

EXPLANATORY STATEMENT

Telecommunications (Consumer Protection and Service Standards) Act 1999

Telecommunications (Eligible Revenue) Determination 2015

Issued by the Australian Communications and Media Authority

Purpose

The *Telecommunications (Eligible Revenue) Determination 2015* (**the Determination**):

- sets out how the eligible revenue of a participating person (defined in section 44 of the *Telecommunications (Consumer Protection and Service Standards) Act 1999* (**the TCPSS Act**) for an eligible revenue period is to be determined; and
- specifies the period within which each participating person is required to provide a written return of the person's eligible revenue for an eligible revenue period.

The eligible revenue of participating persons, determined in accordance with the Determination, is used to calculate the amount of levy payable by the person. This levy (the "telecommunications industry levy" (**the TIL**)) is imposed by the *Telecommunications (Industry Levy) Act 2012*. The levy amount of a participating person is the amount the person must contribute to the cost of funding contractors and grant recipients to deliver public interest telecommunications services (**PITS**) and to fund the costs of the Commonwealth in administering such contracts and grants. PITS include: universal service obligations as they relate to the standard telephone service and payphones; emergency call services; and the National Relay Service.

Contributions are, in general, proportional to each participating person's share of total eligible revenue for a relevant eligible revenue period. Annual carrier licence charges which are imposed by the *Telecommunications (Carrier Licence Charges) Act 1997* and payable by the holders of carrier licences (who are not otherwise exempt from paying the charge) are also, in part, based on a participating person's eligible revenue.

Legislative Provisions

The Determination is made by the Australian Communications and Media Authority (**the ACMA**) under subsections 43(5) and 45(1) of the TCPSS Act.

Subsection 45(1) provides that the eligible revenue of a participating person for an eligible revenue period (other than the first eligible revenue period under the TCPSS Act which is the 2013-14 financial year) is the amount ascertained in accordance with a written determination made by the ACMA.

Subsection 43(1) provides that a participating person for an eligible revenue period must give the ACMA a written return of the person's eligible revenue for that period, and must do so within the period specified in an instrument in force under subsection 43(5). Subsection 43(5) provides that the ACMA may, by legislative instrument, specify a period, that must begin at or after the end of the eligible revenue period, for the purposes of paragraph 43(1)(b).

The Determination is a legislative instrument for the purposes of the *Legislative Instruments Act 2003* (**the LI Act**).

Background

As part of the *Telecommunications Legislation Amendment (Deregulation) Act 2015* (**the Deregulation Act**) the government abolished the Telecommunications Universal Service Management Agency (**TUSMA**) and transferred its functions to the Department of Communications. The Deregulation Act also transferred provisions relating to the assessment, collection and recovery of the TIL from the *Telecommunications Universal Service Management Agency Act 2012* (**the TUSMA Act**) to the TCPSS Act.

Under the TCPSS Act, the ACMA will continue to administer the assessment, collection and recovery of the TIL. From the 2014-15 eligible revenue period onwards, the eligible revenue of a participating person is to be determined in accordance with the TCPSS Act. A 'participating person' will continue to lodge eligible revenue returns with the ACMA and levy payments will continue to be calculated by the ACMA, based on an assessment of each participating person's eligible revenue.

The Determination is substantially similar to the *Telecommunications Universal Service Management Agency (Eligible Revenue) Determination 2013* (**the 2013 Determination**) made under subsections 91(5) and 93(1) of the TUSMA Act which applies to eligible revenue periods up to and including the 2013-14 period. The main differences between the 2013 Determination and the Determination are as follows:

- Minor and machinery terminology updates, including the amendment of provisions that refer to the TUSMA Act with equivalent provisions referring to the TCPSS Act; and
- Amendments to the definition of "inter-person input payment" in order to further clarify the meaning of the term.

The continued approach taken by the ACMA in developing a methodology for the determination of eligible revenue is to spread the burden of the industry contribution across participating persons in a way which is evidence-based, transparent, competitively neutral and as administratively efficient as possible.

In summary, the Determination:

- defines eligible revenue as gross telecommunications sales revenue less certain deductions;
- specifies the type of deductions available to calculate eligible revenue;
- enables participating persons that have the same ultimate Australian parent entity to make certain calculations on a group basis;
- addresses the possibility of avoidance by including in the calculation of eligible revenue the revenue of entities 'related' to a participating person (described as 'consolidated related parties' and 'declared related parties');
- enables the ACMA to make specific declarations in respect of revenue in light of practical experience and to address conduct of participating persons;
- sets out consultation and notification arrangements the ACMA must follow when making declarations and provides that declarations are subject to review by the Administrative Appeals Tribunal (**AAT**); and
- specifies the period within which a participating person must give the ACMA a return of eligible revenue as 4 months after the eligible revenue period ends.

Consultation

Section 17 of the LI Act sets out the consultation requirements relevant to making the Determination. A consultation paper and a draft Determination were provided for public comment through the ACMA website and via direct email notification to all telecommunications carriers.

Copies of the consultation paper and draft Determination were made available on the ACMA website: www.acma.gov.au. Consultation was open for six weeks, with comments closing on Tuesday 12 May 2015.

The ACMA did not receive any comments on the substance of the Determination.

Documents incorporated by reference

The Determination incorporates the following documents by reference:

- the *Broadcasting Services Act 1992*;
- the *Corporations Act 2001*;
- the accounting standards made under section 334 of the *Corporations Act 2001*; and

- the *Telecommunications Act 1997*.

The documents are incorporated as in force from time to time (in accordance with section 14 of the LI Act and section 10 of the *Acts Interpretation Act 1901*) and can be found on the Federal Register of Legislative instruments at <http://www.comlaw.gov.au>.

Regulatory impact

The Office of Best Practice Regulation (**the OBPR**) has agreed that the regulatory changes arising from the Determination are minor in nature and that a Regulation Impact Statement is not required (OBPR reference number 18574).

Statement of compatibility with human rights

Subsection 9(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011* requires the rule maker in relation to a legislative instrument to which section 42 (disallowance) of the LI Act applies, to cause a statement of compatibility to be prepared in respect of that legislative instrument.

This statement has been prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*. The Determination, made under subsections 43(5) and 45(1) of the TCPSS Act:

- sets out how the eligible revenue of a participating person for an eligible revenue period is to be determined; and
- specifies the period within which each participating person is required to provide a written return of the person's eligible revenue for an eligible revenue period.

The legislative instrument does not engage any of the applicable rights or freedoms. The legislative instrument is compatible with human rights as it does not raise any human rights issues.

Notes on sections

Part 1 – Preliminary

Section 1 – Name of determination

Section 1 provides that the name of the Determination is the *Telecommunications (Eligible Revenue) Determination 2015*.

Section 2 – Commencement

Section 2 provides that the Determination commences on the day after it is registered on the Federal Register of Legislative Instruments.

Section 3 – Authority

Section 3 provides that the Determination is made under subsections 43(5) and 45(1) of the TCPSS Act.

Section 4 – Application of determination

Section 4 provides that the Determination applies to the 2014-15 eligible revenue period (2014-15 financial year) and each later eligible revenue period.

Section 5 – Definitions

This section defines the terms used in the Determination, including some words and expressions defined in the TCPSS Act and the *Telecommunications Act 1997*.

Section 6 – Meaning of *declared related party*—participating person

The Determination includes provision for a proportion of the revenue of ‘declared related parties’ to be included in the calculation of a participating person’s eligible revenue. Section 6 defines ‘declared related party’ in relation to a participating person. The ability to capture the revenue of entities other than the participating person is designed to discourage, and ultimately deal with, persons trying to minimise their revenue, and thus levy payments, by diverting revenue to associates that are not participating persons. An entity can be a declared related party for either part or the whole of an eligible revenue period.

Under subsection 6(1), an entity is a ‘declared related party’ in relation to a participating person for the whole of an eligible revenue period, if the entity:

- is not a participating person or a consolidated related party of a participating person; and
- is owned, at any time during the eligible revenue period, by a body that owns the participating person at any time during the eligible revenue period; and
- has telecommunications sales revenue in Australia at any time during the same eligible revenue period.

Subsection 6(3) provides that a body ‘owns’ an entity if the body has company interests of more than 49% in that entity. Company interests may be traced in the same manner as company interests are traced for Part 4 of Schedule 1 to the *Broadcasting Services Act 1992* (**the BSA**).

For example: Entity A wholly (100 per cent) owns Entity B, which is a participating person, and Entity A also owns half (50 per cent) of Entity C. Entity C has telecommunications sales revenue earned in Australia. Entity C is not a participating person, nor a consolidated related party of Entity B. As Entity C meets the requirements of section 6, Entity C is a declared related party of Entity B, the

participating person. Entity C could be a declared related party for part or all of the relevant eligible revenue period.

Subsection 6(2) provides that an entity is a declared related party in relation to a participating person for any part of an eligible revenue period during which the entity:

- is not:
 - a carrier; or
 - a consolidated related party of a participating person; or
 - a participating carriage service provider (defined in section 5 of the Determination as a carriage service provider in relation to which a determination under paragraph 44(1)(b) of the TCPSS Act is in force); and
- is owned by a body that, at any time during the same eligible revenue period, owns the participating person; and
- has telecommunications sales revenue in Australia.

For example, an entity may be a declared related party of a participating person for six months of an eligible revenue period, and then gain its own carrier licence, and retain that licence for the remaining six months of the eligible revenue period. In this instance, the entity would be a declared related party of a participating person for the part of the eligible revenue period during which it did not hold its own carrier licence (that is, the entity was not a carrier).

If the entity is a participating person (as defined in section 44 of the TCPSS Act) for the remaining 6 months of the eligible revenue period the entity would be required to submit its own eligible revenue return under section 43 of the TCPSS Act.

If an entity is a declared related party in relation to a participating person for the whole or part of an eligible revenue period, a proportion of the telecommunications sales revenue (determined using the declared related party factor defined in section 8) of that entity is added to the telecommunications sales revenue of the participating person and its consolidated related parties (if any).

Section 7 – Meaning of *declared related party*—non-participating person

Section 7 defines a declared related party in relation to a non-participating person. The definition in section 7 is in substantially the same terms as the definition in section 6.

The term “non-participating person” is defined by subsection 4(3) of the *Telecommunications (Participating Persons) Determination 2015* and refers to a person who, but for the existence of a determination in force under subsection 44(2) of the TCPSS Act which applies to that person, would have been a participating person.

Section 8 – Meaning of *declared related party factor*

Section 8 sets out how to determine the ‘declared related party factor’, of a declared related party in relation to a participating person or a non-participating person. The declared related party factor is used to determine the proportion of a declared related party’s revenue (and the proportion of any applicable deductions) that must be included (or in the case of deductions, excluded) in calculating the eligible revenue of the person in relation to whom the entity is a declared related party. The formulae to be used to calculate the declared related party factor are:

- participating person interest x party interest; or
- non-participating person interest x party interest.

The participating person interest or non-participating person interest is the proportion of the participating or non-participating person that is owned by the same body that owns the declared related party of the participating or non-participating person, as the case may be.

The ‘party interest’ is the proportion of the declared related party that is owned by the same body that owns the participating person or non-participating person.

The following examples illustrate how the declared related party factor is determined:

Example 1: Entity A wholly (100 per cent) owns Entity B, which is a participating person, and Entity A also owns half (50 per cent) of Entity C. Entity C (under subsection 6(1)) is a declared related party of Entity B, the participating person, for the whole of the eligible revenue period. The declared related party factor is 50 per cent, being 100 per cent x 50 per cent = 50 per cent.

Example 2: Entity A wholly (100 per cent) owns Entity B (a carrier) and Entity A also owns half (50 per cent) of Entity C. Together entities A and B earned \$20 million eligible revenue during the relevant eligible revenue period. Entity C earned \$12 million in telecommunications sales revenue in the same period, is not a participating person, nor a consolidated related party of a participating person. Entity C is a declared related party of Entity B.

The declared related party factor is 50 per cent, being 100 per cent x 50 per cent = 50 per cent. Therefore, 50 per cent of the telecommunications sales revenue of Entity C (\$6 million) is the proportion of revenue to be included in Entity B's calculations.

The declared related party factor is referred to throughout the Determination so that only an appropriate portion of the declared related party's revenue (and any applicable deductions) is included in the calculation of the participating person's eligible revenue.

In the above examples, to work out the eligible revenue of the participating person:

- 100 per cent of the revenue and deductions of the participating person, Entity B, are included;
- 100 per cent of the revenue and deductions of any consolidated related parties of Entity B are included; and
- 50 per cent of the revenue and deductions of the declared related party, Entity C, are included in the calculation of Entity B's eligible revenue.

Section 9 – Meaning of *non-telecommunications sale revenue*

Section 9 of the Determination provides that an amount of revenue is non-telecommunications sales revenue if it is earned from an activity outside the telecommunications industry. The 'telecommunications industry' is defined in section 7 of the *Telecommunications Act 1997*.

Section 9 also provides that the ACMA may, in writing, declare that a specified amount or the value of a benefit or service, is non-telecommunications sales revenue. The declaration must also state which participating person or declared related party or consolidated related party of the participating person, the declaration applies to, and if the declaration specifies that a value of a benefit or service is non-telecommunications sales revenue, how the ACMA worked out that value.

Section 10 – Meaning of *inter-person input payment*

Section 10 of the Determination defines an inter-person input payment. These are amounts paid or payable by a participating person or a consolidated related party or declared related party of the participating person (**the first participating person**) for an act done by another participating person or a non-participating person or a declared related party or consolidated related party in relation to the second person (**the second participating person**). The act must allow the first participating person to provide a listed carriage service.

The definition specifically includes reference to payments made to non-participating persons. This will allow a participating person to continue to deduct (under section 29) payments made to an entity who would have, prior to the commencement of a determination made under subsection 44(2) been a participating person.

Further, section 10 provides that an amount is an inter-person input payment only if the amount is included by the second participating person (if that person is a participating person) as part of its gross telecommunications sales revenue, without claiming the amount as a deduction under any of sections 23 to 28, 30 or 33 of the Determination. If the second participating person is a non-participating person, the provision requires that the person would have been required to include the amount as part of their gross telecommunications sales revenue without deducting the amount, had

the person been a participating person. This ensures that only one deduction is made in respect of the one amount constituted by the inter-person input payment. Section 29 provides for the deduction of inter-person input payment amounts.

While these amounts are deductions, they are clearly different to other deductible revenue streams because they are payments made (or incurred) by the participating person or related party, rather than a form of income received by that party. Inter-person input payments are to be deducted to ensure that participating persons making the payments are not levied disproportionately, given their input payments represent revenue actually passed on to their upstream suppliers. By deducting inter-person input payments from gross telecommunications sales revenue, the Determination aims to approximate a value-added tax regime.

Section 10 also provides that the ACMA may, in writing, declare that a specified amount is an inter-person input payment in relation to one or more specified participating persons, or declared related parties or consolidated related parties of those persons.

Part 2 – Accounting concepts

Section 11 – Accounting on a group basis

Section 11 provides that two or more participating persons that have the same ‘ultimate Australian parent entity’ may make certain eligible revenue calculations under the Determination, as a group or individually. Section 5 defines the ‘ultimate Australian parent entity’ of a participating person as an entity described in that way under accounting methods commonly used in Australia, and in the financial statements in which the participating person’s revenue is reported.

Subsection 11(2) provides that where two or more participating persons have the same ultimate Australian parent entity, each participating person may make its calculation in accordance with the Determination in its own right. Subsection 11(3) provides an alternative to subsection 11(2). Under subsection 11(3), participating persons with the same ultimate Australian parent entity may make all the calculations required under Parts 3 or 4 of the Determination on a group basis.

Under subsection 12(2), where participating persons have the same ultimate Australian parent entity, the starting point for calculating eligible revenue is the consolidated financial statements of the parent entity. Using consolidated financial statements reduces opportunities for minimising ‘eligible revenue’, allows for the elimination of payments between participating persons within a corporate group and provides for a more comprehensive audit trail.

Using consolidated financial statements also allows participating persons to make some calculations on a group basis. Section 36 provides for the attribution of eligible revenue to individual participating persons where eligible revenue is being worked out by the participating person using the method of accounting on a group basis.

Section 12 – Sales revenue

Subsection 12(1) states that the sales revenue of a participating person, consolidated related party or declared related party for an eligible revenue period is to be worked out from particular sources identified in subsections 12(2) and 12(4) to identify the revenue for the ‘relevant period’ (being the period during the eligible revenue period in which the participating person holds a carrier licence, or is a participating carriage service provider).

Subsection 12(2) identifies the sources from which sales revenue is to be worked out as follows:

- where a participating person’s sales revenue is included in the consolidated financial statements of an ultimate Australian parent entity, the sources are:
 - the most recent audited financial statements of the ultimate Australian parent entity; or
 - if the ultimate Australian parent entity is not required to audit its financial statements – the most recent financial statements of the ultimate Australian parent entity; and
- where a participating person’s sales revenue is not included in the consolidated financial statements of an ultimate Australian parent entity, the sources are:

- the most recent audited financial statements including the sales revenue of the participating person; or
- if the participating person is not required to audit its financial statements – the most recent financial statements including the sales revenue of the participating person; and
- for a declared related party, the sources are:
 - the most recent audited financial statements of the declared related party; or
 - if the declared related party is not required to audit its financial statements – the most recent financial statements including the sales revenue of the declared related party.

The sources identified in subsection 12(2) are the most recent financial statements for a period ending on or before the end of the relevant eligible revenue period. For example, in working out the sales revenue of a participating person for the eligible revenue period ending on 30 June 2016, the most recent audited financial statements, including the sales revenue of the participating person, for the period from 1 April 2015 to 31 March 2016 could be used because that period ends before the end of the relevant eligible revenue period. However, the audited financial statements for the period from 1 April 2016 to 31 March 2017 could not be used because that period ends after the end of the relevant eligible revenue period.

Subsection 12(3) provides that in some circumstances, sales revenue for the relevant period may be identified in more than one set of financial statements. Subsection 12(3) further clarifies that the number of months' revenue in the 'relevant period' is the number of months' revenue that should be reported in the participating person's eligible revenue return. For example, if an entity was a carrier for ten months of an eligible revenue period, then those ten months' revenues should be included in its calculation of eligible revenue.

Subsection 12(4) provides that if neither the entity's own financial statements, nor the ultimate Australian parent entity's consolidated financial statements identifies the sales revenue of the participating person, consolidated related party or declared related party then the sales revenue is to be calculated using as many sources as are necessary. This subsection recognises that due to the individual circumstances of the entities, a range of sources may be necessary to properly identify sales revenue of the participating person.

For example, during an eligible revenue period, a participating person may change the participating person's ownership or management arrangements in a way that affects how the participating person's annual financial statements are prepared, such as:

- (a) for accounting purposes, the participating person may cease to report in the participating person's own right and start reporting as part of the consolidated group of an ultimate Australian parent entity; or
- (b) for accounting purposes, the participating person may cease to report as part of an ultimate Australian parent entity's consolidated group and start reporting as an entity in the participating person's own right; or
- (c) the participating person may change the reporting date for the participating person's financial statements.

If the ownership or management arrangements change, the information that identifies the participating person's sales revenue for the relevant period may be found in 2 or more annual financial statements.

Section 12 gives a broad basis for determining eligible revenue and thus funding of public telecommunications policy outcomes. This broad definitional starting point means there is less chance of appropriate revenue being accidentally omitted while enabling inappropriate revenue to be removed via the transparent deduction processes in Parts 3 and 4 of the Determination. The use of consolidated financial statements for participating persons that are members of corporate groups is designed to discourage and ultimately deal with tactics to minimise eligible revenue and therefore levy contributions, by capturing the revenue of consolidated related parties and declared related parties and then putting the onus on the participating persons to justify any deductions claimed.

Section 13 – Bundled revenue

Section 13 provides the definition of bundled revenue, and provides that in order to work out an amount of revenue to be deducted under Part 3 or 4 (deductible revenue), a participating person must separate the deductible revenue from other amounts with which the deductible revenue is bundled. This section ensures that participating persons are able to deduct amounts that are deductible, but that they do not deduct amounts that are not deductible, which are bundled with deductible amounts.

Subsection 13(2) defines bundled revenue as revenue that comes from different sources or acts and is received in a way that does not show how much of the revenue came from the individual sources or acts. Subsection 13(3) provides that the value of a benefit or service can be included in bundled revenue.

Subsection 13(8) provides that if a participating person separates a kind of deductible revenue from bundled revenue for Part 3 or 4, the participating person must identify:

- (a) the total amount of the bundled revenue; and
- (b) the amount of bundled revenue that the person is deducting; and
- (c) how the participating person worked out the amount of deductible revenue.

For example, under section 26, revenue from the *content* of a content service is deductible, whereas revenue from *carriage* of a content service is not deductible. If a participating person earns revenue from pay TV services, with the revenue from content and carriage services being bundled together, then in order to claim a deduction for revenue from content services, the participating person must identify:

- (a) the total amount of the bundled revenue (including revenue earned from both content and carriage components); and
- (b) the amount of the bundled revenue attributable to the content of the content service, which is deductible; and
- (c) how the participating person worked out the deductible amount.

Subsection 13(4) allows the ACMA to make declarations that a specified amount of revenue of a participating person, or declared related party or consolidated related party in relation to a participating person, is bundled revenue. If the ACMA makes a declaration, it must specify the persons to whom the declaration relates, the amount of revenue that is deductible revenue (or how that amount is to be worked out) and if the bundled revenue includes the value of a benefit or service, how that was worked out.

Part 3 – Gross telecommunications sales revenue

Section 14 – Purpose of Part

Section 14 explains that the purpose of Part 3 is to set out how the participating person's gross telecommunications sales revenue for an eligible revenue period is worked out.

Section 15 – Initial sales revenue

Section 15 provides that the initial sales revenue of the participating person, consolidated related parties, and declared related parties for the whole of an eligible revenue period is to be worked out using the sources specified in section 12.

For the participating person and any consolidated related party, 100 per cent of the sales revenue identified in the financial statements must be included as 'initial sales revenue'. This is added to the sales revenue of declared related parties (if any) which is again identified from the sources specified in section 12. For declared related parties, the amount of their sales revenue to be included as part of the participating person's revenue is their sales revenue multiplied by the declared related party factor.

Subsection 15(5) provides that the ACMA may make declarations about whether the sales revenue (either part or whole) of declared related parties (specified in the declaration) is not part of the participating person's initial sales revenue.

Section 16 – Non-telecommunications sales revenue

Section 16 allows a participating person to deduct from the initial sales revenue it has identified under section 15 any amount that is earned from an activity outside the telecommunications industry (that is, non-telecommunications sales revenue, which is defined in section 9). This enables the removal of sales revenue not earned from an activity in the telecommunications industry and which is not considered appropriate to be subject to the levy imposed under the *Telecommunications (Industry Levy) Act 2012*. Such deductions are appropriate for two main reasons; persons who conduct activities outside the telecommunications industry are not direct beneficiaries of the universal telecommunications services and, in operating in such markets, participating persons may be competing with entities not otherwise subject to the levy.

Section 16 provides that non-telecommunications sales revenue of participating persons, consolidated related parties and declared related parties may be deducted. Any non-telecommunications sales revenue of declared related parties must be multiplied by the declared related party factor for that party to work out the amount that is deductible.

For example: Entity B is a participating person, and Entity C is its declared related party. Entity C earned \$100,000 sales revenue during the eligible revenue period. Of this, \$25,000 was earned from activities outside of the telecommunications industry. The declared related party factor (worked out using the formula in section 8) is 50 per cent. As they are declared related parties, a proportion of Entity C's sales revenue must be included in the calculation of the eligible revenue of the participating person, Entity B. In this example:

- \$50,000 of Entity C's sales revenue would be included as initial sales revenue (being \$100,000 sales revenue earned x declared related party factor of 50 per cent) as calculated under section 15;
- \$12,500 of Entity C's sales revenue would be deductible as non-telecommunications sales revenue (being \$25,000 sales revenue earned outside the telecommunications industry x declared related party factor of 50 per cent) from Entity B's initial sales revenue as calculated under section 15.

Any amount of revenue being deducted must be based on adequate and sufficient evidence and have been included in the participating person's initial sales revenue calculated under section 15. Subsection 16(3) provides that any amount deducted must not be more than the total amount received by the participating person, or its consolidated related party or declared related party, in connection with the activity that created the non-telecommunications sales revenue. This is to ensure that only revenue actually received in connection with activities outside the telecommunications industry is deductible.

Section 17 – Other telecommunications sales revenue

Section 17 requires a participating person to also include in its gross telecommunications sales revenue other amounts that could reasonably be described as telecommunications sales revenue of the participating person, consolidated related party or declared related party. This is designed to be a general safeguard to capture telecommunications sales revenue which might otherwise escape the levy net, for example, because it is somehow disguised in a participating person's annual financial statements.

An amount of revenue is telecommunications sales revenue if it is income earned from an activity undertaken by the person within the telecommunications industry. The 'telecommunications industry' is defined in section 7 of the *Telecommunications Act 1997*.

Section 17 also enables the ACMA to make a declaration to the effect that a participating person must recognise the value of a benefit or service, or part thereof, as telecommunications sales revenue of the participating person or a consolidated related party or declared related party of the participating person (specified in the declaration), and therefore part of its gross telecommunications

sales revenue. A declaration must state how the ACMA worked out the value or proportion of the value of a benefit or service mentioned in the declaration.

Section 18 – Revenue before person becomes carrier or participating carriage service provider

Section 18 allows the deduction of revenue earned during an eligible revenue period but prior to the participating person becoming a carrier or a participating carriage service provider from the participating person's initial sales revenue determined under section 15. It is intended that an entity may only deduct revenue under section 18, if that revenue was included in the initial sales revenue identified under section 15.

Section 18 allows deductions of revenue earned by participating persons and consolidated related parties and the deduction of a proportion of revenue earned by declared related parties, in the period during the eligible revenue period before the participating person becomes a carrier or participating carriage service provider. Section 18 needs to be read in combination with section 12, which requires that the sales revenue to be identified is the sales revenue for the 'relevant period'; the relevant period, being the period of time, during the eligible revenue period in which the participating person holds a carrier licence, or is a participating carriage service provider.

For example, Entity D gains a carrier licence on 1 January 2015, and therefore had a carrier licence for 6 months of the eligible revenue period that runs from 1 July 2014 to 30 June 2015. For Entity D, the 'relevant period' for which sales revenue is to be identified is 6 months. Entity D would identify its initial sales revenue, under section 15, and then under section 18 deduct revenue earned prior to it gaining its carrier licence. The result, in accordance with section 12, is that the calculation of Entity D's eligible revenue is based on 6 months of revenue.

Paragraph 18(3)(a) provides that a participating person cannot, under section 18, deduct an amount of revenue that was earned before the day the party or person (as applicable) became a carrier or participating carriage service provider, if the amount relates to an activity in the telecommunications industry that was required, by law, to be performed on or after that day.

Paragraphs 18(3)(b) and (c) provide that a participating person cannot, under subsection 18(1), claim a deduction for revenue earned by a consolidated related party of the participating person, in the period prior to the participating person becoming a carrier or carriage service provider, if the amount was earned while the consolidated related party held a carrier licence, or was a participating carriage service provider. The purpose of this provision is to prevent potential revenue shifting between related parties done for the purpose of claiming maximum deductions for an eligible revenue period.

Section 19 – Revenue after person ceases to be carrier or participating carriage service provider

Section 19 works in a similar way to section 18. It allows a deduction for revenue earned during an eligible revenue period, but after a participating person ceases to be a carrier, or a participating carriage service provider, from the participating person's initial sales revenue determined under section 15. As with section 18, it is intended that an entity may only deduct revenue under section 19 if that revenue was included in the initial sales revenue identified under section 15.

Similarly to subsection 18(3), subsection 19(3) sets out the circumstances in which a participating person cannot deduct revenue earned after ceasing to be a carrier or a participating carriage service provider.

Section 20 – Declarations about revenue

Section 20 allows the ACMA to make declarations that specified amounts or values of specified benefits or services, are part of a participating person's gross telecommunications sales revenue for an eligible revenue period.

A benefit or service includes:

- (a) a benefit or service received by a participating person (for example, a payment in kind); and
- (b) a benefit or service provided by the participating person without receiving remuneration for the benefit or service at reasonable market rates (for example, a subsidy in kind).

This will ensure that participating persons include all amounts that the ACMA believes should reasonably be included as part of the participating person's gross telecommunications sales revenue.

Subsection 20(4) provides that a declaration made under section 20 may apply to one or more participating persons who are specified in the declaration but not generally to all participating persons. The ACMA's power to make declarations is therefore limited to declarations relating to particular participating person(s) who are specified in the declaration.

Section 21 – Gross telecommunications sales revenue

Section 21 provides the methodology for determining a participating person's gross telecommunications sales revenue for an eligible revenue period.

Part 4 – Net telecommunications sales revenue

Once a participating person's gross telecommunications sales revenue for an eligible revenue period is calculated under Part 3, the next step is to work out the participating person's net telecommunications sales revenue for that period. Particular amounts of telecommunications sales revenue, detailed in sections 23 to 30, and 33, may be deducted from gross telecommunications sales revenue, in order to determine net telecommunications sales revenue.

Section 22 – Purpose of Part

Section 22 provides that the purpose of Part 4 is to set out how the net telecommunications sales revenue of a participating person for an eligible revenue period is worked out. Part 4 outlines all of the applicable deductions from gross telecommunications sales revenue that can be made under the Determination to calculate a participating person's net telecommunications sales revenue for that period.

A participating person is not required to deduct an amount under Part 4 from its gross telecommunications sales revenue.

Further, it is intended that an entity may only deduct revenue under sections 23 to 28 if that revenue was included in the entity's initial sales revenue identified under section 15.

Section 23 – Deductions - overseas activities

Section 23 allows deduction of telecommunications sales revenue that was earned by a participating person or a consolidated related party in relation to a participating person, and the deduction of a proportion of telecommunications sales revenue earned by declared related parties, if the revenue was earned from overseas activities. Subsection 23(4) defines overseas activities as specific acts (specified in paragraphs (a)-(f) of the definition) that are carried out outside Australia, such as the supply of a carriage service that originates and terminates outside Australia, in a place outside Australia.

The intention of section 23 is to allow a deduction of telecommunications sales revenue earned by participating persons, and their consolidated and declared related parties, from operating in telecommunications markets overseas. Revenue from these operations should not be counted for the purposes of determining a participating person's contribution to the industry levy which is collected to facilitate the provision of public interest carriage services in Australia.

Section 23 allows deductions of revenue earned by participating persons and consolidated related parties and the deduction of a proportion of revenue earned by declared related parties, where the amount of revenue claimed for an entity as a deduction was earned by the same entity in undertaking the overseas activity.

Under section 23, revenue is only deductible if it is earned from acts carried out overseas while providing telecommunications services overseas. For example, revenue earned from operating satellites, cables, networks or other facilities located in or outside of Australia would only be deductible when it is earned in relation to operations in or between countries other than Australia. Similarly, revenue earned from providing global roaming services would only be deductible under

section 23 if the carriage service is supplied outside Australia and calls made using the service originate and terminate outside Australia.

Subsection 23(3) provides, for the avoidance of doubt, that revenue earned from supplying a telecommunications service to or from Australia is not deductible.

Section 24 – Deductions – acts in Australia for overseas services

Section 24 provides for the deduction of revenue that has been earned from acts carried out in Australia solely for the purposes of the supply of a telecommunications carriage service, in a place outside Australia and which originates and terminates outside Australia.

The intention of section 24 is to allow a deduction of revenue earned by participating persons, and their consolidated and declared related parties, from operating in telecommunications markets overseas, even though acts may be done in Australia in relation to the provision of those services. Such acts include, for example, providing transit, switching, signalling or management services in Australia. It is not intended that revenue from these operations be counted for the purposes of determining a person's eligible revenue. It is not considered appropriate that revenue from a market segment that is mainly contested by persons other than participating persons should form part of a participating person's eligible revenue and therefore be subject to levy.

Section 24 allows deductions of revenue earned by participating persons and consolidated related parties and the deduction of a proportion of revenue earned by declared related parties, where the amount of revenue claimed for an entity as a deduction was earned by the same entity in undertaking the activity.

Subsection 24(3) clarifies, for the avoidance of doubt, that revenue earned from acts relating to supply of a telecommunications service to or from Australia is not deductible.

Section 25 – Deductions – customer equipment

Section 25 provides a deduction for revenue earned from selling, installing, insuring, repairing or maintaining customer equipment, or renting customer equipment to a customer. Customer equipment has the same meaning as in section 21 of the *Telecommunications Act 1997*. It is not considered appropriate that revenue from a market segment that is so widely contested by persons other than participating persons should form part of a participating person's eligible revenue and therefore be subject to levy. Section 25 allows deductions of revenue earned by participating persons and consolidated related parties and the deduction of a proportion of revenue earned by declared related parties, where the amount of revenue claimed for an entity as a deduction was earned by the same entity in undertaking the activity.

Section 26 – Deductions – content services

Section 26 provides for a deduction in relation to revenue earned from the content of content services. Revenue from content is not intended to be subject to the industry levy, given the focus of the levy scheme is on provision of carriage services. In earning revenue from the content of content services, participating persons may also compete with a range of entities that are not participating persons and therefore are not subject to the industry levy. Subsection 26(3) clarifies that the section cannot be used to deduct an amount earned from *carrying* a content service. For example, revenue earned from fees charged for access to content on subscription Internet services is not usually deductible.

Unbundling provisions in section 13 will enable content revenue bundled with other telecommunications sales revenue to be dealt with separately without significantly adding to the regulatory burden of participating persons. For example, revenue earned from the *content* of a pay TV service may be deductible, whereas revenue earned from the *carriage* of the pay TV service would not be deductible under section 26. If the revenue from these two items are bundled together, they will have to be unbundled under section 13 to identify the deductible and non-deductible amounts.

Section 26 allows deductions of revenue earned by participating persons and consolidated related parties and the deduction of a proportion of revenue earned by declared related parties where the

amount of revenue claimed for an entity as a deduction was earned by the same entity in providing the content service.

Section 27 – Deductions – exempt base station

Section 27 provides for a deduction of revenue earned from the use of an exempt base station as defined in subsection 34(2) of the *Telecommunications Act 1997*. This exemption is intended to prevent revenue earned by any participating person or related party from the distribution of subscription or other broadcasting by microwave or other radiocommunications means being included as part of the participating person's eligible revenue. Such an outcome could arise because such an activity falls within the definition of the telecommunications industry under section 7 of the *Telecommunications Act 1997*. The regulatory scheme of that Act, however, generally aims to exclude such terrestrial radiocommunications broadcasting activities from regulation; activity occurring under broadcasting licences is regulated under other legislation.

Section 27 allows deductions of revenue earned by participating persons and consolidated related parties and the deduction of a proportion of revenue earned by declared related parties where the amount of revenue claimed for an entity as a deduction was earned by the same entity in use of an exempt base station.

Section 28 – Deductions – infrastructure revenue

Section 28 provides a deduction for revenue earned in the construction, installation or maintenance (or from management of the construction, installation or maintenance) of the infrastructure of a telecommunications network on the network side of the boundary of the telecommunications network. It is not considered appropriate that revenue from a market segment that is so widely contested by persons other than participating persons should form part of a participating person's eligible revenue and therefore be subject to levy.

Section 28 allows deductions of revenue earned by participating persons and consolidated related parties and the deduction of a proportion of revenue earned by declared related parties where the amount of revenue claimed for an entity as a deduction was earned by the same entity in undertaking the activity.

Other revenue earned through telecommunications infrastructure, such as revenue from the supply of services using infrastructure or leasing of infrastructure is not deductible under this section. Further, section 28 does not allow for the deduction of revenue earned from the leasing of infrastructure, or from the supply of a service using infrastructure.

Section 29 – Deductions – inter-person input payments

Section 29 provides for the deduction of inter-person input payments. These have been defined in section 10 and relate to payments made by a participating person or the first person's consolidated or declared related parties (**the first participating person**), to another participating person or non-participating person (**the second participating person**), or the second participating person's consolidated or declared related parties. As defined in section 10, an amount is an inter-person input payment only if the person receiving the payment includes the amount (or would be required to do so if they were a participating person) as part of their gross telecommunications sales revenue and does not claim the amount as a deduction under the Determination.

Section 29 clarifies that such payments are only deductible if the payment is made while the first participating person and the second participating person are each either the holder of a carrier licence, or are a participating carriage service provider.

Section 29 allows deductions of payments made by participating persons and consolidated related parties and the deduction of a proportion of any payments made by declared related parties where the payment amount claimed for an entity as a deduction was incurred by the same entity to provide a listed carriage service.

Section 30 – Other input amounts

Section 30 provides that the ACMA may declare that a specified input cost or amount other than input amounts dealt with in the Determination (such as inter-person input payments) is an input amount. Section 30 provides that a participating person may deduct an amount from its gross telecommunications sales revenue if it is an input amount declared by the ACMA. Subsection 30(2) provides that the declaration may relate to one or more specified participating persons, but not all participating persons.

This section provides scope for the ACMA to extend the provisions to enable participating persons, in calculating their eligible revenue, to deduct various declared input costs or amounts which are not otherwise deductible under the Determination, and thus make the definition of eligible revenue better approximate a value-added based levy.

Section 31 – Limit on deductions

Subsection 31(1) clarifies that an amount to be deducted under sections 23 to 28 must not exceed the total amount received by the participating person or its related party in connection with the activity that created the deductible amount, in relation to the relevant eligible revenue period.

Similarly, subsection 31(2) provides that inter-person input payment amounts to be deducted must not be greater than the total amount paid (or received) by or on behalf of the participating person in connection with the activity that led to the payment, in relation to the relevant eligible revenue period.

The amount of the deduction must also not be more than the proportion of the declared related party factor (worked out under section 8) for any declared related party of the participating person, in relation to the relevant eligible revenue period.

Section 32 – Suspension of deduction entitlements

Section 32 provides that the ACMA may declare that one or more specified participating persons (but not all participating persons) are not entitled to deduct a specified amount or payment under the Determination in a specified eligible revenue period, or while the declaration is in force. The ACMA's ability to make such declarations is intended to enable the ACMA to restrict access to deductions where experience with the regime shows they are inappropriate or are being abused.

Section 33 – Declarations about deductible revenue

Section 33 provides that the ACMA may declare that a specified amount of gross telecommunications sales revenue of one or more specified participating persons (but not all participating persons) may be deducted. These declarations serve two purposes - to clarify what can be deducted, and extend the scope of allowable deductions where appropriate.

Section 34 – Net telecommunications sales revenue

Section 34 provides that the result of deducting amounts identified under sections 23 to 30 and 33 (as applicable) from a participating person's gross telecommunications sales revenue for an eligible revenue period is that person's net telecommunications sales revenue for that period. A person is not required to deduct an amount from their gross telecommunications sales revenue. Hence, a person's gross and net telecommunications sales revenue may be the same.

Part 5 – Eligible revenue

Section 35 – Purpose of Part

Section 35 provides that the purpose of Part 5 is to set out how a participating person works out their eligible revenue following calculation of their net telecommunications sales revenue under Part 4.

Section 36 – Revenue accounted for on a group basis

Section 36 provides that if the net telecommunications sales revenue of two or more participating persons has been accounted for on a group basis (that is, revenue and deductions are accounted for and made on a group basis, under subsection 11(3)), then the amount of net telecommunications sales revenue relating to each participating person in the group must now be separately identified.

After working out their net telecommunications sales revenue on a group basis, each participating person in the group must identify, from the accounts prepared on a group basis, how much of the net telecommunications sales revenue of the group is their net telecommunications sales revenue, and how much is the net telecommunications sales revenue of other participating persons or persons in the group.

Eligible revenue is calculated on an individual, not group basis, hence it is necessary to determine the net telecommunications sales revenue of each individual participating person in a group.

Subsection 36(3) provides that the ACMA may declare that the eligible revenue of a specified participating person is to be attributed in a specified way when it is being worked out by the person as a member of a group. This power is intended to enable the ACMA to deal with circumstances where it considers the way revenue is being attributed is inappropriate, for example, because it favours a particular participating person in a group to the disadvantage of others in the group.

Section 37 – Eligible revenue

Section 37 provides that a participating person's eligible revenue for an eligible revenue period is equal to the participating person's net telecommunications sales revenue for that period, if their net telecommunications sales revenue is zero or more. If a participating person's net telecommunications sales revenue is less than zero, then their eligible revenue is taken to be zero. If section 36 applies, the net telecommunications sales revenue of the participating person is ascertained in accordance with that section.

It should also be noted that subsection 45(3) of the TCPSS Act gives the Minister the discretion to set a 'threshold amount'. If a determination under subsection 45(3) is in force setting a threshold amount, a participating person's eligible revenue for an eligible revenue period:

- (a) is taken to be zero if the person's eligible revenue is less than the threshold amount specified in the determination; or
- (b) in any other case—must be reduced by the threshold amount.

As at the date of making the Determination, the Minister had not made a determination under subsection 45(3) of the TCPSS Act setting a threshold amount or under its predecessor provision which was subsection 93(3) of the TUSMA Act.

Part 6 – Miscellaneous

Section 38 – Engaging with affected participating persons before making declarations

Section 38 provides that before making a declaration under the Determination, the ACMA must satisfy a number of requirements. Subsection 38(2) requires the ACMA to notify each participating person to whom the declaration is to apply that it proposes to make the declaration and give each such participating person at least 14 days to comment and make submissions on the proposed declaration before the declaration is made. The ACMA also has the discretion to consult other persons in relation to the proposed declaration.

If, after consultation, the ACMA makes a declaration it must notify all participating persons to whom the declaration applies of its decision and give the persons a copy of the declaration. If the ACMA decides not to make a declaration it must notify all participating persons whom it had notified in accordance with subsection 38(2) that it has decided not to proceed with the proposed declaration.

Subsection 38(6) provides that a declaration that is made without complying with section 38 has no effect. This provision recognises that a declaration could potentially have significant implications for a participating person and therefore emphasises the importance of following specified procedures when making a declaration.

Section 39 – Review of decisions

Section 39 provides that a person who is adversely affected by a decision of the ACMA to make a declaration under the Determination may make an application to the AAT for review of the decision. This provision recognises that as a declaration could potentially have significant implications for a participating person it is appropriate that a decision to make a declaration should be subject to merits review in the AAT.

Section 40 – Period for lodging return of eligible revenue

Section 40 provides the period within which a participating person is required to lodge a return of eligible revenue with the ACMA, in accordance with paragraph 43(1)(b) of the TCPSS Act. The period specified is 4 months after the eligible revenue period ends. For example, if the eligible revenue period ends on 30 June 2016, a participating person must give the ACMA a return of eligible revenue before 1 November 2016.