that Telstra establish a benchmark pricing schedule for the designated services that are used by Telstra’s retail business units. The benchmark prices would reflect the actual wholesale prices paid to Telstra by its wholesale customers, with differences allowed where they are cost justified. This pricing equivalence framework would provide transparency that Telstra is not favouring its own retail activities over the activities of its wholesale customers, while allowing Telstra to obtain legitimate benefits from vertical integration.

**Maintenance of Telstra’s wholesale business unit, retail business unit(s) and key network business unit(s) (proposed paragraph 48(2)(b))**

The second object is to require Telstra to maintain at least one wholesale business unit and at least one retail business unit and at least one key network services business unit. A business unit would be defined to mean a part of Telstra (see the definition in proposed clause 50). This reflects Telstra’s management of its business by organising different roles and parts of the company into business units that are notionally separate from each other.

A key network services business unit would be defined in proposed clause 50 to mean a business unit of Telstra that supplies any of the following in relation to designated services:

(a) fault detection, handling and rectification;

(b) service activation and provisioning; and

(c) a declared network service.
These are the upstream support functions that commonly support both wholesale and retail services.

The achievement of the aim of proposed Part 8, and the other objects of proposed Part 8, assume the continued existence in Telstra of at least one wholesale business unit and at least one retail business unit and at least one key network services unit. This would enable the assessment of the equivalence of Telstra’s supply of declared network services, in relation to the supply of designated services, to its wholesale customers the supply of declared network services for designated services to its retail business units.

Proposed paragraph 48(2)(b) is intended to ensure that the operational separation framework provided for by new Part 8 cannot be unwound by Telstra re-organising itself into different business units. The proposed object is therefore directly related to the object in proposed paragraph 48(2)(c) to promote a substantial degree of organisational and operational separation of Telstra.

Organisational and operational separation of Telstra (proposed paragraph 48(2)(c))

The third object is to promote a substantial degree of organisational and operational separation between Telstra’s wholesale business units, its retail business units and its key network services business units. (Each kind of business unit will be considered as a group if there is more than one business unit of that kind.) A wholesale business unit is a business unit in Telstra that deals with its wholesale customers (see the definition in proposed clause 50). Telstra’s wholesale customers are persons who purchase eligible services from Telstra in order to supply those services, or to use the services in connection with the supply of eligible services, to their customers. A key network services business unit is a business unit in Telstra that supplies certain services that relate to services. These services are fault detection, handling and rectification services, service activation and provisioning services and any other service that the Minister declares to be a declared network service under proposed clause 50B (see the definition in proposed clause 50). A retail business unit in Telstra is a business unit that deals with Telstra’s retail customers (see proposed clause 50).

This organisational separation is necessary to prevent the internal functions that Telstra’s wholesale customers rely upon, in order to compete effectively with Telstra, from being operated in a way that systematically advantages the operation of Telstra’s retail business.

This separation is also intended to ensure that wholesale services are supplied by a wholesale business unit that is organisationally separate from any retail business unit, and that has an appropriate status and importance within Telstra. While the details will be subject to specification in Telstra’s operational separation plan, it is envisaged that this wholesale business unit would:

- be headed by an executive of equivalent status to the heads of the retail business units;
- be located in secure separate premises not used by any retail business unit;
- have control over the front of house interfaces with wholesale customers;
- have responsibility for negotiating supply contracts for wholesale customers and would have equivalent authority over setting price and non-price terms of supply as the retail business unit;
- commit to security measures to protect confidentiality of wholesale customer information by means of an information security plan; and
- be staffed separately to the retail business units.

Responsiveness to customers’ needs (proposed paragraph 48(2)(d))

The fourth object is to promote responsiveness by Telstra in meeting its wholesale customers’ needs in relation to eligible services. This object is intended to complement the first object, but also to promote measures that address all wholesale services, not just designated services. This object is intended to apply to those services where it may not possible to compare directly performance between wholesale and retail services.

Proposed subclause 48(5) would provide that, in determining the needs of Telstra’s wholesale customers for the purposes of proposed paragraph 48(2)(d), regard must be had to a number of matters. The first is the need for Telstra’s wholesale customers to be supplied by Telstra with eligible services on a basis that allows those customers to compete on a fair basis, in relation to the supply of those services, with Telstra’s retail business units. This does not mean that Telstra must supply the same service to wholesale customers as it supplies to its retail business units. It is intended to promote the supply by Telstra of wholesale services that can be used by wholesale customers to build effective retail services and compete effectively with the services supplied by Telstra’s retail business units. In other words, wholesale services should not be provided by Telstra in a way that prevents wholesale customers from supplying competitive retail services, through augmenting those Telstra wholesale services with their own infrastructure, systems and features.

The second matter is the need for disputes between Telstra and its wholesale customers about eligible services to be resolved in a fair and timely manner. Regard must also be had to the need for confidentiality in relation to eligible services to its wholesale customers (ie. the need for confidential information that Telstra holds about its wholesale customers’ businesses (including information about their customers) to be kept secure) and the need to be kept informed of relevant issues and developments in connection with Telstra’s network and eligible services supplied by Telstra. This is intended to emphasise the importance of improved communication by Telstra to its wholesale customers about matters that are relevant to their businesses because of their purchase of services from Telstra. This could include information about wholesale service functionality, or enabling wholesale customers to access an appropriate level of information about committed plans to deploy new network technologies or substantially upgrade existing network technologies. Matters other than those specified in proposed subclause 48(5) could be taken into account in determining the needs of Telstra’s wholesale customers (proposed subclause 48(6)).
**Requirement to have a final operational separation plan (proposed paragraph 48(2)(e))**

The fifth object is to require Telstra to have a plan (known as the final operational separation plan) to achieve the aim and objects of proposed Part 8. Telstra will be required to give to the Minister a draft operational separation plan for approval that is directed at achieving the aim and objects of proposed Part 8, that requires Telstra to report annually to the Minister on compliance with the operational separation plan, that provides for an independent audit of Telstra’s compliance, and that complies with such other requirements as to the Minister specifies. Once approved by the Minister, the draft plan will become the final operational separation plan. Compliance with the operational separation plan is not a licence condition of itself. Instead, if Telstra does not comply with the plan, the Minister may direct Telstra to prepare a draft rectification plan that outlines the steps that Telstra will take to comply with the operational separation plan. Telstra will be required to give the draft rectification plan to the Minister for approval. If Telstra does not comply with the approved rectification plan, the ACCC or the ACMA may issue a remedial direction to Telstra to comply with the plan. The ACCC, the ACMA or the Minister would also be able to commence proceedings in the Federal Court to recover a civil penalty for the contravention.

Requiring Telstra to develop the plan will ensure the best possible fit with Telstra’s existing practices and procedures, while still achieving the aim and objects of proposed Part 8.

**Compliance, monitoring and audit procedures and processes (proposed paragraph 48(2)(f))**

The sixth object is to ensure that Telstra has systems, procedures and processes in place that promote and facilitate compliance with the final operational separation plan and monitoring of, and reporting on, compliance with the plan. This object is also directed towards ensuring that Telstra develops performance measures to allow compliance with the final operational separation plan to be monitored and assessed and that compliance with the plan is audited.

For Telstra’s implementation of the final operational separation plan to be credible and transparent, measures must be in place to enable Telstra’s compliance with the aim and objectives of Part 8 to be measured and verified.

While the details will be specified in Telstra’s operational separation plan it is envisaged that Telstra would establish internal governance and enforcement procedures including the following:
- compliance with the plan would form part of the performance evaluation of those business units and personnel who have responsibility for aspects of the operational separation plan.
- a committee of the board of directors would be tasked with overseeing compliance with the framework.
- a new senior position in Telstra responsible for monitoring Telstra’s compliance with the plan, and report to the board and prepare the annual
compliance report to Government, develop an education program on compliance, monitor Telstra’s response to wholesale customer complaints, and oversee any rectification measures.

- an independent external auditor would verify Telstra’s compliance with the operational separation plan, and any retail pricing protocol developed between the ACCC and Telstra.

**Balancing the achievement of the objects with the Telstra’s ability to compete on a fair and efficient basis (proposed paragraph 48(2)(g))**

The sixth object is to ensure that the achievement of the aim and objects of Part 8 discussed above does not impair Telstra’s ability to compete on a fair and efficient basis.

This objective recognises that Telstra should be able to take advantage of the legitimate benefits of its vertical integration and economies of scope and scale. The operational separation measures should be targeted at the areas where wholesale competitors have a genuine concern that Telstra is taking unfair advantage of its integrated structure and market position. Operational separation is intended to provide a more transparent competitive environment so competitors are confident that Telstra is competing with them on a fair basis. It is not intended to prevent Telstra from competing vigorously but fairly.

To the greatest extent possible operational separation should be implemented in a manner that is cost effective, in so far as the cost of the processes Telstra is obliged to put in place to demonstrate equivalence are proportionate to the benefits achieved.

**Proposed clause 49 – Simplified outline**

Proposed clause 49 provides a simplified outline of proposed Part 8.

**Proposed clause 50 – Definitions**

Proposed clause 50 would define terms used in Part 8 of Schedule, including terms that are referred to in the objects of Part 8 in proposed clause 48. The key definitions are discussed in relation to the objects in proposed clause 48.

**Proposed clause 50A – Designated services**

Proposed clause 50A would provide a definition of a ‘designated service’ for the purposes of proposed Part 8. Designated services are referred to in the objects of proposed Part 8 (in proposed paragraph 48(2)(a)).

A ‘designated service’ would be defined as an eligible service that is specified by the Minister in a written determination under proposed subclause 50A(1). The effect of proposed subclause 50A(2) would that, in the first determination that the Minister makes under proposed clause 50A, the Minister would be able to specify such eligible services as the Minister considers appropriate, irrespective of whether or not those eligible services are services that are active declared services, within the meaning of
section 152AR of the TPA (active declared services are subject to the standard access obligations in Part XIC of the TPA). The Minister would be required to consult with Telstra before making the first determination (proposed subclause 50A(5)). However, the Minister would not be able to specify in subsequent determinations made under proposed clause 50A, or in a variation to any determination made under that clause, an eligible service that is not an active declared service unless Telstra had given written consent to the making of the determination or the variation (see proposed paragraph 50A(2)(b) and subclause 50A(4)). The Minister would therefore need to consult with Telstra under proposed subclause 50A(5) for this purpose.

The Minister would have regard to the aims and objects of this part in specifying designated services, or a methodology for determining designated services. Determinations made by the Minister under proposed subclause 50A(1) would be legislative instruments for the purposes of the LIA. This would mean that determinations would be registered on the Federal Register of Legislative Instruments and would be subject to Parliamentary disallowance.

It is intended that services would be considered as designated services if they were considered to be important to the development of competition, particularly, if there were concerns that they were currently not be supplied on an equivalent basis. While the initial list of designated services would be finalised by the Minister following further consultation, it is intended that it would include:

- Unbundled local loop service;
- Local carriage service;
- Line sharing service;
- Wholesale ADSL (layer 2);
- Public switched telecommunications network service originating service; and
- Public switched telecommunications network service terminating service.

The Minister will be able to make a determination under proposed clause 50A prior to the commencement of Schedule 11, relying on subsection 4(1) of the AIA, so that the determination would commence at the same time as Schedule 11 and not earlier.

‘Eligible service’ would be defined in proposed clause 50 to have the same meaning as in section 152AL of the TPA. Section 152AL of the TPA provides that an eligible service is a listed carriage service (as defined by the Telecommunications Act) or a service that facilitates the supply of a listed carriage service.

**Proposed clause 50B – Declared network services**

Proposed subclause 50B(1) would provide that a ‘declared network service’ is a service specified in a written determination by the Minister under that subclause. The Minister would have regard to the aims and objects of this part in determining declared network services. Declared network services are the common support functions that are provided by key network service business units to both wholesale business units and Telstra’s retail business units. The concept of declared network services is relevant to the definition of ‘key network services business unit’ in proposed clause 50. Proposed clause 50 defines a key network services business unit to be a business unit
in Telstra that supplies fault detection, handling and rectification, service activation and provisioning, and a declared network service. The equivalent provision of declared network services is important to enable wholesale customers to compete on a fair basis with Telstra’s retail business units.

A determination by the Minister would be a legislative instrument for the purposes of the LIA. This would mean that the determination would be registered on the Federal Register of Legislative Instruments and would be subject to Parliamentary disallowance.

**Proposed clause 50C – Notional contracts**

Proposed clause 50C declares that, for the purposes of proposed Part 8, a notional contract (however described) between any of Telstra’s business units is to be treated as if it were an actual contract. The reference to ‘however described’ in proposed clause 50C is intended to make it clear that the concept of a notional contract would cover any arrangement between Telstra’s business units which is intended to replicate an actual contract.

The provision, together with the definition of ‘supply’ in proposed clause 50, is relevant to the interpretation of the aim and some of the objects of proposed Part 8, in that the aim and objects assume the ability to compare the supply by Telstra of eligible services (and, in some cases declared network services) to its wholesale customers and the supply of the same or similar services to customers of its retail business units. This would involve comparing the terms and conditions of supply (including the price at which services are supplied).

**Division 2 – Operational separation plan**

**Proposed clause 51 – Contents of draft or final operational separation plan**

Proposed clause 51 deals with the contents of a draft or final operational separation plan. It would be a condition of Telstra’s licence condition that it provide a draft separation plan to the Minister within 90 days of the commencement of proposed clause 53. (The amendments in Schedule 11 would commence on the earlier of a day to be proclaimed or 6 months after the day on which the Bill receives the Royal Assent.)

Proposed subsection 51(1) specifies the matters that must be addressed in order for a plan given to the Minister to be a draft operational separation plan and a final operational separation plan that has been approved by the Minister. The draft or final operational separation plan would need to be directed towards achieving the aim and objects of Part 8 (see proposed clause 48). It would also need to contain provisions requiring Telstra to prepare and give to the Minister an annual compliance report that details the extent to which Telstra has complied with the plan during the year. A draft or final operational separation plan should also contain provisions requiring Telstra to arrange an annual independent audit of its compliance with the final operational separation plan and to obtain, and give to the Minister, a report of that audit. The plan would also need to provide for the annual compliance plan and the audit report (or
extracts of the compliance plan or audit report) to be published on Telstra’s Internet site.

A draft or final operational separation plan would also need to comply with such requirements as are specified by the Minister in a written determination made under proposed paragraph 51(1)(d). It is intended that this instrument would be used to specify the features of the model of operational separation that has been developed by the Government in consultation with Telstra. The majority of these features have been described above. The Minister could also specify in such a determination the manner in which a requirement in proposed paragraph 51(1)(b) or (c) is to be met in the plan. For example, the Minister could specify the time by which the operational separation plan must require the annual compliance plan to be given to the Minister or the Minister could specify requirements relating to the publication of an extract of the compliance plan on Telstra’s website.

A determination by the Minister under proposed paragraph 51(1)(d) would be a legislative instrument for the purposes of the LIA (proposed subclause 51(4)). This would mean that the determination would be registered on the Federal Register of Legislative Instruments and would be subject to Parliamentary disallowance. The Minister could vary the requirements specified in a determination by legislative instrument, or revoke a determination by legislative instrument, relying on subsection 33(3) of the AIA.

The Minister will be able to make a determination under proposed paragraph 51(1)(d) prior to the commencement of Schedule 11, relying on subsection 4(1) of the AIA. Such a determination would commence at the same time as Schedule 11, and would not commence earlier than that Schedule.

A draft or final operation separation plan could empower the Minister, the ACCC or the ACMA to make decisions of an administrative character (proposed subsection 51(3)).

**Proposed clause 52 – Draft operational separation plan to be given to Minister**

Proposed clause 52 would require Telstra to give a draft operational separation to the Minister within 90 days after the commencement of proposed clause 52. Proposed clause 52 (together with the rest of Schedule 11 to the Bill) would commence on the earlier of a day to be proclaimed or 6 months after the day on which the Bill receives the Royal Assent.

If Telstra did not provide a draft plan to the Minister within the required timeframe, the ACCC or the ACMA could give Telstra a formal warning under section 70, or a remedial direction (in the case of the ACCC under proposed section 69A or in the case of the ACMA under section 69). Subsequently, or as an alternative to the issue of a remedial direction or the giving of a formal warning, the ACCC, the ACMA or the Minister could commence proceedings in the Federal Court seeking recovery of a civil penalty up to a maximum of $10 million (failure to comply a condition of a carrier licence is a civil penalty provision – see section 68).
Proposed clause 53 – Public comment – draft operational separation plan

Proposed clause 53 would require Telstra to undertake a public consultation process in relation to a draft operational separation plan and specifies the kind of consultation that must occur.

Telstra would need to publish a notice in a newspaper circulating generally in each State and the Australian Capital Territory and the Northern Territory stating that it has prepared a draft operational separation and that a copy of the draft plan will be available on its Internet site for a period of 30 days after the publication of the notice. Telstra would be obliged to make a copy of the plan available on its Internet site. Telstra would also need to invite persons to give it written comments in relation to the draft plan within 30 days after the publication of the notice in the newspapers.

When giving a draft operational separation plan to the Minister, Telstra would need to give the Minister a copy of any comments it has received in relation to the draft plan (proposed subclause 53(2)).

Proposed clause 54 – Approval of draft by Minister

Proposed clause 54 provides for the Minister to approve or to refuse to approve a draft operational separation plan given to the Minister by Telstra. Proposed subclause 54(3) requires the Minister to have regard to the extent to which the plan is likely to achieve the aim and objects of proposed Part 8 (see proposed clause 48) in deciding whether to approve or refuse to approve a draft operational separation plan. In addition, the Minister would be able to take into account such other matters as the Minister considers relevant in deciding whether to approve or refuse to approve the draft operational separation plan.

Proposed subclause 54(4) would deem the draft plan to have been approved by the Minister if the Minister has not made a decision whether to approve or reject the draft plan before the end of 90 days after the Minister received the draft plan.

Once the Minister makes a decision to approve or refuse to approve a draft plan, the Minister would need to notify Telstra of that decision and, if the Minister has decided not to approve the plan, give Telstra written reasons for that decision.

If the Minister refuses to approve the draft plan, the Minister may give Telstra a direction to vary the draft plan and to give the varied plan to the Minister within 60 days after Telstra was given the direction. For example, if a draft plan did not contain provision requiring Telstra to prepare an annual compliance report as required by proposed paragraph 51(1)(b), the Minister would have to refuse to approve the plan, on the basis that it did not meet the legal requirements of a draft plan, and the Minister could direct Telstra to vary the plan so as to meet the requirements in proposed paragraph 51(1)(b). A direction given by the Minister to vary the plan would be a legislative instrument for the purposes of the LIA (proposed subclause 54(10)). This is because a direction would be considered legislative in character as defined in section 5 of the LIA. The effect of item 41 of the table in subsection 44(2) and item 46 in the
table in subsection 54(2) of the LIA would be that a direction would not be subject to disallowance and Part 6 of the LIA.

If Telstra did not provide a varied draft plan to the Minister within the required timeframe, the ACCC or the ACMA could give Telstra a formal warning under section 70, or a remedial direction (in the case of the ACCC under proposed section 69A, or in the case of the ACMA under section 69). Subsequently, or as an alternative to the issue of a remedial direction or the giving of a formal warning, the ACCC, the ACMA or the Minister could commence proceedings in the Federal Court seeking recovery of a civil penalty up to a maximum of $10 million (failure to comply a condition of a carrier licence is a civil penalty provision – see section 68).

**Proposed clause 55 – Effect of approval**

Proposed clause 55 would provide that a draft operational separation plan that has been approved by the Minister is a final operational separation plan, from the time that Telstra is notified of the Minister’s approval of the draft plan. For the avoidance of doubt, proposed subclause 55(2) would provide that a final operational separation plan is not a legislative instrument for the purposes of the LIA, and proposed subclause 55(3) would provide that compliance with a final operational separation plan is not a carrier licence condition. Contravention of a final operational separation plan could be the subject of a direction by the Minister to prepare a draft rectification plan (see proposed clause 60).

**Proposed clause 56 – Variation of final operational separation plan**

Proposed clause 56 would allow Telstra to give a variation of a final operational separation plan to the Minister for approval. The process for approval of a proposed variation plan would be same as the process that would apply to the approval of a draft operational separation plan (see proposed clause 54). The Minister would be required to have regard to the extent to which the operational separation plan, as proposed to be varied, would be likely to achieve the aim and objects of Part 8. If the Minister has not made a decision by the end of the period of 90 days after receiving the variation, would be taken to have approved the variation. The Minister would also be required to notify Telstra of the Minister’s decision and, in the case of a decision to refuse to approve a variation, would need to provide written reasons for the refusal.

For the avoidance of doubt, proposed subclause 56(10) would provide that a variation of a final operational separation plan is not a legislative instrument for the purposes of the LIA.

**Proposed clause 56A – Minister may direct Telstra to vary final operational separation plan**

Proposed clause 56A would allow the Minister to direct Telstra to prepare a draft variation to a final operational separation plan that is in force and to give that draft variation to the Minister for approval. Telstra would be required to give the Minister the draft variation within 60 days after the day on which the Minister gave it the direction.
An example of the circumstances in which the Minister may give Telstra a direction under proposed clause 56A would be where the Minister has determined additional requirements for the content of a draft and final operational separation plan under proposed paragraph 51(1)(c). Under proposed clause 56A, the Minister could direct Telstra to vary the final operational separation plan in force at that time to address the additional requirements specified in the determination under proposed paragraph 51(1)(c). A direction given by the Minister to vary the plan would be a legislative instrument for the purposes of the LIA (proposed subclause 56A(3)). This is because a direction would be considered legislative in character as defined in section 5 of the LIA. The effect of item 41 of the table in subsection 44(2) and item 46 in the table in subsection 54(2) of the LIA would be that a direction would not be subject to disallowance and Part 6 of the LIA.

Proposed clause 57 – Public comment—variation of final operational separation plan

Proposed clause 57 would require Telstra to undertake public consultation in relation to a draft variation to a final operational separation plan in the same way that would be required in relation to a draft operational separation plan (see proposed clause 53) except that the period of public consultation on the draft variation would be 20 days instead of 30 days. However, this requirement would not apply in relation to two kinds of draft variations. First, it would not apply to a draft variation prepared in compliance with a direction under proposed clause 56A. Secondly, it would not apply in relation to a draft variation proposed by Telstra under proposed clause 56, where Telstra had given the Minister an outline of the proposed variation and the Minister had decided on the basis of the outline that the draft variation was of a minor nature and notified Telstra in writing accordingly. For the avoidance of doubt, a notice given by the Minister to Telstra under proposed paragraph 57(1)(b)(ii) would be specified not to be a legislative instrument for the purposes of the LIA (proposed subsection 57(4)).

Proposed clause 58 – Publication of final operational separation plan

Proposed clause 58 would require Telstra to publish a copy of a final operational separation plan on its website as soon as practicable after the plan comes into force. A final operational separation plan would come into force at the time that the Minister decided to approve the plan.

Telstra would also be required to publish a copy of a varied operational separation plan on its website as soon as practicable after the variation comes into force.

Division 3 – Rectification plan

Proposed clause 59 – Contents of draft or final rectification plan

Under proposed clause 60, if Telstra has contravened or is contravening a final operational separation plan, the Minister would be able to direct Telstra to prepare a draft rectification plan in relation to the contravention. Proposed clause 59 specifies
the matters that must be set out in a draft or final rectification plan. These matters would be the action that Telstra has taken to ensure that the contravention of the final operational separation plan ceases and the action it will take to ensure that the contravention does not occur again in the future. The draft rectification plan must also specify the action to be taken by Telstra to report to the Minister on the action it has taken to cease the contravention and the action it is taking to prevent contraventions in the future.

A draft or final rectification plan would be able to provide for the Minister, the ACCC or the ACMA to make decisions of an administrative character in relation to a matter under the plan.

Proposed clause 60 – Draft rectification plan to be given to the Minister

If Telstra has contravened or is contravening a final operational separation plan, proposed clause 60 would allow the Minister to direct Telstra to prepare a draft rectification plan in relation to the contravention. Telstra would be required to give the Minister a draft rectification plan within 60 days after the day on which the Minister gave it the direction. A direction given by the Minister to prepare a draft rectification plan would be a legislative instrument for the purposes of the LIA (proposed subclause 56A(3)). This is because a direction would be considered legislative in character as defined in section 5 of the LIA. The effect of item 41 of the table in subsection 44(2) and item 46 in the table in subsection 54(2) of the LIA would be that a direction would not be subject to disallowance and Part 6 of the LIA.

Proposed clause 61 – Approval of draft by Minister

If Telstra gives the Minister a draft rectification plan in relation to a particular contravention of a final operational separation plan, the Minister must approve or refuse to approve the plan. The approval process set out in proposed clause 61 would be similar to the process for approving a draft operational separation plan in that the Minister would be taken to have approved the draft rectification plan if the Minister had not made a decision before the end of the period of 90 days after the Minister received the draft plan. Similar requirements to notify Telstra of a decision to approve the plan or of a refusal to approve the plan would apply, as would the requirement for the Minister to give Telstra written reasons for a refusal to approve a draft plan. However, in deciding whether to approve or to refuse to approve a draft rectification plan, the Minister would have to have regard to the extent to which the action Telstra proposes to take is likely to ensure that the contravention of the operational separation plan ceases and that there will be no repetition of the contravention in the future. The Minister would also be able to take into account such other matters as the Minister considers are relevant.

If the Minister refuses to approve the draft rectification plan, the Minister may give Telstra a direction to vary the draft plan and to give the varied plan to the Minister within 60 days after Telstra was given the direction. For example, the Minister may be of the opinion that the action proposed to be taken by Telstra, as described in the plan, would not be likely to ensure that the relevant contravention of the operational separation plan ceases. A direction given by the Minister to vary the plan would be a
legislative instrument for the purposes of the LIA (proposed subclause 61(10)). This is because a direction would be considered legislative in character as defined in section 5 of the LIA. The effect of item 41 of the table in subsection 44(2) and item 46 in the table in subsection 54(2) of the LIA would be that a direction would not be subject to disallowance and Part 6 of the LIA.

**Proposed clause 62 – Effect of approval**

Proposed clause 62 would provide that a rectification plan that has been approved by the Minister is a final rectification plan, from the time that Telstra is notified of the Minister’s approval of the draft plan. For the avoidance of doubt, proposed subclause 62(2) would provide that a final operational separation plan is not a legislative instrument for the purposes of the LIA.

**Proposed clause 63 – Variation of final rectification plan**

Proposed clause 63 would allow Telstra to give a variation of a rectification plan to the Minister for approval. The process for approval of a proposed variation plan would be same as the process that would apply to the approval of a draft rectification plan (see proposed clause 61). The Minister would be required to have regard to the extent to which the rectification plan, as proposed to be varied, would be likely to ensure that the contravention of the operational separation plan ceases and that there will be no repetition of the contravention in the future. However, the Minister would be able to take into account such other matters as the Minister considers are relevant.

If the Minister has not made a decision by the end of the period of 90 days after receiving the variation, the Minister would be taken to have approved the variation. The Minister would also be required to notify Telstra of the Minister’s decision and, in the case of a decision to refuse to approve a variation, would need to provide written reasons for the refusal.

For the avoidance of doubt, proposed subclause 63(10) would provide that a variation of a final rectification plan is not a legislative instrument for the purposes of the LIA.

**Proposed clause 64 – Minister may direct Telstra to vary final rectification plan**

Proposed clause 64 would allow the Minister to direct Telstra to prepare a draft variation to a final rectification plan that is in force and to give that draft variation to the Minister for approval. Telstra would be required to give the Minister the draft variation within 60 days after the day on which the Minister gave it the direction.

A direction given by the Minister to vary the plan would be a legislative instrument for the purposes of the LIA (proposed subclause 64(3)). This is because a direction would be considered legislative in character as defined in section 5 of the LIA. The effect of item 41 of the table in subsection 44(2) and item 46 in the table in subsection 54(2) of the LIA would be that a direction would not be subject to disallowance and Part 6 of the LIA.
Proposed clause 65 – Compliance with final rectification plan

Proposed clause 65 would require Telstra to comply with a final rectification plan. The ACCC or the ACMA would be able to give Telstra direction to comply with the final rectification plan if Telstra has contravened, or is contravening, the rectification plan (see proposed section 69A (item 4 in Schedule 11 to the Bill) and section 69 of the Telecommunications Act). Alternatively, or after having issued a remedial direction, the ACCC, the ACMA or the Minister would be able to commence proceedings in the Federal Court seeking recovery of a civil penalty in relation to Telstra’s failure to comply with a condition of its carrier licence.

Proposed clause 66 – Publication of final rectification plan

Proposed clause 66 would require Telstra to publish a copy of a final rectification plan on its website as soon as practicable after the plan comes into force. This would be at the time that Minister approves the plan.

Telstra would also be required to publish a copy of a varied operational separation plan on its website as soon as practicable after the variation comes into force.

Trade Practices Act 1974

Item 8 – At the end of Part XIB

New Division 14—Operational separation for Telstra

Item 8 would insert a new Division at the end of Part XIB of the TPA dealing with operational separation of Telstra. Part XIB deals with anti-competitive conduct and record-keeping rules in the telecommunications industry.

New section 151CP – Operational Separation for Telstra

Proposed section 151CP would apply where Telstra has engaged in conduct in order to comply with a licence condition set out in new Part 8 in Schedule 1 to the Telecommunications Act and would require the ACCC, in performing a function or exercising a power under Part XIB, to have regard to Telstra’s conduct, to the extent that the conduct is relevant to the performance of the particular function or the exercise of the particular power.

The meaning of the terms ‘conduct’ and ‘engaging in conduct’ is provided by subsection 4(2) of the TPA: those terms are to be read as a reference to doing or refusing to do any act.

The purpose of the proposed amendment in item 8 is to provide an appropriate linkage between Telstra’s compliance with the licence conditions relating to operational separation and Part XIB, where it is relevant.
Item 9 – After section 152EP

New section 151EQ – Operational separation for Telstra

Item 9 would insert a new proposed section 152EQ into Part XIC of the TPA. Part XIC provides for an access regime for the telecommunications industry.

Proposed section 152EQ would be a counterpart for Part XIC to the proposed amendment in item 8. Proposed section 152EQ would apply where Telstra has engaged in conduct in order to comply with a licence condition set out in new Part 8 in Schedule 1 to the Telecommunications Act and would require the ACCC, in performing a function or exercising a power under Part XIC, to have regard to Telstra’s conduct, to the extent that the conduct is relevant to the performance of the particular function or the exercise of the particular power.

The meaning of the terms ‘conduct’ and ‘engaging in conduct’ is provided by subsection 4(2) of the TPA: those terms are to be read as a reference to doing or refusing to do any act.

The purpose of the proposed amendment in item 9 is to provide an appropriate linkage between Telstra’s compliance with the licence conditions relating to operational separation and Part XIC, where it is relevant.

Schedule 12—Interim determinations about access

Division 8 of Part XIC of the TPA relates to the resolution of access disputes. Section 152CP provides that where there is a dispute over access to a declared service, the ACCC must make a written determination on access (unless it terminates the arbitration: section 152CS). Section 152CPA provides that the ACCC may make interim determinations. An interim determination does not terminate an arbitration, and where the ACCC makes an interim determination in an access dispute, it must still make a final determination. Subsection 152CPA(5) provides that an interim determination remains in force until the end of the period specified in the determination, and has a maximum duration of 12 months.

Schedule 12 makes two amendments to section 152CPA to improve the operation of the interim determinations:

- Items 1 and 3 allow the ACCC to make or vary an interim determination in certain circumstances without having to consult with the parties to an arbitration
- Item 2 allows the ACCC to remake an interim determination once the initial 12-month period of the interim determination has expired.
Trade Practices Act 1974

Item 1 – After subsection 152CPA(2)

Item 1 would insert proposed subsection (3) into section 152CPA. Proposed subsection 152CPA(3) provides that the ACCC is not required to observe any of the requirements of procedural fairness in relation to the making of an interim determination in the following circumstances:

- where the ACCC has determined pricing principles under section 152AQA in relation to a declared service, and the price-related terms and conditions in the interim determination made by the ACCC are consistent with the price-related terms and conditions in the pricing principles determined by the ACCC; or
- where the ACCC has determined model terms and conditions under section 152AQB in relation to a declared service, and the price-related terms and conditions in the interim determination made by the ACCC are consistent with the price-related terms and conditions in the model terms and conditions determined by the ACCC.

(The term price-related terms and conditions is defined in the new subsection as terms and conditions relating to price or a means of ascertaining price. This would include specification of a price in the interim determination.)

The effect of this amendment would be that the ACCC will not be required to consult with the parties to an access dispute when it is making an interim determination and the price-related terms and conditions in that interim determination reflect price-related terms and conditions contained in the pricing principles or the model terms and conditions that have been determined by the ACCC in relation to the service that is the subject of the dispute.

Subsection 152AQA(4) provides that, before the ACCC determines pricing principles under subsection 152AQA(1), it must publish a draft determination, invite comments on the draft and take those comment into consideration. Subsection 152AQB(5) similarly provides that the ACCC must publish a draft determination and invite comments and consider those comments before determining model terms and conditions. Therefore, where there is a pricing principles determination or model terms and conditions in force for a particular service, there will have already been an opportunity for persons to comment on the price-related terms and conditions specified in such a determination. It is therefore appropriate to provide that, where the ACCC later relies on these price-related terms and conditions in making an interim determination, it does not have to go once again through the process of consultation with the parties.

Relieving the ACCC from the requirement to consult with the parties to an access dispute in relation to these matters in an interim determination will ensure a more timely resolution of access disputes, while still ensuring that parties have an opportunity to be heard on price-related terms and conditions.
Item 2 – After subsection 152CPA(5)

Item 2 would insert proposed subsections (5A) and (5B) into section 152CPA.

Currently an interim determination made by the ACCC under section 152CPA may be valid for a period of no longer than 12 months. There is no scope for the ACCC to extend the period of an interim determination. The current 12-month limit hinders the ability of the ACCC to rely on an interim determination as a step in resolving arbitrations. If the terms and conditions that are mandated by an interim determination expire before the arbitration is resolved through a final determination, this provides a disincentive for parties to promptly resolve their access disputes.

Proposed subsection 152CPA(5A) would remove the incentive to delay the arbitration process, and would encourage quicker resolution of arbitrations.

Proposed subsection 152CPA(5A) provides that the ACCC may extend the period of an interim determination for an additional period of up to 12 months beyond the initial period of the interim determination specified by the ACCC. The ACCC may only extend the period of the interim determination once.

Proposed subsection 152CPA(5B) provides that the ACCC is not required to observe the requirements of procedural fairness in relation to a decision under proposed subsection 152CPA(5A) to extend (or to refuse to extend) the period of an interim determination. This amendment reflects the amendments made by Items 1 and 3, which remove, in certain circumstances, the requirement for the ACCC to consult with the parties to an arbitration in making or varying an interim determination.

Item 3 – At the end of section 152CPA

Item 3 would insert a new subsection (12) into section 152CPA. Proposed subsection 152CPA(12) mirrors the operation of proposed subsection 152CPA(3), to be inserted by Item 1. Whereas proposed subsection 152CPA(3A) applies to the making by the ACCC of an interim determination, proposed subsection 152CPA(12) applies to the variation by the ACCC of an interim determination.

Subsection 152CPA(10) provides that the ACCC may vary an interim determination. Proposed subsection 152CPA(12) would provide that the ACCC is not required to observe the requirements of procedural fairness in relation to the variation of an interim determination where the price-related terms and conditions in the varied interim determination are consistent with price-related terms and conditions that are included in pricing principles that have been determined by the ACCC (under section 152AQA) or in model terms and conditions that have been determined by the ACCC (under section 152AQB).

The effect of this amendment is that the ACCC will not be required to consult with the parties to an access dispute when it is making a variation to an interim determination to bring the price-related terms and conditions in that interim determination in line with the price-related terms and conditions contained in pricing principles or in model terms and conditions that have been determined by the ACCC.
As noted above, the ACCC is obliged to undertake a consultation process before determining any pricing principles or model terms and conditions. Since parties will have an opportunity to present their views to the ACCC prior to the making of these determinations, it is appropriate to provide that where the ACCC later relies on these determinations in varying an interim determination, the ACCC be relieved from the requirement to consult with the parties. This will ensure a speedier resolution of access disputes and will relieve the ACCC from unnecessarily doubling-up on consultation.

**Schedule 13 – Remedial directions**

Schedule 13 would make amendments to provisions of the Telecommunications Act that give the ACMA a power to issue remedial directions to provide that such directions are not legislative instruments for the purposes of the LIA.

*Telecommunications Act 1997*

**Item 1 – At the end of section 69**

Section 69 enables the ACMA to give a remedial direction to a carrier where the carrier has contravened, or is contravening, a condition of its carrier licence. A carrier who has been given a direction under section 69 may apply to the ACMA for reconsideration of the decision to give the direction and subsequently merits review by the AAT (see sections 555 and 562 and paragraph 1(b) of Schedule 4 to the Telecommunications Act). ACMA’s power under section 69 is similar in nature to the power that the ACCC would have in relation to contraventions by Telstra of certain carrier licence conditions relating to operational separation (see proposed new section 69A, to be inserted by item 3 of Schedule 11 to the Bill). As a direction given by the ACCC under proposed section 69A would be declared not to be a legislative instrument for the purposes of the LIA (it would be subject to merits review by the ACT and therefore would not generally be considered to be legislative in character for the purposes of the LIA (see section 7 of the LIA and regulation 7 and item 21 of Part 1 to the Schedule to the *Legislative Instruments Regulations 2004*)), item 1 would make a similar amendment to section 69.

**Item 2 – At the end of section 102**

Section 102 enables the ACMA to give a remedial direction to a carriage service provider where the carriage service provider has contravened, or is contravening, a service provider rule. A carriage service provider who has been given a direction under section 102 may apply to the ACMA for reconsideration of the decision to give the direction and subsequently merits review by the AAT (see sections 555 and 562 and paragraph 1(h) of Schedule 4 to the Telecommunications Act). ACMA’s power under section 102 is similar in nature to the power that the ACCC would have in relation to contraventions by Telstra of certain carrier licence conditions relating to operational separation (see proposed new section 69A, to be inserted by item 3 of Schedule 11 to the Bill). As a direction given by the ACCC under proposed...
section 69A would be specified not to be a legislative instrument for the purposes of
the LIA (it would be subject to merits review by the ACT and therefore would not
generally be considered to be legislative in character for the purposes of the LIA (see
section 7 of the LIA and regulation 7 and item 21 of Part 1 to the Schedule to the
Legislative Instruments Regulations 2004)), item 2 would make a similar amendment
to section 102.

Item 3 – At the end of section 121

Section 121 enables the ACMA to give a remedial direction to a person (in a particular
section of the telecommunications or e-marketing industries) who has contravened, or
is contravening, a registered industry code which applies to participants in that industry
requiring the person to comply with the code. A person who has been given a
direction under section 121 may apply to the ACMA for reconsideration of the
decision to give the direction and subsequently merits review by the AAT (see sections
555 and 562 and paragraph 1(j) of Schedule 4 to the Telecommunications Act).
ACMA’s power under section 121 is similar in nature to the power that the ACCC
would have in relation to contraventions by Telstra of certain carrier licence conditions
relating to operational separation (see proposed new section 69A, to be inserted by
item 3 of Schedule 11 to the Bill). As a direction given by the ACCC under proposed
section 69A would be specified not to be a legislative instrument for the purposes of
the LIA (it would be subject to merits review by the ACT and therefore would not
generally be considered to be legislative in character for the purposes of the LIA (see
section 7 of the LIA and regulation 7 and item 21 of Part 1 to the Schedule to the
Legislative Instruments Regulations 2004)), item 3 would make a similar amendment
to section 121.