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TELECOMMUNICATIONS BILL 1996

EXPLANATORY MEMORANDUM

VOLUME 1

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Communications and the Arts)

TELECOMMUNICATIONS BILL 1996

OUTLINE

Overview of the telecommunications legislative package

In its pre-election statement, *Better Communications*, the Coalition announced its intention to introduce greater competition in the telecommunications market from 1 July 1997. The Minister for Communications and the Arts released a discussion paper in May 1996 containing broad proposals for key aspects of regulatory reform. Following a process of public consultation on that discussion paper, the Government released exposure draft legislation in three packages during August, September and October 1996.

This Bill forms part of a package of legislation which implements the Government's election commitment and responds to the processes of consultation that the discussion paper and exposure draft legislation facilitated. The package will repeal the *Telecommunications Act 1991* and replace it with a new regulatory framework principally contained in the proposed *Telecommunications Act 1996* and proposed new Parts of the *Trade Practices Act 1974*.

The Telecommunications Bill 1996:

- identifies carriers and carriage service providers as the participants in the telecommunications industry who are to be subject to regulation and creates the mechanisms to impose any necessary regulation upon them;
- creates obligations on carriers and carriage service providers for the benefit of consumers (such as universal service, untimed local calls and the customer service guarantee);
- creates obligations on carriers and carriage service providers for the benefit of the general community (such as provision of emergency call services, protection of the privacy of communications and requirements to co-operate with law enforcement agencies);
- creates obligations on carriers and carriage service providers which will promote competition (such as provision of pre-selection and requirements for calling line identification);
- provides for technical regulation and management of numbering; and
- gives benefits to carriers in the form of certain powers and immunities which assist them in carrying out the obligations which the legislation places on them.

The Trade Practices Amendment (Telecommunications) Bill 1996 will insert industry-specific competition regulation into the *Trade Practices Act 1974*, including specific powers supplementing Part IV of that Act to deal with anti-competitive conduct

and an access regime establishing access rights and obligations for carriers and service providers.

The Australian Communications Authority Bill 1996 will establish the Australian Communications Authority (ACA) by merging AUSTEL with the Spectrum Management Agency. This new body will manage the radiofrequency spectrum, administer licensing of carriers, and administer consumer and technical issues relating to telecommunications, while administration of all competition regulation in this industry will transfer to the Australian Competition and Consumer Commission (ACCC).

A number of smaller Bills provide for relevant taxing arrangements. They are as follows:

- Telecommunications (Universal Service Levy) Bill 1996;
- Telecommunications (Carrier Licence Charges) Bill 1996; and
- Telecommunications (Numbering Charges) Bill 1996.

The Telecommunications (Transitional Provisions and Consequential Amendments) Bill 1996 provides for transitional arrangements between the existing and proposed regimes. In particular, it will enable preparatory work to take place regarding key areas of the post 1997 regime before its commencement on 1 July 1997 and provide for the continuation, where appropriate, of some existing regulatory arrangements until new arrangements can be established.

The following Bills deal with transitional arrangements for carrier licence fees and amendments to radiocommunications tax legislation consequential upon the creation of the ACA:

- Telecommunications (Carrier Licence Fees) Termination Bill 1996;
- Radiocommunications (Transmitter Licence Tax) Amendment Bill 1996; and
- Radiocommunications (Receiver Licence Tax) Amendment Bill 1996.

Telecommunications Bill 1996

Objects and regulatory policy

The main object of the new Telecommunications Act, when read together with the proposed new Parts XIB and XIC of the Trade Practices Act (to be inserted by the Trade Practices Amendment (Telecommunications) Bill 1996), is to provide a regulatory framework that promotes the long-term interests of end-users of carriage services or services supplied by means of carriage services and the efficiency and international competitiveness of the Australian telecommunications industry (see clause 3).

The Bill also contains a statement to the effect that the Parliament intends that telecommunications be regulated in a manner that promotes the greatest practicable use

of industry self-regulation and does not impose undue financial and administrative burdens on participants in the industry, but does not compromise the effectiveness of regulation in achieving the objects of the legislation (see clause 4). This is intended to guide the telecommunications regulators in the performance of their functions and the exercise of their powers.

Carriers and service providers

While retaining the nomenclature of ‘carriers’ and ‘service providers’, the Bill redefines these regulatory concepts. In doing so, the Bill will enable the further evolution of competition in the telecommunications industry by removing existing regulatory barriers to entry into the telecommunications infrastructure market and current technology distinctions in the regulation of infrastructure providers.

There will be no restrictions on the number of carrier licences which may be issued and carriers will no longer benefit from a ‘reserved right’ to install certain telecommunications infrastructure or to be the primary suppliers of certain services. The Bill does, however, establish a prohibition to the effect that carrier licences must be held in relation to telecommunications network units which are used to supply carriage services to the public (see Division 2 of Part 3). In most cases, the licensee will be the owner of those network units, however, provision is made for another person to accept carrier-related responsibilities and become a ‘nominated carrier’ in relation to specific units (see Division 4 of Part 3).

The Bill also imposes a number of carrier licence conditions (Schedule 1) and provides for the imposition, variation or revocation of other conditions over time (Division 3 of Part 3).

Service providers will continue to include persons engaged in the supply of carriage services to the public using carrier network infrastructure (Division 3 of Part 4), but will also include a new group of persons supplying content services to the public (Division 4 of Part 4).

The incorporation of a new concept of ‘content service providers’ is not intended to be used to impose substantial regulation on these persons. The Bill will primarily enable those persons to benefit from access rights under the proposed amendments to the Trade Practices Act (see proposed Part XIC in Schedule 1 to the Trade Practices Amendment (Telecommunications) Bill 1996). The regulation of content remains a matter for the *Broadcasting Services Act 1992*.

Where a carrier is supplying carriage or content services, the carrier will also be a carriage service provider or content service provider, and therefore be subject to relevant service provider regulation. There may be circumstances, however, where a carrier owns infrastructure but does not itself supply carriage or content services. Where appropriate, therefore, obligations are specifically imposed on both carriers and service providers to avoid any potential regulatory gaps.

The Bill provides for the ACA to monitor and report annually on carrier and service provider performance (Part 5).

Obligations for the benefit of consumers

The Bill re-enacts and strengthens existing, and introduces new, obligations on the telecommunications industry in regard to consumers.

Part 6 of the Bill creates a new mechanism for the development of industry codes and standards regarding specific areas of industry activities. This mechanism is expected to be particularly useful for dealing with consumer issues.

Part 7 of the Bill establishes a regime for delivering universal service in telecommunications. The Part is based on Part 13 of the *Telecommunications Act 1991*, which has been effective in delivering universal service to date. A number of significant changes have been made, however, to ensure the scheme will work in an open licensing environment, to clarify and extend the Universal Service Obligation (USO), enhance efficiency in delivery, to improve the accountability of universal service providers, streamline administration and to provide greater flexibility.

The provisions maintain existing requirements in regard to the types of services and equipment obliged to be supplied under the USO. In July 1996, the Government convened a committee to advise the Government on what services might be included in any upgraded USO. This committee is scheduled to report in late 1996.

Part 8 of the Bill establishes a scheme for ensuring that customers in Australia who have historically had access to untimed local calls will continue to get such access. The provisions make some significant changes to the current provisions in ss. 72 and 73 of the *Telecommunications Act 1991* to:

- provide greater precision and clarity in the statement of the obligation; and
- ensure that the scheme is fully consistent with the universal service obligation.

The Bill also includes the customer service guarantee arrangements proposed to be inserted into the *Telecommunications Act 1991* by the Telstra (Dilution of Public Ownership) Bill 1996 (see Part 9).

The Telecommunications Industry Ombudsman scheme will be broadened. In addition to existing requirements for carriers to enter into this scheme, this Bill will require carriage service providers supplying the standard telephone service to residential customers or supplying public mobile telecommunications services to enter the scheme. In addition, the ACA will be empowered to require other classes of service providers to enter the scheme where appropriate (see Part 10).

In recognition of the risks to customers arising from new market entry arrangements, a new requirement will be established by Part 11 of the Bill to give a measure of protection to residential customers of standard telephone services against a failure by their carriage service provider to supply those services.

Service provider rules (Schedule 2) require that carriage service providers supplying a standard telephone service provide end-users of their services with directory assistance and operator assistance services, and itemised billing. Service providers will also be

under an obligation to assist in the maintenance of an integrated public number database which will be used for providing directory assistance and other directory services.

Obligations for the benefit of the general community

The Bill will re-enact and reinforce existing, and introduce new, obligations on the telecommunications industry in regard to the general community.

Existing obligations in regard to emergency service arrangements will be strengthened to enable the ACA to determine arrangements for the provision of direct access by end-users, free of charge, to emergency call numbers, and ancillary arrangements for emergency call handling (see Part 12).

The Bill will protect communications and other information gained by persons in the course of supplying telecommunications services from unauthorised disclosure. While based on existing arrangements in s. 88 of the *Telecommunications Act 1991*, there are some modifications (see Part 13). In particular, offences are introduced for secondary disclosures of information about communications. Record-keeping and reporting requirements have also been included in relation to certain disclosures, and the Privacy Commissioner will have the function of monitoring compliance with the record-keeping requirements.

Obligations under the existing *Telecommunications Act 1991* requiring the ACA, carriers and service providers to do their best to prevent the commission of offences and to give assistance to law enforcement agencies will be re-enacted (Part 14). In addition, existing obligations regarding the interceptibility of telecommunications networks for law enforcement purposes are also re-enacted with some clarifications (Part 15).

New obligations are established to require carriers and carriage service providers to supply carriage services to defence organisations for defence purposes and to co-operate with defence authorities in planning for network survivability and operational requirements in times of crisis (Part 16).

All carriers, unless otherwise exempted, will be obliged to develop, and keep current, an industry development plan relating to their strategic commercial relationships, research and development plans, involvement with domestic industry and export facilitation plans (Part 2 of Schedule 1).

Obligations which will promote competition

While competition regulation is for the most part dealt with in the Trade Practices Amendment (Telecommunications) Bill 1996, this Bill will impose a number of obligations to promote competition in carriage services.

The Bill will provide for the ACA to make a determination requiring pre-selection in regard to the domestic long-distance and international requirements of standard telephone service customers. It also enables a broadening of pre-selection obligations over time and where justified by an analysis of the costs and benefits (Part 17).

Existing obligations on carriers to only install switching systems capable of handling calling line identification will be re-enacted and extended to carriage service providers supplying a standard telephone service (Part 18).

Part 19 of the Bill gives effect to Government policy on the phase-out of AMPS. It closely reflects existing obligations contained in the Telecommunications (Public Mobile Licences) Declaration No 1 of 1992.

The potential for telecommunications businesses based in other countries to take unfair advantage of Australia's liberal market and matters such as access to INTELSAT and Inmarsat via their Australian Signatories and compliance with international conventions will continue to be regulated (Part 20).

Technical regulation of the telecommunications industry

The Bill establishes a scheme for the technical regulation of telecommunications by addressing the matters of standards, compliance, cable installation and labelling (Part 21).

Current telecommunications and radiocommunications legislation regulate technical issues differently, even though those issues are closely related and could be handled in a similar way. This Bill, together with changes to the *Radiocommunications Act 1992*, aims to harmonise this regulation.

The approach is based on that already successfully implemented by the Spectrum Management Agency for the technical regulation of radiocommunications. It places primary responsibility on industry self regulation, with the ACA required to ensure adequate safeguards for issues not suitable for self-regulation. The industry's technical expertise underpins the current AUSTEL standards development process.

The Bill also contains provisions relating to numbering, including the preparation of the numbering plan, and the management of electronic addressing (Part 22).

Benefits to carriers and carriage service providers

Telstra and its predecessors have enjoyed broad land access powers and a wide range of immunities from State/Territory planning and environment laws since 1901. With the introduction of competition, these powers and immunities were extended to the new carriers (Optus - in 1991 - and Vodafone - in 1993) under the provisions of Part 7 of the *Telecommunications Act 1991*.

Taking into consideration the more competitive environment from 1 July 1997, community concerns about infrastructure rollout and the need to have a stable environment to encourage infrastructure investment, the rollout of infrastructure will be generally subject to State/Territory planning laws from 1 July 1997, with Commonwealth law to apply in specified circumstances.

Schedule 3 to this Bill provides for carriers to retain standing land access powers and immunities from State and Territory planning and environment laws for:

- (i) inspection of land;
- (ii) maintenance;
- (iii) installation of declared 'low impact' facilities;
- (iv) temporary installation of defence facilities; and
- (v) connection of subscribers to existing networks until 30 June 2000.

AUSTEL will convene a public inquiry to advise on what constitutes "low impact" facilities. The definition will take into account the type of facility and its location. The Minister for Communications and the Arts will determine "low impact" facilities following the inquiry.

Carriers will also be able to apply to the ACA in certain limited circumstances for a permit to install facilities. The ACA may, after a public inquiry, issue a permit where the ACA is satisfied that the grounds for grant of a permit specified in the Bill are met. A permit to install a designated overhead line only may be granted if, among other things, the relevant administrative authority under State or Territory law has approved the installation.

Carrying out activities authorised by the Bill will be subject to a range of conditions under a Ministerial Code of Practice, including conditions similar to those provided for in the 1991 Act and the Telecommunications National Code. It is intended that the Code of Practice will require that subscriber connections be installed underground unless the subscriber agrees otherwise. The carrier may charge different prices for aerial and underground connections.

Carriers also will have to give prior notice of any proposed installation of facilities not authorised under this law, where this raises issues about possible impact on environment or heritage matters dealt with under other Commonwealth law, and will have to comply with any directions of the ACA to minimise the environmental impact of those activities.

In the face of increasing demand for mobile communications services and restrictions on the use of aerial cabling, there will be a continuing increasing demand for transmitter sites and underground ducts. Part 5 of Schedule 1 to the Bill will impose a licence condition requiring carriers to allow co-location of their mobile communications towers and sites and underground cable facilities on request. If a carrier gives reasonable notice to another carrier to co-locate one of these facilities, access must be given unless the ACA certifies that it is not technically possible to do so. If necessary, the ACCC will be able to arbitrate on the terms and conditions of co-location. Carriers will also be required, in planning for future services, to co-operate with other carriers to share facilities.

General administration, enforcement and miscellaneous

The Bill re-enacts and, where appropriate, updates general administrative and enforcement provisions. These include:

- powers enabling the ACA and the ACCC to conduct public inquiries in connection with certain matters relating to telecommunications either on the initiative of the ACA or the ACCC or following a request from the Minister (Part 25);
- powers for the ACA to be able to investigate certain matters relating to telecommunications, such as suspected contraventions of the Act, on its own initiative, in response to written complaints made to the ACA or where requested to do so by the Minister (Part 26);
- powers to enable the ACA to obtain information and documents from carriers, service providers and others whom the ACA has reason to believe have relevant material or who are capable of giving relevant evidence in connection with the performance or exercise of any of the ACA's telecommunications functions and powers (Part 27);
- provisions for the enforcement of the new Act and powers of inspectors under the Act in relation to offences against technical regulation provisions (Part 28);
- provisions to enable various administrative decisions to be reviewed by the Administrative Appeals Tribunal following a process of internal reconsideration by the ACA (Part 29);
- powers to enable the Federal Court, on the application of the Minister, the ACA or the ACCC, to grant injunctions in relation to contraventions or proposed contraventions of the Act (Part 30);
- provisions dealing with pecuniary penalties that are payable for contraventions of the civil penalty provisions of the Act (Part 31);
- provisions dealing with the proof of matters that involve directors of corporations, employees and agents in connection with civil and criminal proceedings under the Act (Part 32);
- the creation of an offence in connection with the giving of false or misleading information to an ACA employee or delegate exercising or performing functions relating to the regulation of telecommunications matters (Part 33);
- provisions requiring the ACA, in performing its telecommunications functions and exercising its telecommunications powers, to have regard to Australia's obligations under any international convention, agreement, arrangement or understanding of which the Minister has notified the ACA in writing (Part 34); and
- miscellaneous matters, including those relating to continuing offences, partnerships, the service of documents, instruments under the Act, Constitutional protections and regulations (Part 35).

This legislative package is more lengthy than the *Telecommunications Act 1991*. There are two reasons for this. Firstly, the package contains a number of new initiatives not contained in the existing legislative regime designed to strengthen the consumer protection arrangements. These include the customer service guarantee arrangements, provisions for the protection of residential customers from a failure by carriage service providers to supply the standard telephone service and a framework for ongoing development of industry codes and mandatory standards. New provisions are also included regarding requirements for carriers and carriage service providers to cooperate with defence organisations.

Secondly, a number of detailed obligations generally applicable to carriers and/or eligible service providers under the current Act, and which were set out in licence conditions and class licences, have been brought into the Bill or the Schedules to the Bill.

The legislative package makes extensive use of disallowable instruments to include or exclude specified persons, services and/or infrastructure from obligations under the legislation. This reflects both the pace of technological change in the industry, thus requiring flexibility to bring within, or exclude from, the regulatory regime particular persons or services where appropriate. The phenomenon of convergence is also resulting in the development of hybrid forms of communications/computing functions. Where possible, these developments have been anticipated. Elsewhere, legislative instruments are proposed to enable anomalous situations to be addressed as they emerge.

FINANCIAL IMPACT STATEMENT

It is estimated that the measures contained in this package will place additional pressures on the ACCC during the transitional period. Additional expenditure in the order of \$1m is expected to be required in 1996/97 to ensure the regulatory mechanisms for an open market are fully operative from 1 July 1997. Implementation of the new regime will also require considerable effort from AUSTEL and the Department of Communications and the Arts. All additional expenditure by the regulatory authorities will be offset by carrier licence application charges and annual fees imposed by the Telecommunications (Carrier Licence Fees) Termination Bill 1996 and the Telecommunications (Carrier Licence Charges) Bill 1996. The details of the ongoing resource requirements for the ACA and ACCC will be considered in the 1997/98 and subsequent budget processes.

This Bill places increased emphasis on the use of industry self-regulation, particularly in technical regulation and through use of codes of practice. It is expected that some costs will be incurred by industry in establishing self-regulatory processes. Those costs, however, should be outweighed by efficiency benefits for the industry as an outcome of establishing self-regulatory approaches which reflect industry needs and broader community benefits from codes of practice.

The introduction of competition under the current *Telecommunications Act 1991* has brought with it financial benefits for both residential and business consumers through lower prices. Product innovation and increased quality of service, arising out of new competition, have also contributed benefits to the business community and therefore the competitiveness of the economy as a whole.

This Bill will facilitate an enhanced level of competition in telecommunications, increasing further the pressure on existing and new market operators to achieve greater levels of efficiency and quality, and to pass those benefits on to consumers. It is difficult to quantify the direct financial impact of these reforms on the industry itself or the economy generally.

ABBREVIATIONS

The following abbreviations are used in this explanatory memorandum:

1991 Act:	<i>Telecommunications Act 1991</i>
ACA:	Australian Communications Authority
ACA Act:	<i>Australian Communications Authority Act 1996</i> (when enacted)
ACCC:	Australian Competition and Consumer Commission
Act:	<i>Telecommunications Act 1996</i> (when enacted)
AUSTEL:	Australian Telecommunications Authority
Bill:	Telecommunications Bill 1996
BSA:	<i>Broadcasting Services Act 1992</i>
CSG	customer service guarantee
DDA:	<i>Disability Discrimination Act 1992</i>
NCA	net cost area
NUSC	net universal service cost
Radcom Act:	<i>Radiocommunications Act 1992</i>
SMA:	Spectrum Management Agency
STS	standard telephone service
Telstra	Telstra Corporation Limited
TIO:	Telecommunications Industry Ombudsman
TPA:	<i>Trade Practices Act 1974</i>
USO	universal service obligation
USP	universal service provider

NOTES ON CLAUSES

Part 1—Introduction

Clause 1 – Short title

This clause provides for the Act to be cited as the *Telecommunications Act 1996*.

Clause 2 – Commencement

This clause provides that most of the provisions of the new Act will commence on 1 July 1997 (clause 2(3)).

Clause 2(1) provides that Parts 1 and 2, Divisions 2, 3 and 4 of Part 4, Division 3 of Part 33 and clauses 573 and 577 commence on Royal Assent.

Clause 2(2) provides that clauses 52 to 55 commence on 5 June 1997.

The earlier commencement of these provisions will facilitate the initial establishment of the regime prior to its full commencement on 1 July 1997. In particular, necessary definitions will commence on Royal Assent to enable the ACCC to start preparations for its enhanced role from 1 July and applications for carrier licences will be able to be made to AUSTEL from 5 June 1997, for subsequent issue by the ACA on 1 July 1997.

Clause 3 – Objects

This clause sets out the objects of the new Telecommunications Act, when read together with the proposed new Parts XIB and XIC of the TPA (to be inserted by the proposed *Trade Practices Amendment (Telecommunications) Act 1996*).

The main object is to provide a regulatory framework that promotes the long-term interests of end-users of carriage services or services supplied by means of carriage services and the efficiency and international competitiveness of the Australian telecommunications industry. The reference to promoting ‘the long-term interests of end-users’ is intended to have a wide meaning, and is not intended to be read down by reference to the narrower definition of promoting the long-term interests of end-users in proposed section 152AB in the proposed Part XIC of the TPA. That section sets out an object for proposed Part XIC alone.

A list of other objects is set out in clause 3(2).

Clause 4 – Regulatory policy

This clause sets out a statement of regulatory policy intended to guide the telecommunications regulators in the performance of their functions and the exercise of their powers under the proposed Telecommunications Act. This statement is to the effect that the Parliament intends that telecommunications be regulated in a manner that promotes the greatest practicable use of industry self-regulation and does not impose undue financial and administrative burdens on participants in the industry, but does not

compromise the effectiveness of regulation in achieving the objects mentioned in clause 3.

This regulatory policy is intended to give guidance to the Minister, the ACA and the ACCC in the exercise of their powers and functions under the proposed Telecommunications Act. The regulatory policy will be important, for example, in guiding the exercise of powers and the performance of functions relating to industry codes and industry standards (Part 6), technical regulation (Part 21) and numbering and electronic addressing (Part 22).

Clause 5 – Simplified outline

This clause sets out a simplified outline of this Act to assist readers.

Clause 6 – Main index

This clause sets out a main index to the Act to assist readers.

Clause 7 – Definitions

This clause provides definitions of terms used in the Act.

Many of the fundamental concepts in the new Act, such as **carry**, **communications facility**, **line**, **line link** and **telecommunications network** are defined in substantially similar terms to the way they were defined in the 1991 Act. The new Act uses the term **carriage service** instead of ‘telecommunications service’, but this term is also defined in substantially similar terms to the previous definition. This maintains a measure of continuity in the foundations of the regulatory structure.

There are four defined terms which are relevant to the provision of emergency call services (Part 12). An **emergency call service** is a service for receiving and handling calls to an emergency service number and providing information about such calls to the relevant police, fire or ambulance service or other emergency service organisation specified in the numbering plan. The phrase ‘receiving and handling’ calls used in paragraph (a) of the definition means that calls to an emergency service number are to be received and forwarded to the appropriate emergency service organisation. The information about such calls to be provided to emergency service organisations referred to in paragraph (b) of the definition is commonly known as calling line information and is to be specified by the ACA in a determination under s. 255 of the Act. In making the determination, the ACA must have regard to the objective that emergency service organisations are provided with automatic information about the location of the caller and the identity of the customer of the service being used by the caller (see clause 255(2)(b)).

An **emergency call person** is a recognised person who operates an emergency call service. A recognised person is defined in clause 19. A reference to an emergency call person includes an employee of such a person, as well as an emergency call contractor or an employee of such a person. An **emergency call contractor** is a person who performs services for or on behalf of a recognised person who operates an emergency call service, but is not an employee of the recognised person.

An **emergency service number** is a number specified in the numbering plan for the purpose (clause 450).

The term **exempt network-user** is used in relation to network units which are exempt from the carrier licensing obligation and in the carriage service provider definition. The primary purpose of the concept is to enable the supply of services by means of capacity on exempt network units which is not used for the purpose for which the exemption was given. That capacity may be supplied to carriers (as provided in the provisions themselves) or to exempt network-users who are:

- persons who have acquired the right to use the network unit either directly or indirectly from a carrier (such as through a carriage service provider); or
- a police force or service, fire service, ambulance service or other emergency service specified in regulations, where the principal purpose of their use of the network unit is to enable exempt networks to be used for communications between members of the force or service or between those members and members of another force or service.

The addition of emergency service agencies is intended to ensure the legality of existing practices by which those forces and services use capacity on exempt network units for the purposes of communicating with their members in their vehicles. This provision will also enable communications between, for example, police cars and ambulance vehicles. It is not intended that this exemption be used to allow communications between members of the forces or services and members of the public to become a significant use of these exempt networks.

Telecommunications industry is defined in the same terms as in the proposed ACA Act and sets out the scope of the industry that it is proposed to regulate. It includes: carrying on a business as a carrier or carriage service provider; supplying goods or services for use in connection with the supply of listed carriage services; supplying a content service using a listed carriage service; manufacturing or importing customer equipment and customer cabling; or installing, maintaining, operating or providing access to a telecommunications network or facilities used to supply a listed carriage service.

Clause 8 – Crown to be bound

This clause provides that the proposed Act binds the Crown in right of the Commonwealth, each of the States, the Australian Capital Territory, the Northern Territory and Norfolk Island so telecommunications activities of these governments are subject to this Bill.

Clause 8(2) provides that the Crown is not liable to a pecuniary penalty or to be prosecuted for an offence. This protection does not apply to an authority of the Crown (clause 8(3)).

Clause 9 – Extra-territorial application

This clause provides that the proposed Act would apply within and outside Australia. The application outside Australia is necessary to enable the regime to apply to facilities outside Australia which are used to provide services to, from or within Australia (for

example, a satellite) and to allow the international activities of the telecommunications industry to be regulated (Part 20).

Clause 10 – Extension to external territories

This clause provides that the proposed Act would apply to the Territories of Christmas Island and Cocos (Keeling) Islands and any other prescribed external Territories.

Clause 11 – Extension to adjacent areas

Clause 11(1) provides that the proposed Act would apply to the adjacent areas of each of the States and each of the eligible Territories and references to Australia include references to those adjacent areas. Clause 11(2) limits this application to being in relation to acts, matters and things touching, concerning, arising out of or connected with the exploration or exploitation of the continental shelf of Australia. This is extended to all acts done by or in relation to, and all circumstances and things affecting any person who is in the adjacent area for a reason touching, concerning, arising out of or connected with the exploration or exploitation of the continental shelf of Australia (clause 11(3)).

‘Adjacent area’ and ‘continental shelf’ are defined in clause 11(5).

Clause 12 – Act subject to Radiocommunications Act

This clause provides that the proposed Act has effect subject to the Radcom Act. Clause 12(2) clarifies that a person being authorised to do something by a licence under the Radcom Act would not entitle the person to do that thing if the person is prohibited by or under this proposed Act from doing it, unless a condition of the licence requires the person to do it.

Clause 13 – Continuity of partnerships

This clause provides that a change in the composition of a partnership does not affect the continuity of the partnership.

Clause 14 – Controlled carriage services, controlled networks and controlled facilities

This clause defines the terms **controlled carriage service**, **controlled network** and **controlled facility**. These terms are used in Parts 15 (co-operation with law enforcement agencies), 17 (pre-selection in favour of carriage service providers) and 18 (calling line identification) of the Bill.

A ‘controlled carriage service’ is defined as a carriage service which involves, or will involve, the use of a controlled network or a controlled facility of a carrier or carriage service provider.

A ‘controlled network’ is defined as a network which is operated by a carrier or carriage service provider and which satisfies the geographical test in subclause (4). A ‘controlled facility’ is defined as a facility which is operated by a carrier or carriage service provider and which satisfies the geographical test in subclause (4).

In relation to the definition of a ‘controlled network’ or a ‘controlled facility’, the geographical test is satisfied if:

- the whole or any part of the network or facility is, or will be, located in Australia; or
- the person or group of persons who operates the network or facility carries on, or will carry on, a telecommunications-related business wholly or partly in Australia, and the network or facility is used, or will be used, to supply a listed carriage service, or a service that is ancillary or incidental to such a service.

Clause 15 – Content service

This clause defines a ‘content service’ as:

- a broadcasting service (as defined in the *Broadcasting Services Act 1992*);
- an on-line service (including those for information and entertainment); and
- a service specified in a determination made by the Minister.

An ‘on-line service’ is not given a detailed definition. On-line services are an emerging industry, with new types of services being developed on a daily basis. It is not proposed to specify a detailed definition which may have the unintended consequence of not applying to new services as they emerge. Instead, it is proposed to rely on the general concept of an ‘on-line service’ as it is understood within the telecommunications industry. Clause 15(1) specifically includes the examples of on-line information services and on-line entertainment services. For further information about on-line services, readers may refer to:

- ‘Networking Australia’s Future’, the final report of the Broadband Services Expert Group, December 1994;

- the ‘Communications Futures Final Report’ prepared by the Bureau of Transport and Communications Economics, March 1995; or
- ‘The Online Economy - Maximising Australia’s Opportunities From Networked Commerce’, Cutler and Company, October 1995.

Clause 15(2) allows the Minister to make a determination specifying a kind of service to be a content service. This will give the flexibility to specifically include particular kinds of services as content services if doubts arise about their status. A determination is a disallowable instrument for the purposes of the *Acts Interpretation Act 1901* and must be published in the *Gazette*, tabled in the Parliament and is subject to Parliamentary disallowance.

Clause 16 – Listed carriage services

This clause defines a ‘listed carriage service’ as:

- a carriage service between a point in Australia and one or more other points in Australia;
- a carriage service between a point in Australia and one or more other points, at least one of which is outside Australia; and
- a carriage service between a point outside Australia and one or more other points, at least one of which is in Australia.

Clause 16(2) provides that a ‘point’ includes a mobile or potentially mobile point, whether on land, underground, in the atmosphere, in outer space, at sea or anywhere else. This would include, for example, points on vehicles, aircraft and ships.

Clause 16(3) clarifies that a point in the atmosphere, in or below the stratosphere and above Australia is taken to be in Australia. Accordingly, a point on an aircraft above Australia is taken to be a point in Australia for the purpose of this clause. A point on a satellite that is above the stratosphere is taken to be a point outside Australia (clause 16(4)).

Clause 17 – Standard telephone service

Clause 17 defines ‘standard telephone service’ for the purposes of the Act.

The standard telephone service is a fundamental concept in the Act. The concept plays a central role in the provisions relating to the universal service regime (Part 7), continued access to untimed local calls (Part 8), the Telecommunications Industry Ombudsman (Part 10), protection for residential customers against failure by a carriage service provider (Part 11), the provision of emergency call services (Part 12), pre-selection (Part 17), calling line identification (Part 18), operator services (Part 2 of Schedule 2), directory assistance (Part 3 of Schedule 2) and itemised billing (Part 5 of Schedule 2).

The use of a uniform concept of the standard telephone service reflects the practical reality that there is a basic carriage service, based on voice telephony, that the community

expects to be available (with this goal being achieved through the USO) and to which certain attributes (eg. untimed local calls, directory assistance, etc) attach.

In practical terms the concept of the standard telephone service has much in common with the standard telephone service concept in the 1991 Act. The definition has, however, been recast for a number of reasons: to focus attention on the functionality of the service, namely basic communications (by voice, or an equivalent service for end-users with a disability); to make the definition technologically neutral; to avoid uncertainty about the meaning of ‘public switched telephone service’; to accommodate non-voice users of ‘voice services’; to support a consistent definition of the standard telephone service throughout the legislation; and to enable a better, more transparent approach to be taken to definition of the universal service obligation (USO).

The key difference between the standard telephone service concept in the 1991 Act and this Bill is that the new concept is not explicitly linked to the concept of the public switched telephone service or any particular service technology. By breaking this link between the standard telephone service and the public switched telephone service, it becomes possible to use the concept throughout the Bill as a device to which to attach certain requirements which are generally applicable to voice telephony, regardless of the underlying carriage service or delivery technology.

Under clause 17(1) a reference in a particular provision of the Act to a standard telephone service is a reference to a carriage service for each of three purposes, namely:

- the purpose of voice telephony;
- if voice telephony is not practical for a particular end-user with a disability and another form of communication that is equivalent to voice telephony would be required to be supplied to the end-user in order to comply with the *Disability Discrimination Act 1992*, the purpose of that form of communication;
- a purpose declared by regulations to be a designated purpose for the purposes of that provision;

where:

- the service passes the connectivity test; and
- to the extent that the service is for the purpose referred to above, the service has the characteristics (if any) declared by the regulations to be the designated characteristics in relation to that service for the purposes of that provision.

The standard telephone service is a carriage service which is defined in clause 7 as ‘a service for carrying communications by means of guided and/or unguided electromagnetic energy’. A relay service for speech and/or hearing impaired people is not a carriage service and it is not intended that such a service be an element of the standard telephone service. If such a service were to be made part of the USO, it is envisaged that it would be treated as a service supplied for use in connection with the standard telephone service or prescribed carriage services specified in regulations under clause 138 or 139.

The standard telephone service is based on the concept of voice telephony (or its equivalent for people with a disability) reflecting that, in the first instance, the service is for basic voice communications. This picks up the ‘telephony’ aspect of the ‘standard telephone concept’ in the 1991 Act. In practical terms, ‘voice telephony’ is intended to refer to communications by voice by telephone. The key idea behind the concept is the ‘plain old telephone service’ or simple, real time, two-way voice communication. By basing the standard telephone service on voice telephony (or its equivalent for people with a disability) the legislation sets a firm baseline below which the standard telephone service cannot fall.

Unlike in the 1991 Act, the definition of standard telephone service does not include customer equipment. Such an inclusion is inappropriate given the multiple roles the concept plays in the Bill. The supply of customer equipment will continue to be a component of the USO (under clauses 138 and 139) but without being an inherent part of the standard telephone service itself.

The explicit reference in the standard telephone service definition to people with a disability is intended to make clear that the standard telephone service is to be supplied to people with a disability. The Government’s decision to rely on the *Disability Discrimination Act 1992* accords with its preference to rely on general, rather than industry-specific, legislation and to treat disability issues as mainstream concerns. The approach also means the telecommunications industry is subject to the same general level of regulation in relation to disability matters as other sectors of the economy.

Building the needs of disabled people into the standard telephone service also ensures that attributes that attach to that service (eg. untimed local calls, directory assistance, emergency call access) also attach to the standard service as it is supplied to people with a disability.

In the exposure draft (October 1996), the standard telephone service was given a static definition. This has been changed in the final draft of the Bill. Given the important regulatory role the standard telephone service plays, it is appropriate for there to be scope to:

- prescribe other purposes for the standard telephone service; and
- precisely specify the performance characteristics of the standard telephone service;

as it applies generally throughout the Bill and in relation to specific regulatory provisions.

The ability to prescribe additional purposes for the standard telephone service provides an effective functionality-based means of clarifying or upgrading the standard telephone service concept over time. Examples of other purposes that may be declared include the carriage of data and tone signalling (clause 17(3)).

The ability to declare in regulations additional purposes for the standard telephone service and characteristics of the service enables the standard telephone service for the purposes of the USO (Part 7) to be readily upgraded and more precisely specified. It is intended, for example, that if another purpose was declared for the standard telephone

service for the purposes of the USO (say, for example, tone signalling) it would be part of the USO to ensure that the standard telephone service supplied under the USO would be for that purpose. Specific characteristics could be declared as appropriate. The ability to change the standard telephone service for the purposes of the USO in this way ensures that the basic service that will be of general appeal to most customers and can be adjusted where appropriate, while reserving the prescribed carriage service component of the USO to ensure there is reasonable access to services that may not be of general appeal.

The ability to prescribe standard telephone service purposes for specific regulatory purposes also means that should the standard telephone service be modified for the purposes of the USO, then it can be similarly modified for other provisions. This means that the standard telephone service concept in different provisions can be kept in tandem if appropriate, enabling various attributes to continue to be attached to the standard telephone service that must be supplied under the USO.

The requirement that the standard telephone service meets the connectivity test (paragraph (1)(d)) is intended to make it clear that the standard telephone service is to facilitate general communications between end-users supplied with the standard telephone service. This replicates the 'public switched' concept in the definition of the standard telephone service in the 1991 Act which refers to a service being offered to the public and enabling users of the service to communicate with one another because calls can be switched as needed. Further comments about the connectivity test are made in relation to clause 17(2).

The ability to precisely specify the performance characteristics of the standard telephone service provides an effective means of clearly delineating the detailed characteristics of the service, thereby giving certainty to persons to whom the service is relevant. Where the standard telephone service's characteristics are specified for USO purposes, the obligation of the universal service provider and the rights of end-users will be clearer. The specification of characteristics for other regulatory purposes will enable carriage service providers to be given a clear idea of the precise service to which obligations attach. A universal service provider must ensure that the standard telephone service it supplies can be used for the purposes it is required to serve under clause 17. This may require the universal service provider to upgrade its infrastructure if this is necessary to supply the service for the purpose declared (but see the comment in relation to clause 17(4)).

It is intended that the regulations should be able to declare a wide range of characteristics to be designated characteristics, including, but without being limited to, performance characteristics (clause 17(5)). Designated characteristics will be able to be declared in relation to the standard telephone service for the purpose declared in relation to a particular provision. This enables characteristics to be declared in a very focussed way. At the same time, characteristics can be applied uniformly by declaring a purpose in relation to all provisions of the Bill.

Subclause 17(2) sets out the connectivity test for the purposes of paragraph 17(1)(d), which a service must meet to be a 'standard telephone service'. A service passes the connectivity test if an end-user supplied with the standard telephone service for a purpose mentioned in paragraph (1)(a), (b) or (c) is ordinarily able to communicate by means of

the service, with each other end-user who is supplied with the same service for the same purpose, whether or not the end-users are connected to the same network.

As noted above, the purpose of the connectivity test is to ensure the standard telephone service is a carriage service which enables general communications between end-users. It is intended that connectivity include the ability to communicate with people locally, nationally and internationally and whether or not end-users are mobile. (It is not intended that a carriage service provider supplying only an access and/or local call service can argue that it is not providing a standard telephone service because it does not provide access to end-users outside the local call area. The Bill assumes that that standard telephone service interconnects with long distance services, thus passing the connectivity test.)

‘Ordinarily able to communicate’ means that the service has been designed to enable end-users to communicate with other end-users of the service unless something happens to prevent this, for example, network outage or call barring.

It is intended that in determining whether end-users supplied with the ‘same service’ are able to communicate, ‘same service’ should be interpreted broadly and with regard to the relevant purpose of the standard telephone service, rather than the underlying delivery technology. Thus a person should be able to use the standard telephone service to communicate by voice telephony with any other person supplied with a service to communicate by voice telephony, whether it be supplied, for example, by different types of line links or terrestrial or satellite radiocommunications. It is not assumed that where the standard telephone service is for more than one purpose that communications should be possible across those purposes (eg. if the carriage of data was declared a purpose, it is not envisaged that a person using the service for voice telephony should be ordinarily able to communicate with a person using the service for data carriage).

That end-users need not be ‘connected to the same telecommunications network’ to communicate means that they can be connected to networks owned and/or operated by different persons or networks employing different technologies (see the preceding comment about ‘the same service’).

Subclause 17(3) gives examples of purposes that could be declared to be ‘designated purposes’ by regulations made for the purposes of paragraph (1)(c). The examples given are the purpose of the carriage of data and the purpose of tone signalling. Tone signalling refers to the ability to send communications by means of tone signals, for example, when a person uses an automated telephone payment system to pay a bill. The examples are illustrative only and not exhaustive.

Subclause 17(4) requires the Minister, in making a recommendation to the Governor-General at a particular time about making regulations for the purposes of declaring a ‘designated purpose’ for the purposes of paragraph (1)(c), to have regard to:

- whether a carriage service for the purpose proposed to be declared by the regulations can be supplied using the same infrastructure as is, at the time, being used by universal service providers to supply a standard telephone service for the purpose in paragraph (1)(a); and

- such other matters (if any) as the Minister considers relevant.

The purpose of this provision is to ensure that the Minister considers whether the same infrastructure would be used to deliver the standard telephone service where that service is for a purpose declared in the regulations. This reflects the view that when consideration is being given to upgrading the standard telephone service, especially for USO purposes, consideration should be given to the implications of, and for, the delivery infrastructure. This will require the Minister to consider whether any upgraded standard telephone service could be delivered using existing infrastructure, and particularly the public switched telephone network. This requirement reflects the practical reality that the standard telephone service has historically been delivered using this network and an upgrade requiring the use (or building) of another network has significant implications that must be considered closely. In giving consideration to this matter, the Minister would consider whether the upgrade to the USO might be better achieved by prescribing a prescribed carriage service under clause 137.

Subclause 17(5) provides that clause 17 does not prevent a characteristic declared by regulations made for the purposes of paragraph (1)(e), (f) or (g) from being a performance characteristic.

This provision makes it clear that designated characteristics may include performance characteristics. It is envisaged that particular data rates could be declared as performance characteristics if the carriage of data was declared under paragraph (1)(c). Other examples of performance characteristics which could be declared in regulations include loss limits, noise limits, distortion limits and call failure rates.

Clause 18 – Direct access to an emergency service number

Clause 255 of the Bill requires the ACA to make a determination imposing requirements on carriers, carriage service providers and emergency call persons in relation to emergency call services. Under clause 255(2)(a), the ACA is required to have regard to the objective that each end-user of a standard telephone service should have direct access, free of charge, to an emergency service number unless the ACA considers that it would be unreasonable for such access to be provided.

This clause provides that a person is taken not to have direct access to an emergency service number unless, if the person attempts to make a call to the number, the call can be established and maintained. This definition is intended to refer to the ability of the carrier's or carriage service provider's network to connect the call to the emergency service number and maintain the call until it is completed.

An emergency service number is a number specified in the numbering plan for the purpose (clause 450).

Clause 19 – Recognised person who operates an emergency call service

A recognised person who operates an emergency call service is defined to be a person who operates an emergency call service and who is specified in a written determination made by the ACA as a national or a regional operator of emergency call services. An emergency call service is defined in clause 7 to be a service for receiving and handling

calls to an emergency service number and providing information about such calls to the relevant police, fire or ambulance service or other emergency service organisation specified in the numbering plan.

It is a policy objective that end-users perceive a seamless integrated emergency call service regardless of the involvement of different carriage service providers. The requirement for the ACA to specify national or regional operators is intended to prevent any undesirable proliferation of emergency call service providers, which may lead to a decrease in the quality of emergency call services. However, multiple operators may be necessary to manage calls from different types of services or equipment. For example, users of teletypewriter machines require separate access to emergency call services by an emergency call person with appropriate facilities.

The power to determine a regional operator of emergency call services is included to facilitate new ways of handling emergency call services. In particular, in Victoria the Bureau of Emergency Services Telecommunications is investigating the feasibility of directly handling incoming calls and co-ordinating the response of Victorian emergency service organisations.

When deciding whether a person should be a recognised person for the purposes of this clause, it is expected that the ACA will have regard to whether or not the person can provide access to its emergency call services to the customers of the various carriers and carriage service providers and the ability of the person to transfer the call and associated information to emergency service organisations.

Clause 20 – Customer cabling

This clause defines ‘customer cabling’, a term which is used in relation to provisions about technical standards and cabling providers.

Clause 20(1) provides that customer cabling is a line treated as customer cabling under the regulations. The regulations may refer to the boundary of a telecommunications network as defined by clause 22. This provides the flexibility to address particular circumstances where the default definition in clause 20(4) is not appropriate.

Clause (4) provides that, if there are no relevant regulations in force, customer cabling is a line that is used, installed ready for use, or intended for use on the customer side of the boundary of a telecommunications network as defined in clause 22. Only those lines which are, or will be, connected to telecommunications networks or facilities operated by a carrier or carriage service provider are regulated under the technical regulation provisions in Part 21.

Clause 21 – Customer equipment

This clause defines ‘customer equipment’ which is a term primarily used in relation to defining network units (Part 2) and technical regulation (Part 21).

Clause 21(1) provides that for the purposes of this Act, customer equipment means any equipment, apparatus, tower, mast, antenna, other structure or thing, or system, but not a line, that is used, installed ready for use, or intended for use in connection with a carriage

service and treated as customer equipment under the regulations. The regulations may refer to the boundary of a telecommunications network as defined by clause 22. This provides the flexibility to address particular circumstances where the default definition in clause 21(4) is not appropriate.

Clause 21(4) provides that, if there are no relevant regulations in force, customer equipment is any equipment, apparatus, tower, mast, antenna, other structure or thing, or system, that is used, installed ready for use, or intended for use on the customer side of the boundary of a telecommunications network as defined in clause 22. It does not include:

- a line;
- equipment of a kind specified in regulations;
- an apparatus, tower, mast, antenna or other structure or thing of a kind specified in regulations; or
- a system of a kind specified in regulations.

The regulation making power will enable particular kinds of equipment on the customer side of the network boundary to be excluded - for example, certain kinds of equipment used in private networks where the private networks are connected to carrier networks.

In clauses 21(1) and (4), a system includes software to allow technical regulation to extend to software when appropriate, for example, to enable technical standards to be made to protect the integrity of telecommunications networks or facilities operated by a carrier or carriage service provider (see clause 361).

Clause 22 – Customer cabling and customer equipment – boundary of a telecommunications network

This clause provides the definition of the “boundary of a telecommunications network” for the purposes of the definitions of customer cabling (clause 20) and customer equipment (clause 21).

Clause 22(1) provides that the term may be defined in regulations, and clause 22(2) that those regulations may refer to the terms of agreements between carriers, carriage service providers, carriers and carriage service providers, a carrier and its customers and a carriage service provider and its customers. This provides the ability to incorporate such agreements in the scheme because they can allow self-regulation by the industry and the flexibility to deal with different technologies and circumstances.

If there are no regulations, clause 22(4) defines the network boundary as:

- for services provided by a line that enters a building, a network termination device located at or in close proximity to the building entry point;
- for satellite services direct to the end-user, the outer surface of the satellite-based facility (ie. that satellite-based facility remains within the boundary of the network);
- in other cases, the outer surface of the fixed facility nearest to the end-user.

The last rule provides a network boundary for public mobile telecommunications services and terrestrial radiocommunications customer access networks.

The ‘building entry point’ is defined as the point at which a line that is used to provide a carriage service to an end-user in a building meets the outer surface of that building, immediately before entering the building (clause 22(5)).

‘Building’ is defined to include a structure, caravan or mobile home (clause 22(6)).

Clause 23 – Immediate circle

This clause provides the principles by which a person’s immediate circle may be determined. The concept of an immediate circle is central to determining whether a carrier licence must be held in regard to certain network units (see clause 42) and whether a person supplying carriage or content services is a service provider (see Part 4).

Paragraph (1)(a) provides that where a person is an individual, that person’s immediate circle is the person and any employee of the person.

Paragraph (1)(b) provides that where a person is a partnership, that person’s immediate circle is the partnership and any employee of the partnership.

Paragraph (1)(c) provides that where a person is a body corporate, that person’s immediate circle is:

- the body corporate;

- an officer of the body corporate (which includes a director, secretary, executive officer and employee); and
- if another body corporate is related to the body corporate (within the meaning of the Corporations Law), that other body corporate and an officer of that other body corporate.

Paragraph (1)(d) provides that the Commonwealth's immediate circle is:

- the Commonwealth;
- an authority or institution of the Commonwealth (other than an authority or institution that carries on a business as a core function) and a constituent member or an employee of such an authority or institution;
- an officer or employee of the Commonwealth;
- a member of the Australian Defence Force;
- a member of the Australian Federal Police;
- a member of the Parliament and a member of the staff of a member of the Parliament; and
- a person who holds or performs the duties of an office under the Constitution or a law of the Commonwealth.

Paragraph (1)(e) provides that the immediate circle of a State is:

- the State;
- an authority or institution of the State (other than an authority or institution that carries on a business as a core function) and a constituent member or an employee of such an authority or institution;
- an officer or employee of the State;
- a member of the police force of the State;
- a member of the Parliament of the State and a member of the staff of a member of the Parliament of the State; and
- a person who holds or performs the duties of an office under a law of the State.

Paragraph (1)(f) provides that the immediate circle of a Territory is:

- the Territory;
- an authority or institution of the Territory (other than an authority or institution that carries on a business as a core function) and a constituent member or an employee of such an authority or institution;
- an officer or employee of the Territory;
- a member of the police force of the Territory;
- a member of the Legislative Assembly of the Territory and a member of the staff of a member of the Legislative Assembly of the Territory; and
- a person who holds or performs the duties of an office under a law of the Territory.

Paragraph (1)(g) provides that the immediate circle of an authority or institution of the Commonwealth (other than an authority or institution that carries on a business as a core function) is:

- the authority or institution;

- a constituent member or an employee of the authority or institution;
- an officer or employee of the Commonwealth;
- a member of the Australian Defence Force;
- a member of the Australian Federal Police;
- a member of the Parliament and a member of the staff of a member of the Parliament;
- a person who holds or performs the duties of an office under the Constitution or a law of the Commonwealth; and
- a constituent member or an employee of another authority or institution of the Commonwealth (other than an authority or institution that carries on a business as a core function).

Paragraph (1)(h) provides that the immediate circle of an authority or institution of the Commonwealth which does carry on a business as a core function is the authority or institution and a constituent member or employee of the authority or institution.

Paragraph (1)(i) provides that the immediate circle of an authority or institution of a State (other than an authority or institution that carries on a business as a core function) is:

- the authority or institution;
- a constituent member or an employee of the authority or institution;
- an officer or employee of the State;
- a member of the police force of the State;
- a member of the Parliament of the State and a member of the staff of a member of the Parliament of the State;
- a person who holds or performs the duties of an office under a law of the State; and
- a constituent member or an employee of another authority or institution of the State (other than an authority or institution that carries on a business as a core function).

Paragraph (1)(j) provides that the immediate circle of an authority or institution of a State which does carry on a business as a core function is the authority or institution and a constituent member or employee of the authority or institution.

Paragraph (1)(k) provides that the immediate circle of an authority or institution of a Territory (other than an authority or institution that carries on a business as a core function) is:

- the authority or institution;
- a constituent member or an employee of the authority or institution;
- an officer or employee of the Territory;
- a member of the police force of the Territory;
- a member of the Legislative Assembly of the Territory and a member of the staff of a member of the Legislative Assembly of the Territory;
- a person who holds or performs the duties of an office under a law of the Territory; and
- a constituent member or an employee of another authority or institution of the Territory (other than an authority or institution that carries on a business as a core function).

Paragraph (1)(l) provides that the immediate circle of an authority or institution of a Territory which does carry on a business as a core function is the authority or institution and a constituent member or employee of the authority or institution.

Paragraph (1)(m) provides that the immediate circle of any person may be extended to include any person specified in a determination made by the Minister under clause 23(2). Any such determination is disallowable by the Parliament. This power is included to enable any anomalous situations which emerge with the operation of the new Act to be addressed.

Clause 23(5) makes it clear that, for the purposes of this clause, a person who holds or performs the duties of the office of Administrator of the Northern Territory is taken to be an officer of that Territory.

Clause 23(6) makes it clear that, for the purposes of this clause, the Australian Federal Police are to be taken to be the police force of the Australian Capital Territory.

Clause 23(7) makes it clear that the term ‘core function’ in relation to an authority or institution means a function of the authority or institution other than a secondary or incidental function. It is intended that authorities or institutions of Commonwealth, State or Territory Governments which carry on a business as part of their core function should not be considered to be part of the immediate circle of non-business parts of the Commonwealth, State or Territory. In particular, where those authorities or institutions are competing with the private sector, such a broad immediate circle would not be competitively neutral.

Clause 24 – Extended meaning of *use*

This clause provides that, unless the contrary intention appears, the ‘use’ of a thing is a reference to the use of the thing either in isolation or in conjunction with one or more other things.

Part 2—Network units

Division 1—Simplified outline

Clause 25 – Simplified outline

This clause provides a simplified outline of this Part to assist readers.

Division 2—Basic definition

This Division defines the concept of a network unit which is central to determining whether a carrier licence is required in order for telecommunications facilities to be used to supply public telecommunications services (see Part 3).

Clause 26 – Single line links connecting distinct places in Australia

Clause 26 provides that a line link which connects distinct places (see clause 36) in Australia which are at least the statutory distance apart is a network unit. The statutory distance is defined to be 500 metres (or any longer distance of up to 50 kilometres specified in regulations).

The 500 metre rule reflects the rule in clause 4 of the Telecommunications (Authorised Facilities) Direction No. 1 of 1991 that enables AUSTEL to authorise a person to install line links between distinct places not more than 500 metres apart where the person is the principal user of those distinct places.

The regulation making power is included to enable further consideration to be given to allowing longer line links to be used to supply services to the public without a carrier licence, following experience with the operation of the new legislation. However, due to the need to ensure that limits are placed on the discretion to lengthen the statutory distance, the regulations cannot specify a distance longer than 50 kilometres.

Clause 27 – Multiple line links connecting distinct places in Australia

Clause 27 is intended to deal with any potential to avoid the operation of the single line link rule in clause 26 which arises by installing line links between a series of distinct places, all within 500 metres of one another. This clause identifies when line links which do not meet the test in clause 26 are network units because they represent a network of links owned by the same person(s) or company group.

Clause 27(1) provides that if two or more line links are owned by the same person or persons and connect distinct places in Australia and the aggregate distance between those distinct places is more than the statutory distance, then each line link is a network unit.

Clause 27(2) provides that if two or more line links which connect distinct places in Australia are owned by bodies corporate which are all members of the same related company group and the aggregate distance between those distinct places is more than the statutory distance, then each line link is a network unit. Determining whether a body corporate is related to another body corporate is to be undertaken in the same manner as it would be determined under the Corporations Law (clause 27(5)).

For the purposes of this section, the statutory distance is 5 kilometres (or any longer distance of up to 500 kilometres specified in regulations). The regulation making power is included to enable further consideration to be given to the aggregate distance in the event that the power in clause 26(2) is used to allow longer line links to be used to supply services to the public without a carrier licence, following experience with the operation of the new legislation. However, due to the need to ensure that limits are placed on the discretion to lengthen the statutory distance, the regulations cannot specify a distance longer than 500 kilometres.

To limit the scope for artificial ownership arrangements to be used as an avoidance tactic, an owner is defined to mean the legal or beneficial owner and own has a corresponding meaning. (clause 27(4)).

Clause 28 – Designated radiocommunications facility

This clause provides that if a designated radiocommunications facility (see clause 31) is used to supply carriage services between one or more points in Australia, the facility is a network unit.

Clause 28(2) clarifies that it is not relevant whether the supply involves the use of a satellite or a line or other facility outside Australia while clause 28(3) clarifies that the definition of a point includes mobile or potentially mobile points, such as on vehicles, aircraft and ships.

Clause 28(4) provides that, for the purpose of this clause, points above Australia which are in or below the stratosphere are taken to be points in Australia. Accordingly, points on aircraft above Australia are taken to be points in Australia. Clause 28(5) provides that points on a satellite above the stratosphere are taken to be points outside Australia.

Clause 29 – Facilities specified in Ministerial determination

The Minister may determine that a specified facility is a network unit for the purposes of this Act (clause 29(1)). Any such determination is a disallowable instrument for the purposes of s. 46A of the *Acts Interpretation Act 1901* (clause 29(3)).

It is expected that this power will be used primarily to include as network units (and thus facilities regulated under this Bill), facilities which in the future may be used to supply services substitutable for, or competitive with, services supplied by means of network units as defined elsewhere in this Division. Given the pace of technological developments in the telecommunications industry, it is not possible to predict what kinds of infrastructure may in future become important enough to be subject to the obligations which this Act imposes.

Clause 29(4) clarifies that nothing in the other provisions of this Part, including provisions which expressly exclude facilities from being network units, limits the power for the Minister to specify any facility to be a network unit under clause 29(1).

Division 3—Related definitions

Division 3 includes detailed definitions of facilities which, because of Division 2, are network units for the purposes of this Act.

Clause 30 – Line links

Clauses 26 and 27 provide that certain line links are network units.

This clause provides rules for determining what is a line link. The rules are based on the current definition of a line link in s. 22 of the 1991 Act. A line constitutes a line link. A line is defined in clause 7 to mean a wire, cable, optical fibre, tube, conduit, waveguide or other physical medium used, or for use, as a continuous artificial guide for or in connection with carrying communications by means of guided electromagnetic energy.

Where two or more lines are connected and one constitutes a line link or part of a line link, the lines together constitute a line link (clause 30(2)). This is a recursive process (clause 30(3)).

Clause 30(4) provides the circumstances in which lines are considered to be connected. Lines are connected if they are connected to each other or if both are connected to a facility (other than a line) in such a way as to enable communications to be carried by means of the lines, or by means of facilities which include the two lines, in the same way as if the two lines were a single line.

Clause 30(5) clarifies that a facility other than a line does not form part of any line link.

Clause 31 – Designated radiocommunications facility

Clause 28 provides for circumstances where a designated radiocommunications facility is a network unit.

This clause defines that the following things are a designated radiocommunications facility:

- a base station used, or for use, to supply a public mobile telecommunications service (unless exempted by a Ministerial declaration), see clause 32;
- a base station that is part of a terrestrial radiocommunications customer access network (unless exempted by a Ministerial declaration), see clause 34;
- a fixed radiocommunications link (unless exempted by a Ministerial declaration), see clause 35;
- a satellite-based facility (unless exempted by a Ministerial declaration), see clause 7; and
- a radiocommunications transmitter or receiver of a kind determined by the Minister.

The Ministerial declaration power is included to enable facilities that come within the definition to be excluded in particular circumstances. There may be particular kinds of services supplied by such facilities which it is in the public interest to encourage, but which would not proceed if the facilities are subject to carrier licensing. The Ministerial power will enable a legislative instrument to deal with such circumstances if they emerge.

Any Ministerial declaration or determination made for the purposes of this clause is a disallowable instrument for the purposes of s. 46A of the *Acts Interpretation Act 1901*.

Clause 31(7) clarifies that the Minister's powers to make declarations or determinations under this clause are not limited by other provisions in this Part (in particular, some of those provisions define certain facilities as designated radiocommunications facilities or as not being designated radiocommunications facilities). For example, clause 34(2) excludes a network solely used for broadcasting services from being a terrestrial radiocommunications customer access network. Clause 31(7) makes it clear that this specific exemption cannot be used to read down the scope of clause 31(2).

Clause 32 – Public mobile telecommunications service

Clause 31 provides that a base station used, or for use, to supply a public mobile telecommunications service is a designated radiocommunications facility.

This clause establishes rules for determining what is a public mobile telecommunications service. These rules are based on the current provisions in ss. 25 and 26 of the 1991 Act.

Clause 32(1) provides that a carriage service is a public mobile telecommunications service if an end-user of the service can use the service while moving continuously between places, the customer equipment used in relation to the service is not in physical contact with any part of the telecommunications network by means of which the service is supplied, the telecommunications network supplying the service has inter-cell hand-over functions (see clause 33) and the service is not an exempt service.

Clauses 32(2), (3) and (4) describe services which are exempt for the purposes of clause 32(1).

Clause 32(2) provides that a carriage service is exempt if:

- the service is supplied by means of a primary network that is connected to network units (other than other public mobile telecommunications service base stations) in relation to which a carrier licence is held;
- the principal function of the primary network is for communication between persons (or equipment) connected to the primary network;
- the function which enables communications with networks in relation to which carrier licences are held is at most an ancillary function of the primary network; and
- the network cannot carry communications as a single transaction between equipment connected to a network in relation to which a carrier licence is held and other such equipment.

This exemption is intended to exclude from the definition of a public mobile telecommunications service private mobile radiocommunications networks that are connected to carrier networks where such interconnection is only ancillary. For example, a trunked land mobile radio service can be interconnected into carrier networks as long as communications between the network and the carrier networks is at most an ancillary function of the network.

Clause 32(3) exempts one-way only, store and forward communications services and services which perform the same functions from being taken to be public mobile telecommunications services. This excludes services such as simple paging services.

Clause 32(4) exempts services which would otherwise meet the definition in clause 32(1) but where the end-users of the service are all located at the same distinct place. This is intended to exclude services such as those using ‘micro-cell’ technologies and which are used as a substitute for fixed customer equipment (for example, a mobile service or wireless PABX on a factory floor, or on the property of a resort).

Clause 33 – Intercell hand-over functions

For the purposes of determining what is a public mobile telecommunications service (clause 32) and whether a base station is part of a terrestrial radiocommunications customer access network (clause 34), this clause defines inter-cell hand-over functions.

A telecommunications network is taken to have inter-cell hand-over functions where the network includes:

- at least two base stations which transmit and receive signals from customer equipment used for a mobile service and located in a particular cell; and
- the functions necessary to enable the network, while carrying a communication to or from the customer equipment, to determine the cell in which the equipment is located and cause the base station in that cell to transmit and receive signals to and from the equipment and, when the equipment moves from one cell to another, cause the base station in one cell to stop and the base station in the other cell to start transmitting and receiving signals to and from the equipment.

Clause 34 – When a base station is part of a terrestrial radiocommunications customer access network

Clause 31 provides that a base station which is part of a terrestrial radiocommunications customer access network is a designated radiocommunications facility.

This clause establishes the rules by which it can be determined whether a base station is part of a terrestrial radiocommunications customer access network.

A base station is part of a terrestrial radiocommunications customer access network if the base station is part of a telecommunications network:

- which does not have inter-cell hand-over functions;

- supplying carriage services used or for use wholly or principally at premises occupied or used by the end-user or in the immediate vicinity of those premises; and
- where the customer equipment used for or in relation to the service is not in physical contact with the network.

Regulations may specify further conditions to be satisfied and certain exemptions are established in clause 34(2) to provide that even if a base station meets the definition above, it is not considered to be part of a terrestrial radiocommunications customer access network if:

- the sole use of the network is by a broadcaster to supply broadcasting services or to supply a secondary carriage service by means of the main carrier signal of a primary broadcasting service, or both;
- the network is used, or for use, for the sole purpose of supplying carriage services on a non-commercial basis; or
- the network is of a kind specified in the regulations.

Reference to a secondary carriage service is intended to enable the supply of ancillary communications services using, for example, the vertical blanking interval of television broadcasting services or a FM sub-carrier frequency of a FM radio broadcasting service. The term ‘carrier’ used in the term ‘main carrier signal’ is not intended to be a reference to a licensed carrier, but to the primary signal carrying the radio or television broadcasting service.

Clause 35 – Fixed radiocommunications link

Clause 31 provides that a fixed radiocommunications link is a designated radiocommunications facility.

This clause provides that a facility or combination of facilities is a fixed radiocommunications link where:

- the facility or combination is used to supply carriage services by means of radiocommunications between 2 or more fixed points;
- any of those communications are double-ended interconnected; and
- the facility is not part of a terrestrial radiocommunications customer access network or facilities exempted from being a terrestrial radiocommunications customer access network because of clause 34(1)(g).

Clause 35(3) provides that, for the purposes of this clause, a communication is double-ended interconnected if:

- it is carried over a facility that is a network unit (other than a facility covered by this clause) in relation to which a carrier licence is held;

- then carried by means of radiocommunication between 2 or more fixed points; and
- then carried over another facility that is a network unit (other than a facility covered by this clause) in relation to which a carrier licence is held.

The second and third carriage must occur either immediately following the immediately preceding carriage or with a delay of transmission of not longer than 30 seconds.

The concepts in the double-ended interconnection rule are based on the concepts used in the current ‘single-ended interconnection’ rule in the Telecommunications (Radiocommunications Facilities) Direction No 1 of 1991.

Division 4—Distinct places

Division 4 establishes rules by which distinct places can be determined. The concept of a distinct place plays a key role for the purposes of determining whether line links exceed the statutory distance and are therefore network units which in turn play a role in determining circumstances under which a carrier licence must be held (see Part 3 of the Act). This Division draws heavily on parallel provisions in Division 3 of Part 1 of the 1991 Act, primarily to retain consistency, to the extent practicable, between concepts used under the pre-1 July 1997 regulatory framework and that proposed in this legislation.

Clause 36 – Distinct places – basic rules

This clause sets out the basic rules for determining what are distinct places. In essence, places are distinct unless they are in:

- the same property;
- contiguous properties (see clause 38) for which either
 - the same person or persons are the principal user (see clause 39), or
 - there is a Ministerial determination in force under clause 40 defining the properties as an eligible combined area for the purpose of this clause; or
- the same eligible Territory (see clause 7).

Clause 36(5) clarifies that clauses 37 to 40 inclusive define concepts for the purposes of this Division alone and are not intended to influence the interpretation of concepts elsewhere in the Act.

Clause 37 – Properties

This clause defines where an area of land is a property for the purposes of this Division.

Clause 37(1) provides that an area of land is a property if there is a single freehold or leasehold title for that area, no part of that area has been leased from the titleholder and the title is defined by reference to geographic coordinates.

Clause 37(2) provides that where a single freehold or leasehold title exists in relation to an area of land, but some of the area is leased (or subleased), then the area of the land not subject to the lease or sublease is a property.

Clause 37(3) provides that an area of land is not a property except as provided in this clause.

Clauses 37(4) and (5) provide that regulations may prescribe circumstances where an area of land in relation to which there is a single freehold or leasehold title is not to constitute a property and where an area of land, the title of which is not defined by reference to geographical coordinates is a property.

Clause 38 – Combined areas

This clause sets out the circumstances where properties form a combined area.

Two properties which are contiguous (that is, they touch along a common boundary or at a common point) form a combined area.

Where a property is contiguous with another property and the second property forms part of a combined area, the property and the combined area all form a combined area. This rule is recursive and can apply through repeated applications (clause 38(3)).

Clause 39 – Principal user of a property

This clause provides the mechanism by which the principal user of a property is defined for the purposes of this Division.

The principal user of a property is the person who occupies the property or uses the property for the sole or principal purpose for which the property is used. If two or more persons together occupy the property or together use the property for the sole or principal purpose for which the property is used, then they are together taken to be the principal user of the property.

Clause 40 – Eligible combined areas

This clause enables the Minister to determine that specified combined areas are eligible combined areas for the purposes of paragraph 36(3)(b). The principal effect of such a declaration would be to affect the calculation of the distance of line links for the purposes of clauses 26 and 27.

Any such determination is a disallowable instrument for the purposes of s. 46A of the *Acts Interpretation Act 1901*.

Clause 71 of the Telecommunications (Transitional Provisions and Consequential Amendments) Bill 1996 deems the existing determination under s. 16(1) of the 1991 Act to continue to have force as if made under the proposed Act.

Part 3—Carriers

This Part creates prohibitions which require the licensing of carriers, establishes the mechanisms for carrier licences to be issued and provides for the imposition of licence conditions on carriers. The concept of a carrier plays a central role in the proposed regulatory regime. A number of important obligations throughout the legislation are placed on carriers as they are the primary providers of telecommunications infrastructure. Carrier networks are also used as a key reference point to assist in targeting carriage service provider regulation (see Part 4 of the proposed Act).

Division 1—Simplified Outline

Clause 41 – Simplified outline

This clause provides a simplified outline of this Part to assist readers.

Division 2—Prohibitions relating to carriers

This Division establishes a primary prohibition on the use of network units to supply carriage services to the public without a carrier licence being held in relation to the unit(s). It also details certain exemptions from this prohibition, generally where network units are being used solely or principally for certain purposes. In this regard, the term ‘principal’ is intended to enable network units to be installed and used primarily for the purposes described in the relevant provision, but also enable ancillary or unplanned excess capacity to be supplied to carriers or exempt network users (as defined in clause 7). Requiring remaining use to be supplied primarily through carriers will ensure that the relevant capacity becomes covered by carrier and access obligations. It is not intended that these exemptions enable networks designed, or where a major proportion of their capacity is intended to be for use, for public carriage services to be able to evade the primary prohibition merely by carrying some traffic covered by an exemption.

Clause 42 – Network unit not to be used without carrier licence or nominated carrier declaration

This clause establishes a basic prohibition on the use of network units to supply carriage services to the public unless the owner, or each of the owners, is a licensed carrier or there is a person who is responsible for the carrier related obligations regarding the unit by being a nominated carrier for that unit (see Division 3).

The broad prohibition is established by means of four individual rules which provide that:

- where there is a single owner of a network unit, that owner must not:

- use the unit, either alone or jointly with other persons, to supply a carriage service to the public (clause 42(1)), or
- allow or permit another person to use the unit to supply a carriage service to the public (clause 42(2)),

unless the owner holds a carrier licence or there is a nominated carrier declaration in force in relation to the unit;

- where there are two or more owners of a network unit, each of those owners must not:
 - use the unit, either alone or jointly with other persons, to supply a carriage service to the public (clause 42(3)), or
 - allow or permit another person to use the unit to supply a carriage service to the public (clause 42(4)),

unless the owner in question holds a carrier licence or there is a nominated carrier declaration in force in relation to the unit.

Contravention of the provisions in this clause is an offence punishable on conviction by a fine of up to 20,000 penalty units (\$2 million for an individual, \$10 million for a body corporate).

This clause relies on the concepts of network unit and supply to the public. Network units are defined in Part 2 of this Bill and supply to the public is defined in clause 44 for the purposes of this clause.

Certain exemptions from this prohibition are established in clauses 45 to 51 inclusive.

Clause 43 – Continuing offences

This clause provides that for each day a person contravenes clause 42, that person is guilty of a separate offence.

Clause 567 provides for the maximum penalty in respect of each day that the offence continues. This is 10% of the maximum penalty that could be imposed in respect of the offence under clause 42 (ie, 2000 penalty units). Clause 568 sets out certain procedures in relation to the prosecution of such offences.

Clause 44 – Supply to the public

This clause sets out the circumstances in which a network unit is taken to be used to supply carriage services to the public for the purposes of clause 42.

The concept of supply to the public is determined by reference to its obverse. That is, if a carriage service is being supplied within a relevant immediate circle (clause 23), it is not considered to be supplied to the public. This clause also establishes that a relevant immediate circle is established by reference to either the owner of the network or a licensed carrier who has accepted responsibility for carrier related obligations regarding the network unit in question.

There are three distinct circumstances in which this test will be applied.

The first is addressed in clause 44(2) which provides that if there is a single owner of a network unit and no nominated carrier declaration in force in relation to the unit, then the unit is taken to be used to supply a carriage service to the public if any of the following conditions are satisfied:

- the unit is used for the carriage of communications between two end-users, where each of those end-users is outside the immediate circle of the owner of the unit;
- the unit is used to supply point-to-multipoint services to end-users, where at least one of the end-users is outside the immediate circle of the owner of the unit; or
- the unit is used to supply designated content services (other than point-to-multipoint services) to one or more end-users, where at least one of the end-users is outside the immediate circle of the owner of the unit.

The first condition is intended to enable communications between two end-users (such as voice telephony) where at least one party is within the immediate circle of the owner. This will enable single-ended interconnection of private networks without a requirement for a carrier licence to be held in regard to those networks. The second condition is intended to ensure that point-to-multipoint services, such as pay TV services, are considered to be supplied to the public if any one person receiving the service or the supplier of the service is outside the immediate circle of the owner.

The third condition relies on a reserve power in clause 44(6) to enable the designation of content services (other than point-to-multipoint services) which, if supplied by means of a network unit to a person outside the immediate circle, would mean the network unit is

taken to be used to supply carriage services to the public. The requirement that services under this third condition be designated is intended to avoid capturing unintended services, such as persons supplying an Internet homepage which is accessed by facilities which include an otherwise privately operated (single-ended interconnected) network unit. The power could be used, however, to specify certain kinds of interactive broadband services, if it becomes necessary to do so. Such a determination is a disallowable instrument, and will accordingly be subject to Parliamentary disallowance.

The second circumstance under which the 'supply to the public' test is applied is addressed in clause 44(3), which provides that if there are two or more owners of a network unit and no nominated carrier declaration in force in relation to the unit, then the unit is taken to be used to supply a carriage service to the public if any of the following are the case:

- the unit is used for the carriage of communications between two end-users, where each of those end-users is outside the overlap of the immediate circles of the owners of the unit;
- the unit is used to supply point-to-multipoint services to end-users, where at least one of the end-users is outside the overlap of the immediate circles of the owners of the unit; or
- the unit is used to supply designated content services (other than point-to-multipoint services) to one or more end-users, where at least one of the end-users is outside the overlap of the immediate circles of the owners of the unit.

Clause 44(5) provides that a person is outside the overlap of the immediate circles of the owners of a network unit unless the person is within the immediate circle of every one of the owners of the unit or the person is one of the owners of the unit.

The third circumstance under which the 'supply to the public' test is applied is addressed in clause 44(4), which provides that where a nominated carrier declaration is in force in relation to a network unit, then the unit is taken to be used to supply a carriage service to the public if any of the following are the case:

- the unit is used for the carriage of communications between two end-users, where each of those end-users is outside the immediate circle of the nominated carrier;
- the unit is used to supply point-to-multipoint services to end-users, where at least one of the end-users is outside the immediate circle of the nominated carrier; or
- the unit is used to supply designated content services (other than point-to-multipoint services) to one or more end-users, where at least one of the end-users is outside the immediate circle of the nominated carrier.

Clause 45 – Exemption – defence

This clause will enable defence organisations to continue to use network units for defence purposes without becoming subject to the primary prohibition in clause 42. This retains the practical effect of the exemption defence organisations have from the reserved rights for carriers established under the 1991 Act (see s. 101 of that Act).

The clause provides that if the sole or principal use of a network is use by, or on behalf of, a defence organisation to carry communications necessary or desirable for defence purposes, then, subject to limitations on the remaining use of the unit, clause 42 does not apply. The provision enables the remaining use of those network units to be only by one or more carriers or one or more exempt network-users. An exempt network-user is defined in clause 7.

Clause 45(3) defines defence organisations. ‘Defence purposes’ is defined in clause 7.

Clause 46 – Exemption – intelligence operations

This clause provides that the prohibitions in clause 42 do not apply to network units used wholly or principally by the Australian Secret Intelligence Service or the Australian Security Intelligence Organisation.

Clause 47 – Exemption – transport authorities

This clause will enable certain transport authorities to continue to use network units for certain purposes without becoming subject to the primary prohibition in clause 42. This retains the practical effect of the exemption these transport authorities have from the reserved rights for carriers established under the 1991 Act (see s. 98 of that Act).

The clause provides that if the sole or principal use of a network is use by, or on behalf of, Airservices Australia, the Australian National Railways Commission, a State or Territory transport authority or a rail corporation for purposes necessary or desirable for the workings of the services for which they are responsible, then, subject to limitations on the remaining use of the unit, clause 42 does not apply. The provision enables the remaining use of those network units to be only by one or more carriers or one or more exempt network-users. An exempt network-user is defined in clause 7.

Clause 48 – Exemption – broadcasters

This clause will enable broadcasters to continue to use network units for certain purposes without becoming subject to the primary prohibition in clause 42. The exemption is narrower than the corresponding exemption which broadcasters received under s. 99 of the 1991 Act. The exemption does not exclude from the prohibition the broadband cable or the broadcasting transmitter which delivers broadcasting services to the end-user in the home (or elsewhere).

Clauses 48(1) and (2) provide that if the sole or principal use of a network is use by a broadcaster to carry communications between broadcast studios, or between a broadcasting studio and a broadcasting transmitter, or between a broadcasting studio and the head end of a cable transmission system, for the purpose of either or both:

- the supply of broadcasting services to the public by that or another broadcaster; or
- the supply of a secondary carriage service by means of the main carrier signal of a primary broadcasting service;

then clause 42 does not apply.

It is intended that this exemption enable broadcasters to carry communications between the places listed for purposes of broadcasting. This will enable, for example, the communication of a broadcasting service itself from a studio to a broadcasting transmitter without the links used becoming subject to the primary prohibition. It will also enable communications between broadcasting studios for purposes associated with the supply of broadcasting services to the public, such as the exchange of programming.

Reference to a secondary carriage service is intended to enable the supply of ancillary communications services using, for example, the vertical blanking interval of television broadcasting services or a FM sub-carrier frequency of a FM radio broadcasting service. The term ‘carrier’ used in the term ‘main carrier signal’ is not intended to be a reference to a licensed carrier, but to the primary signal carrying the radio or television broadcasting service.

Clauses 48(3) and (4) provide that if a line link is used for the sole or principal purpose of re-transmission of a kind mentioned in s. 212 of the BSA, then, subject to limitations on the remaining use of the unit, clause 42 does not apply.

The provisions enable the remaining use of network units described in clauses 48(2) and (4) only to be by one or more carriers or one or more exempt network-users. An exempt network-user is defined in clause 7.

Clause 48(5) defines a broadcaster, broadcasting transmitter and head end of a cable transmission system for the purposes of this clause.

Clause 49 – Exemption – electricity supply bodies

This clause will enable electricity supply bodies to continue to use network units for certain purposes without becoming subject to the primary prohibition in clause 42. This retains the practical effect of an authorisation, originally issued under the *Telecommunications Act 1975*, enabling these bodies to install and use line links for certain purposes, and which was ‘grandfathered’ under the 1991 Act.

The clause provides that if the sole or principal use of a network is use by an electricity supply body for the purposes of carrying communications necessary or desirable for managing the generation, transmission, distribution or supply of electricity or charging for the supply of electricity, then, subject to limitations on the remaining use of the unit, clause 42 does not apply.

The provision enables the remaining use of those network units only to be by one or more carriers or one or more exempt network-users. An exempt network-user is defined in clause 7.

Clause 49(3) defines an electricity supply body and widens the application of the previous authorisation from state or territory authorities to include all bodies corporate carrying on a business, or performing the functions of generating, transmitting, distributing or supplying electricity or managing those operations.

Clause 50 – Exemption – line links authorised by or under previous laws

This clause provides for the continuation of the rights given to certain persons or in relation to certain links under previous laws to use line links without being required to be licensed as a carrier.

Clauses 50(1) and (2) provide that if an authorisation under s. 13(1)(a) of the *Telecommunications Act 1975* was in force in relation to a line link immediately before the repeal of that Act, and the sole or principal use of the link is in accordance with the authorisation, then, subject to limitations on the remaining use of the link, clause 42 of this Bill does not apply to the link.

Clause 50(2) enables any remaining use of those network units only to be by one or more carriers or one or more exempt network-users. An exempt network-user is defined in clause 7.

Clause 50(3) provides that a line link installed by virtue of s. 45 of the *Telecommunications Act 1989* (which enabled the then AUSSAT or a person entitled to use AUSSAT satellite facilities or services to install, maintain and operate an earth-based facility necessary or desirable for use of the AUSSAT facilities or services, including an earth-based link between an earth station and AUSSAT premises or the person's premises) then clause 42 does not apply to the link.

Clauses 50(4) and (5) provide that if a line link was authorised by s. 46 of the *Telecommunications Act 1989* (which enabled AUSTEL to authorise a person to supply, install, maintain and operate a facility that is connected to, and within the boundaries of, a network operated by a carrier) and the sole or principal use of the link is in accordance with any conditions of the authorisation, then, subject to limitations on the remaining use of the link, clause 42 does not apply to the link.

Clause 50(5) enables any remaining use of those network units only to be by one or more carriers or one or more exempt network-users.

Clause 50(6) provides that if a line link was authorised by s. 108 of the 1991 Act (which enabled AUSTEL to authorise a person to install, maintain, use or dispose of specified line links) and the sole or principal use of the line link is in accordance with any conditions in the authorisation, then, subject to limitations on the remaining use of the link, clause 42 does not apply.

Clause 50(7) enables any remaining use of those network units only to be by one or more carriers or one or more exempt network-users.

Clause 51 – Exemption – Ministerial determination

This clause will enable the Minister to make a determination exempting specified network units, specified persons or specified uses of a network unit from the application of clause 42. This will provide some level of flexibility for exemptions from carrier licence obligations to be provided to infrastructure, people, or for particular purposes where such regulation is inappropriate or will not contribute to achieving the objects of the Bill.

Clause 51(2) enables conditions to be specified in such a determination.

Clause 51(4) provides that any such determination is a disallowable instrument for the purposes of s. 46A of the *Acts Interpretation Act 1901*.

Division 3—Carrier licences

Clause 52 – Applications for carrier licence

This clause provides that any constitutional corporation, eligible partnership or public body may apply for a carrier licence. The 1991 Act only enabled corporations to apply for a carrier licence. This provision broadens the range of persons which may apply for a carrier licence in recognition that partnerships between corporations should be able to be separately licensed and that public bodies may own substantial telecommunications infrastructure.

Clause 53 – Form of application etc.

An application made under clause 52 must be in writing and in accordance with the form approved by the ACA.

Clause 54 – Application to be accompanied by charge

An application made under clause 52 must be accompanied by any charge imposed by Part 2 of the proposed *Telecommunications (Carrier Licence Charges) Act 1996*.

Clause 55 – Further information

The ACA may request further information from an applicant within 28 days of the application being made. The ACA may refuse to consider the application until the applicant complies with the ACA's request.

Clause 56 – Grant of licence

This clause provides that the ACA may grant a carrier licence in accordance with an application and, if it does so, must give written notice to the new licensee and cause a notice stating that the licence has been granted to be published in the *Gazette*.

A decision to refuse to grant a licence will be subject to merits review (see Part 29 and Schedule 4).

Clause 57 – Carrier licence has effect subject to this Act

This clause provides that a carrier licence has effect subject to this Act.

Clause 58 – Refusal of carrier licence – disqualified applicant

This clause provides the circumstances under which the ACA may refuse to grant a carrier licence. A licence may be refused if the applicant is disqualified.

Clause 58(2) provides that a body corporate is disqualified at a particular time if:

- a carrier licence held by the body corporate, or any partnership in which the body corporate was a partner, at any previous time has been cancelled under s. 71(1) or (2) of the Act (which relate to a failure to pay annual licence fees or the universal service levy); or
- at the time, if a director, secretary or any other person who is concerned in, or takes part in, the management of the body corporate is disqualified.

Clauses 58(3) and (4) provide that an individual is disqualified if:

- the person:
 - was a director, secretary or person concerned in, or who took part in, the management of a body corporate, or
 - while an employee, was concerned in, or took part in, the management of a partnership,

whose carrier licence was cancelled under s. 71(1) or (2) of the Act; and

- that individual aided, abetted, counselled or procured the failure of the body corporate or partnership, or was in any way directly or indirectly, knowingly concerned in, or a party to the failure of the body corporate or partnership to pay in full the charge or levy referred to in those clauses.

Clause 58(5) provides for when a partnership is disqualified. A partnership is disqualified at a particular time if:

- a carrier licence held by the partnership at any previous time has been cancelled under clause 71(1) or (2); or

- at the time, any of the partners or any individual who is an employee of the partnership and is concerned in, or takes part in, the management of the partnership, is disqualified.

Clause 58(6) clarifies that this clause does not limit the grounds on which the ACA may refuse to grant a carrier licence.

A decision to refuse to grant a licence will be subject to merits review (see Part 29 and Schedule 4).

Clause 59 – Time limit on licence decision

This clause provides for circumstances in which the ACA will be taken to have refused to grant a carrier licence.

If the ACA has not made a request for further information under clause 55 and has failed, within 28 days of receiving the application, to make a decision in regard to the application, it is deemed to have refused the application.

If the ACA has made a request for further information under clause 55 and the request has been complied with, and the ACA has failed, within 14 days of receiving the further information, to make a decision in regard to the application, it is deemed to have refused the application.

If the ACA has made a request for further information under clause 55 and the request has not been complied with, and the ACA has failed, within 28 days of making the request for further information, to make a decision in regard to the application, it is deemed to have refused the application.

A decision to refuse to grant a licence will be subject to merits review (see Part 29 and Schedule 4).

Clause 60 – Notification of refusal of application

This clause provides that, if the ACA refuses to grant a carrier licence, it must give written notice of the refusal to the applicant.

Clause 61 – Conditions of carrier licence specified in Schedule 1

A carrier licence is subject to the conditions specified in Schedule 1 to this Bill. Part 1 of that Schedule requires a carrier to comply with the Act.

Clause 62 – Condition of carrier licence set out in section 152AZ of the *Trade Practices Act 1974*

A carrier licence is subject to the condition set out in proposed s. 152AZ of the TPA, to be implemented by the proposed *Trade Practices Amendment (Telecommunications) Act 1996*, which provides that a carrier must comply with any applicable standard access obligations.

Clause 63 – Conditions of carrier licence declared by Minister

Clause 63(1) provides that the Minister may, by written instrument, impose conditions, in addition to those referred to in clauses 61 and 62, applying to all carrier licences.

Clause 63(2) provides that the Minister may, by written instrument, impose conditions on specified carrier licences. The licences can be specified individually or by class (see s. 46(2) of the *Acts Interpretation Act 1901*). Accordingly, this mechanism could be used to impose conditions on all carriers who supply a particular kind of service.

Clause 63(3) provides that the Minister may, by written instrument, provide that specified conditions will be imposed on a carrier licence which may be granted to a specified person during a specified period. This will enable conditions to be imposed on a particular licence which has been applied for, prior to its grant and which will come into force upon that grant.

An instrument made under clause 63(1), (2) or (3) may be varied or revoked by the Minister.

The Minister must give the holder of any licence to which an instrument (or the variation or revocation of that instrument) relates, a copy of the instrument. Where the instrument has been made under clause 63(3), the applicant must be given a copy of the instrument. However, a failure to comply with the notification provisions does not affect the validity of the instrument.

An instrument imposing, varying or revoking licence conditions must be published in the *Gazette* and is disallowable by the Parliament.

Clause 64 – Consultation about declared licence conditions

This clause provides that before imposing a licence condition on carrier licences under clause 63, the Minister must cause the holders of any licence to which the instrument relates (or in the case of an instrument to be made in regard to specified future licences, the applicant for that licence) to be given a draft version of the instrument and an invitation to make submissions on that draft. It also requires that the Minister consider any submissions received within the time specified in the notice. The time must be at least 30 days where the condition is proposed to be imposed on an existing licence.

Clause 65 – Conditions about foreign ownership or control

This clause makes it clear that a condition imposed by the Minister under clause 63 may relate to the extent of foreign ownership or control of the holder. Clause 65(2) clarifies that this clause does not, by implication, limit the conditions that may be declared under clause 63. This clause ensures that current foreign ownership requirements in existing carrier licences will be able to be replicated in relation to licences under the new Act.

Clause 66 – Carrier licence conditions have effect subject to radiocommunications licence conditions

Clause 66 provides that a condition of a carrier licence held by a carrier has effect subject to the provisions of a licence under the Radcom Act under which the carrier is authorised to do something. Accordingly, if a condition of a carrier licence requires a carrier to do something, but the provisions of a radiocommunications licence impose limitations on what the carrier can do, the provisions of the radiocommunications licence will override the carrier licence condition. Note also the operation of clause 12(2) of this Bill in relation to the interaction of radiocommunications licences and the proposed Telecommunications Act.

Clause 67 – Compliance with conditions

This clause establishes the basic obligation on carriers to comply with licence conditions. Clause 67(1) provides that a carrier must not contravene a condition of the licence it holds.

Clause 67(2) provides that any person must not assist, encourage, knowingly be a party to or concerned in or conspire with others to effect a contravention of clause 67(1).

Both these prohibitions are provisions which, if breached, make the person subject to pecuniary penalties detailed in Part 31.

Clause 68 – Remedial directions – breach of condition

This clause enables the ACA to give remedial directions to a carrier which has contravened, or is contravening, a condition of the carrier licence held by the carrier, other than the conditions in:

- Part 1 of Schedule 1 in so far as it relates to the requirement in clause 354 to comply with the Rules of Conduct under clause 352;
- Parts 3 and 4 of Schedule 1 to this Bill; and
- s. 152AZ of the TPA to be inserted by the proposed *Trade Practices Amendment (Telecommunications) Act 1996*.

The responsibility for enforcing these excepted conditions lies with the ACCC.

A remedial direction is one which requires the carrier to take specific action directed at ensuring the carrier does not, or is not likely to, contravene that condition again in the

future. As non-limiting examples, clause 68(3) provides that a direction may require the implementation of certain administrative arrangements to monitor compliance with the condition or other systems to ensure employees, agents or contractors gain a better understanding and knowledge of the requirements of the condition as they affect those persons.

A decision to give or vary or refuse to revoke a remedial direction will be subject to merits review under Part 29 (see Schedule 4).

Clause 69 – Formal warning – breach of condition

This clause enables the ACA and ACCC to issue a formal warning if a carrier contravenes a condition of the carrier licence held by the carrier. The ACA's power to issue formal warnings extends to all conditions of the licence, other than the conditions in:

- Part 1 of Schedule 1 in so far as it relates to the requirement in clause 354 to comply with the Rules of Conduct under clause 352;
- Parts 3 and 4 of Schedule 1 to this Bill; and
- s. 152AZ of the TPA to be inserted by the proposed *Trade Practices Amendment (Telecommunications) Act 1996*.

The responsibility for enforcing these excepted conditions lies with the ACCC.

Clause 69(5) gives the ACCC power to issue formal warnings in relation to contraventions of conditions contained in:

- Part 1 of Schedule 1 in so far as it relates to the requirement in clause 354 to comply with the Rules of Conduct under clause 352;
- Parts 3 and 4 of Schedule 1 to this Bill; and
- s. 152AZ of the TPA to be inserted by the proposed *Trade Practices Amendment (Telecommunications) Act 1996*.

Clause 70 – Surrender of carrier licence

This clause enables a carrier to surrender its licence by written notice to the ACA.

Clause 71 – Cancellation of carrier licence

This clause provides the circumstances in which the ACA may cancel the licence of a carrier or the licence is deemed to have been cancelled. The ACA may cancel a carrier licence under clause 71(1), (2), (3) or (4):

- where the carrier fails to pay in full any annual carrier licence charge or universal service levy on or before the date the charge becomes due and payable; or

- where the holder of the licence becomes a disqualified body corporate or disqualified partnership.

It is difficult to envisage circumstances where these discretions would be exercised to cancel the licence of a major industry player such as Telstra, Optus or Vodafone, most particularly because there would be few, if any, circumstances where the cancellation of such a licence, with associated cessation of services to existing customers, would be in the public interest. Further, alternative penalty arrangements apply (such as a late payment penalty for annual charges, see clause 72) which may be more appropriate for the ACA to use in such circumstances.

The power of cancellation is included primarily to deal with ‘fly-by-night’ operators which prove unable to fulfil their financial obligations. With the opening of market entry under the new legislation, there is a greater risk of such operators emerging. The ACA will have the power to cancel carrier licences and subsequently remove them from the register of carrier licences.

Clause 71(5) provides that if the holder of a carrier licence ceases to be a constitutional corporation, eligible partnership or public body, the licence is taken to have been cancelled at that time.

The ACA must:

- before exercising its discretionary power to cancel a licence under clause 71(1), (2), (3) or (4), give the carrier notice of the proposal to cancel the licence and an invitation to make submissions to the ACA on the matter, and consider any submissions received within the time limit specified in the notice (which must be at least seven days);
- give written notice of the cancellation of a licence to the person who held that licence.

A decision to cancel a carrier licence will be subject to merits review under Part 29 (see Schedule 4).

Clause 72 – Collection of charges relating to carrier licences

Clause 72(2) provides that an application charge imposed on an application for a carrier licence is due and payable when the application is made.

Clauses 72(3) and (4) provide that the ACA may determine the time at which an annual charge imposed by the proposed *Telecommunications (Carrier Licence Charges) Act 1996* is due and payable and late payment penalty arrangements.

A determination made in relation to late payment penalties may authorise the ACA to make decisions about the remission of any or all of that late payment penalty amount. A decision about the remission of a late payment penalty will be subject to merits review under Part 29 (see Schedule 4).

Clause 72(7) provides that annual charges, application charges and late payment penalties are payable to the ACA on behalf of the Commonwealth. Clause 72(7) enables the ACA to recover annual charges and late payment penalties as debts due to the Commonwealth

and clause 72(9) provides that amounts received by way of annual charges, application charges and late payment penalties must be paid into the Consolidated Revenue Fund.

A determination under s. 72(3) or (4) is a disallowable instrument.

Clause 73 – Collection of charges on behalf of the Commonwealth

This clause enables the ACA to enter into arrangements with a person by which they will collect, on behalf of the Commonwealth, payments of charge imposed by the proposed *Telecommunications (Carrier Licence Charges) Act 1996*.

Clause 74 – Cancellation of certain exemptions from charge

This clause cancels any provision contained in another Act that has the effect of exempting a person from liability to pay the charge imposed by the proposed *Telecommunications (Carrier Licence Charges) Act 1996* unless that Act is enacted after the commencement of this Bill and specifically refers to the charges imposed by the proposed *Telecommunications (Carrier Licence Charges) Act 1996*. This will ensure that any Commonwealth statutory authorities who are carriers will be subject to charges unless specifically exempted by the legislation establishing them.

Clause 75 – Commonwealth not liable to charge

This clause clarifies that the Commonwealth is not liable to pay a charge imposed by the proposed *Telecommunications (Carrier Licence Charges) Act 1996*. The reference to the Commonwealth includes reference to any authority of the Commonwealth that cannot by law be made liable to taxation by the Commonwealth. This provision reflects the fact that the Commonwealth cannot constitutionally tax itself.

Division 4—Nominated carrier declarations

This Division enables licensed carriers to apply to the ACA to be declared a nominated carrier in relation to specified network units owned by another person. Where a nominated carrier declaration is in force, any obligation on the owner of the network unit to be licensed as a carrier in regard to that unit ceases. The nominated carrier declaration mechanism is expected to be used in circumstances where the owners of network units in relation to which a licence must be held are either passive investors or financial institutions whose ownership has arisen because of financing arrangements. A nominated carrier must take on all the responsibilities imposed on a carrier in relation to the specified network units.

Clause 76 – Applications for nominated carrier declarations

This clause enables a carrier to apply to the ACA for a nominated carrier declaration in relation to one or more specified network units. Network units may be specified individually, in a class or in any other way - enabling a single application to be made in relation to entire networks.

Clause 77 – Application to be accompanied by charge etc.

Any application for a nominated carrier declaration must be accompanied by the charge (if any) imposed by a determination made under the ACA Act, evidence of the consent of the owner, or each of the owners of the network unit(s) and an election to accept all responsibilities for the unit(s) for the purposes of this Act.

Clause 78 – Form of application etc.

This clause provides that an application and accompanying consent and election must be made in writing and in a form approved by the ACA.

Clause 79 – Further information

This clause enables the ACA to request from the applicant further information about the application and to refuse to consider the application until that further information is received.

Clause 80 – Making a nominated carrier declaration

This clause provides that the ACA may make a nominated carrier declaration after considering an application if it is satisfied that the applicant would be in a position to comply with all of the obligations imposed on the applicant in the applicant's capacity as the nominated carrier and that the making of the declaration will not impede the efficient administration of the Act.

Reference to the efficient administration of the Act will enable the ACA to refuse an application if, for example, it considers the application to be an attempt or part of an attempt to spread carrier related responsibilities for a network across a large number of persons and therefore impede the operation of the Act.

Clause 80(2) provides that the ACA may only declare one carrier to be a nominated carrier in relation to a network unit. This will assist in retaining simplicity in the administration of the Act.

Clause 80(3) requires the ACA to give a copy of a nominated carrier declaration to the applicant and each of the owners of the network unit and to cause it to be published in the *Gazette*.

A decision to refuse to make a nominated carrier declaration will be subject to merits review under Part 29 (see Schedule 4).

Clause 81 – Notification of refusal of application

If the ACA refuses to make a nominated carrier declaration, it must notify the applicant and each of the owners of the network unit.

Clause 82 – Revocation of nominated carrier declaration

Clause 82(1) enables the ACA to revoke a nominated carrier declaration at a time if, assuming the nominated carrier were to apply for the declaration at that time, the ACA is satisfied it would refuse to make the declaration.

Clause 82(2) requires the ACA to revoke a nominated carrier declaration in the circumstance that the owner or any of the owners gives written notice that they do not consent to the continued operation of the declaration or the nominated carrier gives written notice that it no longer accepts responsibility for the unit for the purposes of the Act.

Revocations made under clauses 82(1) and (2) take effect on the date specified in the revocation. Copies of the revocation must be given to the former nominated carrier and the owner or owners of the unit and it must be published in the *Gazette*.

Clause 82(6) provides that the ACA must not revoke a nominated carrier declaration under clause 82(1) (where it has a discretion) unless it has first given the nominated carrier a written notice of its proposal to make the revocation, given an invitation to the nominated carrier to make a submission on the proposal and considered any submission received within the time period specified in the notice (which must be at least seven days).

A decision to revoke a nominated carrier declaration will be subject to merits review under Part 29 (see Schedule 4).

Division 5—Register of nominated carrier declarations and carrier licences

Clause 83 – Register of nominated carrier declarations and carrier licences

This clause requires the ACA to maintain a register of all nominated carrier declarations and carrier licences currently in force and all conditions of such licences.

The register may be maintained electronically and a person may, on payment of a charge (if any) fixed by a determination under the ACA Act, inspect the register and make copies or extracts of the Register.

Where the register is maintained by electronic means, a person is taken to have made a copy or taken an extract where the ACA gives the person a printout of all or part of the Register. In addition, the ACA may provide information on a data processing device (such as a computer disk) or by way of electronic transmission when complying with a request for a copy of the register.

Part 4—Service Providers

Division 1—Simplified outline

Clause 84 – Simplified outline

Clause 84 provides a simplified outline of this Part to assist readers.

Division 2—Service providers

Clause 85 – Service providers

Clause 85 defines a ‘service provider’ as a carriage service provider or a content service provider. A carriage service provider is defined in clause 86 and a content service provider is defined in clause 96.

Division 3—Carriage service providers

Clause 86 – Carriage service providers

Clause 86 defines a carriage service provider. There are five elements to the definition.

Clause 86(1) sets out the primary definition of a carriage service provider as a person who supplies, or proposes to supply, a listed carriage service (see clause 16) to the public using a network unit in relation to which a carrier licence is held. Basing this definition on network units in relation to which a carrier licence is held, is intended to avoid unintentionally capturing persons providing services over facilities which it is not intended to regulate, such as facilities used solely for amateur radio transmissions and private networks.

Clause 86(2) provides that if a person supplies carriage services to the public between one or more points in Australia and one or more points outside Australia using a line link connecting a place in Australia and a place outside Australia or a satellite-based facility, then the person is a carriage service provider. This clause is intended to bring within service provider regulation persons supplying international services which may not be captured by the primary definition in clause 86(1) by reason that there is no obligation to hold a carrier licence in relation to these international facilities.

Clause 86(3) provides that if a carrier or exempt network-user supplies a carriage service to the public using capacity acquired from exempt networks (as described in clauses 45 to 50 inclusive), then the carrier or exempt network-user is a carriage service provider.

Clause 86(4) allows the Minister to declare that a specified person who supplies, or proposes to supply, a specified listed carriage service is a carriage service provider for the purposes of this Act. This power is necessary to enable persons supplying carriage services using facilities in relation to which there is no obligation to hold a carrier licence to be regulated, if it becomes apparent during the operation of the new Act that it is necessary to do so. Due to the changing nature of technology, it is not possible to predict which particular kinds of services may gain in social or economic importance over time. This clause provides a mechanism to include new services within the regulatory scheme if they become more important.

Clause 86(5) provides that a person who:

- for reward (other than remuneration as an employee) arranges, or proposes to arrange, for the supply of listed carriage services by a carriage service provider to a third person; and
- would be a carriage service provider under clause 86(1) or (2) if the person was actually supplying those services; and
- has a commercial relationship with the third person which is governed (in whole or in part) by an agreement dealing with one or more matters relating to the continuing supply of the service; and
- satisfies any other conditions included in a determination made under clause 86(8);

is a carriage service provider. Note that the definition of ‘carriage service intermediary’ in clause 7 provides that a person who is a carriage service provider because of clause 86(5) is a carriage service intermediary.

Clause 86(5) is intended to ensure that persons generally known in the industry as switchless resellers and/or aggregators, and who, in a particular case, may not themselves be **supplying** a listed carriage service, are to be considered to be carriage service providers and subject to relevant obligations. The requirement for the agreement to deal with matters relating to the continuing supply of the service is intended to exclude retailers of customer equipment, such as mobile phone retailers, who sign the customer with a carriage service provider, but take no part in the continuing supply of the carriage service (for example, by subsequently billing the customer for the continuing supply of the service).

Note that clause 95 enables the Minister to determine that particular regulatory obligations do not apply to persons who are carriage service providers because of a determination under clause 86(4) or because of the operation of clause 86(5).

Any carrier, to the extent that its activities are covered by this clause, is also a carriage service provider. The rights and obligations of carriage service providers throughout the Act and related Acts are, therefore, intended to apply to carriers who also are carriage service providers.

An instrument made under clause 86(4) or (8) is a disallowable instrument which must be notified in the *Gazette*, tabled in the Parliament and is subject to Parliamentary disallowance.

Clause 87 – Supply to the public

Clause 87 sets out the circumstances in which a carriage service is deemed to be supplied to the public for the purposes of s. 86(1), (2) or (3). A carriage service is supplied to the public if one of three conditions are met:

- if the service is used to carry communications between two end-users, both of whom are outside the immediate circle of the supplier of the service;

- if the service is used to supply point-to-multipoint services to end-users, at least one of whom is outside the immediate circle of the supplier of the service; or
- if the service is used to supply designated content services (other than point-to-multipoint services) to end-users, at least one of whom is outside the immediate circle of the supplier of the service.

The first condition is intended to enable communications between two end-users (such as voice telephony) where either one party or both parties are within the immediate circle of the supplier. This will enable single-ended interconnection of private services without the supplier being considered to be a carriage service provider. The second condition is intended to ensure that point-to-multipoint services, such as pay TV services, are considered to be supplied to the public if any one person receiving the service is outside the immediate circle of the supplier of the service. The third condition provides a reserve power to enable the designation of content services (other than point-to-multipoint services) which, if supplied to a person outside the immediate circle, would mean the service is taken to be supplied to the public. The requirement that services under this third condition be designated is intended to avoid capturing unintended services, such as persons supplying an Internet homepage which is accessed by persons outside their immediate circle.

‘Immediate circle’ is defined by clause 23.

Clause 88 – Exemption from definition – customers located on the same premises

Clause 88 exempts a supplier of a carriage service from the carriage service provider definitions in clauses 86(1) and (2) if the person manages a business or other activity carried on at particular premises, where the business or activity is the sole or principal use of the premises and all the customers of the service are physically present on the premises. This is intended to exempt hotels, motels, hospitals, nursing homes and similar organisations from being included within the carriage service provider definition even though they may, during the normal course of their business, be supplying carriage services to customers who are outside their immediate circle.

Clause 89 – Exemption from definition – defence

Clause 89 exempts from the carriage service provider definitions in clauses 86(1) and (2) carriage services used by the Department of Defence, the Australian Defence Force, and any foreign defence organisation authorised to operate or train in Australia or an external Territory, if the sole or principal use of the carriage service is to carry communications necessary or desirable for defence purposes. ‘Defence purposes’ is defined under clause 7.

Clause 90 – Exemption from definition – intelligence operations

Clause 90 exempts from the carriage service provider definitions in clauses 86(1) and (2) carriage services wholly or principally used by the Australian Secret Intelligence Service and the Australian Security Intelligence Organisation.

Clause 91 – Exemption from definition – transport authorities

Clause 91 exempts from the carriage service provider definitions in clauses 86(1) and (2) carriage services used by Airservices Australia, the Australian National Railways Commission, State and Territory transport authorities and rail corporations, if the sole or principal use of the carriage service is to carry communications necessary or desirable for the workings of aviation services, train services, bus or other road services, or tram services for which the body is responsible.

Clause 92 – Exemption from definition – broadcasters

Clause 92 exempts from the carriage service provider definitions in clauses 86(1) and (2) carriage services if the sole or principal use of the carriage service is to carry communications between broadcasting studios, between a broadcasting studio and a broadcasting transmitter, or between a broadcasting studio and the head end of a cable transmission system, for the purpose of either or both supplying broadcasting services to the public, or supplying a secondary carriage service by means of the main carrier signal of a primary broadcasting service.

This exemption also applies to re-transmissions under s. 212(1)(a) or (b) of the BSA.

Reference to a secondary carriage service is intended to enable the supply of ancillary communications services using, for example, the vertical blanking interval of television broadcasting services or a FM sub-carrier frequency of a FM radio broadcasting service. The term ‘carrier’ used in the term ‘main carrier signal’ is not intended to be a reference to a licensed carrier, but to the primary signal carrying the radio or television broadcasting service.

Clause 93 – Exemption from definition – electricity supply bodies

Clause 93 exempts from the carriage service provider definition in s. 86(1) carriage services used by electricity supply bodies, if the sole or principal use of the carriage service is to carry communications necessary or desirable for managing the generation, transmission, distribution, supply, or charging for the supply, of electricity.

‘Electricity supply body’ is defined as a body corporate or authority carrying on the business or function of generating, transmitting, distributing or supplying electricity or managing those functions.

Clause 94 – Exemption from definition – Ministerial determination

Clause 94 allows the Minister to exempt specified carriage services or specified persons from the carriage service provider definitions in s. 86(1), (2), (3) or (5) on either a conditional or unconditional basis.

This power is included to enable any anomalous situations which emerge during the operation of the new Act to be addressed.

Any such determination is a disallowable instrument for the purposes of s. 46A of the *Acts Interpretation Act 1901*.

Clause 95 – Exemption from certain regulatory provisions – Ministerial determination

This clause enables the Minister to determine that particular regulatory provisions in the Act or any other Commonwealth law referring to carriage service providers (either specified individually or in a class) do not apply to persons who are carriage service providers because of s. 86(4), which enables the Minister to declare specified persons supplying listed carriage services to be carriage service providers, or s. 86(5), which brings within the concept of carriage service provider people acting as intermediaries in the supply of listed carriage services.

This will enable the Minister to limit the regulation of these persons if that is considered appropriate to address any anomalies which emerge during the operation of the new Act. For example, certain kinds of resellers and aggregators may only have a limited role in the continuing supply of services to customers, so it may become necessary to exclude them from particular obligations which another carriage service provider is fulfilling in relation to the customers concerned.

Any such determination may be conditional or unconditional and is a disallowable instrument for the purposes of s. 46A of the *Acts Interpretation Act 1901*.

Division 4—Content service providers

Clause 96 – Content service providers

Clause 96 defines a content service provider as a person who uses, or proposes to use, a listed carriage service to supply a content service to the public. A content service is deemed to be supplied to the public when at least one end-user of the content service is outside the immediate circle of the supplier of the service.

‘Immediate circle’ is defined by s. 23. ‘Content service’ is defined by s. 15.

Division 5—Service provider rules

Clause 97 – Service provider rules

Clause 97 sets out the service provider rules for the purposes of the Act. These are:

- the rules set out in Schedule 2;
- the rules set out in any determinations in force under s. 98; and
- the rule set out in proposed s. 152BA(2) of the *Trade Practices Act 1974* which requires that a carriage service provider must comply with any standard access obligations that are applicable to the provider.

Clause 98 – Service provider determinations

Clause 98 allows the ACA, after consulting the ACCC, to make a written determination setting out rules that apply to service providers in relation to the supply of specified carriage or specified content services. Determinations made under this clause are known as service provider determinations.

Service provider determinations have effect only to the extent that they are authorised:

- by paragraph 51(v) (either alone or when read together with paragraph 51(xxxix)) of the Constitution; or
- by s. 122 of the Constitution if it would have been authorised by paragraph 51(v) (either alone or when read together with paragraph 51(xxxix)) if s. 51 extended to the Territories.

Paragraph 51(v) of the Constitution gives the Parliament the power to make laws with respect to postal, telegraphic, telephonic and other like services. Paragraph 51(xxxix) of the Constitution gives the Parliament the power to make laws with respect to matters incidental to the execution of any power vested in the Constitution. Section 122 of the Constitution gives the Parliament the power to make laws in relation to the Territories.

Service provider determinations must relate to matters specified in the regulations or in s. 331. Section 331 enables service provider determinations to require specified carriage service providers to comply with a designated disaster plan.

The requirements for service provider determinations to relate to matters specified in the regulations is intended to limit the ACA from making further regulation of the industry under this determination power unless a good case has been made that such regulation is necessary. Both the regulations and the service provider determinations will be disallowable by the Parliament.

A service provider determination will be able to empower the ACA to make decisions of an administrative character.

Any such decisions will be subject to merits review under Part 29 (see Schedule 4).

Clause 99 – Exemptions from service provider rules

The Minister may determine that a specified service provider is exempt from all (clause 99(1)) or specified (clause 99(2)) service provider rules.

Service providers and service provider rules may be specified individually, in a class, or in any other way (see s. 46(2) of the *Acts Interpretation Act 1901*).

A determination made under this clause may be unconditional or conditional, and is a disallowable instrument for the purposes of s. 46A of the *Acts Interpretation Act 1901*.

Clause 100 – Service providers must comply with the service provider rules

Clause 100 requires service providers to comply with service provider rules applicable to them. Pecuniary penalties apply under Part 31 for a contravention of this clause.

Clause 101 – Remedial directions – breach of service provider rules

Clause 101 applies if a service provider has contravened, or is contravening, a service provider rule other than the service provider rules set out in:

- Part 1 of Schedule 2 in so far as it relates to s. 354 which requires carriage service providers to comply with the Rules of Conduct under s. 352; and
- s. 152BA(2) of the TPA to be inserted by the proposed *Trade Practices Amendment (Telecommunications) Act 1996* which requires a carriage service provider to comply with any standard access obligations that are applicable to the provider.

The ACA may give the service provider a written direction requiring the provider to take specified action ensuring that the rule is not contravened, or not likely to be contravened, in the future.

Clause 101(3) gives two examples of the kinds of directions which the ACA may give under this clause:

- a direction that the provider implement effective administrative systems for monitoring compliance with a service provider rule; and

- a direction that the provider implement a system designed to inform its employees, agents and contractors of the requirements of a service provider rule.

A service provider must not contravene a direction given under this clause.

A decision to give or vary or refuse to revoke a remedial direction will be subject to merits review under Part 29 (see Schedule 4).

Clause 102 – Formal warnings – breach of service provider rules

Clauses 102(1) and (2) allow the ACA to issue a formal warning if a person contravenes a service provider rule, other than the service provider rules set out in:

- Part 1 of Schedule 2 in so far as it relates to s. 354 which requires carriage service providers to comply with the Rules of Conduct under s. 352; and
- s. 152BA(2) of the TPA to be inserted by the proposed *Trade Practices Amendment (Telecommunications) Act 1996* which requires a carriage service provider to comply with any standard access obligations that are applicable to the provider.

Clauses 102(4) and (5) enable the ACCC to issue a formal warning if a person contravenes the service provider rule set out in:

- Part 1 of Schedule 2 in so far as it relates to s. 354; and
- s. 152BA(2) of the TPA to be inserted by the proposed *Trade Practices Amendment (Telecommunications) Act 1996*.

Part 5—Monitoring of the performance of carriers and service providers

Clause 103 – Simplified outline

Clause 103 contains a simplified outline of Part 5 to assist readers.

Clause 104 – Monitoring of performance

Clause 104 is based on the requirements of ss. 38(2)(c), 40(b) and 399(2)-(5) of the 1991 Act which require AUSTEL to review, and report to the Minister, on carrier performance.

The ACA will be required to monitor, and report each financial year to the Minister on, all significant matters relating to the performance of carriers and service providers, with particular reference to consumer satisfaction, consumer benefits and quality of service (clause 104(1)). In gauging ‘consumer satisfaction’ it is expected that the ACA will have regard to the number of complaints it and the Telecommunications Industry Ombudsman have received during each financial year from consumers.

In performing its functions under clause 104(1), the ACA will be required to have regard to such world best practice performance indicators as the ACA considers appropriate.

The ACA will also be able to have regard to such other matters as it considers appropriate (clause 104(2)).

The ACA's report will be required to include details of:

- the efficiency with which carriers and service providers supply carriage services, ancillary goods and ancillary services;
- the adequacy and quality of the carriage services, billing services, billing information services, ancillary goods and ancillary services (being goods or services for use in connection with a carriage service) supplied by carriers or service providers;
- the adequacy of each carrier's and each carriage service provider's compliance with its obligations under Part 6 of the Act (dealing with industry codes and standards) and with codes registered, and standards determined, under that Part; and
- the adequacy of each universal service provider's compliance with its obligations under Part 7 of the Act;
- such other matters relating to the performance of carriers or service providers as the ACA thinks appropriate (clause 104(3) and (7)).

The ACA will also be required to monitor and report each financial year to the Minister on the appropriateness and adequacy of the approaches taken by the carriage service providers in carrying out their obligations and discharging their liabilities under Part 9 of the Act (dealing with the customer service guarantee) (clause 104(4)).

The ACA will be required to provide the Minister with its report as soon as practicable after 1 July 1998 and each subsequent 1 July (clause 104(5)). (With respect to the 1996/97 financial year, s.65 of the proposed *Telecommunications (Transitional Provisions and Consequential Amendments) Act 1996* will require the ACCC to fulfil AUSTEL's obligation to report to the Minister under ss. 399(2) and (4) as soon as practicable after 1 July 1997.)

The Minister will be required to arrange for a copy of the report to be laid before each House of the Parliament within 15 sitting days of that House after receiving the report (clause 104(6)).

Part 6—Industry codes and industry standards

This Part sets out arrangements for industry codes and industry standards as part of a predominantly self-regulatory framework for the telecommunications industry. Many of the matters addressed by such codes will be of interest to consumers, but they may relate to many other matters. This Part extends light-touch regulation into areas which are currently not regulated and is an important contribution to improving consumer protection. The implementation of the arrangements is expected to develop over a number of years, as will the range of matters covered by industry codes.

The proposed arrangements will be based on industry sections developing codes and registering them with the ACA. The ACA will be provided with safety net powers which may be used if self-regulation in an industry section has serious failings. This is similar to the approach to codes of practice taken under the *Broadcasting Services Act 1992*.

Industry codes will allow both existing matters, and any new matters that emerge in the post 1997 environment, to be dealt with by an appropriate level of regulation. More serious matters will continue to be regulated under statute or in carrier licence conditions or service provider rules, for example: privacy; emergency calls; TIO participation and directory services. If other matters of a high level of importance arise the Minister may declare licence conditions (clause 63) or the ACA may determine service provider rules (clause 98).

Division 1—Simplified outline

Clause 105 – Simplified outline

This clause provides an outline of Part 6 to assist readers.

Division 2—Interpretation

Clause 106 – Industry codes

This clause defines an industry code as a code developed under this Part. Codes will be developed by industry.

Clause 107 – Industry standards

This clause defines an industry standard as a standard determined under this Part. Standards will be determined by the ACA.

Clause 108 – Telecommunications activity

This clause defines a telecommunications activity for the purposes of this Part. A telecommunications activity is an activity that consists of: carrying on business as a carrier; carrying on business as a carriage service provider; supplying goods or services for use in connection with the supply of a listed carriage service; supplying a content service using a listed carriage service; manufacturing or importing customer equipment or customer cabling; installing, maintaining, operating or providing access to a telecommunications network or a facility used to supply a listed carriage service. These are the activities to which industry codes and industry standards under this Part may relate.

The exposure draft included ‘supplying a listed carriage service’ as one of the defined telecommunications activities. This has been replaced with the wider concept of ‘carrying on business as a carriage service provider’ following the inclusion in clause 86

of ‘carriage service intermediaries’ as a category of carriage service providers. A carriage service intermediary may not necessarily be supplying a carriage service.

Clause 109 – Sections of the telecommunications industry

This clause defines a section of the telecommunications industry for the purposes of the Part. Such sections are used so that codes will be developed by, and applied to, relevant sections and requests for codes by the ACA (s. 116) may be directed to representatives of relevant sections. The definition of “industry sections” is important in ensuring that it is clear for compliance and enforcement purposes to whom a particular code or standard applies.

Clause 109(2) indicates that each of the following groups will be predetermined as a section of the industry: carriers; service providers; carriage service providers; carriage service providers who supply standard telephone services; carriage service providers who supply public mobile telecommunications services; content service providers; persons who perform cabling work; persons who manufacture or import customer equipment or customer cabling. These are the key sections most likely to make use of the codes regime.

Clause 109(3) allows the ACA to determine that other persons carrying on, or proposing to carry on, a specified telecommunications activity constitute a section of the telecommunications industry for this Part. Clause 109(6) provides that the sections of the industry need not be mutually exclusive, may be formed of two or more sections, or may be subsets of sections. Clause 109(7) provides that clause 109(6) does not limit the ACA’s options for determining sections under clause 109(3).

Clause 110 – Participants in a section of the telecommunications industry

This clause provides that a participant is a person who is a member of a group that constitutes a section of the telecommunications industry under this Part. This provision establishes a link between persons and industry sections and is important for compliance and enforcement purposes.

Division 3—General principles relating to industry codes and industry standards

Clause 111 – Statement of regulatory policy

This clause is a statement of the Parliament’s regulatory policy and provides important guidance to the ACA in performing its functions under this Part.

Clause 111(1) provides that it is the Parliament’s intention that industry codes be developed by bodies or associations that the ACA is satisfied represent sections of the industry. This reflects the self-regulatory objective of the code-standard regime. An industry body or association set up to represent an industry section does not need to be incorporated to develop a code.

Clause 111(2) provides that it is the Parliament’s intention that the ACA exercise specified powers in this Part in a manner that, in the opinion of the ACA, enables public interest considerations to be addressed without imposing undue financial or administrative burdens on industry participants. In forming its opinion the ACA must have regard to: the number of customers who are likely to benefit; the extent to which those customers are residential or small business customers; the legitimate business interest of the participants; and the public interest in having competition in markets (clause 111(3)). The ACA may consider other matters (clause 111(4)).

The powers specified in clause 111(2) are those in clauses 115, 116, 117, 121, 122 and 123.

Clause 112 – Examples of matters that may be dealt with by industry codes and industry standards

This clause gives examples of the matters that industry codes and industry standards may address, however, the applicability of a particular example will depend on the section of the industry concerned. The examples include: telling customers about goods and services on offer, their prices and terms and conditions; giving customers information about performance indicators and customer complaints mechanisms; the issue of privacy, including the protection of personal information and the monitoring or recording of communications; security deposits given by customers; debt collection practices; customer credit practices; disconnection of customers; the quality of standard telephone services; the accuracy of billing of customers of carriage service providers in relation to the supply of standard telephone services; the timeliness and comprehensibility of bills; and the procedures to generate standard billing reports so as to assist in the investigation of customer complaints about bills.

The list in s. 112(3) consists of examples of matters for industry codes. Many may not be applicable to particular industry sectors and not all matters may need to be addressed in codes. Moreover, codes and standards need not be limited to the matters identified.

Clause 113 – Industry codes and industry standards may confer powers on the Telecommunications Industry Ombudsman

This clause provides that the TIO may have functions and powers conferred on it by industry codes or standards, but only if the TIO consents. It is expected that the TIO would only consent to the conferral of functions and powers where authorised to do so in accordance with the constitution of TIO Limited. The continuity of consent is not affected if there is a change in occupancy of the position of TIO, but it would be affected by a vacancy of more than 4 months (clause 113(2)). Given the role of codes and standards, it is appropriate that provision be made to allow the TIO to be involved in their administration and enforcement.

Clause 114 – Industry codes and industry standards not to deal with certain design features and performance requirements

This clause provides that industry codes and standards will not have effect to the extent that they require customer equipment or cabling or telecommunications networks or facilities to have particular design features or performance requirements except as specified in clause 114(2). This prevents industry codes and standards from being used for technical regulation purposes. Part 21 sets out the proposed arrangements for technical regulation of telecommunications and its ambit should not be extended by the use of powers in this Part, except when specific provision is made.

Industry codes and standards also have no effect to the extent they deal with the content of content services (paragraph (1)(b)). The Act regulates telecommunications infrastructure and carriage services; content services will be regulated by content specific legislation such as the *Broadcasting Services Act 1992*.

Clause 114(2) provides a limited exception to clause 114(1) for technical codes or standards that relate to the accuracy of billing of customers and the quality of the standard telephone service. Other matters may be specified by regulation.

Under s. 47 of the proposed *Telecommunications (Transitional Provisions and Consequential Amendments) Act 1996*, technical standards relating to network matters, namely end-to-end quality of service and the accuracy of charges and billing, in force under s. 244 of the 1991 Act, will continue to apply until varied or revoked in accordance with s. 127 or 128 as the case may be of the proposed Telecommunications Act. If codes expressed to replace those standards are registered or standards expressed to replace those standards determined under Part 6, those standards under section 244 of the 1991 Act would be revoked.

Under s. 48 of the proposed *Telecommunications (Transitional Provisions and Consequential Amendments) Act 1996*, indicative performance standards relating to the quality of standard telephone services in force under s. 38(2)(b) of the 1991 Act will continue to apply until a code is registered or a standard is determined under this Part that replaces those standards.

Division 4—Industry codes

Clause 115 – Registration of industry codes

A body or association representing a section of the telecommunications industry may submit a draft code, that applies to participants of the section and deals with one or more matters relating to the telecommunications activities of that section, to the ACA for registration.

Clause 115(1) requires the ACA to register a code if the ACA is satisfied that:

- the code provides appropriate community safeguards or deals with the matters in an appropriate manner, depending on the nature of the matters;
- the body or association has published a draft code, invited participants in that section to make submissions within a period of at least 30 days (clause 115(3)) and considered any submissions;
- the body or association has published a draft code, invited members of the public to make submissions within a period of at least 30 days (clause 115(3)) and considered any submissions;
- the TIO has been consulted about the development of the code;
- where a code relates to privacy issues, the Privacy Commissioner has been consulted about the development of the code; and
- the ACCC does not object to the code.

The public comment requirements are additional to any opportunities the industry may provide for the involvement of the public or consumer representatives in the code development process.

Clause 115(4) provides that when a new code is registered under this Part and it is expressed to replace another industry code, the other code ceases to be registered.

A decision to refuse to register a code is subject to merits review under Part 29 of the Act (see Schedule 4).

Clause 116 – ACA may request codes

This clause performs the function of being a formal trigger for the development of an industry code. The failure to develop the code which has been requested provides a ground for the ACA to develop an industry standard (s. 121). That provision has the effect of preventing the ACA developing an industry standard before the industry has an opportunity to develop a code.

This clause provides that if the ACA is satisfied that a body or association represents a particular section of the telecommunications industry, it may request them to develop a code that would apply to participants of the section and deals with one or more specified matters. The ACA must specify a period of at least 90 days for a code to be developed and a copy be given to it.

The ACA is not permitted to make a request under this clause unless it is satisfied that the development of the code is necessary or convenient to provide appropriate community safeguards or otherwise deal with the performance or conduct of participants in that industry section, and it is unlikely that an industry code would be developed within a reasonable period without such a request.

The ACA may vary the request by extending the period (clause 116(4)) and may specify indicative targets for progress in developing the code. The targets are binding and may be used to guide the timing of the development process (s. 121(1)(b)(ii)).

Clause 117 – Publication of notice where no body or association represents a section of the telecommunications industry

This clause provides that if the ACA is satisfied that there is no body or association in existence that represents a particular industry section, it may publish a notice in the *Gazette* to the effect that if such a body were to come into existence, the ACA would be likely to request it to develop a code under s. 116 about the matters in the notice. The notice must set a period of at least 60 days for the section to develop a representative body.

This clause supports s. 116 by encouraging the formation of necessary industry bodies or associations to support the development and implementation of industry codes. If no such body or association is formed within the period set out in the notice, this would be a consideration in whether an industry standard would be made under s. 122. Again, the provision has the effect of preventing the ACA developing an industry standard before industry has an opportunity to develop a code.

Clause 118 – Replacement of industry codes

This clause provides that changes to industry codes are to be achieved by replacement of the code. However, when the changes are of a minor nature, the requirements for consultation with participants in the section and the public in clauses 115(1)(e) and (f) do not apply to the registration process. This will limit consultation to when matters of substance arise and facilitate the making of minor changes to registered codes.

Clause 119 – Directions about compliance with industry codes

It is intended that compliance with industry codes be voluntary or as determined by the industry section subject to the code. It is envisaged, however, that where a code is effective and being complied with by a majority of participants to whom it applies, it may be appropriate to direct non-compliant persons to comply with the code. This may particularly apply when the person can give no good reason for non-compliance with the code. In this context, clause 119 allows the ACA to direct the person to comply with a code. This provides a back-up to self-regulation by allowing a person who refuses to comply with otherwise successful self-regulatory arrangements to be directed to comply with a code; in effect, compliance with the code becomes mandatory for that person.

A decision to give or vary a direction, or refuse to revoke a direction, under this clause is subject to merits review under Part 29 of the Bill (see Schedule 4).

Breaches of a direction are subject to pecuniary penalties under Part 31.

Clause 120 – Formal warnings – breach of industry codes

This clause provides that if an industry participant contravenes an industry code, the ACA may issue a formal warning to the industry participant. It is intended to enable the ACA to formally indicate its concerns about a contravention of a code to a person. Such a warning may be a precursor to making a compliance direction under s. 119. However, in the case of a serious, flagrant or recurring breach, the ACA may decide to give a direction under s. 119 without giving a prior formal warning.

Division 5—Industry standards

Industry standards provide a formal back-up to industry self-regulation by way of codes. It is intended that industry standards not be made unless industry self-regulation using codes fails.

Clause 121 – ACA may determine an industry standard if a request for an industry code is not complied with

This provision enables the ACA to make a standard where it has requested industry to develop a code and it has failed to do so or to have made satisfactory progress. The provision works in tandem with s. 116. It prevents the ACA from making a standard before an industry section has had an appropriate opportunity to develop a code.

This clause provides that, if the ACA requests a code to be developed by a particular section of the telecommunications industry under s. 116(1) and this request has not been complied with; indicative targets have not been met; or a code has been developed that the ACA subsequently refused to register, then the ACA may determine an industry standard if it is satisfied that it is necessary or convenient to do so to provide appropriate community safeguards or otherwise regulate adequately that industry section.

Clause 121(3) requires the ACA to consult the body or association to which it made the request before determining an industry standard.

A standard is a disallowable instrument for the purposes of the *Acts Interpretation Act 1901*.

Clause 122 – ACA may determine industry standard where no industry body or association formed

This provision enables the ACA to make a standard where no industry representative body has been established. The provision works in tandem with s. 117. It prevents the ACA from making a standard before an industry section has had an appropriate opportunity to develop a code.

If the ACA is satisfied that a particular section of the industry is not represented by a body or association, and has published a notice under s. 117(1) and no such body or association comes into existence within the period in the notice, then the ACA may determine an industry standard if it is satisfied that it is necessary or convenient to do so to provide appropriate community safeguards or otherwise regulate adequately that industry section.

A standard is a disallowable instrument for the purposes of the *Acts Interpretation Act 1901*.

Clause 123 – ACA may determine industry standards where industry codes fail

This provision enables the ACA to make a standard where a code has clearly failed. It prevents the ACA from making a standard before a code has proven to be ineffective.

If the ACA is satisfied that an industry code is deficient; a written notice has been given to the developer of a code to address these deficiencies within a period of at least 30 days; and after that period the ACA is satisfied that it is necessary or convenient to determine a standard, the ACA may determine an industry standard. This clause only applies to codes registered for at least 180 days to ensure that the implementation of a code has had adequate time before its success is judged and is intended to reinforce the preference for successful industry self-regulation.

If the ACA is satisfied that a body or association represents that industry section, clause 123(4) requires the ACA to consult with the body or association before determining an industry standard. The industry code ceases to be registered on the day the industry standard comes into force.

A standard is a disallowable instrument for the purposes of the *Acts Interpretation Act 1901*.

An industry code is deficient if, and only if, it is not operating to provide appropriate community safeguards or not otherwise operating to regulate adequately that industry section (clause 123(7)).

Clause 124 – Industry standards not to be determined during the first 180 days after commencement

This clause provides that the ACA must not determine an industry standard for 180 days after the commencement of the Act. This is to allow the industry a period within which to establish initial self-regulatory arrangements. It does not mean that all codes must be in place within 180 days.

Clause 125 – Compliance with industry standards

This clause provides that compliance with an industry standard developed by the ACA is compulsory for participants in the relevant section of the industry. Contravention of an industry standard is subject to pecuniary penalties under Part 31.

Clause 126 – Formal warnings – breach of industry standards

This clause provides that if an industry participant contravenes an industry standard, the ACA may issue it with a formal warning. It is intended to enable the ACA to formally indicate its concerns about a contravention of an industry standard, possibly as a precursor to considering seeking a sanction under s. 125, if the person does not heed the warning. However, in the case of a serious, flagrant or recurring breach, the ACA may decide to take action under Part 30 or 31 without giving a prior formal warning.

Clause 127 – Variation of industry standards

The ACA may vary an industry standard if it is satisfied that it is necessary or convenient to do so to provide appropriate community safeguards or otherwise adequately regulate participants.

A variation is a disallowable instrument for the purposes of the *Acts Interpretation Act 1901*.

Clause 128 – Revocation of industry standards

This clause provides that the ACA can revoke an industry standard. An instrument of revocation is a disallowable instrument for the purposes of the *Acts Interpretation Act 1901*.

If an industry code is developed by a section of the industry to replace an industry standard, the industry standard is revoked when the new code is registered. The process by which the code will be registered will ensure the code provides appropriate community safeguards or otherwise deals with its subject matter in an appropriate manner.

Clause 129 – Public consultation on industry standards

This clause provides that, before the ACA determines or varies a standard, it must publish a notice in a newspaper circulating in each State seeking public comment on a draft industry standard within 90 days of the publication of the notice. Minor variations are exempted from this requirement (clause 129(2)).

The ACA must have due regard to any comments made (clause 129(3)).

Clause 130 – Consultation with ACCC and the Telecommunications Industry Ombudsman

This clause provides that before determining, varying or revoking an industry standard, the ACA must consult with the ACCC and the TIO.

Clause 131 – Consultation with Privacy Commissioner

If an industry standard deals with privacy issues, the ACA must consult the Privacy Commissioner before determining, varying or revoking the standard.

Division 6—Register of industry codes and industry standards

Clause 132 – ACA to maintain Register of industry codes and industry standards

The clause provides for the establishment and maintenance by the ACA of a Register of industry codes and standards, requests under s. 116, notices under s. 117 and directions under s. 119. The Register may be maintained in electronic form. A person may inspect the Register and take extracts or make a copy of the Register on payment of the charge (if any) determined by the ACA.

If the Register is maintained in electronic form, a printout from the Register is taken to be a copy or extract and, if the person requests, a copy can be provided on a data processing device or by an electronic transmission.

The maintenance of the Register is intended to provide industry and the public with ready information about the codes and standards that are in force. The inclusion of the information in the Register will inform industry and the public about ACA initiatives to have codes developed.

Part 7—Universal service regime

Part 7 establishes a regime for delivering universal service in telecommunications. It is designed to ensure that a minimum level of telecommunications service is reasonably available to all people in Australia on an equitable basis, regardless of where they reside or carry on business. As an adjunct to imposing this obligation on the telecommunications industry, the Part provides for the funding by telecommunications carriers of losses incurred in fulfilling the universal service obligation (USO). Contributions to USO losses will be levied under the proposed *Telecommunications (Universal Service Levy) Act 1996*.

The universal service regime established under Part 7 is one means by which the Government can promote access to carriage and related goods and services. Other means include price control, specific statutory and licence conditions (relating, for example, to untimed local calls, emergency call services, directory services and itemised billing) and targeted assistance, which are dealt with elsewhere.

The universal service regime has nine main elements relating to:

1. the definition of the USO;
2. identification of universal service providers and participating carriers;
3. plans relating to the fulfilment of the USO;

4. charges for services supplied under the USO;
5. the calculation of net universal service costs, that is, the loss incurred in fulfilling the USO;
6. the calculation of participating carriers' contributions to the net universal service cost;
7. the making of assessments;
8. the disclosure of information about the basis and methods of an assessment; and
9. collection, recovery and payment of levy.

Provisions relating to compliance, enforcement, penalties, inquiries, investigations, monitoring and reporting are relevant to the universal service regime and are located in other Parts of the Act.

Under Part 1 of Schedule 1, compliance with the Act, and thus Part 7, is a standard carrier licence condition. Clause 67 of the Bill provides that a carrier must not contravene a condition of a carrier licence held by the carrier and that this is a civil penalty provision. Part 31 provides for pecuniary penalties for breaches of civil penalty provisions.

Under Part 25 of the Act, the ACA, at the Minister's direction or of its own volition, may hold public inquiries about certain matters relating to telecommunications. Such an inquiry may deal with the universal service regime. In particular, the Minister could direct the ACA to undertake a public inquiry about the adequacy of a universal service provider's draft universal service plan.

Under Part 26 a person may complain to the ACA about, amongst other things, a contravention of the Act, including a contravention of the universal service regime under Part 7 and in particular, a failure to take all reasonable steps to fulfil the USO (clause 146(5)) or to comply with a universal service plan (clause 162). The ACA has the power to investigate such a complaint.

Under clause 104 the ACA must monitor, and report each year to the Minister on the performance of carriers, including the adequacy of each universal service providers' compliance with its obligations under Part 7. The ACA has powers to require records to be kept and to gather information (Part 27) that will assist it in its performance of its monitoring and reporting functions.

Part 7 of the proposed Act is based on Part 13 of the 1991 Act, which has been effective in delivering universal service to date. To a large extent, Part 7 of the Act is best understood by reference to changes it makes to the current arrangements. Significant changes have been made to ensure the scheme will work in an open licensing environment, clarify and extend the Universal Service Obligation, enhance efficiency in delivery, improve the accountability of universal service providers, streamline administration and provide greater flexibility.

The most important changes:

- redefine the standard telephone service and the USO;
- make it clear that the universal service obligation is inclusive of people with a disability by explicitly linking it with the *Disability Discrimination Act 1992*;
- provide for the determination of systems, including tender systems, for selecting universal service providers for all or part of the USO;
- provide for multiple universal service providers within the same area, in relation to the same or different parts of the USO;
- require universal service providers to prepare and maintain plans setting out how they will fulfil the USO in their service area;
- enable price controls to be imposed on charges for services provided under the USO;
- enable a universal service provider's net universal service cost to be ascertained in a number of ways;
- enable the Minister to formulate principles about whether costs are to be treated as excess or revenues are to be treated as unreasonably low, with a view to adjusting them accordingly;
- provide for participating carriers' contributions to be based on their share of total 'eligible revenue' rather than timed traffic as under the 1991 Act, or according to a methodology determined by the Minister with the agreement of all participating carriers;
- introduce a levy guarantee for new market entrants;
- provide for the clawback and repayment of overpayments; and
- make changes of an administrative nature, for example, in relation to the lodgement of information, audit requirements, the completion and variation of assessments and the advance payment of levy.

Separate from the legislative reforms given effect in the Bill, the arrangements for applying the avoidable cost less revenue forgone methodology used in the 1991 Act and in the Bill are currently being refined by AUSTEL in consultation with the carriers.

Part 7 sets out the legislative framework for the delivery of the Universal Service Obligation after 1 July 1997. In terms of the services it requires to be delivered, it maintains existing service obligations. The question of whether the USO as a whole should be upgraded is being considered in a related but separate exercise. In July 1996 the Government established the Standard Telephone Service (STS) Review and convened a committee to advise the Government on what services might be included in any upgraded USO. This committee is scheduled to report in late 1996. It is envisaged that any decision the Government takes to upgrade the USO in light of the STS Review will be

given effect within the framework set out in Part 7 and, where appropriate, using provisions in clause 17.

Division 1—Introduction

Clause 133 – Simplified outline

Clause 133 provides a simplified outline of Part 7 to assist readers.

Clause 134 – Objects

Clause 134 sets out four key policy principles that Part 7 of the proposed Act is intended to give effect to. It provides a basic framework for understanding and interpreting the Part as a whole.

Clause 134 is modelled on s. 287 of the 1991 Act, but incorporates certain changes.

The fundamental policy principle is set out in clause 134(a). That is, that all people in Australia, wherever they reside or carry on business, should have reasonable access, on an equitable basis, to:

- (i) standard telephone services;
- (ii) payphones; and
- (iii) prescribed carriage services.

The USO's fundamental purpose is to safeguard access to a minimum level of essential telecommunications services for all persons in Australia. This recognises the fundamental importance of telecommunications in supporting effective participation in Australian society. The regime is constructed to ensure that access to a voice service, the 'standard telephone service', will always be available and cannot be altered, except by legislative amendment by Parliament. It is also recognised that the services people may need to have access to may evolve over time, for example to reflect changes in the uses of communications services. Thus the policy principle provides for people to be given reasonable access to services in addition to the standard telephone service by such services being made prescribed carriage services. Because universal service is a 'needs-based' concept, the designation of a service as a USO service would depend on the need for it in the community.

This principle is the basis for the USO which is defined in clause 144. In relation to the concepts of 'reasonable access' and 'equitable basis', it should be noted that these concepts are intended to relate primarily to access in geographical terms and equity in terms of equality of opportunity, rather than concepts of affordability. While affordability is clearly important to access in general terms, it is a matter which the Government considers should not be embedded in the USO itself, but should be tackled through other (transparent) mechanisms such as competition, price control and targeted assistance.

Division 4 of the Part enables the direct regulation of universal service charges. Accordingly, the affordability of services supplied under the USO is not dealt with in defining the USO itself.

Clause 134(a) refers to all people in Australia having reasonable access to certain carriage services, but does not include the detail that is part of the USO under clause 144. This is because the policy principle is a broad objective from which the more detailed composition of the USO in clause 144 flows and which therefore subsumes the detailed elements of the USO. For example, if the standard telephone service is to be reasonably accessible to all people in Australia, it follows that that service must be supplied on reasonable request, as provided for in clauses 144(1) and (2).

The other policy principles to which Part 7 gives effect support the key principle of providing all people in Australia with reasonable access to telecommunications services.

The policy principle in clause 134(b) is that the universal service obligation described in clause 134(a) should be fulfilled as efficiently and economically as practicable. This recognises that universal service in telecommunications involves a significant allocation of resources and maximum effort should be made to fulfil the USO at the least possible cost. However, while it is intended that costs be minimised, this is not intended to be at the expense of achieving the USO itself. This principle should be seen as both imposing a requirement on the universal service provider to fulfil its USO in an efficient and economical manner and foreshadowing a number of external mechanisms in the legislation designed to promote this outcome. These external mechanisms include, for example: provision for the Minister to determine a selection system, including tendering, for selecting universal service providers; provision for the Minister to declare more than one universal service provider in a service area; the advance approval of net cost areas (NCAs); provision for the Minister to determine principles to be used in determining whether net universal service costs (NUSC) should be treated as excessive; and the scrutiny of NUSC claims by the ACA and participating carriers (under the information disclosure provisions).

The policy principle in clause 134(c) is that losses that result from supplying loss-making services in the course of fulfilling the universal service obligation should be shared among carriers. Much of the administrative machinery of the universal service regime is concerned with achieving this outcome, including the provisions for calculating NUSCs, determining participating carriers' contributions and collecting and distributing levy. The losses are to be shared among carriers so that the financial burden of universal service is spread across participating carriers, thus distributing the burden more widely and making universal service sustainable on an ongoing basis. Moreover, sharing the losses amongst carriers on a pro-rata or agreed basis minimises any distortions in competitive or financial performance that would be expected to arise if the cost of fulfilling the USO was borne solely by the universal service provider or a limited group of carriers. (It is generally recognised that a universal service provider that must subsidise USO losses by itself in a competitive regime faces a competitive disadvantage.) While it is generally expected that losses will be shared amongst carriers on an equitable basis, particularly where shares are calculated on the basis of eligible revenue, explicit reference to equitable sharing of losses (as occurs in the 1991 Act) has been omitted in recognition that the Minister, with the agreement of participating carriers, may determine a method for determining shares.

The final policy principle in clause 134(d) is that information on the basis of which, and the methods by which, losses incurred in fulfilling the USO and participating carriers' shares in those losses are determined should be open to scrutiny by those carriers and the public to the greatest extent possible, without causing undue damage to a carrier's interests. This object reflects the importance of ensuring that where the Government effectively directs the allocation of significant national resources, those allocations should be open to the maximum possible public scrutiny. Such scrutiny is also important in promoting the efficient and economical fulfilment of the USO. To protect the legitimate commercial interests of universal service providers and participating carriers, constraints are placed on the extent of the information that can be made available under the Act.

Clause 135 – Special meaning of *Australia*

Clause 135 defines Australia for the purposes of Part 7 and provides that a reference to 'Australia' includes a reference to the territories of Christmas Island and Cocos (Keeling) Islands and an external territory specified in the regulations. This requires the Government to make a conscious decision to extend the universal service regime to other external territories, such as Norfolk Island. The definition of 'Australia' in clause 7 does not apply to Part 7. This definition of Australia applies the USO to the territories of Christmas and Cocos (Keeling) Islands and is consistent with previous Government decisions to extend the body of Commonwealth laws to these territories.

Clause 135 corresponds to s. 288(6) of the 1991 Act.

Clause 136 – Payphones

Clause 136 defines a payphone for the purposes of Part 7. The clause largely re-enacts the corresponding definition in s. 5 of the 1991 Act with some modifications, for example to reflect the new definition of 'standard telephone service'. For the purposes of Part 7, a payphone is a fixed telephone that is a means by which a standard telephone service is supplied and when in normal working order, generally cannot be used to make a call unless payment or similar activation takes place. A 'fixed telephone' refers to a payphone fixed at a single geographical location and does not include a telephone that is fixed in a vehicle (eg. a taxi, train or aircraft). In relation to the USO, 'payphone' includes all payphones, not just payphones in public places, thus ensuring that payphones in hotel lobbies, shopping malls and other private places which are nonetheless reasonably accessible to the public can be taken into account when fulfilling the USO. It is intended that a universal service provider's obligation to provide payphones to meet the needs of people with a disability should be determined under the *Disability Discrimination Act 1992*.

Clause 137 – Prescribed carriage services

Clause 137 provides that for the purposes of Part 7, a 'prescribed carriage service' is a carriage service specified in the regulations. 'Carriage service' is defined in clause 7 to be a 'service for carrying communications by means of guided and/or unguided electromagnetic energy'. This provision does not, therefore, enable the prescription of

services other than carriage services to be made part of the USO. (This outcome could be achieved under clauses 138(d) and 139(c).)

‘Prescribed carriage services’ are, along with payphones and the standard telephone service, the basic constituents of the USO. Should the Government seek to clarify, expand or upgrade the USO, it will have two avenues open to it. First, it can make regulations for the purposes of clause 17 declaring that the standard telephone service must serve additional purposes or have particular performance characteristics. (This is discussed in more detailed in the notes on clause 17.) Second, the Government can make regulations prescribing new carriage services for the purposes of Part 7 as provided for in clause 137. (This differs from the approach in the 1991 Act which only enables the definition of the standard telephone service to be changed. The reason for this approach is explained more fully in the notes on clauses 17 and 144.)

The USO is able to be upgraded in these two ways to ensure, through compartmentalising the components of the USO, that people will always have reasonable access to a minimum service that is of general appeal and that can change over time, while providing a mechanism to ensure more advanced services, which may not be of general appeal, can be required to be made accessible under the USO, without affecting overall access to the basic service.

Nothing is intended to preclude multiple services under the USO (for example, the standard telephone service and a high capacity data service, if it were prescribed) being supplied using a single infrastructure connection or being supplied, as it were, as a type of combined service.

Clause 138 – Supply of standard telephone services

Clause 138 is a definitional provision that sets out what is included in a reference to the supply of a standard telephone service (for example, under clause 144(2)(a)) and thereby provides a means of adding further requirements to the USO. Clause 138 provides that a reference in Part 7 to the supply of a standard telephone service includes a reference to the supply of:

- if the regulations prescribe customer equipment - that customer equipment or customer equipment supplied instead of that first-mentioned customer equipment in order to comply with the *Disability Discrimination Act 1992*; and
- if the regulations do not prescribe customer equipment - a telephone handset that does not have switching functions or other customer equipment supplied instead of such a handset in order to comply with the *Disability Discrimination Act 1992*; and
- other prescribed goods; and
- prescribed services;

where the equipment, goods or services, as the case may be, are for use in connection with the standard telephone service.

Clause 138 ensures that, as under the 1991 Act, customer equipment will be supplied under the USO along with the standard telephone service. Unless regulations provide otherwise, that customer equipment will be, at a minimum, a telephone that does not have switching functions; that is, a basic telephone that allows calls to be made and received but does not necessarily have other functionality (including, for example, the ability to redirect calls, ie. a switching function).

In the case of people with a disability, the customer equipment would be the equipment supplied instead of such a telephone, in order to comply with the *Disability Discrimination Act 1992*.

A power is included to enable regulations to prescribe other customer equipment to be supplied for use in connection with the standard telephone service. This enables upgrade of the type of customer equipment for use in connection with the standard telephone service under the USO. For example, a regulation might prescribe a telephone with switching functions or with a liquid crystal display (LCD) for use with calling line identification (CLI) services. In the case of people with a disability, the customer equipment would be the equipment supplied instead of such equipment, in order to comply with the Disability Discrimination Act. Reliance on the *Disability Discrimination Act 1992* is consistent with the Government's overall approach of relying on the general provisions of that Act to address the needs of people with a disability. (This matter is discussed further in the context of clause 17.)

In addition to customer equipment, clauses 138(c) and 138(d) also enable regulations to provide that a reference to the supply of the standard telephone service also includes a reference to the supply of prescribed goods (other than customer equipment) and prescribed services (other than carriage services). These provisions give the

Government considerable flexibility in constructing the package of products that may be supplied under the USO for use in connection with the standard telephone service. Other prescribed goods could include, for example, particular telephone add-ons or manuals on how to use a service. Prescribed services could include non-carriage services, for example, customer helplines or relay services for speech/hearing impaired users.

It is important to note that equipment, other goods and services included in a reference to the supply of a standard telephone service must be for use in connection with the standard telephone service. Equipment, other goods and services not for use in connection with the standard telephone service cannot be required to be supplied under this provision. Furthermore, equipment, other goods and services for use in connection with the standard telephone service are not required to be supplied on a stand-alone basis, but only for use in conjunction with the standard telephone service. For example, persons cannot request that they be supplied with just a telephone; they can only request a telephone be supplied for use in connection with a standard telephone service.

It is intended, however, that if regulations are made under clause 150 or 151 providing for the declaration of multiple universal service providers in a single area to provide different components of the USO (eg. the standard telephone service and customer equipment), that one universal service provider might only supply the standard telephone service while another supplies the customer equipment. In such a circumstance, however, the equipment would still be provided for use in connection with the standard telephone service and the person responsible for providing customer equipment would not be expected to provide it except for use in connection with that service, even though it may have been acquired from a different universal service provider. To the extent that legislative modification might be necessary to ensure this outcome, regulations under clauses 150 and 151 authorising multiple universal service providers can make such modifications to the Part as are required to make a scheme for multiple universal service providers effective.

Clause 139 – Supply of prescribed carriage services

Clause 139 is a companion provision to clause 138 that sets out what is included in a reference to the supply of a prescribed carriage service (for example, under clause 144(2)(c)). Like clause 138, this clause provides a further means of adding items, for use in connection with a prescribed carriage service, to the USO. Clause 139 provides that a reference in Part 7 to the supply of a prescribed carriage service includes a reference to the supply of:

- prescribed customer equipment;
- other prescribed goods; and
- prescribed services.

Clause 139 has a similar purpose to clause 138. However, under clause 139 there is no standing requirement that customer equipment be supplied with a prescribed carriage service, rather any customer equipment needs to be specifically prescribed. Customer equipment, other goods and other services, including those for people with a disability, that might be required to be supplied for use in connection with a prescribed carriage

service would need to be considered when prescribing that carriage service, having regard to the nature of that carriage service.

Clause 140 – Service area

Clause 140 is a definitional provision that provides that, for the purposes of Part 7, a ‘service area’ is: a geographical area within Australia; any area of land; or any premises or part of premises; regardless of size. To avoid doubt, it is intended that the universal service obligation applies to premises that are within another building, for example, a flat or shop in a multi-unit complex. ‘Service area’ is used, for example in clause 145, in defining the area in relation to which regional and national universal service providers have the obligation to fulfil the USO and in Division 5 in relation to the declaration of net cost areas.

Clause 140 re-enacts, without significant change, the definition of ‘service area’ in s. 5 of the 1991 Act.

Clause 141 – Participating carriers

Clause 141 is a definitional provision. It provides that, for the purposes of Part 7, a ‘participating carrier’ is a person who in relation to a financial year, was a carrier at any time during the financial year. However, the clause does not apply to a person if the person is of a kind declared by the regulations to be exempt from this clause.

Clause 141 corresponds to s. 289 of the 1991 Act, but is significantly different.

Participating carriers are those carriers who participate in the universal service regime by contributing to the cost of the losses incurred in fulfilling the USO. Importantly, any person who was a carrier during a financial year is a participating carrier in relation to that year. Accordingly, if a person has ceased to be a carrier when the USO assessment is made, that person is nevertheless still a participating carrier for the purpose of the assessment and liable to pay levy. This approach is designed to ensure that persons who were carriers in a financial year and earned revenue in the industry make a contribution to the cost of fulfilling the USO. New provisions requiring participating carriers to take out levy guarantees (clause 210) are designed to ensure levy contributions are paid, including in the case of insolvency.

A person who is a carrier in relation to financial year may be exempt from being a participating carrier if the person is a kind of person declared by regulations to be exempt from the clause. It is envisaged that regulations would exempt the class of participating carriers whose revenues are such that their contribution to total net universal service cost would be minimal and may not exceed the administrative cost in levying it. It is intended that the regulations could, for example, declare that persons who do not earn eligible revenue (see clause 142) above a certain level are not participating carriers.

Clause 142 – Eligible revenue

Clause 142 is a definitional provision. It provides that, for the purposes of Part 7, the ‘eligible revenue’ of a participating carrier for a financial year is the amount that, under the regulations, is taken to be the eligible revenue of the carrier for the financial year.

That is, 'eligible revenue' has the meaning given to it in the regulations. 'Eligible revenue' is an important concept because it is the basis upon which participating carriers' USO contributions will be normally determined under clause 187. (In this regard it replaces the 'timed traffic' concept which served the same purpose in the 1991 Act.)

Clause 142 gives the Government wide discretion in defining what constitutes 'eligible revenue'. Because eligible revenue is the amount 'taken' to be eligible revenue, it is not restricted to revenue received by a participating carrier. It may include any amounts, including revenue received by persons other than the carrier. Amongst other things, this wide-ranging approach has been taken to avoid disputes as to what can and cannot be treated as eligible revenue and to provide a means of addressing tactics to avoid levy, for example by minimising eligible revenue by engaging in transfer pricing. Should participating carriers seek to minimise levy by diverting revenue to related service provider operations, such revenue will be able to be included under the regulations. Similarly, revenue paid to an infrastructure owner, rather than a participating carrier that is a nominated carrier in relation to the infrastructure, could be included in 'eligible revenue'.

It is envisaged that eligible revenue may, for example, include - but need not be limited to - revenue from charges for services such as connection, line rental, calls, leased lines and providing access to carriers and service providers. It is also intended that, for clarity, the regulations would specify that certain amounts (eg. perhaps revenue earned from investments outside of Australia) are not 'eligible revenue'.

Clause 143 – Approved auditor

Clause 143 is a definitional provision. It provides that a reference in Part 7 to an 'approved auditor' is a reference to a person included in a class of persons specified in a written determination, published in the *Gazette*, made by the ACA for the purposes of this clause.

Net universal service claims (clause 174) and eligible revenue returns (clause 182) must be audited by an independent auditor. As the ACA is ultimately responsible for accepting such claims and returns, it is appropriate that the ACA determine the class of persons who it will accept as approved auditors.

Division 2—Universal service obligation

Clause 144 – Universal service obligation

Clause 144 is a definitional clause which, because it defines the universal service obligation, is the key provision of Part 7. The clause is central to giving effect to the policy principle in clause 134(a) of the objects of Part 7.

Clause 144 re-enacts, with significant changes, s. 288 of the 1991 Act. The clause also relies on new concepts and definitions not used in the 1991 Act.

Clause 144(1) provides that for the purposes of the Act, the universal service obligation is the obligation to ensure that:

- standard telephone services;
- payphones; and
- prescribed carriage services;

are reasonably accessible to all people in Australia on an equitable basis, wherever they reside or carry on business.

This clause provides a broad conceptual definition of the universal service obligation: people in Australia are to have reasonable access to certain specified carriage services. In relation to the concepts of ‘reasonably accessible’ and ‘equitable basis’, see the notes on clause 134. This broad conceptual obligation is backed up by a further part of the obligation, namely to supply the services and payphones necessary to achieve the objective of ensuring the specified services and payphones are reasonably accessible to people in Australia on an equitable basis.

Clause 144(2) therefore provides that to the extent necessary to achieve the obligation mentioned in clause 144(1), it is part of the universal service obligation:

- to supply standard telephone services to people in Australia on request; and
- to supply, install and maintain payphones in Australia; and
- to supply prescribed carriage services to people in Australia on request.

This two tier approach to defining the universal service obligation provides a clear ‘headland’ statement of the core of the universal service obligation, and indicates that the supply of services under the obligation supports the broad obligation, rather than runs in tandem with it. This removes a tension that has been perceived in s. 288 of the 1991 Act, that the provision of reasonable access and the supply of services are, somehow, obligations of equivalent standing, rather than leading and supporting obligations.

Importantly, clause 144(2) provides for the supply of the specified carriage services ‘on request’, that is, on the request of the person seeking supply of the relevant service. The

‘on request’ concept has been introduced to further clarify the nature of the universal service obligation, particularly in a situation in the future where more than one carriage service or ancillary item (other than payphones), might be required to be supplied under the universal service obligation. For example, some customers may only want to receive a standard telephone service and no other prescribed carriage services. It is not considered appropriate therefore, for the universal service provider to be required to supply that customer with all the services under the USO, including services the customer does not want.

Clause 144(3) enables the Minister to determine in writing that it is part of the USO to install payphones at specified locations. This enables specific community concerns, should they arise, about the availability of payphones to be addressed. Such a determination would be an integral component of the USO.

Clause 144(4) requires any determination under clause 144(2) to be published in the *Gazette*. This ensures the full extent of a universal service providers’ obligation is publicly known.

Clause 144(5) enables regulations to prescribe what is, or is not, necessary to ensure payphones are reasonably accessible. Such regulations would be an integral component of the USO.

Clauses 144(6) and (7) are interpretive rules which prevent clauses 144(3) and (5) being used to read down the meaning of each other.

Division 3—Universal service providers

Clause 145 – Universal service providers

This clause enables the Minister to declare in writing that a specified carrier is the universal service provider for Australia or for a specified service area. ‘Service area’ is defined in clause 140. Under clause 146(5), a universal service provider must take all reasonable steps to fulfil the universal service obligation so far as it relates to the area for which it is the universal service provider. Under clause 162, a universal service provider must take all reasonable steps to ensure that its universal service plan, which sets out how it is to progressively fulfil its USO, is complied with. A universal service provider must fulfil the USO in its respective area and can claim for proceeds of the levy to compensate it for the losses it incurs in fulfilling the USO.

There is nothing in the legislation to prevent a carrier who wishes to be declared a universal service provider approaching the Minister to be so declared. Except where a system for selecting a universal service provider has been determined under clause 147 or 148, the Minister has a full discretion as to who is declared to be a universal service provider.

Clause 145 corresponds to s. 290 of the 1991 Act, but incorporates various changes.

Clause 145(1) enables the Minister to declare that a specified carrier is the national universal service provider. By virtue of clause 145(11), a ‘carrier’ must be a

‘participating carrier’. The effect of being declared the national universal service provider, in terms of geographical responsibilities, is stated in clause 146(1).

Clause 147 enables the Minister to determine in writing a selection system for the selection of a national universal service provider.

Clause 150 enables regulations to authorise the Minister to declare multiple national universal service providers in relation to the USO as a whole or, more importantly, in relation to particular components of the USO. Regulations made for the purposes of clause 150 may modify Part 7 as required so that it is consistent with the operation of multiple national universal service providers. Clause 145 would require such modification if it becomes desirable to proceed with the declaration of multiple national universal service providers in the future.

Clause 145(2) enables the Minister to declare that a specified carrier is the regional universal service provider for a specified service area. By virtue of clause 145(11), a ‘carrier’ must be a ‘participating carrier’. The effect of being declared a regional universal service provider, in terms of geographical responsibilities, is stated in clause 146(2). ‘Service area’ is defined in clause 140.

Clause 148 enables the Minister to determine in writing a selection system for selecting a regional universal service provider.

Clause 151 enables regulations to authorise the Minister to declare multiple regional universal service providers in relation to the USO as a whole or, more importantly, in relation to particular components of the USO. Regulations made for the purposes of clause 151 may modify Part 7 as required so that it is consistent with the operation of multiple regional universal service providers. Clause 145 would require such modification if it becomes desirable to proceed with the declaration of multiple regional universal service providers in the future.

Clause 148 enables the Minister to determine a selection system for the purposes of selecting carriers to be regional universal service providers for specified areas. If such a selection system has been determined under clause 148, a declaration under clause 145(2) must be consistent with the selection system. In the absence of such a selection system, it is intended, however, that the Minister can declare a person to be a regional universal service provider at his or her discretion.

Clause 145(3) provides that a declaration under clause 145(1) or (2) has effect accordingly. The effect of such declarations is stated in clauses 146(1), (2) and (5).

Clause 145(4) requires the Minister to exercise his or her powers in such a way that at any particular time there is only one national universal service provider and the service areas of any regional universal service providers do not overlap. This provision is designed to remove confusion over which universal service provider, under the normal operation of the universal service regime, is obliged to fulfil the USO for a service area. The responsibilities of the national universal service provider when there are one or more regional universal service providers are stated in clause 146(1).

Where it becomes desirable to proceed with the declaration of multiple national and/or regional universal service providers for the same area under clause 150 and/or clause 151, clause 145 will need to be modified by regulations made under those clauses to be consistent with the operation of these multiple operators. It is intended that the multiple provider powers in clauses 150 and 151 will enable the regulations to modify these provisions to allow for the declaration of two or more national or regional universal service providers for the same service area, or one or more national and regional universal service providers for the same service area.

Clause 145(5) makes a declaration take effect at the start of the financial year after the financial year in which it is made and cease at the end of the financial year the declaration specifies unless it is revoked sooner. If the declaration does not include a cessation date, it continues in force until it is revoked. This provision is subject to clauses 145(7), (8) and (9) which deal with replacement of declarations and the cessation of a carrier licence. The universal service regime operates in relation to financial years.

Clause 145(6) makes a revocation take effect at the end of the financial year it specifies or the financial year in which it is made if it does not specify another financial year.

Clause 145(7) is designed to enable a carrier that is the existing national universal service provider to be replaced by another carrier. It provides that if a fresh declaration declaring another carrier to be the national universal service provider is made to replace an existing declaration (the 'original declaration') the fresh declaration takes effect, and the original declaration ceases to have effect, from the time specified in the fresh declaration. A fresh declaration may be made before the date it is to come into effect (ie. the date specified in the declaration), thereby providing a period for the new carrier to prepare itself for its role of national universal service provider.

Clause 145(8) mirrors clause 145(7) but is designed to enable a carrier that is a regional universal service provider to be replaced by another carrier. It provides that if a fresh declaration declaring another carrier to be the regional universal service provider for a particular area is made to replace an existing declaration (the 'original declaration') the fresh declaration takes effect, and the original declaration ceases to have effect, from the time specified in the fresh declaration. A fresh declaration may be made before the date it is to come into effect (ie. the date specified in the declaration), thereby providing a period for the new carrier to prepare itself for its role of regional universal service provider.

Clause 145(9) provides that if a carrier is a regional universal service provider and the carrier ceases to hold a carrier licence, then the declaration in relation to that carrier ceases to be in force from that time. That is, on ceasing to be a carrier, the person is no longer a regional universal service provider. In this instance, unless the Minister declares another carrier to be the regional service provider for that particular service area, fulfilment of the USO in that area will become the responsibility of the national universal service provider (see clauses 146(1) and (2)).

Clause 145(10) makes a declaration of a universal service provider a disallowable instrument which accordingly must be notified in the Gazette, tabled in the Parliament and is subject to Parliamentary disallowance.

Clause 145(11) provides that a reference in clause 145 to a carrier does not include a reference to a person of a kind declared by the regulations to be exempt from clause 141. That is, to be declared a universal service provider, a person must be a participating carrier.

Clause 146 – Effect of universal service provider declaration

Clause 146 sets out the effect, in terms of geographical responsibilities and legal obligations, of being declared a universal service provider. The clause re-enacts, with changes, s. 291 of the 1991 Act and incorporates aspects of s. 292 of that Act. The explicit linkage between the USO and being a universal service provider is established in clause 146(5) and is supported through the universal service plans (Division 3).

This clause would require modification under regulations made for the purposes of clause 150 and/or clause 151 if multiple national and/or regional universal service providers were to be declared in accordance with regulations made for the purposes of those clauses.

Clause 146(1) makes the national universal service provider the universal service provider for all of Australia except for each service area in relation to which a regional universal service provider has been declared and for so much of a service area as is not within such an area.

Clause 146(1)(b) is a drafting device designed to link a national universal service provider to the concept of ‘service area’ (clause 140), which is a geographical area to which the USO relates. The provision assumes that all of Australia is the ‘service area’ of a national universal service provider. Accordingly, a national universal service provider’s service area is any service area other than a service area of a regional universal service provider (as stated in paragraph (a)). (The ‘service area’ referred to in paragraph (b) is not the ‘service area’ of the regional universal service provider referred to in paragraph (a).)

It is also worth noting here that a national universal service provider, as the ‘underlying’ universal service provider may also be responsible for ‘enclave’ service areas within the service area of a regional universal service provider if that service area is so designed.

Clause 146(2) makes a regional universal service provider in relation to a particular service area the universal service provider for that area and for each service area within that area. As in clause 146(1), paragraph (2)(b) is a drafting device to link the universal service provider to the ‘service area’ concept for the purpose of particular provisions.

One of the effects of clauses 146(1) and (2) is that where there ceases to be a regional universal service provider, the national universal service provider automatically becomes responsible for fulfilling the USO in that regional universal service provider’s service area. Nothing in the legislation, however, requires a national universal service provider to maintain infrastructure in the service area of a regional universal service provider.

Clause 146(3) provides that a person in relation to whom there is a declaration in force under clause 145(1) or (2) at any time during a financial year is a universal service provider in relation to that financial year. This means that that person is eligible to make

a claim for levy credit under clause 174, even though the person may no longer be a universal service provider.

Clause 146(4) provides that the areas for which a person is a universal service provider are taken to be a single area. This means that although a universal service provider may be responsible for fulfilling the USO in a number of non-contiguous areas (for example, Victoria and Western Australia) for the purposes of the Part, those areas are treated as a single area. This assists with administration of the USO costing arrangements.

Clause 146(5) provides that the universal service provider for an area must take all reasonable steps to fulfil the universal service obligation, so far as the obligation relates to that area. This clause performs the function of requiring the universal service provider to fulfil the USO. Division 4 of Part 7 places further obligations on the universal service provider for a particular area in relation to universal service plans and clause 162 requires such a universal service provider to take all reasonable steps to ensure that the plan is complied with. Under clause 153, a universal service plan sets out how the universal service provider will progressively fulfil the USO in the provider's area. In considering whether a provider has taken all reasonable steps to fulfil the USO, regard should be had to whether the provider has complied with its universal service plan.

Note that in the case of the national universal service provider, the relevant area is Australia, except for each service area in relation to which there is a regional universal service provider (clause 146(1)).

The obligation in clause 146(5) is expressed in terms of taking 'all reasonable steps'. The reasonableness requirement recognises that a universal service provider may only be able to fulfil the USO progressively in its area. This is particularly the case where the USO is upgraded, as the rollout of additional network infrastructure may be required.

Clause 565 enables the ACA to give written directions to a carrier in connection with performing any of the ACA's telecommunications functions or exercising any of the ACA's telecommunications powers. Those functions include regulating telecommunications in accordance with the proposed Telecommunications Act. As clause 146(5) requires the universal service provider to take all reasonable steps to fulfil the USO, clause 1 of Schedule 1 makes this obligation a standard carrier licence condition and the ACA has the powers to enforce this carrier licence condition (see clauses 68, 69 and Parts 30 and 31), the ACA will have the power under clause 565 to direct a universal service provider in relation to its compliance with this obligation.

Clause 147 – Selection system for national universal service providers

Clause 147 and its companion provision, clause 148, are new provisions without any antecedent in the 1991 Act. The following comments about clause 147 are also generally applicable to clause 148.

This clause provides a head of power to enable the Minister to determine a selection system for selecting the national universal service provider for Australia in relation to specified financial years. Amongst other things, the provision is intended to enable the national universal service provider to be selected by tender (ie. with the tenderer submitting the lowest cost being declared the national universal service provider),

particularly where the provider would, by virtue of regulations made under clause 150, be one national provider, along with others, of a component of the USO. The selection system for national universal service providers (particularly in the case of tendering) is envisaged as generally working in tandem with a multiple universal service provider scheme under clause 150 and in relation to a discrete component of the USO rather than the USO as a whole.

The precise requirements of the selection system are to be dealt with in subordinate legislation rather than the Act because of the significant detail that may need to be specified.

A selection system determined by the Minister need not involve price-based tendering. The Minister has full discretion as to the nature of a selection system. A selection system could, for example, provide for the selection of a provider according to non-price criteria such as industry experience, innovation, infrastructure and ability to fulfil the USO.

Where the Minister declares a national universal service provider selection system, the Minister is obliged to use that system. This protects applicants by preventing the Minister disregarding a determined system. Where no selection system has been determined, however, the Minister has full discretion as to the selection and declaration of a universal service provider.

Where the national universal service provider is selected according to a selection process, it would still be necessary for that person to be declared the national universal service provider under clause 145(1).

While clauses 147 and 148 provide a mechanism for tendering out the USO nationally or in a particular service area, the precise arrangements will be dealt with in the Minister's determination. Some comments, however can be made about envisaged linkages between the operation of clauses 147 and 148 and the remainder of Part 7. Where the selection system involves tendering, it is envisaged that the system would provide for the preparation of a tender specification. This specification would set out the requirements the Government would require of the successful tenderer. These requirements would largely derive from the USO as it is defined in clause 144 and any price control arrangements provided for under Division 5 of Part 7.

Successful universal service providers would be subject to other requirements applying to the standard telephone service (and other services) under other legislative provisions (eg. untimed local calls, customer service guarantee) as a matter of course.

The Bill enables the Minister to require an applicant for selection under a selection system to submit a draft universal service plan as part of its application or tender. Where a tenderer was successful, it would be declared the national or regional (as appropriate) universal service provider. As such it would be bound by the USO and price control as provided for in the legislation (and as identified in the tender specification).

Clause 147(1) enables the Minister, by written instrument, to determine a selection system for the purpose of selecting a carrier to be the national universal service provider in relation to specified financial years.

It is intended that where regulations have authorised the Minister to declare multiple national universal providers, particularly in relation to different components of the USO, that a selection system under clause 147 could be used to select a national universal service provider in relation to a particular component. For example, regulations under clause 150 may authorise the Minister to declare different national universal service providers for the standard telephone service and payphones. The Minister may exercise his or her discretion in declaring the provider of the standard telephone service, while deciding that the provider of the payphones should be selected via a selection system under clause 147.

Subsection 147(2) requires that a selection system so determined must require the selected carrier to have elected that:

- an amount specified in the election will be the carrier's net universal service cost for the financial year concerned; or
- a method of ascertaining an amount, being a method specified in the election, will apply for the purposes of determining the carrier's net universal service cost for the financial year concerned.

Accordingly, clause 147(2) requires the selected carrier to have elected that a specific amount is to be its net universal service cost (for example, an amount that it has tendered as its cost to fulfil the USO) or to have elected that its net universal service costs will be ascertained by means of a particular method (again, for example, possibly as proposed by an applicant during a selection process).

Clause 147(3) provides that a selection system determined by the Minister may require an applicant for selection under such a system to give the Minister a copy of the document that the applicant would be required to give to the Minister under clause 152, namely a draft universal service plan, in the event that the applicant is successful. This provision is intended to enable the submission of a draft universal service plan as part of the process for the selection of a universal service provider. Whether a successful applicant (or the Minister) would be bound by such a document should the applicant be successful would depend on the details of the selection system determined by the Minister. This provision, does not, by implication, limit the kind of selection scheme the Minister can determine under clause 147(1).

Clause 147(4) prevents the Minister from exercising his or her power to declare a national universal service provider under clause 145(2), in any way that is inconsistent with the determined selection system. That is, where a system is in place for determining the national universal service provider, that system must be used. However, where no system has been determined, the Minister may exercise his or her discretion in selecting a national universal service provider.

Clause 147(5) provides that Part 7 does not prevent a method mentioned in clause 147(2)(b) from being the same as a method that would have applied if the system concerned had not been determined. This means that even if a national universal service provider is selected under clause 147, the successful carrier may elect to have its net universal service cost calculated according to a methodology determined by the Minister,

with the agreement of all participating carriers under clause 177(1)(c), or using the avoidable cost less revenue forgone methodology under clause 177(1)(d).

Clause 147(6) makes a selection system determination a disallowable instrument.

Clause 148 – Selection system for regional universal service providers

Clause 148 is a parallel provision to clause 147 but provides for the determination of selection systems for regional, rather than national, universal service providers. Most of the explanation in relation to clause 147 is also applicable to this clause.

This clause provides a head of power to enable the Minister to determine a selection system for selecting regional universal service providers for particular areas in relation to specified financial years. Amongst other things, the provision is intended to enable a regional universal service provider for a particular area to be selected by tender (eg. where the tenderer submitting the lowest cost is declared the regional universal service provider). The precise requirements of the selection system are to be dealt with in subordinate legislation rather than the Act because of the significant detail that may need to be specified.

Where a regional universal service provider is selected according to a selection process, it would still be necessary for that person to be declared a regional universal service provider under clause 145(2).

Clause 148(1) enables the Minister, by written instrument, to determine a selection system for the purpose of selecting carriers to be regional universal service providers for specified service areas in relation to specified financial years.

Clause 148(2) provides that a selection system so determined must require the selected carrier to have elected that:

- an amount specified in the election will be the carrier's net universal service cost for the financial year concerned; or
- a method of ascertaining an amount, being a method specified in the election, will apply for the purposes of determining the carrier's net universal service cost for the financial year concerned.

Clause 148(3) provides that a selection system determined by the Minister may require an applicant for selection under such a system to give the Minister a copy of the document that the applicant would be required to give to the Minister under clause 152, namely a draft universal service plan, in the event that the applicant is successful. This provision is intended to enable the submission of a draft universal service plan as part of the process for the selection of a universal service provider. Whether a successful applicant (or the Minister) would be bound by such a document should the applicant be successful would depend on the details of the selection system determined by the Minister. This provision, does not, by implication, limit the kind of selection system the Minister can determine under clause 148(1).

Clause 148(4) prevents the Minister from exercising his or her power to declare a regional universal service provider under clause 145(2), in any way that is inconsistent with the

determined selection system. That is, where a system is in place for determining the regional universal service provider for a particular area, that system must be used. However, where no system has been determined in relation to a particular area, the Minister may exercise his or her discretion in selecting a regional universal service provider for that area.

Clause 148(5) provides that Part 7 does not prevent a method mentioned in clause 148(2)(b) from being the same as a method that would have applied if the system concerned had not been determined. This means that even if a regional universal service provider is selected under clause 148, the successful carrier may elect to have its net universal service cost calculated according to a methodology determined by the Minister, with the agreement of all participating carriers under clause 177(1)(c), or using the avoidable cost less revenue forgone methodology under clause 177(1)(d).

Clause 148(6) makes a selection system determination a disallowable instrument.

Clause 149 – Selection systems – information gathering powers

Clause 149 is a new provision with no antecedent in the 1991 Act and is a companion to clauses 147 and 148. The clause is designed to enable information relevant to selection systems to be obtained from carriers and carriage service providers.

Clause 149(1) enables the Minister, by a written notice given to a carrier or carriage service provider, to require the carrier or carriage service provider to give the Minister, within the period and in the manner and form specified in the notice, any information that is relevant to:

- the exercise of his or her powers to determine a selection system for a national or regional universal service providers under clause 147 or 148; or
- the administration of such a selection system.

A carrier or carriage service provider must comply with any such requirement for information (clause 149(2)).

For a selection system to operate effectively, particularly if it involves tendering, it will be necessary for relevant information to be obtained from relevant industry players, particularly from the person who is the universal service provider in an area to which a selection system is to apply. In seeking information, it is expected that the Minister would confine his or her request to the minimum needed for the purpose of preparing and conducting the selection system and would have due regard to the commercial confidentiality requested by carriers and carriage service providers. However, such commercially confidential information may need to be made available to applicants under a selection system if the selection system is to work effectively. While a universal service provider must be a carrier, provision has been made to obtain information from carriage service providers as such persons may be involved in the fulfilment of the USO and may have relevant information, particularly in relation to revenue.

Clause 150 – Multiple national universal service providers

Clause 150, and its companion provision, clause 151, are new provisions without any antecedents in the 1991 Act. The provisions give greater flexibility in the declaration of universal service providers, enabling multiple universal service providers to be declared in relation to the fulfilment of the USO as a whole or with the effect of enabling different universal service providers to be declared in relation to discrete, constituent components of the USO. The provisions will enable specialist providers to be declared where more than one service may be designated under the USO. The approach also provides for the possibility of having two or more universal service providers competing in the delivery of services in an area.

Clause 150(1) provides that regulations may authorise the Minister to declare that two or more carriers are to be national universal service providers. Under this provision the universal service providers could be responsible for supplying the same services.

Clause 150(2) provides that the regulations may also authorise the Minister to declare that the Act has effect, in relation to any multiple national universal service provider that is declared, as if the USO applicable to the provider were limited as set out in the declaration. This power is intended to enable the Minister to split the USO as a whole between a number of service providers, for example, in accordance to their expertise in relation to a particular component. For example, the Minister may declare one person the universal service provider in relation to the standard telephone service, another the universal service provider in relation to payphones and a third in relation to a prescribed carriage service. The approach will also make possible use of a selection system under clause 147 to select the best universal service provider for a particular USO component. It is intended that this provision could further limit the USO in relation to a declared provider so that the provider is only required to supply customer equipment for use in connection with a standard telephone service or prescribed carriage service.

Clause 150(2) also requires, however, that declarations may only be made in accordance with the clause for the purpose of dividing the universal service obligation between two or more declared providers. This means that although the USO may be limited in relation to one of a number of multiple universal service providers, it is not limited in relation to the providers as a whole: the limitations on any individual are complemented by the obligations applying to its companion universal service providers so that there is no limitation on the delivery of the USO as a whole.

Clause 150(2) differs from the preceding clause in that the different national universal service providers would be responsible for the supply of different components of the USO, rather than the USO as a whole.

This approach gives the Minister the ability to declare as national universal service providers persons who may have a particular expertise or other advantage in supplying the components of the USO. This may be the case where quite disparate services are required to be reasonably accessible under the USO, particularly, where separate infrastructures may be involved. This would be the case, for example, if the standard telephone service, public mobile telecommunications services and broadband services were all required to be reasonably accessible under the USO.

It is conceivable that clauses 150(1) and (2) could also operate together with the effect that there could be multiple providers of the same component of the USO, as well as different components.

Clause 150(3) provides that a declaration made in a manner consistent with regulations authorising multiple regional universal service providers has effect accordingly.

Clause 150(4) enables regulations to provide that Part 7 applies in relation to any such declared multiple national universal service providers subject to such modifications as are specified in the regulations. Modifications includes additions, omission and substitutions (clause 150(5)).

Part 7 has been drafted on the premise that there will generally be only one universal service provider responsible for the whole USO in any one service area. If it is decided that multiple universal service providers should be declared, regulations can alter any provision of Part 7 as is required to enable the declaration of multiple national universal service providers to operate under Part 7. Provisions that may require modification to support multiple national universal service providers include clauses 145, 146, 153, 156, 171, 172 and 177.

Alternative provisions for dealing with multiple universal service providers have not been incorporated into the legislation at the outset because they would add significantly to the complexity of Part 7 .

Clause 151 – Multiple regional universal service providers

Clause 151 is a parallel provision to clause 150 but provides for the regulations to authorise the declaration of multiple regional, rather than national, universal service providers. Most of the explanation in relation to clause 150 is also applicable to this clause.

Clause 151(1) provides that regulations may authorise the Minister to declare that two or more carriers are to be regional universal service providers. Under this provision, the universal service providers would be responsible for supplying the same services.

Clause 151(2) provides that the regulations may also authorise the Minister to declare that the Act has effect, in relation to any multiple regional universal service provider that is declared, as if the USO applicable to the provider were limited as set out in the declaration. This power is intended to enable the Minister to split the USO as a whole between a number of service providers, for example, in accordance to their expertise in relation to a particular component. For example, the Minister may declare one person the regional universal service provider in relation to the standard telephone service, another the regional universal service provider in relation to payphones and a third in relation to a prescribed carriage service. The approach will also make possible use of a selection system under clause 148 to select the best regional universal service provider for a particular USO component.

Clause 151(2) also requires, however, that declarations may only be made in accordance with the clause for the purpose of dividing the universal service obligation between two or more declared regional providers. This means that although the USO may be limited

in relation to one of a number of multiple universal service providers, it is not limited in relation to the overall fulfilment of the USO in the service area concerned by declared providers as a whole.

Clause 151(2) differs from the preceding clause in that the different regional universal service providers would be responsible for the supply of different components of the USO, rather than the USO as a whole.

It is conceivable that clauses 151(1) and (2) could also operate together with the effect that there could be multiple regional universal service providers of the same component of the USO, as well as different components.

Clause 151(3) provides that a declaration made in a manner consistent with regulations authorising multiple regional universal service providers has effect accordingly.

Clause 151(4) enables regulations to provide that Part 7 applies in relation to any such declared multiple regional universal service providers subject to such modifications as are specified in the regulations. Modifications includes additions, omission and substitutions (clause 151(5)). These provisions enable regulations to modify Part 7 as required to accommodate the operation of multiple regional universal service providers. The provisions that would need modification would be the same as those identified above in relation to multiple national universal service providers.

Division 4—Universal service plans

Division 4 of Part 7 is a new Division with no antecedent in the 1991 Act.

The Division provides for the development by universal service providers of universal service plans, for those plans to be approved by the Minister, and for universal service providers to comply with approved plans. Universal service plans are intended to assist with the achievement of the following objectives:

- better planning of USO delivery by requiring universal service providers to focus on what they must do to fulfil their obligations and how they should do it;
- better community information about the USO and what the universal service provider is doing to fulfil it (approved universal service plans will be public documents);
- better monitoring of USO fulfilment through measuring a universal service provider's performance against its plan;
- better enforcement of the USO (a plan will be able to be used in identifying failures to adequately fulfil the USO).

A universal service provider has the obligation, under clause 145(6), to take all reasonable steps to fulfil the USO. Universal service plans are intended to support and supplement this obligation by setting out how the provider will progressively fulfil the USO.

Division 4 of Part 7 sets out a scheme under which a universal service provider must develop plans about how it is to fulfil the USO in the area for which it is responsible. These plans will be subject to Ministerial approval and monitoring by the ACA. Through his or her ability to formulate requirements for plans, to approve or refuse plans and require variations or replacements of plans, the Minister will have considerable scope to oversee the fulfilment of the USO. At the same time, however, universal service providers have primary responsibility for determining how they are to fulfil their USO and initiative in planning rests with them. The planning requirement will force universal service providers to focus on the fulfilment of their responsibilities under the USO and set themselves concrete targets, timeframes and performance indicators.

Clause 152 – Universal service provider must submit universal service plan

This clause requires a universal service provider for a particular area to give the Minister a draft universal service plan for that area (clause 152(1)) within 90 days of becoming the universal service provider for that area (clause 152(2)). Where a national universal service provider takes over responsibility for a service area from a regional universal service provider that ceases to have responsibility for that service area, this requirement will apply to the national universal service provider. Nothing would prevent that service provider adopting the plan of the former regional universal service provider.

Clause 153 – Universal service plans

This clause states that a draft or approved universal service plan for an area is a plan that sets out how the universal service provider for that area will progressively fulfil the USO (in so far as it relates to that area).

The requirements imposed on the universal service provider by the USO provide the basis for a universal service plan. The plan is intended to set out the means by which the universal service provider will fulfil those requirements. Given that it may take time for a universal service provider to fulfil its obligations in an area, particularly if the obligation has been significantly expanded or upgraded, the plan may provide for the progressive fulfilment of the obligation.

Amongst other things, it is envisaged that universal service plans could specify:

- the levels of service quality, in terms of both technical performance and customer service, at which the universal service provider intends to supply the services required under the USO;
- the timeframes within which a service would be made accessible within an area (for example, where significant network upgrading would be required);
- the timeframes within which services would be supplied (ie. connected) to a customer (which may vary from area to area, if such differences are reasonable); and
- timeframes for the rectification of faults and targets in terms of payphone densities or availability.

To a large extent, the plans are envisaged as playing much the same role as the 'View of the USO' developed by AUSTEL to assist it in monitoring the fulfilment of universal service under the 1991 Act. However, a plan will be a legislative document which a universal service provider must take all reasonable steps to ensure is complied with, rather than an administrative tool. It is also envisaged that, providing it is consistent with the USO definition, plans might also be used to fulfil the same function as a network development deed.

Performance levels under a universal service plan would be separate from, and not have any implications for, standards under the Customer Service Guarantee (CSG). However, where there are standards under the CSG (which applies to carriage service

providers, not just universal service providers), it would be expected that those standards would be replicated in the universal service plans.

Clause 154 – Replacement of approved universal service plan

This clause provides that a draft universal service plan for an area may be expressed to replace a pre-existing approved plan for an area if such a plan is in force. When the draft plan becomes an approved plan, the pre-existing plan ceases to be in force. This provides a means by which universal service providers can change their universal service plans as they consider it appropriate. Changes might be required, for example, if the USO is revised, an area's demographics change, a provider decides to deploy different technologies or experience reveals deficiencies in service provision, including quality.

Clause 155 – Approval of draft universal service plan by Minister

This clause provides for the approval or rejection of a draft universal service plan by the Minister. The Minister's ability to refuse to approve a draft plan and to direct a universal service provider to submit a new plan enables the Minister to contribute to the planning of fulfilment of the USO and provides an active level of Governmental involvement appropriate to this important obligation.

Clause 155(1) requires the Minister to approve or refuse to approve a draft universal service plan. In assessing a plan, the Minister must have regard to the criteria set out in clause 156.

Clause 155(2) makes a draft plan approved by the Minister an approved universal service plan. Under clause 162, a universal service provider must take all reasonable steps to ensure that an approved universal service plan is complied with.

Clause 155(3) enables the Minister to direct a universal service provider to give the Minister, within the period specified and in the terms specified in the direction, a fresh draft universal service plan if the Minister refuses to approve a draft plan (for example, if the Minister considers the plan does not adequately provide for the fulfilment of the USO in an area). The content of such a direction can state where the Minister considers a draft plan was deficient and how those deficiencies should be rectified in a new draft plan. The provider must comply with a direction to submit a new draft plan.

Clause 156 – Minister to have regard to certain matters

This clause sets out criteria the Minister must have regard to in considering whether or not to approve a draft universal service plan. The criteria are designed to ensure the USO is fulfilled in a manner consistent with relevant objects of the Act and of Part 7.

Clause 156(1) requires the Minister, in deciding whether to approve a draft universal service plan for an area, to have regard to whether the plan provides for the USO (in so far as it relates to that area) to be fulfilled:

- as efficiently and economically as practicable; and

- at performance standards that reasonably meet the social, industrial and commercial needs of the Australian community; and
- progressively throughout that area within such period as the Minister considers reasonable; and

the draft plan complies with any requirement (formulated by the Minister) in force under clause 157.

The three detailed criteria derive from the objects of the Bill and of Part 7 (see clauses 3(2)(a) and 134).

As a matter of course, the Minister would have regard to any advice or report provided by the ACA to the Minister at the Minister's request, including any report on a public inquiry on a draft universal service plan the Minister has asked the ACA to conduct. Clause 156(1) does not, by implication, limit the matters to which regard may be had (clause 156(2)).

This clause is important in providing a means by which the Minister can contribute to planning the fulfilment of the USO.

Clause 157 – Minister may formulate requirements for draft plans

This clause enables the Minister to formulate requirements to be complied with by a draft universal service plan (clause 157(1)) and gives examples of possible types of requirements, including:

- timetables for the supply of services (for example, that a newly prescribed carriage service must be accessible to a particular percentage of the population or in particular areas by a particular time or within a particular period);
- performance standards relating to the fulfilment of the USO (relating to both the technical performance of a service and customer service in the supply of a service, for example, that the standard telephone service have a specified dial tone delay or voice transmission quality or be connected within a specified period); and
- the form of a draft universal service plans (eg. what must be included in a plan in terms of information).

The Minister's requirements must be consistent with the USO as it is defined in clause 144. The Minister cannot formulate a requirement that would require a universal service provider to do something that does not fall within the USO as defined in clause 144. Under s. 33(3A) of the *Acts Interpretations Act 1901*, different provision can be made for different types of providers. Clause 157(3) makes an instrument setting out such requirements a disallowable instrument.

Clause 158 – Notification of decision

This clause requires the Minister to notify the universal service provider that has submitted the draft plan and the ACA as to whether he or she has approved or refused to

approve the draft plan (clause 158(1)). The Minister must give the universal service provider submitting the plan a written notice setting out the reasons for refusing to approve the draft plan if the Minister has rejected the plan (clause 158(3)). Note that under clause 155(3) the Minister may direct the universal service provider to give the Minister another draft plan, within the period and within the terms specified in the direction.

Clause 159 – Variation of approved universal service plan

This clause sets out the process for varying an approved universal service plan, as may be necessary, for example, because of changes to the USO, changes in the demographics of a service area, or changes to the service provider's delivery strategy.

Clause 159(1) makes this clause apply if an approved plan ('the current plan') is in force and the universal service provider for the area gives the Minister a draft variation of the plan.

Clause 159(2) requires the Minister to approve or refuse to approve the variation.

Clause 159(3) prevents the Minister from approving the variation unless the Minister is satisfied that he or she would approve a draft universal service plan in the same terms as the current plan but varied as proposed in the draft variation.

Clause 159(4) requires the Minister to notify the universal service provider that has submitted the draft plan and the ACA as to whether he or she has approved or refused to approve the variation. A copy of the notice must be published in the *Gazette* (clause 159(5)).

Clause 159(6) requires the Minister to give the universal service provider submitting the draft variation a written notice setting out the reasons for refusing to approve the variation if the Minister has rejected it.

Clause 159(7) provides that a current plan is varied accordingly if the Minister approves a variation.

Clause 160 – Minister may direct the ACA to give reports and/or advice

This clause enables the Minister to direct the ACA to give the Minister such reports and/or advice as the Minister requires to assist him or her in deciding whether to approve a draft universal service plan or draft variation (clause 160(1)). The ACA must comply with the direction (clause 160(2)). The ACA's role here is to provide specialist research and advice to the Minister, particularly in light of its responsibility for monitoring and reporting on the fulfilment of the USO (clause 104(3)(e)). The provision does not by implication limit the Minister's powers in relation to public inquiries (clause 160(3)) and the Minister is able to direct the ACA to hold a public inquiry on a draft plan if he or she considers it is appropriate to do so.

Clause 161 – Minister may direct variation or replacement of plan

This clause applies if an approved universal service plan for an area is in force (clause 161(1)). The clause enables the Minister to give the universal service provider for the area a notice requiring the provider to give the Minister a draft variation of its current plan or a fresh draft plan for the area that is expressed to replace the current plan (clause 161(2)). The provider must comply with the notice (clause 161(3)).

This clause enables the Minister to require changes to, or replacement of, an approved universal service plan should the Minister form the view that the approved plan is no longer adequate. A plan may need to be changed, for example, because experience reveals deficiencies with the approved plan, circumstances within the service area change, or the USO itself is changed (and the universal service provider has failed to automatically vary its plan accordingly).

Clause 162 – Compliance with approved universal service plan

This clause requires the universal service provider for an area to take all reasonable steps to ensure that it complies with an approved universal service plan for that area.

Clause 162 provides a test of ‘reasonableness’ in relation to compliance with a universal service plan in recognition that the supply of telecommunications services on a national or even regional basis is a complex undertaking involving many factors, not all of which may be within the control of the universal service provider. For example, compliance with a plan may be rendered difficult or impossible because of natural disasters or failure of suppliers (eg. satellite launch failure).

Clause 162 requires compliance with an approved universal service plan. Part 1 of Schedule 2 to the Act makes it a statutory condition of licence that a carrier (and a universal service provider must be a carrier) comply with the Act. Contravention of the Act is subject to civil penalty provisions (see Part 31) involving pecuniary penalties of up to \$10 million.

Clause 146(5) provides that the universal service provider for an area must take all reasonable steps to fulfil the universal service obligation, so far as the obligation relates to that area. Clause 162 requires a universal service provider for a particular area to take all reasonable steps to ensure that the plan for the area is complied with. Under clause 153, a universal service plan sets out how the universal service provider will progressively fulfil the USO in the provider’s area. In considering whether a provider has taken all reasonable steps to fulfil the USO for the purpose of clause 146(5), it is intended that regard should be had to whether the provider has complied with its universal service plan.

Clause 163 – Register of universal service plans

This clause requires the ACA to maintain a register including all approved universal service plans currently in force (clause 163(1)). The register is to be open for public inspection, subject to payment of a fee, if any, (clause 163(2)), and may be maintained by electronic means (clause 163(3)). The register is similar to other public registers maintained by the ACA. The register should enable greater public awareness and scrutiny of how universal service providers intend to fulfil their USOs and facilitate public action to ensure providers fulfil their obligations.

Division 5—Regulation of universal service charges

Division 5 of Part 7 establishes a new component in the universal service regime, having no antecedent in Part 13 of the 1991 Act. The Division is, however, modelled on the Telstra price control arrangements in Part 6 of the *Telstra Corporation Act 1991*.

Division 5 of Part 7, together with Part 6 of the *Telstra Corporation Act 1991*, are intended to provide a means of ensuring the prices of services supplied under the universal service obligation can be controlled, with a view to ensuring they are affordable. This is in recognition that the affordability of services is a central determinant of the use that is made of access. As noted, in relation to clause 134 the affordability of services under the USO is intended to be addressed through external mechanisms such as competition, targeted assistance and price control; it is not intended to be inherent in the universal service concept itself.

The USO set out in clause 144 will ensure that standard telephone services, payphones and prescribed carriage services are reasonably accessible to all people in Australia, regardless of where they reside or carry on business, and are supplied to people on reasonable request. Of itself, however, the USO does not ensure the prices at which such services are supplied are necessarily affordable for end-users. The obligation simply ensures the services are available. While a universal service carrier would be required by its obligation to supply services in an area, in the absence of external price control it would be free to charge what the market would bear for its services. Given the economics of supplying services in areas which are typically loss-making (for example, rural and remote Australia), for the foreseeable future and in the absence of price controls such prices might be higher than the Government might generally prefer, and higher than many customers could pay.

In the past, as Telstra has been the universal service carrier and has been subject to price control under the *Telstra Corporation Act 1991*, the prices at which services were supplied under the USO has not been an issue. Price controls, interacting with Telstra's historical price structures, have meant that prices for services supplied under the USO in loss-making areas have remained generally affordable and comparable with those of services supplied in profitable service areas. With the possibility of carriers other than Telstra becoming universal service providers after 1997, there is a need for the Government to be able to regulate the prices at which they provide services under the USO.

This Division will only apply to Telstra to the extent that Telstra is not subject to price control under the *Telstra Corporation Act 1991*.

Consistent with the preference to rely on general regulation where practicable, administration of Division 5 has been given to the ACCC, which has responsibility for general prices surveillance. The ACCC is also being given responsibility for administration of the price controls under Part 6 of the *Telstra Corporation Act 1991*.

Clause 164 – Universal service charges

Clause 164(1) makes this clause apply if a person is a universal service provider for a particular area. The substantive provision of the clause, clause 164(2), provides that for the purposes of this Division, a ‘universal service charge’ is a charge imposed or proposed to be imposed, by the person for :

- the supply of standard telephone services to persons in the area (this reference to ‘supply’ includes customer equipment, other goods and prescribed services of the kind mentioned in clause 138 and charges for such items are universal service charges); or
- calls made from payphones in the area; or
- the supply of prescribed carriage services to persons in the area (this reference to ‘supply’ includes prescribed customer equipment, other prescribed goods and prescribed services of the kind mentioned in clause 139 and charges for such items are universal service charges).

It is intended that the full range of charges relating to these services should be universal service charges and be eligible for price control, including, but not limited to, charges for network extension, charges for service connection, annual or periodic rental charges (including for customer equipment) and charges for local, national and international calls.

Universal service charges can only apply to services provided under the USO and in areas where a person is the universal service provider. Thus if a person is a universal service provider in one region and also supplies services in another region where it is not a universal service provider, its charges in the second region are not subject to price controls under Division 5.

Clause 165 – Declaration subjecting universal service charges to price control arrangements

This clause enables the Minister, by a notice published in the *Gazette*, to declare that specified universal service charges are subject to price control arrangements under this Division (clause 165(1)). Clause 165(2) makes such a declaration a disallowable instrument.

Clause 166 – Price control determinations

This clause enables the Minister to determine the actual price control arrangements to which declared universal service charges are to be subject.

Clause 166(1) makes this clause apply if a declaration is in force under clause 165 in relation to a particular universal service charge.

Clause 166(2) enables the Minister to make a written determination setting out:

- price-cap arrangements and other price control arrangements that are to apply in relation to the charge; or
- principles or rules in accordance with which the universal service provider may impose or alter the charge;

or both.

Price control determinations may set out any manner of price controls, including maximum monetary charges, parity with charges in other areas, rates at which existing charges may change and notification and disallowance provisions. A price control determination will be able, for example, to stipulate the exact level of a particular charge. This is seen as particularly important where a new universal service provider may be commencing service in an area and it does not yet have charges in the market place that may be otherwise regulated. Some further examples of the kinds of controls that may be included in a determination are given in clause 167. Clause 167(1) does not limit clause 166 (clause 167(2)).

Clause 166(3) makes a determination have effect in accordance with its content.

Clause 166(4) makes a determination under clause 166 take effect at the start of the next financial year after the one in which it is made. A price control determination must, therefore, be made in the financial year before the financial year in which it is to apply. This is because universal service providers need to know what prices they will be able to charge for the services they supply under the USO to determine what areas will be net cost areas - under clause 171, universal service providers must propose their net cost areas within 60 days of the beginning of the financial year.

Clause 166(5) provides that a price control determination under this clause may make different provision with respect to different customers. The clause, however, does not, by implication limit s. 33(3A) of the *Acts Interpretation Act 1901*.

It is intended that a price control determination may provide that different (two or more) price control arrangements apply in relation to one kind of universal service charge, with each of the different price control arrangements relating to customers in a particular class. For example, a price control determination may apply different price control arrangements in relation to residential and business customers being supplied with the standard telephone service. (Such differentiation exists under the *Telstra Carrier Charges - Price Control Arrangements, Notification and Disallowance Determination 1995*.) It is also intended that a price control determination be able to apply particular price controls in relation to more specific classes of customer, for example, educational institutions, medical facilities or public libraries. This would mean, for example, that where a prescribed carriage service is prescribed for the purposes of the USO, the Minister in a price determination could require that it be provided to schools, libraries and hospitals at a particular price, while it may be available to other customers at another regulated price, or even an unregulated price.

It is also intended that separate determinations may apply to different universal service providers and different service areas. That is, it is not intended that if there are two or more universal service providers they must all be subject to a single price control determination under clause 166. Subjecting all universal service providers to a single price control determination would be too inflexible, enabling no account to be taken of the individual circumstances of each universal service provider.

It is envisaged (but need not necessarily be the case) that if the provision of universal service is tendered out using a selection system provided for in clause 147 or 148, then price requirements in any tender specification would derive from a price control determination under Division 5.

Clause 166(6) makes the determination a disallowable instrument.

Clause 167 – Content of price control determinations

This clause lists some of the price control arrangements, particularly involving notification and disallowance, that a determination under clause 166 may apply to a universal service charge.

Clause 167(1) enables a price control determination to:

- prohibit a charge from being imposed or altered without the consent of the Minister or the ACCC (clause 167(1)(a) and (b)); or
- prohibit a charge from being imposed or altered without prior notice being given to the Minister or the ACCC (clause 167(1)(c) and (d)); or
- empower the Minister to direct the ACCC to give the Minister such reports and advice as he or she requires for the purposes of assisting the Minister in deciding whether to give consent in accordance with the determination (clause 167(1)(e)).

Under these provisions both initial charges (where services have previously not existed or been charged for) and changes to existing charges for a service may be subject to consent or prior notification requirements.

Clause 167(2) states that clause 167(1) does not, by implication, limit clause 166. This makes it clear that a price control determination may provide for price control arrangements other than those of the type described in clause 167.

Clause 168 – Price control determinations subject to determinations under Telstra Corporation Act

This clause renders a price control determination under clause 166 ineffective to the extent that it relates to a charge that is the subject of a price control determination under s. 20 or 23 of the *Telstra Corporation Act 1991*.

Clause 168(1) makes this clause apply if a determination under s. 20(1) or 23(1) of the *Telstra Corporation Act 1991* is in force in relation to a charge imposed by Telstra. If a determination under the Telstra Act is in force, a determination under this Division is of no effect as far as it relates to that charge (clause 168(2)).

Where Telstra is a universal service provider, primary reliance has been placed on price control imposed on it under the *Telstra Corporation Act 1991* because price control under that Act applies to all Telstra services, not just those being supplied under the USO, thus giving that price control wider scope. This is appropriate because the price controls applied to Telstra have a wider function than those applying to universal service providers

under this Act. For example, price controls on Telstra play multiple roles of simulating competitive pressures in uncontested or newly contested markets, promoting internal efficiency gains in Telstra, passing efficiency gains onto consumers and distributing those gains in particular ways. Notwithstanding this, where a determination under this Division is not rendered ineffective by a determination under the Telstra Act, it will have effect to the extent that it relates to charges imposed by Telstra as a universal service provider. That is, it is feasible that Telstra would be subject to determinations under both this and the Telstra Act, albeit in relation to mutually exclusive charges.

Clause 169 – Compliance with price control determinations

Clause 169 requires a universal service provider to comply with a determination in force under this Division. Part 1 of Schedule 2 to the Act makes it a statutory condition of licence that a carrier (a universal service provider must be a carrier) comply with the Act. Contravention of the Act is subject to civil penalty provisions (see Part 31) involving pecuniary penalties of up to \$10 million.

Division 6—Assessment, collection, recovery and distribution of universal service levy

Subdivision A—Simplified outline

Clause 170 – Simplified outline

Clause 170 provides a simplified outline of Division 6 of Part 7 to assist readers.

Subdivision B—Net cost areas

The identification of areas where a net cost is expected to be incurred at the commencement of the financial year enhances the operation of the avoidability methodology used to determine net universal service costs.

The main purpose of identifying net cost areas in advance is to encourage universal service providers to control their total universal service cost by removing the opportunity for them to claim costs in areas that they expected to be profitable, but through careless management, could be loss-making. Without net cost areas being declared in advance, a universal service provider would have less incentive to control costs in marginal areas because it knew if it did not, and it did incur a loss, it could, nevertheless, seek compensation under the universal service fund at the end of the year.

The ACA must scrutinise proposed net cost areas carefully and reject those that do not qualify as net cost areas. ACA scrutiny of proposed net cost areas and its approval or rejection of them helps to establish the boundaries of the costs that can be claimed under the USO and as such acts as a discipline on the universal service provider to contain its overall costs by not providing access to subsidies for areas that, in the ACA's opinion, should not be loss making.

The net cost area process is also intended to:

- give greater certainty to the identification of costs using the avoidable cost less revenue forgone methodology;
- allow the ACA to judge whether proposed net cost areas should be eligible for inclusion in the total cost for calculating the levy in accordance with the criteria set down by the Minister under clause 173;
- provide a framework for the ACA to assess whether adequate revenue and cost details will be available; and
- provide a streamlined procedure to audit the net costs at the end of the financial year.

Clause 171 – Universal service provider must propose service areas for declaration as net cost areas

This clause requires a person who is a universal service provider in relation to a financial year, to give the ACA within 60 days of commencement of the financial year, a notice specifying service areas for which the person is the universal service provider and which the person considers the ACA should declare as net cost areas for the financial year (clause 171(2)). The notice must be in a form approved by the ACA (clause 171(3)) and contain any additional information required by the approved form (clause 171(4)).

This clause is self-enforcing. If a person or carrier does not specify service areas, the ACA cannot declare them as net cost areas under clause 172. Without having net cost areas declared, the universal service provider cannot calculate its net universal service cost under clause 177 and thus not make a claim under clause 174.

Clause 172 – Net cost areas

This clause enables the ACA to declare areas as net cost areas. An area declared to be a net cost area is taken into account in determining whether the universal service provider has incurred a net universal service cost and whether the universal service provider is therefore entitled to proceeds of the levy.

Clause 172(1) requires the ACA to decide whether a proposed area is a net cost area within 60 days of receiving a notice under the preceding clause.

Clause 172(2) requires the ACA to decide in relation to each service area to:

- declare the area as a net cost area;
- declare a different service area that includes all or part of that service area; or
- not make such a declaration.

The second option enables the ACA to declare alternative net cost areas based on net cost areas proposed by the universal service provider.

Clause 172(3) requires the ACA to make a written declaration in accordance with its decision to declare net cost areas under clauses 172(2)(a) and (b).

Clause 172(4) enables the ACA to make whatever inquiries it thinks necessary or desirable before making its decision under clause 172(2). This provision supports the ACA's function of closely scrutinising proposed net cost areas so that the net cost area approach achieves its intended purpose of setting, in advance, an effective boundary for net universal losses, thereby promoting better planning, encouraging cost control and streamlining administration.

Clause 172(5) requires the ACA, in making its decision under clause 172(2), to have regard to the universal service provider's reasons, as specified in its notice, for proposing a service area as a net cost area (clause 171(2)(b)) and to comply with any Ministerial directions in force under clause 173.

Clause 173 – Minister may give directions about declaring net cost areas

This clause enables the Minister to give the ACA directions about the criteria it should apply and the matters to which it should have regard in deciding whether or not to declare an area as a net cost area for a financial year. For example, the direction might set out the criteria to apply where carrier competition rather than fulfilment of the USO has resulted in a net cost for the USO carrier in an area or how short term start-up losses in new subdivisions should be treated.

Subdivision C—Assessment of liability for levy and of entitlement to levy distributions

This Subdivision sets out the mechanisms for:

- determining the losses incurred in fulfilling the USO (called net universal service costs);
- determining participating carriers' contributions to those losses;
- the making of assessments of levy entitlements and liabilities by the ACA; and
- recovering levy for participating carriers and paying it to universal service providers.

Clause 174 – Claims for levy credit

This clause enables a person that is a universal service provider in relation to a financial year to submit a claim for levy credit, that is the credit it has in the event of levy being levied. A universal service provider accrues this levy credit in fulfilling the USO and the amount of its credit is, in effect, its USO loss.

Clause 174(1) makes this clause apply to a financial year if a person is a universal service provider in relation to that financial year. Note, a person need no longer be a universal service provider at the time of lodgement to be a universal service provider in relation to a financial year.

Clause 174(2) enables a person who is a universal service provider in relation to a financial year to give the ACA a written claim for levy credit within 90 days of the end of the financial year to which the claim relates. This period is not extendable. This period is longer than the comparable period available under the 1991 Act to give universal service providers a more reasonable period in which to prepare their claims and to better align the claim process with other business reporting requirements.

The claim must be in a form approved in writing by the ACA (clause 174(3)). Clause 174(4) sets out the details that must be included in a levy credit claim.

The claim must be accompanied by a report by an approved auditor in a form approved by the ACA stating that the auditor has had sufficient access to the person's records in order to audit the claim, that the auditor has audited the claim and containing a declaration of

the auditor's opinion, being a declaration in the terms specified in the form approved by the ACA (clause 174(5)). 'Approved auditor' is defined in clause 143. The auditing requirement is intended to provide another check on the appropriateness of claims and place a greater onus on universal service providers to ensure their claims are correct. It is expected that before specifying the terms for the auditor's declaration of opinion, the ACA will consult with representatives of the auditing profession about the appropriate form of such a declaration.

Clause 175 – No levy payable unless at least one claim for a levy credit is made

Clause 175 provides that no person is liable to pay an amount of levy in respect of a financial year, if at the end of the 90 day period within which claims can be submitted, no claim for a levy credit has been lodged by a universal service provider under clause 174. The clause provides an incentive for universal service providers to lodge claims within the 90 day period and reduces administrative activity where no claims are made.

Clause 176 – ACA to give copies of claims to other participating carriers

This clause requires the ACA to give, as soon as practicable or in any case within 14 days, a copy of a claim lodged under clause 174 to each person (other than the person who lodged the claim) who is a participating carrier for that financial year. Note, a person need no longer be a participating carrier at the time the claim is lodged to still be a participating carrier in relation to a relevant financial year.

This clause is designed to make the process of assessing and collecting the universal service levy open and transparent for participating carriers by requiring the ACA to copy any claims lodged to other participating carriers.

Clause 177 – Net universal service cost of a universal service provider for a financial year

This clause is central to the calculation of a universal service provider's costs in fulfilling its USO. It provides the basis for determining participating carriers' respective credits and debits and levy entitlements and liabilities. This clause is substantially a re-enactment of s. 301 of the 1991 Act. The normal manner by which net universal service costs would be calculated would be using the avoidable cost less revenue forgone methodology set out in the clause. Two significant changes, however, have been made to accommodate the selection of universal service providers using a system determined by the Minister and to enhance the overall flexibility of the costing process.

First, the clause provides for a net universal service cost to be derived in accordance with a selection system under clause 147 or 148. This sum may be an actual amount that a carrier has elected will be its net universal service cost on being declared the universal service provider (clause 147(2)(a) or 148(2)(a)) or an amount ascertained by means of a methodology that a carrier has elected will be used to determine its net universal service cost on being declared the universal service provider (clause 147(2)(b) or 148(2)(b)).

Second, the clause enables the Minister to determine, with the agreement of all participating carriers, a method for ascertaining a person's net universal service cost. This second change should enhance administration of the levy arrangements by enabling

alternative methods of calculating the net universal service costs to be utilised where all participating carriers agree.

Clause 177(1) enables a person's net universal service cost for a financial year to be calculated in one of four mutually exclusive ways.

First, clause 177(1)(a) sets out how a universal service provider's net universal service cost is to be determined where the person is a universal service provider in relation to that financial year because of the operation of a selection system determined under clause 147 or 148 and the person has elected that a specified amount will be the person's net universal service cost for the financial year. In this instance, the person's net universal service cost for the financial year is equal to the amount the person elected to be its net universal service cost.

For example, the Minister may undertake a process by which to select a universal service provider by a tender arrangement. The successful tenderer may have agreed to fulfil the USO that has been tendered for, say, \$50 million (indexed at CPI), per annum over a ten year period. That universal service provider's net universal service cost would then be \$50 million (indexed at CPI) for each applicable year. This amount would then be factored into the overall USO assessment process as appropriate.

Second, clause 177(1)(b) sets out how a universal service provider's net universal service cost is to be determined where the person is a universal service provider in relation to that financial year because of the operation of a selection system determined under clause 147 or 148 and the person has elected that a specified method of ascertaining an amount will apply for the purposes of determining the person's net universal service cost for the financial year. In this instance, the person's net universal service cost for the financial year is equal to the amount that is worked out using that method.

This provision reflects the flexibility that has been built into the selection system provisions which enables a selection system to not only generate a specific amount but alternatively, a methodology for ascertaining an amount.

As a purely hypothetical example, a person selected to be a universal service provider may have elected that its universal service cost would be calculated on the basis of a certain amount per customer per month. (In practice, much more sophisticated methodologies may be involved.) Its net cost would then be worked out according to that methodology. In the hypothetical example suggested above, if it is assumed that the service provider has a stable customer base of 3,000 customers per month and it claims \$200 per month per customer, its net universal service cost would be \$7.2 million ($\$200 \times 12 \times 3000$).

Note that clause 148(4) does not prevent a method that a person elects to have used in determining its NUSC in a selection system from being the same that would have applied if the system concerned had not been determined. That is, the methodology may be a methodology determined by the Minister with the agreement of participating carriers (see clause 177(6)) or the default, avoidable cost less revenue forgone methodology.

Third, clause 177(1)(c) sets out how a universal service provider's net universal service cost is to be determined where: the person is a universal service provider in relation to that financial year; the person is not a universal service provider in relation to that financial year because of the operation of a selection system determined under clause 147 or 148; and a Ministerial determination is in force under clause 177(6) setting out an alternative methodology. In this instance the person's net universal service cost for the financial year is worked out in accordance with the determination.

The ability for the Minister to determine an alternative methodology for calculating a universal service provider's NUSC is provided for in clause 177(6) and its use is discussed in detail in that context.

Fourth, clause 177(1)(d) sets out how a universal service provider's net universal service cost is to be determined where: the person is a universal service provider in relation to that financial year; the person is not a universal service provider in relation to that financial year because of the operation of a selection system determined under clause 147 or 148; and no determination is in force under clause 177(6) setting out an alternative methodology in relation to that financial year. In this instance, the default methodology, the avoidable cost less revenue forgone methodology, is to be employed, the formula for which is set out in clause 177(2).

If the amount worked out using the avoidable cost less revenue forgone methodology is greater than zero dollars, the person's net universal service cost for the financial year is equal to that amount. This is because the person has incurred a loss in fulfilling the USO. If, however, the amount worked out using the avoidable cost less revenue forgone methodology is not greater than zero dollars, the person's net universal service cost for the financial year is zero dollars. This is because the person has not incurred a loss in fulfilling the USO and it is unnecessary for the person to be compensated for fulfilling the USO.

Clause 177(2) gives the formula for determining a person's net universal service cost for a financial year when the universal service provider has not been selected under clause 148 or there is no Ministerial determination in force in relation to that financial year. The formula is:

Avoidable costs - Revenue forgone.

The formula provides for net universal service costs to be calculated by subtracting the revenue it is reasonable to expect the person would not have earned if the person had not supplied services that under the USO they were required to supply to net cost areas, from the total of the operating and capital-related costs that a person would not have incurred had the person not supplied services to net cost areas.

In the formula, 'avoidable costs' means one of two things.

First, under clause 177(2)(a), if a determination is in force under clause 177(9), it is the amount ascertained in accordance with the determination.

Clause 177(9) enables the ACA to make a written determination specifying a method of ascertaining an amount for the purposes of paragraph (a) of the definition of 'avoidable

cost' in clause 177(2). Under clause 177(10) a determination under clause 177(9) must provide for an amount to be ascertained wholly or partly by reference to an indexation factor. It is intended that indexation can be used to establish the amount of any of the components that comprise avoidable cost or to establish avoidable cost as a whole. It is also intended that some components should be able to be based on indexation while others may be based on actual costs. The ability to enable avoidable costs to be ascertained using indexation recognises the practical difficulties that can be involved in ascertaining actual avoidable costs each year and that the use of indexed costs provides a practical and acceptable alternative.

A determination under clause 177(9) may only be made with the consent of the Minister and is a disallowable instrument (clause 177(11)). This is to ensure that the Minister has the opportunity to be satisfied the indexation method is consistent with the intended operation of the avoidable cost less revenue forgone methodology. Before making a determination under clause 177(9), the ACA must also consult with each person who was a participating carrier immediately before the determination was made. This is to ensure that there is general acceptance of the proposed methodology by affected parties.

Second, under clause 177(2)(b), if there is no determination under clause 177(9), 'avoidable costs' means the total of:

- the amount (if any) of operating costs;
- the amount (if any) of total allowances made by the person for depreciation during the financial year of capital items;
- the amount (if any) of the person's total opportunity costs of capital; and
- the amounts (if any) specified for this purpose in a determination by the ACA under clause 180.

In the formula, 'revenue forgone' means an amount of revenue equal to so much of the revenue earned by the person during the financial year as it is reasonable to expect the person would not have earned during that financial year if the person had not supplied the services (ie. the items required under the USO) to net cost areas during that financial year.

The capital cost component of 'avoidable costs' includes the total opportunity costs of capital. Under clause 180 the ACA may also determine amounts to be included in 'avoidable costs'.

Clause 177(3) makes clear the meaning of 'supplying services' in clause 177(2), explaining that a reference in clause 177(2) to a person supplying services to a net cost area during a financial year is a reference to the person:

- supplying standard telephone services to persons in the net cost areas for that financial year for which the person was the universal service provider; or
- supplying, installing or maintaining payphones in those areas; or
- supplying prescribed carriage services in those areas.

Clause 177(4) makes a reference in clauses 177(2) and (3) to the financial year a reference to the part of the financial year when the person was a carrier if the person was a carrier for only part of the year. This clause limits the calculation of a person's net universal service cost to the period in which it was a carrier and thus eligible under clause 145 to be a universal service provider.

Clause 177(5) requires that an amount applicable to a person under the formula in clause 177(2) must be in accordance with the ACA's determinations under clause 180 and as they apply to a universal service provider because of clause 181.

Clause 177(6) enables the Minister to make written determinations specifying a method of ascertaining an amount for the purposes of clause 177(1)(c), that is, for determining a person's net universal service cost. Such a determination has no effect unless each person who was a participating carrier immediately before the determination was made gave written consent to the making of the determination.

This clause is a significant new provision in this Part of the Act. The clause is designed to enable the easier calculation of net universal service costs instead of using the sophisticated avoidability methodology when all participating carriers agree. All participating carriers must agree because they are all contributing to total universal service costs and must be confident that those costs are reliable. This approach provides an alternative to the cost calculation process which is involved, requires large amounts of data and can be time consuming and controversial. Envisaged methods of ascertaining a net universal service costs including negotiation between parties, continuation of previously agreed amounts and the indexation of previously agreed amounts.

Clause 177(7) states that the amount worked out under a determination under clause 177(6) may be zero dollars.

Clause 177(8) requires that a determination under clause 177(6) must be published in the *Gazette*. This clause ensures the process for calculating net universal service costs is publicly known and thus open to scrutiny.

Clauses 177(9) to (12) are discussed above in relation to clause 177(2)(a), to which they relate.

Clause 178 – Reduction of excessive costs etc.

Clause 178 is an important new provision in the legislation with no antecedent in the 1991 Act. It is intended to provide a further means for the Government to control excessive net universal service costs of a universal service provider as calculated using the avoidable cost less revenue forgone methodology. The provision is largely intended as a reserve power to be used should it be apparent that a universal service provider's costs are in excess of widely acceptable benchmarks, for example, common industry practice or world best practice. The methodology enables a universal service provider's costs to be calculated on the basis of principles determined by the Minister rather than actual costs. This enables, the Minister, for example, to require a universal service provider's costs to be calculated using benchmark costings derived from other universal service providers in Australia or overseas. Clause 179 is a parallel provision dealing with 'revenue forgone'.

Clause 178(1) enables the Minister, by written instrument, to formulate principles that are to be applied in determining the extent (if any) to which costs, allowances or opportunity costs of a kind mentioned in paragraph (a), (b) or (c) of the definition of ‘avoidable costs’ in clause 177(2) are to be treated as excessive for the purposes of this clause.

For the purposes of calculating the avoidable cost less revenue forgone formula in clause 177(2) in relation to a particular financial year, if the person who is a universal service provider has incurred costs, allowances or opportunity costs of a kind mentioned in the definition of ‘avoidable costs’ in clause 177(2) and the costs, allowances or opportunity costs, as the case may be, are treated as excessive to any extent under the principles determined by the Minister, the amount of the costs, allowances or opportunity costs, as the case may be, is to be reduced by the amount of the excess. That is, a universal service provider’s avoidable costs may be considered against the excessive cost principles formulated by the Minister and if they are found to be excessive when considered against those principles, they are to be reduced by the amount of that excess.

A Ministerial determination setting excessive cost principles under clause (1) is a disallowable instrument for the purposes of s. 46A of the *Acts Interpretation Act 1901* (clause 178).

This approach draws on the concept of “best practice” costing of community service obligations (CSOs), which recognises that where cost structures in the delivery of CSOs are not at the most efficient levels, it may be desirable to fund the CSOs on the basis of “best practice” cost structures.

The Ministerial principles could include benchmarks, or principles that set out discounting factors which the Minister considers are reasonable, or other methods to be applied in determining the extent (if any) to which costs are to be treated as excessive.

An example of a principle that may be applied with a view to identifying and reducing excess costs would be the principle that costs should not exceed such costs as would have been incurred if the USO was provided using telecommunications networks that were operated and maintained in accordance with accepted international benchmarks for operational efficiency. In this context, the principles might then specify those benchmarks in detail or, alternatively, leave it to the ACA to identify those benchmarks.

Generally, it is envisaged such principles would be determined prior to the financial year in which they were to apply, thus providing the universal service provider with an opportunity to achieve the cost levels provided for in the principles, or to enable the provider to calculate its costs in accordance with the principles. Note, however, that nothing in the legislation requires the principles to be determined in advance of the period to which they will apply. The Minister may choose to make a written instrument under clause 178(1) during a financial year if it became apparent that a universal service provider’s costs for that year were unacceptably high. In all instances, however, it is intended that the principles be applied by the universal service provider in calculating its net universal service cost and preparing its levy credit claim. Where principles have been formulated and applied to a year, the ACA will be required to examine the correctness of the claim having regard to such principles as have been formulated.

Clause 179 – Shortfalls in revenue earned

Clause 179 is an important new provision in the legislation with no antecedent in the current Act. Clause 178 is a parallel provision dealing with ‘avoidable costs’. Clause 179 is intended to provide a further means for the Government to exercise control over the net universal service costs of a universal service provider as calculated using the avoidable cost less revenue forgone methodology. The provision is largely intended as a reserve power to be used should it be apparent that a universal service providers’ revenues are unreasonably below widely acceptable benchmarks, for example, common industry practice or world best practice, particularly as a result of the provider undercharging. The methodology enables a universal service provider’s revenue to be calculated on the basis of principles determined by the Minister rather than actual revenue. In practice, application of the principles would influence the minimum prices at which carriers supplied the services required under the USO. It is intended that the principles may be so specific as to set out the precise price at which a service or component of the USO should be assumed to have been supplied for the purposes of calculating net universal service costs.

Clause 179(1) enables the Minister, by written instrument, to formulate principles that are to be applied in determining the extent (if any) to which there is taken, for the purposes of the avoidable cost less revenue forgone methodology in clause 177(2), to be a shortfall in relation to revenue earned as mentioned in the definition of ‘revenue forgone’ in that clause.

For the purposes of calculating the avoidable cost less revenue forgone formula in clause 177(2) in relation to a particular financial year, if the person who is a universal service provider has earned revenue as mentioned in the definition of ‘revenue forgone’ in clause 177(2) and under the principles formulated by the Minister under clause 179(1), there is taken to be a shortfall in relation to that revenue, the amount of the revenue in the formula is to be increased by the amount of the shortfall. That is, a universal service provider’s ‘revenue forgone’ may be considered against the revenue shortfall principles formulated by the Minister and if there is found to be a shortfall when considered against those principles, the revenue is to be increased by the amount of that shortfall.

A Ministerial determination setting excessive cost principles under clause 179(1) is a disallowable instrument for the purposes of s. 46A of the *Acts Interpretation Act 1901* (clause 179(3)).

The ability for the Minister to determine principles in relation to revenue is intended to deal with the unlikely, but possible, situation of a universal service provider undercharging for the services it is required to supply under the USO. A number of parties expressed concern about this possibility in comments on the exposure draft. It is conceivable that a universal service provider might behave in this manner to damage competition or to secure inappropriate subsidies for the services it is supplying under the USO. Undercharging for anti-competitive purposes should be dealt with under the competition provisions of the TPA. However, undercharging which does not constitute anti-competitive conduct may be of concern in the context of the USO process because it means a universal service provider could incur a greater loss than it needs to, with that loss being partially subsidised by other participating carriers. It is desirable that such undercharging can, if the need arises, be dealt with under the USO process.

It is intended that the principles determined by the Minister be applied by the universal service provider in calculating its net universal service cost and preparing its levy credit claim. The ACA will be required to examine the correctness of claims having regard to such principles as have been formulated.

Clause 180 – ACA determinations about working out a universal service provider’s net universal service cost

This provision provides a mechanism to enable the ACA to give a universal service provider guidance as to how it is to work out its net universal service cost under clause 177(2).

Clause 180 enables the ACA to make written determinations for or in relation to specifying methods of calculating an amount of operating costs, depreciation allowances, and opportunity costs of capital in the definition of avoidable costs or an amount in relation to the definition of revenue forgone (clause 177(2)). The ACA may also make determinations specifying amounts for the purposes of subparagraph (b)(iv), of the avoidable costs definition (clause 180(1)(b)). The determination is only to be made with the Minister’s consent and is a disallowable instrument for the purposes of s. 46A of the *Acts Interpretation Act 1901*.

Clause 181 – Application of determinations under section 180

Clause 181(1) provides that, except so far as the contrary intention appears in a determination under clause 180, a provision of the determination applies in relation to the first financial year which ends after the provision commences and each later financial year. Thus a provision of a determination applies in the financial year in which it commences and each later year.

Clause 181(2) prevents a provision of a determination under clause 180 from applying in relation to a financial year ending before the provision commences, subject to the ‘election’ rule in clause 181(3). Thus, unless a person elects otherwise, a provision of a determination cannot be applied retrospectively.

Clause 181(3) enables a person to elect to have a provision of a determination apply to an earlier financial year and clause 181(4) makes the election take effect accordingly. This enables a person to have an ACA determination apply to it in relation to a financial year when it would not otherwise apply to it. It may choose to do so, for example, because it would favour it in its calculation of its net universal service cost.

Clause 181(5) defines ‘commencement’ for the purposes of this clause. This is the time when an original provision or, if the provision has been varied - the variation, took effect.

Clause 182 – Participating carriers must lodge returns of eligible revenue

The information provided under this clause will be used by the ACA, along with the net universal service cost information provided under clause 174 (and calculated in accordance with clause 177), to calculate by means of the formula in clause 187, the levy

debts of participating carriers. Levy debits in turn are used to determine participating carriers' liabilities and entitlements.

This clause requires that a participating carrier for a financial year must lodge with the ACA a return of its eligible revenue for that financial year within 90 days of the end of the financial year (clauses 182(1) and (2)). Unlike under the 1991 Act, there is no requirement that participating carriers receive a copy of a levy credit claim before having to submit their eligible revenue returns. 'Eligible revenue' is defined in clause 142. The return must be in a form approved by the ACA (clause 182(2)).

Clause 182(3) sets out details that must be included in the return, namely the carrier's eligible revenue, details of how that eligible revenue was worked out and any other information required by the form approved by the ACA.

Clause 182(4) makes a person who intentionally or recklessly contravenes clause 182(1) guilty of an offence. The lodgement of returns is subject to an offence provision because a person who is a participating carrier in relation to a financial year need not be a carrier at the time it is required to lodge its eligible revenue return and would not therefore be subject to the general enforcement provisions of the Bill. Contravention of the provision is an offence, reflecting the importance of ensuring that all participating carriers contribute to the levy calculation process and USO funding.

Clause 182(5) enables the ACA to require statements in a return to be verified by statutory declaration.

The claim must be accompanied by a report by an approved auditor in a form approved by the ACA stating that the auditor has had sufficient access to the person's records in order to audit the claim, that the auditor has audited the return and containing a declaration of the auditor's opinion, being a declaration in the terms specified in the form approved by the ACA (clause 182(6)). 'Approved auditor' is defined in clause 143. The auditing requirement is intended to provide another check on the appropriateness of returns and place a greater onus on participating carriers to ensure their returns are correct. It is expected that in specifying the terms for the auditor's declaration of opinion, the ACA will consult representatives of the audit profession.

Clause 183 – ACA may inquire into the correctness of a claim or return

This clause enables the ACA to make whatever inquiries it thinks necessary or desirable to determine the correctness of a levy credit claim or eligible revenue return. Information and documents obtained as a result of such inquiries are to be used by the ACA in making its assessment of liabilities and entitlements (clause 184(4)).

Clause 184 – ACA to assess liabilities and entitlements

Clause 184(1) requires the ACA to make a written assessment for the purposes of Part 7 for each financial year.

Clause 184(2) identifies matters that the assessment must set out in relation to each participating carrier in relation to that financial year.

Clause 184(3) identifies matters that the assessment must set out in relation to each universal service provider in relation to that financial year.

Clause 184(4) sets out the basis on which the assessment must be made. The assessment must be made on the basis of the levy credit claims lodged under clause 174, eligible revenue returns lodged under clause 182, information and documents obtained by the ACA because of its inquiries under clause 183, and any other information or documents the ACA has and thinks relevant to making the assessment. This clause is important because it makes it clear that the ACA does not need to rely solely on the information provided to it in claims and returns to make its assessment. The clause gives the ACA considerable discretion to take into account the findings of its inquiries and other relevant matters in making its assessment.

Clause 185 – Explanation to the Minister if assessment not made within 270 days

This clause provides the ACA with guidance on the period it should take to complete its USO assessment. (Note that assessments can be amended). This change to the arrangements under the 1991 Act addresses industry concerns about the assessment period being open-ended and about delays in the ACA finalising assessments.

If the ACA has not made its original assessment in relation to a financial year within 270 days after the end of the financial year (clause 185(1)), the ACA must give the Minister a written statement explaining why the ACA has not made its assessment within that 270-day period.

The ACA has 270 days to complete its assessment. With universal service providers and participating carriers having 90 days to lodge levy claims and eligible revenue returns, this effectively gives the ACA 180 days to assess the information provided to it and make its assessment.

If the ACA is unable to meet this initial deadline, it will be required to explain the reason to the Minister. This provides a discipline on the ACA and enables the Minister to initiate any necessary remedial action that may be appropriate. The ACA may not be able to meet the deadline for a variety of reasons, for example, because the ACA is awaiting information or requires clarification on certain costing issues. However, should the ACA pass the 270 day deadline, it is not intended it be subject to further deadlines. If needed, the Minister could direct the ACA (clause 12 of the ACA Bill 1996) to complete its assessment within a particular additional period should it fail to meet the 270 day deadline.

It is intended that assessment and payment of levy should, at most, take no longer than 360 days from the end of the financial year to which it relates. An assessment for one financial year should be completed before the assessment process for the next financial year commences. This requires assessments to be completed within 330 days given that participating carriers then have 28 days under clause 194 to pay their levy liabilities. It is also a reasonable expectation on the part of universal service providers that their entitlements be assessed and reimbursed no later than 12 months after the financial year in which they were incurred. These matters would be taken into account in response to an ACA explanation of why it has not met the 270 day deadline.

The legislation does not specify that the assessment must be completed within a fixed period because of the practical and legal difficulties that might arise if that deadline could not be met. For example, if an assessment had to be completed within an inflexible deadline of, say, 360 days, a court may hold the assessment to be invalid if this did not occur. This would not be helpful to universal service providers whose interests are best served by having the assessment completed as soon as possible.

Clause 186 – Amendment of assessments

Clause 186 is a new provision with no antecedent in the 1991 Act. However, application of subsections 33(1) and (3) of the *Acts Interpretation Act 1901* would have the same effect. It is intended to make it clear that an original assessment, once made, can be varied.

The ACA may amend its assessment under clause 184 by making such alterations and additions as it thinks necessary, even if levy credits or levy has been paid in respect of the assessment (clause 186(1)). Unless the contrary intention appears, an amended assessment is taken, for the purposes of Part 7, to be an assessment under clause 184.

An assessment of USO liabilities and entitlements is of the nature of a tax assessment and like an income tax assessment can be amended. To avoid doubt, this provision makes it clear that an assessment can be altered. For example, the ACA may become aware of new information that would substantially alter the assessment. This may particularly occur where universal service providers or participating carriers challenge elements of the ACA assessment. Challenges may be brought to the attention of the ACA and ultimately the courts. It is not intended that uncertainty about an assessment postpone the recovery of levy or payment to universal service providers. It is intended that such transactions as specified in the legislation take place as provided for. If an assessment is subsequently amended, these payments would be adjusted as necessary. Again, this is similar to processes in relation to income tax assessments.

It is not intended that the ACA would amend an assessment for insignificant reasons. As a matter of course, the ACA would have to act reasonably in deciding to amend an assessment and would be expected to take into account whether any new evidence or knowledge of which it had become aware was of sufficient substance to justify amendment of the original assessment.

Clause 187 – Levy debit of a participating carrier for a financial year

This clause sets out the formula for determining each participating carrier's levy debit, that is the amount it must contribute to the overall funding for the USO, and how elements of that formula are arrived at.

Clause 187(1) provides that a participating carrier's levy debit for a financial year is worked out using the formula:

$$\text{Contribution factor} \times \text{Total net universal service cost.}$$

'Contribution factor' has the meaning given to it in clause 187(2). 'Total net universal service cost' means the total net universal service costs of all the universal service providers in relation to the financial year.

Clause 187(2) provides that the 'contribution factor' depends on whether a determination in relation to determining the contribution factor is in force under clause 187(3). If such a determination is in force, the contribution factor is worked out in accordance with that determination. If there is no determination, the contribution factor is worked out in accordance with the formula:

$$\frac{\text{Carrier's eligible revenue}}{\text{Total eligible revenue.}}$$

In the formula, ‘carrier’s eligible revenue’ means the participating carrier's eligible revenue for the financial year and ‘total eligible revenue’ means the total eligible revenue for the financial year of all the participating carriers in relation to the financial year.

Application of this formula means that participating carriers’ contributions to the Total net universal service cost are proportional to their share of total eligible revenue.

The amounts used for total net universal service cost, carrier’s eligible revenue and total eligible revenue would be taken from the ACA’s assessment under clause 184, which reflect the amounts involved after the ACA has inquired into the correctness of claims and returns (see clause 183) and taken the results of its inquiries and any other relevant information into account in completing its USO assessment (clause 184(4)(c) and (d)).

Clause 187(3) provides an alternative mechanisms for determining the contribution factor for the purposes of the levy debit formula in clause 187(1). The clause enables the Minister to make a written determination specifying a method of ascertaining the contribution factor for the purpose of the levy debit formula. Such a determination, however, has no effect unless each person who was a participating carrier immediately before the determination was made gave written consent to the making of the determination. A copy of such a determination must be published in the *Gazette* for public information purposes (clause 187(4)). The determination is not a disallowable instrument because it is made with the agreement of all parties that it affects.

Like the Minister’s related ability to determine alternative mechanisms for ascertaining a universal service provider’s net universal service cost (clause 177(6)), the ability of the Minister to determine an alternative methodology for determining a contribution factor is designed to enhance the flexibility of the legislation, providing scope for participating carriers to agree to alternative cost sharing mechanisms where they consider they are desirable. This may occur, for example, if all participating carriers agree that there is a preferable approach to relying on eligible revenue, which may result in business costs by requiring special record keeping.

The requirement that all persons who are participating carriers immediately before the making of a determination must agree to an alternative mechanism provides a safeguard against any individual carrier being disadvantaged by a move away from the default methodology based on eligible revenue.

Clause 188 – Levy debit balance of a participating carrier for a financial year

Clause 188 sets out the means of determining the levy debit balance of a participating carrier. If a person’s levy debit determined under clause 187 exceeds the person’s net universal service cost, the person has a levy debit balance. The amount of that balance is the amount by which the person’s levy debit exceeds its net universal service cost. If the person’s share of the total net universal service cost exceeds its own net universal cost (the cost it has incurred in fulfilling its obligations under the USO) the person is liable to pay levy equal to the amount of its levy debit.

Under the proposed *Telecommunications (Universal Service Levy) Act 1996*, levy will be imposed on a levy debit balance. The amount of the levy is equal to the amount of the levy debit balance.

Clause 189 – Levy credit balance of a universal service provider for a financial year

Clause 189 sets out the means of determining the levy credit balance of a participating carrier. If a person's net universal service cost exceeds the person's levy debit determined under clause 187, the person has a levy credit balance. The amount of that balance is the amount by which the person's net universal service cost exceeds its levy debit. If the person's share of the total net universal service cost is less than its net universal service cost (the cost it has incurred in fulfilling its obligations under the USO) the person is entitled to receive levy equal to the amount of its levy credit.

By way of illustration, the following table sets out a sample assessment:

ASSESSMENT OF USO LIABILITIES AND ENTITLEMENTS						
Item	Carrier 1	Carrier 2	Carrier 3	Carrier 4	Total	Provision of clause 184
Carrier's eligible revenue (cl. 182)	8,000,000,000	6,000,000,000	4,000,000,000	2,000,000,000	20,000,000,000	184(2)(a)
Carrier's levy debit (cl. 187)	80,000,000	60,000,000	40,000,000	20,000,000	200,000,000	184(2)(b)
Carrier's levy debit balance (cl. 188)	-20,000,000	10,000,000	40,000,000	-30,000,000	0	184(2)(c)
Levy payable (cl. 188)	0	10,000,000	40,000,000	0	50,000,000	184(2)(d)
Levy claims (ie NUSC) (cl. 174, 177)	100,000,000	50,000,000	0	50,000,000	200,000,000	184(3)(a)
USP's levy credit balance (cl. 189)	20,000,000	0	0	30,000,000	50,000,000	184(3)(b)
USP's levy receivable (cl. 205)	20,000,000	0	0	30,000,000	50,000,000	184(3)(c)

Clause 190 – Publication of assessment

This clause requires the ACA, as soon as practicable after making an assessment under clause 184, to publish a copy of its assessment in the *Gazette* and give a copy to each participating carrier. If an assessment is amended under clause 186, the amended assessment will also need to be published and given to participating carriers as under clause 186(2) such an assessment is to be taken to be an assessment under clause 184.

The clause ensures the assessment is placed in the public domain for information and scrutiny. Under clause 194, levy under the assessment becomes due and payable on the 28th day after the ACA gives a copy of the assessment to a participating carrier.

The period for payment of levy has been extended from 14 days (provided for in the 1991 Act) to 28 days to give participating carriers a more reasonable period in which to organise funds to pay their levy liabilities. This recognises that levy may involve substantial amounts and that finalisation of an assessment may be unpredictable.

Subdivision D—Disclosure by the ACA of information about the basis and methods of an assessment

This subdivision enables members of the public and participating carriers to obtain from the ACA information about the basis on which the ACA has made its assessment under clause 184 and information about how the ACA has worked out that assessment. The information is intended to be available to the greatest extent possible without undue damage being caused to a carrier's interests by the disclosure of confidential commercial information (see clause 134(d)). The purpose of the Division is to open the assessment process to scrutiny by both the public and participating carriers.

The Division re-enacts the corresponding provisions of the 1991 Act.

Clause 191 – Public may request information

This clause enables a person to request information about an assessment, namely information on which the assessment is based and about the methodology, and requires the ACA to comply with the request except in relation to certain information. The ACA must not make available information obtained from, or relating to a universal service provider, and that could reasonably be expected to cause substantial damage to the universal service provider, or information prescribed in regulations.

Clause 192 – Request for information that is unavailable under section 191

This clause enables a universal service provider or a participating carrier in relation to a financial year to request the ACA to provide specified information, being information the ACA cannot provide under clause 191, and sets out rules in relation to the ACA's compliance with the request.

Clause 193 – How the ACA is to comply with a request

This clause sets out how the ACA is to comply with a request for information under clause 191 or 192 in terms of the manner in which it is to provide the information requested to the requesting party.

Subdivision E—Collection and recovery of levy

This subdivision sets out the arrangements for the collection and recovery of levy payable by participating carriers.

Clause 194 – When levy payable

This clause makes levy due and payable by a participating carrier 28 days after the ACA has given it an assessment under clause 190.

Clause 195 – Levy a debt due to the Commonwealth

This clause makes levy that is due and payable recoverable in a court of competent jurisdiction as a debt due to the Commonwealth.

Clause 196 – Validity of assessment

This clause provides that the validity of an assessment under clause 184 is not affected by a contravention of this Act. This clause is intended to include a contravention by either the ACA or a participating carrier. It is intended to prevent the validity of an assessment being challenged on a minor technical matter or a failure of procedure.

Clause 197 – Evidence of assessment

This clause creates a presumption that a copy, or purported copy, of a *Gazette* setting out what purports to be a copy of an assessment does set out a copy of the assessment and that the ACA has duly made the assessment and the details set out are correct.

Clause 198 – Onus of establishing incorrectness of assessment

This clause puts the onus of establishing that an assessment under clause 184 is incorrect on the party that asserts that. Placing the onus on this party recognises the numerous checks under the Part designed to ensure the accuracy of the USO process. A person challenging an assessment has the benefit of the information disclosure provisions of Subdivision D.

Clause 199 – Refund of overpayment of levy

This clause relates to an overpayment of levy by a participating carrier. If a participating carrier overpays levy, the overpayment is to be refunded. This provision will deal with overpayments that come to light as a result of an amendment of an assessment.

Clause 200 – Cancellation of certain exemptions from levy

Clause 200 cancels the effect of a provision of another Act that would have the effect of exempting a person from liability to pay levy, except if the provision of the other Act is enacted after the commencement of this clause and refers specifically to levy imposed by the proposed *Telecommunications (Universal Service Levy) Act 1996*.

The purpose of this provision is to set out the circumstances in which a provision of another Act can cancel a person's liability to pay levy. This acts as a safeguard on persons unintentionally being exempted from the payment of levy. It is particularly aimed at preventing the unintentional exemption from levy of Commonwealth authorities that can be made liable to taxation by law of the Commonwealth (see clause 201). Such authorities would remain liable for levy unless legislation specifically gave them exemption from levy and referred specifically to the *Telecommunications (Universal Service Levy) Act 1996*.

Clause 201 – Commonwealth not liable to levy

Clause 201 provides that the Commonwealth is not liable to pay levy and states that a reference in this clause to the 'Commonwealth' includes a reference to an authority of the Commonwealth that cannot, by law of the Commonwealth, be made liable to taxation by the Commonwealth. Under the Constitution, the Commonwealth is not able to impose tax on itself.

Subdivision F—Distribution of levy

Subdivision F establishes the Universal Service Reserve into which amounts equal to levy payments are paid by participating carriers and from which levy payments are paid to universal service providers. The Subdivision also provides for the payment of levy entitlements.

Division 9 corresponds closely to Division 4 of Part 13 of the 1991 Act.

Clause 202 – Universal Service Reserve

Clause 202 establishes an account called the Universal Service Reserve. This is a trust account for the purposes of s. 62A of the *Audit Act 1901* and is to be administered by the Department of Communications and the Arts. The purposes of the Reserve are set out in clause 204.

Clause 203 – Payments into Universal Service Reserve

Clause 203 lists the types of payments that must be paid into the Reserve. Note that amounts equal to overpayments of levy recovered from a universal service provider can be paid into the Reserve (paragraph (d)).

Clause 204 – Purposes of Universal Service Reserve

Clause 204 sets out the purposes of the Reserve.

Under clause 204(1)(d), one of the purposes of the Reserve is to reimburse the Commonwealth for the costs or expenses it or the ACA incurs in administering the proposed *Telecommunications (Universal Service Levy) Act 1996* and Division 6 of Part 7. The Minister for Finance may, from time to time, determine the amount of such a reimbursement (clause 204(2)). Under clause 204(3), however, the total of amounts reimbursed for these purposes must not exceed the total of the amounts paid into the

Universal Service Reserve under clauses 203(b) and (c), namely amounts appropriated by law for the Universal Service Reserve's purposes and amounts equal to interest from the investment of money in the Universal Service Reserve. These amounts are in addition to amounts equal to amounts of levy paid under Part 7 which are paid out to universal service providers. These amounts are paid under paragraph 203(a). Any reimbursements to the Commonwealth or the ACA under clause 204(1)(d) would not therefore be deducted from levy to be paid to universal service providers.

Clause 205 – Levy distribution to a universal service provider

Clause 205 provides that if a person has a levy credit balance because of clause 189 for a financial year, an amount equal to the amount of that balance is payable to that person out of the Reserve. It is by this means that a universal service provider who has incurred a loss in fulfilling its USO greater than its share of the total net universal service cost is compensated for the excess loss it has incurred.

Clause 206 – Levy not to be distributed until paid

Clause 206 prevents monies being paid from the Reserve until the ACA has made its assessment under clause 184 for the financial year and each participating carrier in respect of which levy was assessed has paid its levy.

This provision, in general, ensures no payments are made from the Reserve in relation to a financial year until that year's assessment is complete and the levy assessed as necessary to pay universal service providers has been collected. There would be no money in the Reserve available to pay the universal service providers until the levy has been paid by carriers with levy debits. This clause therefore prevents payment out of the Reserve under clause 205 until the levy has first been paid into the Reserve. New Subdivision G does, however, provide for the ACA to make an advance on account of payments that may become payable to a universal service provider under clause 205.

Clause 207 – Recovery of overpayments

Clause 207 is a new provision with no antecedents in the 1991 Act. The provision is designed to enable an amount of levy overpaid to a universal service provider under clause 205 to be recovered. Such an overpayment may come to light where an amended assessment recognises that a universal service provider is entitled to less levy than a previous assessment stated.

For the purposes of the clause, an 'overpaid amount' is so much of an amount paid to a universal service provider under clause 205 as represents an overpayment (clause 207(1)).

Like levy itself (clause 195), an overpaid amount is a debt due to the Commonwealth (clause 207(2)) and may be recovered by the Commonwealth by action in a court of competent jurisdiction (clause 207(3)). This clause provides a mechanism for the Commonwealth to pursue bad debts of universal service providers that fail to repay overpaid levy.

An overpaid amount may be deducted from one or more other payments payable to the person (for example, further instalment of levy, including for subsequent financial years). Where this is done, the other amounts are taken to be paid in full (clause 207(4)).

Subdivision G—Advance on account of distribution of levy

Subdivision G provides a mechanism for universal service providers to be paid, in special circumstances, advances on account of levy payments that may become payable to them. This provision is designed to provide a means of ameliorating possible disadvantage a universal service provider may suffer by not having access to levy payments.

It is envisaged advances would generally be paid where an assessment has been made and most, but not all, levy has been paid. Under clause 206, levy cannot be distributed until it is fully paid. The mechanism for making an advance provides a means of making some funds available to a universal service provider in advance of all levy being paid and thus being able to be distributed to universal service providers. Any advances which turn out to be excess must be repaid.

This mechanism recognises, amongst other things, that universal service providers will generally be carrying substantial losses for up to 24 months (ie. the financial year to which their claim relates plus an assessment period of up to 12 months) and it is appropriate that they have prompt access to their levy entitlements.

Clause 208 – Advance on account of distribution of levy

Clause 208 provides that if the ACA is satisfied that, because of special circumstances, it is appropriate to do so, the ACA may, on behalf of the Commonwealth, make an advance on account of payments that may become payable to a person under clause 205 in relation to a financial year. The making of an advance still depends upon monies already having been paid into the Universal Service Reserve.

Clause 209 – Repayment of excess advances

Clause 209 provides for the repayment of excess advances made under clause 208.

If a person has received a total amount, by way of advances on account of payments that may become payable to the person under clause 205 in relation to a particular financial year, and that total amount is greater than the amount that became payable to the person under clause 205 in relation to that financial year, the person is liable to pay to the Commonwealth the amount of the excess.

If a person is liable to pay an amount to the Commonwealth under clause (1), the amount may be recovered, as a debt due to the Commonwealth, by action in a court of competent jurisdiction; or the amount may be deducted from any other amount that is payable to the person under this Part, and if the amount is so deducted, the other amount is taken to have been paid in full to the person.

Subdivision H—Levy guarantee

Subdivision H is a new division with no antecedent in the 1991 Act. The Division is designed to ensure that participating carriers that are new to the Australian telecommunications market will be able to pay levy when it falls due, thereby ensuring the burden of USO losses are shared amongst industry participants.

In summary, Subdivision H requires certain participating carriers to obtain guarantees from third persons in respect of the discharge of their liability to pay levy. In the event that a participating carrier is unable to pay its levy, it will be the responsibility of the guarantor to pay the levy. This mechanism is seen as particularly important in the post-1997 telecommunications market where there are increased risks of new entrants leaving the market before paying levy contributions. The guarantee is particularly intended to cover the circumstance where a participating carrier becomes insolvent before discharging its levy liability, either before it receives its assessment under clause 184 or before levy becomes due for payment under clause 194.

Telstra, Optus and Vodafone as established carriers will be exempted from the levy guarantee requirements. The ACA will also have the discretion to exempt persons from the levy guarantee requirements subject to certain conditions.

While it is unlikely in practice, it is conceivable that a party that has been exempted from the levy guarantee requirements may fail to discharge its levy liabilities, particularly because it has become insolvent. If this situation were to eventuate, it is intended that the ACA would amend the relevant assessment to exclude the contribution of the defaulting participating carrier and determine new levy credit and debit balances for the remaining participating carriers. At the same time, if it had not already done so, the Commonwealth would initiate action under general insolvency law to recover the defaulting party's levy. (Under clause 196, levy is a debt payable to the Commonwealth.) Should the Commonwealth succeed in recovering any levy from the insolvent carrier, it would be reimbursed to other participating carriers according to a further amendment of the original assessment.

Clause 210 – Levy guarantee

Clause 210 applies to a person ('the first person') at a particular time if the first person is a carrier at that time, or the first person ceased to be a carrier during the 2-year period that ended at that time (clause 210(1)). This provision applies the levy guarantee requirement to a person who is a carrier or was a carrier in the preceding two years. The two year period ensures that even if a person ceases to be a carrier it will still be required to have a levy guarantee for the two year period it may take for it to be assessed for levy. For example, a person might cease to be a carrier on 1 August 1998 but the levy assessment process applicable to it would not commence until 1 July 1999 and may not be completed until 30 June 2000.

The first person must ensure that, at that time, there is in force a guarantee given by a third person in respect of the discharge of the first person's liability (if any) for levy (clause 210(2)).

Clause 210(3) requires that the third person, the guarantor, must be:

- a bank (within the meaning of the *Banking Act 1959*); or
- a body corporate formed under the law of a State or Territory to carry on the business of banking within Australia; or
- a body corporate whose sole or principal business is the provision of financial accommodation to other persons, where the body corporate is registered as a financial institution under the *Financial Corporations Act 1974*; or
- a body corporate accredited in writing by the ACA for the purposes of paragraph 210(3)(d).

Amongst other things, it is envisaged that the ACA would be able to accredit corporations with substantial established businesses that are parents to corporations establishing operations as carriers in Australia to be guarantor for these corporations. For example, if person was a subsidiary of a major overseas telecommunications company, it is intended that the ACA could accredit that parent company to be the person's guarantor.

A reference in clause 210 to a 'carrier' refers only to a participating carrier (ie. it does not include a reference to a person who, under clause 141(2), is exempt from clause 141).

Clause 211 – Exemptions from levy guarantee

Clause 211 sets out the circumstances in which a participating carrier is exempt from the levy guarantee requirements.

Telstra, Optus and Vodafone will be exempt from the levy guarantee requirements on the basis that they held a general telecommunications licence or a public mobile licence, that was in force under the 1991 Act on 30 June 1997 (clause 211(1)). They have a standing exemption because they are established market participants.

In addition, clause 211(2) enables the ACA to make a written determination exempting a specified person from the levy guarantee requirements. The ACA can only make such a determination if:

- in the ACA's opinion, there is no reasonable likelihood that the person will incur a liability for levy; or
- both the person has held a carrier licence for at least 2 years; and in the ACA's opinion, there is no significant risk that the person will fail to discharge fully the person's liability for levy.

A determination has effect accordingly (clause 211(2)).

This provision is intended to provide a mechanism for exempting a person from the levy guarantee requirement (and its attendant administrative and cost burdens) where there is no significant risk that the person will fail to pay their levy liability. The first circumstance is where a person is unlikely to incur a levy liability, for example, because it is a universal service provider and is likely to have a levy credit balance. The second circumstance is where the person has been licensed for two years and the ACA is of the

opinion there is no significant risk of them failing to pay their levy, for example, because they have established a robust market presence or have the clear backing of a significant parent company.

Clause 212 – Compliance with levy guarantee obligations

A person must not contravene clause 210 or in any way, directly or indirectly, cause a person to contravene the levy guarantee requirements. Part 31 provides for pecuniary penalties for breaches of civil penalty provisions.

Part 8—Continued access to untimed local calls

This Part provides for residential/charity customers who had access to untimed local calls, whether voice or data, immediately before 20 September 1996 to continue to have access to them. It further provides for other customers who had access to untimed local calls for voice telephony immediately before 20 September 1996 to continue to have access to them.

The Part re-enacts the untimed local call provision in s. 73 of the 1991 Act, with necessary amendments to provide for:

- its extension for residential/charity customers to calls of a kind provided on an untimed basis immediately before 20 September 1996;
- its extension (for voice calls of a kind provided on an untimed basis immediately before 20 September 1996) to customers other than residential/charity customers;
- the extension of the obligation so that it is placed on all carriage service providers who charge customers in standard local call zones for eligible local calls made using a standard telephone service; and
- the possibility that the universal service obligation may in future be fulfilled for some customers by other technologies, and the need to ensure that those customers continue to have access to untimed local calls via their universal service provider.

This Part requires carriage service providers who charge customers located in standard call zones for eligible local calls to offer those customers the option of having local calls charged for on an untimed basis.

It does not require carriage service providers who offer other standard telephone services (eg. long-distance calls) but not local calls to commence offering local calls. However, where a customer in a traditional local call zone is supplied with a standard telephone service by the relevant universal service provider for the customer, the untimed local call obligation applies to eligible local calls made using that service. This ensures that customers continue to have access to local calls which are untimed.

Clause 213 – Simplified outline

This clause provides a simplified outline of Part 8 to assist readers.

Clause 214 – Requirement to provide an untimed local call option

A carriage service provider who charges an eligible customer for eligible local calls made using a standard telephone service supplied to that customer must give the customer an untimed local call option for those calls.

It does not matter who supplies the standard telephone service to the customer. In particular, if a carrier supplies the service, but the customer deals with a switchless reseller, the clause requires that in relation to any eligible local calls the customer is charged for by that reseller, the customer should receive the option of having them charged for on an untimed basis.

Clause 215 – Untimed local call option

A customer receives an untimed local call option if, and only if, the customer may choose, both at the time of connection and at any subsequent time, to have the charges for eligible local calls on that service worked out on an untimed basis. The definition in clause 215(1) is essentially in the same terms as ss. 73(2)(a) - (d) of the 1991 Act.

An ‘untimed basis’ is defined in clause 215(2) and is essentially in the same terms as s. 73(1)(b) of the 1991 Act.

Clause 216 – Eligible local calls

An eligible local call is one made using a standard telephone service supplied to an eligible customer between two points within the relevant applicable zone; and which:

- in the case of a residential/charity customer, is of a kind that immediately before 20 September 1996, a general carrier offered to supply, or supplied, on an untimed basis (and therefore will include data calls made using a standard telephone service that were offered at the relevant time on an untimed basis); or
- in the case of other customers, is a voice call or the equivalent for an end-user with a disability, which is of a kind that immediately before 20 September 1996, a general carrier offered to supply, or supplied, on an untimed basis; or
- in any case, is made using a standard telephone service supplied to that customer in fulfilment of the universal service obligation.

As now, calls to or from a public mobile telecommunications service (PMTS) or satellite phone do not attract the untimed local call obligation (except when the PMTS or satellite services involved are being supplied to fulfil the universal service obligation).

In determining the meaning of ‘kind’, reference should be made to the functionality of the service and the technology used to supply it. Therefore, ISDN services are not of the same ‘kind’ as existing non-ISDN services which are supplied on an untimed basis. PMTS and satellite services are not of the same ‘kind’ as existing public switched telephone network services or cable services.

However, PMTS and satellite services may have been supplied on an untimed basis in certain cases (eg. weekends) immediately before 20 September 1996. An explicit exclusion for non-USO PMTS and satellite services is included for this reason. (Nothing

in this Part prevents a carriage service provider from choosing to offer untimed calls on PMTS or satellite services to attract customers.)

‘Residential/charity customer’ is defined by clause 216(4), in the same terms as in s. 73(3) of the 1991 Act.

Clause 217 – Standard zones

This clause defines ‘standard zones’, which are the traditional local call zones as they stood immediately before 1 July 1991. It is essentially in the same terms as s. 73(1) of the 1991 Act.

Clause 218 – Applicable zones

The ‘applicable zone’ is the zone within which calls are ‘local’ calls. The default ‘applicable zone’ is the relevant ‘standard zone’ in which that customer is situated.

However, a different applicable zone may apply in the following circumstances:

- for the relevant universal service provider for that customer - where the provider nominates a different zone to the ACA and the customer chooses to adopt the nominated zone; and
- for any other carriage service provider - where the carriage service provider nominates a different zone to the ACA.

Hence, each eligible customer will be entitled to be offered a service (by the relevant universal service provider) for which the zone in which the customer can make untimed local calls is the traditional local call zone.

Clause 219 – Eligible customer

Any customer located in a ‘standard zone’ is an ‘eligible customer’.

Clause 220 – Points

This defines ‘point’ for mobile-type services to include points which are mobile or potentially mobile. It is included for the avoidance of doubt.

Clause 221 – Application of this Part

Existing contracts for the supply of services are preserved.

Part 9—Customer service guarantee

This Part establishes the Customer Service Guarantee (CSG) as proposed by the Government in its pre-election policy statement, *Better Communications*. The CSG involves the ACA setting performance standards for carriage service providers, and payment of specified damages to customers where those standards are contravened. The

CSG is not intended to address every individual service difficulty that may arise, but is intended to supplement other customer complaint mechanisms. The CSG is intended to guard against poor service in certain key problem areas and provide a streamlined means for compensating consumers where set standards in those areas are not met. Matters not covered by the CSG are addressed by other more appropriate mechanisms either in statute, licence condition or under the proposed industry code-standard regime in Part 6.

Under a scale of damages developed by the ACA, up to \$3000 can be awarded to a consumer for contravention of a performance standard by a carriage service provider. The primary intention of standards however, is not to benefit customers financially, but provide carriage service providers with an incentive to meet performance standards. It is only when a carriage service provider fails to meet such standards that customers can seek compensation. While the CSG must ultimately be enforced by a court, the scheme has been designed to encourage voluntary compliance by the industry and the involvement of the Telecommunications Industry Ombudsman (TIO). The CSG provides a streamlined means of compensating customers in certain specified circumstances. The CSG does not limit or affect any other rights to action or damages a person may have.

Clause 222 – Simplified outline

This clause provides a simplified outline of the Part to assist readers.

Clause 223 – Interpretation

This clause is an interpretation provision which sets out definitions of terms used in Part 9 and contains an interpretive rule requiring these definitions to be disregarded in determining the meaning of the terms when used other than in Part 9.

Clause 224 – Performance standards

This clause provides for the making of performance standards.

Clause 224(1) gives the ACA the power to make standards to be complied with by carriage service providers in relation to:

- the making of arrangements with customers about the period taken to comply with requests to connect customers to specified kinds of carrier services;
- the periods that carriage service providers may offer to customers when making the above arrangements;
- compliance by carriage service providers with the terms of those arrangements;
- the period taken to comply with requests to rectify faults or service difficulties relating to specified kinds of carriage services; and
- the keeping of appointments to meet customers (or their representatives, eg. family members) about such connections and rectifications.

‘Customer’ is defined in clause 223(1) to include a prospective customer, to avoid any argument that a person who is not receiving a service from a carriage service provider but has requested a connection may not yet be a customer of the carriage service provider.

Clause 224(2) is intended to provide protection for a carriage service provider from the requirement to comply with a performance standard for a particular kind of carriage service where the carriage service provider does not offer to supply that kind of service at a particular location. For example, if a carriage service provider has installed cable in particular suburbs of a city and offers local call services using that cable at locations in close proximity to where that cable is installed, it should not be subject to a performance standard for connection of local call services at those locations which are not in close proximity to where the cable has been installed.

Clause 224(3) prevents the ACA making a standard unless directed to do so by the Minister under clause 232. This provision is included because it may not be appropriate for all carriage services to be subject to performance standards, for example services used only by large corporate customers. The Minister will have the power to direct the ACA to impose standards in relation to particular services where regulatory attention should be

focussed - for example, the standard telephone service used by residential and business customers and other services commonly used by small business.

Clause 224(4) provides that a performance standard may be of general application or may be limited as provided for in the standard. This provision is included because a standard may need to recognise circumstances where the standard should not apply, for example in circumstances beyond the carriage service provider's control, such as when a natural disaster has occurred.

Clause 224(5) provides for the commencement of a standard.

Clause 224(6) provides that a performance standard is a disallowable instrument which accordingly must be notified in the *Gazette* and tabled in the Parliament and is subject to Parliamentary disallowance.

Performance standards are to be made by disallowable instrument in order to enable standards to be made for new services, as they are developed, and to enable standards to be increased progressively over time, as carriage service provider performance improves.

Clause 225 – Damages for breach of performance standards

This clause provides that if a carriage service provider contravenes a performance standard in relation to a customer, the carriage service provider will be liable to pay specific damages to that particular customer.

Clause 225(2) makes the amount of damages payable equal to the relevant amount specified in the scale of damages determined by the ACA under clause 226. 'Damages' is defined in clause 223(1) to include punitive damages in recognition that the scale of damages is intended to specify a penalty for the carrier and accordingly may include amounts that go beyond the real measure of damages suffered by a customer for a contravention of a performance standard.

Clause 225(3) provides that if a carriage service provider credits a customer's account or pays the customer an amount as a result of a right or remedy for the event causing the contravention, the amount of damages is to be reduced by the amount of the credit or payment. This provision ensures that if the TIO, for example, determines or directs that an amount is payable under the TIO scheme for the event causing the contravention, the carriage service provider's liability under the CSG is reduced accordingly.

Clause 225(4) enables a customer to recover the amount by action against the carriage service provider in a court of competent jurisdiction. In practice, customers should not need to take court action. Carriage service providers would be expected to credit customer's accounts where they have breached a performance standard. The TIO, in handling complaints under the TIO scheme, will be able to make determinations or give directions that reflect the penalties payable under the CSG.

Clause 225(5) enables a carriage service provider to discharge a liability by giving the customer a credit in an account the customer has with the carriage service provider. However, in some circumstances, the customer may not have an account with the carriage service provider, for example because the customer is now using a different carriage

service provider or has left the country. This clause allows the carriage service provider and customer to come to an agreement about another manner for the discharge of the liability to deal with such circumstances.

Clause 225(6) requires any court action to be instituted within 2 years of the contravention occurring or beginning.

Clause 225(7) ensures that where a customer dies, the executor can continue to recover the damages from the carriage service provider.

Clause 226 – Scale of damages for breach of performance standards

This clause provides that the ACA may specify a scale of damages for contraventions of standards by carriage service providers under clause 224 (clause 226(1)).

Clause 226(2) requires the scale to specify categories of contraventions and a dollar amount as the amount of damages payable for contraventions covered by each of those categories.

As proposed in *Better Communications*, it is intended that the scale would specify different amounts based on the number of days that a contravention continued in relation to a specified service. For example, the dollar amount for delays in connecting or rectifying faults with the standard telephone service would be set at an amount equivalent to the monthly standard telephone rental fee for each day of delay, until a maximum is reached. The dollar amount for delays in connecting or rectifying faults with other services would be set at an amount equivalent to the monthly rental fee for those services for each day of delay up to a maximum. It may be appropriate in the case of particularly expensive services to set a lower figure. The Ministerial power of direction under clause 232 can be used, if necessary, to ensure that the ACA gives effect to Government policy in this regard.

Clause 226(3) provides that a dollar amount specified in the scale of damages must not exceed \$3000. This provision is included to put a cap on the maximum amount of damages which can be determined by the ACA to minimise any concern that giving this power to the ACA represents an inappropriate delegation of legislative power.

The \$3000 maximum is considered to be the highest amount appropriate to be awarded under the customer service guarantee scheme, which is mainly aimed at residential and small business customers. The amount is more than adequate to cover most envisaged penalties - for example, the maximum intended penalty for a failure to rectify a fault with the standard telephone service under the performance standard is intended to be 6 times the monthly rental fee, which for Telstra customers is some \$70 for a residential line and \$120 for a business line. The maximum will allow higher penalties for more expensive services if they are included in a performance standard.

The CSG is intended to supplement, not replace, existing remedies for customers. Accordingly clause 229 specifically saves other laws and remedies. It is intended that customers with complaints will still be able to seek redress, for example, from the TIO or the courts. The \$3,000 ceiling for the CSG does not impinge on the TIO's ability to make determinations of up to \$10,000.

Clause 226(4) makes it clear that a category of contraventions can be specified by reference to the number of days the contravention continues and new clause 226(5) makes it clear that this does not by implication limit the ways a category can be specified. This provision ensures that, as proposed in *Better Communications*, damages can accumulate if a contravention of a standard continues for a number of days.

Clause 226(6) provides that an instrument specifying a scale of damages is a disallowable instrument which accordingly must be notified in the *Gazette* and tabled in the Parliament and is subject to Parliamentary disallowance.

Clause 227 – Evidentiary certificate issued by the Telecommunications Industry Ombudsman

The TIO is an industry ombudsman established by carriers and carriage service providers under Part 10 which requires them to enter into, and comply with, an Ombudsman scheme providing for investigation in relation to complaints about carriage services by end-users, including complaints about billing and the manner of charging for carriage services.

Given the nature of the TIO's role, it would be appropriate for it to investigate complaints about breaches of performance standards and to make determinations against carriage service providers requiring them to pay compensation of an amount equivalent to the damages required under the CSG. Such involvement is dependent on the TIO scheme entered into by carriers and carriage service providers allowing the TIO to take on such a role. The involvement of the TIO in making such determinations under the TIO scheme would be expected to significantly reduce the need for customers to take action in the courts under the CSG. However, if court action needs to be taken, it is proposed to make taking action easier for the customer by enabling the TIO or the ACA to provide evidentiary certificates.

This clause gives the TIO the power to issue evidentiary certificates stating that a specified carriage service provider has contravened a performance standard and setting out particulars of the contravention.

Under clause 227(2), such a certificate becomes prima facie evidence of the matters contained in it for the purposes of any proceedings under Part 9.

However, in recognition that the TIO scheme is an industry-based scheme, the TIO will only obtain these powers if the TIO gives a written notice consenting to the conferral of the powers (clause 227(4)). The notice must be published in the *Gazette* (clause 227(6)).

If the TIO does not consent to the conferral of the powers or subsequently revokes consent, the ACA is able to exercise them (clause 227(5)). Note that although there is no specific reference to revoking consent, s. 33(3) of the *Acts Interpretation Act 1901* would provide the basis for the TIO to do so and the reference to a notice 'in force' under clause 227(4) is intended to recognise that a notice previously given may be revoked.

Clause 227(7) makes it clear that the continuity of a notice under clause 227(4) is not affected by a change in occupancy of the TIO position. However, if a vacancy in the

TIO position continues for more than 4 months, the power would revert to the ACA and the new TIO would need to give the Minister a new notice under clause 227(4).

While it may be desirable for the Bill to make direct statutory provision for the TIO to enforce the CSG, this is not possible for Constitutional reasons. The CSG requires a decision to be made as to whether a carriage service provider has failed to meet a standard and for a penalty to be imposed as a consequence. Such a decision is judicial in nature and Chapter III of the Constitution requires that a court make that decision. Issues about the exercise of judicial power by bodies other than courts were considered by the High Court in *Brandy v. The Human Rights and Equal Opportunity Commission*.

Clause 228 – Waiver of customer service guarantee

This clause enables the ACA, by written instrument, to make provision for customers of carriage service providers to waive, in whole or in part, their protection and rights under this Part in relation to a particular service supplied, or proposed to be supplied, by the carriage service provider concerned.

Clause 228(2) provides that if such a waiver is made then, to the extent of the waiver, the carriage service provider is not bound by the performance standards under clause 224 which apply to the supply of the particular service to the customer.

Clause 228(3) requires a waiver to be made in accordance with the rules set out in the instrument.

Clause 228(4) provides that an instrument setting out a waiver scheme is a disallowable instrument and accordingly must be notified in the *Gazette* and tabled in the Parliament and is subject to Parliamentary disallowance.

The waiver power is included because it is intended to ensure that as far as possible customers are not restricted in the choices they make. It is expected that the ACA would exercise this power to enable a carriage service provider to offer cheaper prices for a service where a customer is prepared to waive some or all of the customer's rights under this Part.

Clause 229 – Savings of other laws and remedies

This clause is intended to ensure that this Part is not interpreted as excluding, limiting, restricting or affecting any right a person may otherwise have under Commonwealth, State or Territory or common law where a carriage service provider fails to comply with a performance standard.

In this context, it should be noted that the setting of a ceiling of \$3,000 on the maximum damages payable under the CSG (see clause 226) does not affect a customer's right to seek higher damages under other laws.

However, clause 225(3) ensures that the damages payable under the CSG are reduced where the carriage service provider makes a payment in such circumstances.

Clause 230 – Breach of performance standards is not an offence

This clause makes it clear that contravention of a performance standard under clause 224 is not an offence. Section 225 provides the mechanism for dealing with a contravention of a standard.

Clause 231 – Clause 1 of Schedule 2 does not apply to a breach of a performance standard

Clause 1 of Schedule 2 is a service provider rule which requires a service provider to comply with this Act.

This clause provides that clause 1 of Schedule 2 does not apply to a contravention of a performance standard under clause 224. Parts 30 and 31 set out mechanisms for enforcing contraventions of service provider rules. These mechanisms are inappropriate in relation to contraventions of performance standards, as clause 225 provides the mechanism for dealing with such contraventions.

Clause 232 – Minister may direct the ACA about the use of its powers under this Part

This clause enables the Minister to give the ACA written directions about how it should exercise its powers under this Part.

Such a direction could be given, for example, to identify the kinds of carriage services in relation to which performance standards should be imposed, the standard that should be imposed for a specified service, the level of penalty that should be specified in a scale of damages, what provision the ACA should make for waiver or processes the ACA should follow in making a performance standard.

Clause 232(2) requires the ACA to comply with such a direction.

Clause 232(3) is an interpretive rule which prevents the ambit of other directions powers being read down by reference to this specific power.

Clause 232(4) makes a direction under this clause a disallowable instrument which accordingly must be notified in the *Gazette* and tabled in the Parliament and is subject to Parliamentary disallowance.

Clause 232(5) provides that the Minister must not give the ACA a direction under s. 12 of the ACA Act about how the ACA is to exercise its powers under this Part.

Clause 233 – Review of performance standards following Ministerial direction

This clause requires a Ministerial Direction to be given under clause 232 before the ACA makes a performance standard. This will allow the Minister to direct the ACA as to where regulatory attention should be focussed.

Clause 233(2) ensures that where the Minister revokes such a direction, the ACA must revoke the relevant standard.

Clause 233(3) ensures that if the Minister varies such a direction, the ACA must either vary, or revoke and remake, the relevant standard so that it complies with the varied direction.

Clause 233(4) is included to make it clear that the previous rules do not prevent the ACA varying, or revoking and remaking, a performance standard on its own initiative as long as it complies with the Ministerial direction.

Part 10—The Telecommunications Industry Ombudsman

This Part requires carriers and certain carriage service providers to enter into a Telecommunications Industry Ombudsman scheme which is a central element of the self-regulatory arrangements for the telecommunications industry provided for by the Act.

The TIO was previously dealt with in clause 4 of the Telecommunications (General Telecommunications Licences) Declaration (No. 2) of 1991. The TIO scheme is intended to provide customers with an independent complaint handling mechanism after they have taken up their complaints with the respective carrier or carriage service provider and failed to resolve them. It is expected that the TIO scheme will continue to operate along current lines, however the detail of its operation is effectively a matter for the members of the scheme. The TIO may accept functions and powers under industry codes and industry standards (clause 113).

Clause 234 – Simplified outline

This clause provides a simplified outline of the Part to assist the reader.

Clause 235 – Eligible carriage service providers

This clause defines an eligible carriage service provider for the purposes of this Part.

Clause 235(a) defines an eligible carriage service provider as a carriage service provider who supplies a standard telephone service to residential or small business customers, or a public mobile telecommunications service. The exemption in clause 88 from the definition of carriage service provider ensures that the operators of hotels, motels and hospitals are not eligible carriage service providers, and are therefore not subject to obligations under the TIO scheme. Once an eligible carriage service provider is defined as such, all of the carriage services supplied by the provider are subject to investigation by the TIO, not just their standard telephone service.

Clause 235(b) includes a carriage service intermediary who arranges for the supply of a service referred to in paragraph (a) as an eligible carriage service provider.

Clause 236 – Telecommunications Industry Ombudsman scheme

Clause 236(1) requires all carriers and eligible carriage service providers to enter into a Telecommunications Industry Ombudsman scheme. The scheme must provide for the TIO to investigate customer complaints about carriage services and make determinations and give directions relating to those complaints (clause 236(3)).

Clause 236(4) lists complaints about billing or the manner of charging for the supply of carriage services as examples of complaints which the TIO may investigate. Other complaints investigated by the TIO could include, but are not limited to, complaints about: mobile phones; operators; fault reporting and “white pages” directory entries.

Clause 236(5) provides that complaints relating to tariff levels or the content of a content service are outside the jurisdiction of the TIO scheme. Membership of the TIO scheme must be open to all carriers and carriage service providers (clause 236(6)).

Clause 237 – Exemptions from requirement to join scheme

Clause 237(1) gives the ACA the power, by notice in the *Gazette*, to exempt a specified carrier or carriage service provider from the requirement in clause 236(1) to enter into the TIO scheme. Clause 237(2) lists matters that the ACA must have regard to when considering exemptions for carriers or carriage service providers. These matters are: the extent to which a carrier or carriage service provider deals with residential and small business customers; and the potential for complaints about services provided by the carrier or carriage service provider.

This list does not limit the matters to which the ACA may have regard when making an exemption (clause 237(3)). The ACA must consult the TIO before making an exemption (clause 237(4)).

A decision to refuse to exempt a carrier or carriage service provider is subject to merits review under Part 29 of the Act (see Schedule 4).

Clause 238 – Direction to join scheme

Clause 238(1) gives the ACA the power to direct a carriage service provider to join the TIO scheme. A carriage service provider must comply with this direction (clause 238(2)). Clause 238(3) lists the matters the ACA must have regard to when making a direction. These matters are: the extent to which a carriage service provider deals with residential and small business customers; and the potential for complaints about services provided by the carriage service provider.

This list does not limit the matters to which the ACA may have regard when making a direction (clause 238(4)). Before directing a carriage service provider to join the TIO scheme, the ACA must consult the TIO.

A decision to direct a carriage service provider to join the TIO scheme is subject to merits review under Part 29 of the Act (see Schedule 4).

Clause 239 – Determination that a class of carriage service providers must join scheme

This clause allows the ACA to make a written determination that requires all members of a class of carriage service providers to enter into the TIO scheme (clause 239(1)). Clause 239(3) requires the ACA to have regard to certain matters when making a determination. These matters are: the extent to which members of that class deal with residential and small business customers; and the potential for complaints to the TIO about services provided by members of the class.

This list does not limit the matters to which the ACA may have regard when making a determination (clause 239(4)). Before the ACA can determine that all members of a class of carriage service provider be required to join the TIO scheme, the TIO must be consulted.

Clause 240 – Members of scheme must comply with scheme

This clause provides that all members of the TIO scheme must comply with the scheme.

Clause 241–Register of members of scheme

This clause provides that a public register of the names of all members of the scheme must be kept by the TIO. The register may be maintained in electronic form (clause 241(2)), and must be open for public inspection at reasonable times (clause 241(3)).

Part 11—Protection for residential customers against failure by carriage service providers to provide standard carriage services

This Part is intended to protect residential customers from losing prepaid monies if a new carriage service provider fails to supply standard carriage services through circumstances such as insolvency. This Part provides a safeguard for customers who choose to deal with new carriage service providers in the post 97 environment and accordingly represents a significant addition to customer protection arrangements.

Clause 242 – Simplified outline

This clause provides a simplified outline to assist the reader.

Clause 243 – Scope of Part

Clause 243(1), provides that this Part applies to all carriage service providers supplying, or proposing to supply, a standard telephone service to residential customers. A carriage service provider that was a carrier before 1 July 1997 is exempt from this Part (clause 243(2)). These carriers have a substantial market presence and accordingly their customers are unlikely to need these protection arrangements.

Clause 243(3) gives the ACA the power to declare a specified person exempt from this Part, by notice in the *Gazette*, having regard to certain listed matters. These matters are:

- the length of time (if any) that the person had carried on business in Australia as a carriage service provider;
- the scale of the person's prior operations in Australia as a carriage service provider;
- the person's business record;
- if there is a partnership, the business record of each partner; and:
- if there is an incorporated company, the business record of each individual who is concerned, or takes part, in the management of the company.

This list does not limit the matters to which the ACA may have regard when considering exemptions (clause 243(5)).

A decision to refuse to make a declaration giving an exemption is subject to merits review under Part 29 (see Schedule 4).

Clause 244 – Standard residential customer

This clause provides that a residential customer receiving a standard telephone service is a standard residential customer (clause 244(1)(a)), and, the service is a standard carriage service (clause 244(1)(b)), for the purposes of this Part. Specifically excluded from clause 244 are public mobile telecommunications services, except where supplied in fulfilment of the universal service obligation.

Clause 245 – Protected payments

Clause 245(1) provides that the ACA may make a written determination that a payment made to a carriage service provider by a standard residential customer is a protected payment. Under clause 245(2), a protected payment must be received by the carriage service provider, directly or indirectly in connection with its business as a carriage service provider.

Examples of protected payments include line and equipment rental, connection fees and prepaid standard carriage services (clause 245(3)). A determination under this clause must specify a minimum service period for each protected payment (clause 245(4)), and this period must not be longer than two years (clause 245(5)).

A determination under this clause is a disallowable instrument for the purposes of s. 46A of the *Acts Interpretation Act 1901*.

Clause 246 – Compliance with protection schemes for protected payments

This clause provides that before demanding or receiving a protected payment from a residential customer, a carriage service provider must provide the ACA with a written election to be bound by a specified protection scheme (clause 246(1)). Clause 246(2) provides that a carriage service provider that has made such an election, must comply with the specified protection scheme. If the carriage service provider wishes to vary an election, it can do so by substituting another protection scheme for the original scheme by notice in writing to the ACA (clause 246(3)). However, the original scheme continues to apply to protected payments made before the new scheme took effect (clause 246(4)).

Clause 247 – Protection schemes for protected payments – alternative supply of standard carriage services

Clause 247(1) provides an example of a scheme which the ACA may formulate providing for the alternative supply of standard carriage services to residential customers. Arrangements under the scheme would operate if a carriage service provider that has received a protected payment fails to supply standard carriage services to the customer at any time during the minimum service period. The scheme would be for the purpose of ensuring that the customer is supplied with equivalent standard carriage services for the remainder of the minimum service period at no extra cost.

A scheme formulated under this clause is a disallowable instrument for the purposes of s. 46A of the *Acts Interpretation Act 1901*.

Clause 248 – Protection schemes for protected payments – third party guarantee

Clause 248(1) provides an example of a protection scheme the ACA may formulate that requires a carriage service provider to reimburse a protected payment to a residential customer, on a pro-rata basis, depending on the time period for which the service was not provided. This scheme would also require the carriage service provider to obtain a third party guarantee on their liability (clause 248(1)(b)). The scheme would require the reimbursement to be made if a carriage service provider that has received a protected payment fails to supply standard carriage services to the customer at any time during the minimum service period.

A scheme formulated under this clause is a disallowable instrument for the purposes of s. 46A of the *Acts Interpretation Act 1901*.

Clause 249 – Protection schemes for protected payments – insurance cover

Clause 249(1) provides an example of a protection scheme the ACA may formulate that requires a carriage service provider to reimburse a residential customer for a protected payment on a pro-rata basis, as well as take out an insurance policy to indemnify the residential customer (clause 249(1)(b)). The scheme would require the reimbursement to be made if a carriage service provider that has received a protected payment fails to supply standard carriage services to the customer at any time during the minimum service period.

A scheme formulated under this clause is a disallowable instrument for the purposes of s. 46A of the *Acts Interpretation Act 1901*.

Clause 250 – Protection schemes for protected payments – holding of payments in trust accounts

Clause 250(1) provides an example of a protection scheme the ACA may formulate that requires a carriage service provider to reimburse a protected payment on a pro-rata basis, with those protected payments being held in trust accounts (clause 250(1)(b)). The carriage service provider must not transfer any or all of the money in such a trust account to its beneficial ownership except in accordance with the draw-down rules set out in the scheme (clause 250(1)(c)). The scheme would require the reimbursement to be made if a carriage service provider that has received a protected payment fails to supply standard carriage services to the customer at any time during the minimum service period.

A scheme formulated under this clause is a disallowable instrument for the purposes of s. 46A of the *Acts Interpretation Act 1901*.

Clause 251 – Waiver of protection by customers

Clause 251(1) allows a scheme formulated under this Part to provide for residential customers to be able to waive their rights under a protection scheme in relation to a particular protected payment. In such a case, the carriage service provider is not bound by the scheme in relation to that payment (clause 251(2)). Clause 251(3) requires a waiver to be made in accordance with the rules of that scheme, and may require the carriage service provider to inform the customer of the consequences of a waiver (clause

251(4)). Clause 251(4) does not limit the matters that may be dealt with under a standard or a code registered under Part 6 (clause 251(5)).

Clause 252 – Incidental rules

Clause 252(1) provides that carriage service providers participating in a protected payment scheme may be required to comply with any ancillary or incidental rules set out in the scheme, including rules about informing residential customers about matters relating to the implementation of the scheme (clause 252(2)).

Clause 253 – Enforcement of protection schemes

Clause 253(2) provides that an order may be sought from the Federal Court by a customer or by the ACA in relation to a breach of a protection scheme by a carriage service provider that is bound by a scheme formulated under this Part. If satisfied that a carriage service provider has breached the scheme, the Federal Court can make all or any of the following orders under clause 253(3):

- an order directing the carriage service provider to discharge a liability under the scheme;
- an order directing the carriage service provider to comply with the scheme;
- an order directing the carriage service provider to compensate any person who has suffered loss or damage as a result of the breach; and
- any other order that the Court thinks appropriate.

Clause 253(4) allows the Federal Court to discharge or vary an order given under this Part, but any order given under this Part should not limit other remedies available to a customer (clause 253(5)). When enforcing a protection scheme, an order can direct the carriage service provider's administrators or receivers. Under clause 253(6)(a), when the carriage service provider is an individual or partnership, an order can direct the provider's trustee in bankruptcy. Under clause 253(6)(b), where the carriage service provider is a body corporate or a partnership, an order can direct the following groups: a receiver or controller of property of the body; an administrator of the body; an administrator of a deed of arrangement; a liquidator or provisional liquidator; and a trustee or other person administering a compromise between the body and any other person. These provisions are intended to ensure that protection schemes for residential customers continue to be effective, to the extent possible, in the event of the carriage service provider becoming insolvent.