

1996

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

TELECOMMUNICATIONS BILL 1996

EXPLANATORY MEMORANDUM

VOLUME 2

(Circulated by authority of Senator the Hon. Richard Alston, Minister for
Communications and the Arts)

NOTES ON CLAUSES – CONTINUED

Part 12—Provision of emergency call services

This Part sets out requirements for the provision of emergency call handling services.

The provision of emergency call services is currently dealt with in the Telecommunications (General Telecommunications Licences) Declaration (No. 2) of 1991 and Telecommunications (Public Mobile Licences) Declaration (No. 2) of 1991. This Part is intended to provide for the provision of emergency call services, that meet community expectations, in a multi-carrier and carriage service provider environment. In particular, it is intended to provide what appears to be a single national service to end-users and to minimise the possibility of a proliferation of emergency call service providers, which may result in a decrease in the quality of emergency call services.

An ‘emergency call service’ is defined in clause 7 as a service for receiving and handling calls to an emergency service number, and providing information about such calls to emergency service organisations for purposes connected with dealing with the matters raised by the call. Clause 450 provides for ‘emergency service numbers’ to be specified under the numbering plan. An ‘emergency call person’ is defined in clause 7 as a recognised person who operates an emergency call service or their employees, or an emergency call contractor. A ‘recognised person’ is defined in clause 19 as a person who is specified as a national or regional operator of emergency services in a written determination made by the ACA. It is intended that the ACA will identify the most appropriate operator of emergency call services on a national or a regional basis in order to prevent any undesirable proliferation of operators of emergency call services which could result on a lower level of service. Multiple operators may be necessary, however, to manage calls from different types of services or equipment (for example, calls from teletypewriter (TTY) machines).

Clause 254 – Simplified outline

Clause 254 provides a simplified outline of this Part to assist readers.

Clause 255 – Provision of emergency call services

This clause requires the ACA to make a determination that sets out the fundamental emergency call service requirements. This process allows the requirements to evolve in response to changes in industry arrangements, technology and community expectations for emergency call handling. A determination is a disallowable instrument which must be notified in the *Gazette*, tabled in the Parliament and is subject to Parliamentary disallowance.

The determination would be expected to include, for example, requirements in relation to the way in which calls are transmitted through a carrier’s or carriage service provider’s network, the period within which calls must be answered and the form in which information about calls is transferred to emergency service organisations. The determination could also include other performance requirements and technical requirements for the transmission of calls to emergency service organisations.

Clause 255(1) requires the ACA to make a written determination imposing requirements on carriers, carriage service providers and emergency call persons in relation to emergency call services. The ACA must have regard to listed objectives when making its determination (clause 255(2)). These objectives are:

- that each end-user of a standard telephone service have direct access, free of charge, to an emergency service number unless the ACA considers it would be unreasonable for such access to be provided (note that under clause 361 an ACA technical standard may include requirements to ensure that customer equipment can be used to give direct access to an emergency service number);
- that emergency call persons be provided with automatic information about the caller's location and the customer's identity;
- that carriers provide carriage service providers with access to controlled carriage services, networks and facilities in order that the providers can comply with their obligations under the determination;
- that carriage service providers provide other carriage service providers with access to controlled carriage services, networks and facilities in order that the other providers can comply with their obligations under the determination;
- that the determination be consistent with Principle 11 of the Information Privacy Principles set out in s. 14 of the *Privacy Act 1988*, and any registered codes or standards under Part 6.

This list does not limit the matters to which the ACA may have regard when making a determination (clause 255(3)).

The ACA's determination may also deal with ancillary or incidental matters, such as privacy protection (clause 255(4)).

If appropriate, the ACA may apply, adopt or incorporate, with or without modification, any matter contained in a code or standard proposed or approved by a body or association. This provision is intended to allow the ACA to take into account any work in the area of emergency call services which may be undertaken by a body formed for that purpose by representatives from the telecommunications industry and from emergency service organisations. In any case, before making its determination, the ACA must consult representatives of carriers, carriage service providers, recognised emergency call persons and emergency service organisations (including a police force or service, a fire service, an ambulance service or a service specified in the numbering plan as an emergency service organisation).

It is expected that the ACA will have regard to the needs of end-users with a disability, and will attempt to give effect to the objective of direct access as far as is technically possible.

Clause 256 – Compliance with determination

Clause 256 requires a person to comply with any requirements imposed on the person by a determination made under clause 255. Pecuniary penalties apply under Part 31 for a

contravention of a determination. Funding the costs of meeting any requirements will be a matter for persons subject to those requirements.

Clause 257 – Access to be provided

This clause is intended to facilitate access to the carriage services, networks and facilities needed by a person subject to requirements in a determination made under clause 255.

Clause 257 applies if a determination under clause 255 requires a person to provide access to controlled carriage services, networks or facilities. It requires the person to provide access in accordance with the determination and on such terms and conditions as are agreed between the parties, or failing agreement, as are determined by an arbitrator appointed by the parties. If the parties fail to agree on the appointment of an arbitrator, then the ACCC is to be the arbitrator. It is expected that the ACCC will have regard to the types of issues it is required to consider in arbitrating disputes under proposed Part XIC of the TPA to be inserted by the proposed *Trade Practices Amendment (Telecommunications) Act 1996* and would follow similar procedures. The regulations may make provision for and in relation to the conduct of an arbitration under this clause.

Part 13—Protection of communications

This Part provides for the protection of communications by means of secrecy provisions which create offences for the use or disclosure of certain information by carriers, carriage service providers, emergency call persons and their respective associates.

The Part re-enacts the substance of s. 88 of the 1991 Act in the new Act.

There are six significant policy changes proposed to the terms of the current s. 88:

- to create an offence for secondary use or disclosure of information disclosed under exceptions to the primary offences;
- to create record-keeping requirements in relation to certain disclosures and give the Privacy Commissioner the function of monitoring compliance with those requirements;
- to allow disclosure of information requested by certain Government agencies for the enforcement of the criminal law or of a law imposing a pecuniary penalty or for the protection of the public revenue upon certification by a senior officer authorised by the head of the agency that it is reasonably necessary that the information be disclosed for the relevant purpose;
- to allow the use and disclosure of information for the purposes of an integrated public number database for directory, emergency services and law enforcement purposes;
- to enable disclosure of emergency information to a person who deals with emergency service calls for the police force, fire service or ambulance service;
- to exempt public communications from the scope of the offences.

Division 1—Introduction

Clause 258 – Simplified outline

This clause provides a simplified outline of Part 13 to assist readers.

Clause 259 – Eligible person

This clause defines the term ‘eligible person’ which is a fundamental term for the purposes of this Part. The prohibitions and exemptions provided for in this Part apply to eligible persons.

The term ‘eligible person’ includes the following: a carrier; a carriage service provider; an employee of a carrier or a carriage service provider; a telecommunications contractor (this term is defined in clause 261); and an employee of a telecommunications contractor.

Clause 260 – Information

This clause makes it clear that ‘information’, in relation to this Part, includes an opinion.

Clause 261 – Telecommunications contractor

This clause defines the term ‘telecommunications contractor’. It means a person who performs services on behalf of a carrier or carriage service provider. Employees of carriers and carriage service providers are excluded from this definition as they are specifically identified as eligible persons.

Division 2—Primary disclosure/use offences

Clause 262 – Primary disclosure/use offence - eligible persons

This clause prohibits an eligible person from disclosing or using certain information or documents connected with the provision of carriage services (clause 262(1)).

The types of information or documents concerned are those that relate to:

- the contents of a communication that was carried by the carrier or carriage service provider (subparagraph (a)(i));
- the contents of a communication that is being carried by the carrier or carriage service provider (subparagraph (a)(ii));
- carriage services supplied or intended to be supplied to another person (subparagraph (a)(iii)); or
- the affairs or personal particulars of another person (subparagraph (a)(iv)).

The types of information or documents concerned must come to that person's knowledge or possession in connection with the person's involvement in the business of a carrier or carriage service provider, or of a telecommunications contractor (paragraph (b)).

Clause 262(2) prohibits a person who has been an eligible person from disclosing or using that same type of information or document which came to the person's knowledge or possession when that person was an eligible person.

Clause 262(3) makes it an offence to breach the prohibitions in clause 262(1) or 262(2), the penalty for which is imprisonment for a maximum of 2 years. [Note that the *Crimes Act 1914* provides for conversion of imprisonment terms into penalty units: for a natural person the number of penalty units is equal to five times the number of months of the term of imprisonment (s. 4B(2)); for a body corporate, it is five times the number of penalty units that are applicable to a natural person, including penalty units applicable by virtue of s. 4B(2) (s. 4B(3))].

Clause 262(4) confines the scope of subparagraphs (1)(a)(i) and (ii) to communications carried by means of electromagnetic energy, not by hard copy.

Clause 263 – Primary disclosure/use offence – emergency call persons

This clause prohibits an emergency call person from disclosing or using certain information or documents that relate to:

- the contents of a communication that was carried by a carrier or carriage service provider (subparagraph (1)(a)(i));
- the contents of a communication that is being carried by a carrier or carriage service provider (subparagraph (1)(a)(ii)); or
- the affairs or personal particulars of another person (subparagraph (1)(a)(iii)).

'Emergency call person' is defined in clause 7 as being a recognised person who operates an emergency call service (defined in clause 19); an employee of such a person; an emergency call contractor (defined in clause 7 as meaning a person who performs services on behalf of a recognised person who operates an emergency call service, other than an employee); or an employee of an emergency call contractor.

The types of information or documents concerned are those that come to that person's knowledge or possession in connection with the person's involvement in the provision of an emergency call service (paragraph (b)).

Clause 263(2) prohibits a person who has been an emergency call person from disclosing or using that same type of information or documents which came to the person's knowledge or possession when that person was an eligible person.

Clause 263(3) makes it an offence to breach the prohibitions in clause 263(1) or (2), the penalty for which is imprisonment for a maximum of 2 years. [Note that the *Crimes Act 1914* provides for conversion of imprisonment terms into penalty units: for a natural person the number of penalty units is equal to five times the number of months of the term

of imprisonment (s. 4B(2)); for a body corporate, it is five times the number of penalty units that are applicable to a natural person, including penalty units applicable by virtue of s. 4B(2) (s. 4B(3))].

Clause 263(4) confines the scope of subparagraphs (1)(a)(i) and (ii) to communications carried by means of electromagnetic energy, not by hard copy.

Division 3—Exceptions to primary disclosure/use offences

This Division provides for a number of exceptions to the offences created by clauses 262 and 263.

Subdivision A—Exceptions

Clause 264 – Performance of person’s duties

This clause exempts eligible persons who are employees and contractors from the prohibition in clause 262 where the disclosure or use of the information or document was made in the performance of the person’s duties as an employee or contractor (clauses 264(1) and (2)). This exemption is necessary for the myriad of day-to-day communications between employees about connecting, disconnecting and billing customers.

Clauses 264(3) and (4) exempt emergency call persons who are employees and contractors from the prohibition in clause 263 where the disclosure or use of the information or document was made in the performance of the person’s duties as an employee or contractor.

Clause 265 – Authorisation by or under law

This clause exempts persons from the prohibitions in clauses 262 and 263, where the disclosure or use is required or authorised by or under law.

Clause 266 – Witnesses

This clause exempts persons from the prohibitions relating to disclosures in clauses 262 and 263, where the disclosure is made as a witness in the course of giving evidence or producing documents.

Clause 267 – Law enforcement and protection of public revenue

Sections 88(3)(g) and (4)(e) of the 1991 Act provide an exception to the prohibition on the disclosure and use of relevant information if disclosure or use is reasonably necessary for the enforcement of the criminal law or of a law imposing a pecuniary penalty or for the protection of public revenue.

At present, release of call charge records and address information at the request of police agencies for the purposes of a police investigation occurs under s. 88(3)(g). However, the exception requires the disclosure to be reasonably necessary for the particular purposes concerned. This creates difficulties for the employees of a carrier who are not in a position to be able to make an objective judgement about whether disclosure is reasonably necessary because they do not know the details of the investigation.

The current exemption remains necessary to allow disclosure where a carrier employee comes across information which clearly is relevant to enforcement of the criminal law in the course of performing his or her duties and the information has not been requested by a law enforcement agency.

However, this clause introduces a new test which enables an eligible person to disclose information where an authorised officer has certified that the disclosure is reasonably necessary for the enforcement of the criminal law, a law imposing a pecuniary penalty or for the protection of the public revenue.

This clause exempts persons from the prohibitions in clauses 262 and 263, where the disclosure or use is reasonably necessary for the enforcement of the criminal law (clause 267(1)). A disclosure or use under this clause would require the relevant eligible person or emergency call person to make the judgement as to whether the disclosure or use is necessary for that purpose.

Clause 267(2) exempts persons from the prohibition in clause 262 where the disclosure or use is reasonably necessary for the enforcement of a law imposing a pecuniary penalty (paragraph (a)), or for the protection of the public revenue (paragraph (b)). Again, a disclosure or use under this clause would require the eligible person to make the judgement as to whether the disclosure or use is necessary for the relevant purpose.

Clause 267(3) exempts persons from the prohibitions relating to disclosures in clauses 262 and 263, where an authorised officer of a criminal law-enforcement agency has certified that the disclosure is reasonably necessary for the enforcement of the criminal

law. In this case, it is the relevant authorised certifying officer who has to make the judgement as to whether the disclosure is necessary.

The authorised officer has to be of a senior level, either: a commissioned officer (in the case of a police force or service); a member of the senior executive service (in the case of a law enforcement agency that has such levels); an officer who participates in the management of the agency; or the most senior officer at the premises of an office of the agency that is more than 50 kilometres from the general post office of a capital city (see definition of ‘senior officer’ in clause 267(7)). The officer is to be authorised by the head of that officer’s agency to issue such certificates (see definition of ‘authorised officer’ in clause 267(7)).

Clause 267(4) exempts persons from the prohibition relating to disclosures in clause 262, where an authorised officer of a criminal law-enforcement agency, or a civil penalty-enforcement agency, has certified that the disclosure is reasonably necessary for the enforcement of a law imposing a pecuniary penalty. In this case, it is the relevant authorised certifying officer who has to make the judgement as to whether the disclosure is necessary. The same requirements as to the level and authorisation of the officer apply as in relation to disclosures under clause 267(3).

Clause 267(5) exempts persons from the prohibition relating to disclosures in clause 262, where an authorised officer of a criminal law enforcement agency, or a public revenue agency, has certified that the disclosure is reasonably necessary for the protection of the public revenue. Again, in this case, it is the relevant authorised certifying officer who has to make the judgement as to whether the disclosure is necessary. The same requirements as to the level and authorisation of the officer apply as in relation to disclosures under clause 267(3).

Clause 267(6) makes it clear that a certificate issued under clause 267(3), (4) or (5) may be in a written or an electronic form. This accommodates the practice of requests for disclosure, and the actual disclosures, being made in an electronic form.

Clause 267(7) defines terms used in this clause.

Clause 268 – ASIO

This clause exempts persons from the prohibitions relating to disclosures in clauses 262 and 263, where the disclosure is made to an ASIO officer or employee authorised by the Director-General of Security for that purpose, and is connected with the performance of ASIO’s functions (clause 268(1)).

Clause 268(2) exempts persons from the prohibitions relating to disclosures in clauses 262 and 263 respectively, where the disclosure is made to an ASIO officer or employee authorised by the Director-General of Security for the purpose, and an ASIO officer or employee authorised by the Director-General of Security for the purpose has certified that the disclosure would be connected with the performance of ASIO’s functions.

Clause 269 – Assisting the ACA, the ACCC or the Telecommunications Industry Ombudsman

This clause exempts persons from the prohibition relating to disclosures in clause 262 where the disclosure is:

- made to the ACA or an ACA staff member, and would assist the ACA to carry out its functions or powers (clause 269(1));
- made to the ACCC or an ACCC staff member, and would assist the ACCC to carry out its telecommunications functions or powers (clause 269(2)); or
- made to the TIO or a TIO employee, and would assist the TIO in the consideration of a complaint to it (clause 269(3)).

Clause 270 – Integrated public number database

This clause exempts persons from the prohibition in clause 262 where the information or document disclosed or used:

- relates to information contained in Telstra’s integrated public number database that it is required to keep under Part 4 of Schedule 2 (paragraph (a));
- relates to carriage services provided or proposed to be provided to another person, or to the affairs or personal details of another person (paragraph (b)); and
- is connected with directory services provided by, or on behalf of, a carriage service provider, or the publication of a public number directory, but not a directory that enables reverse-searching (paragraph (c)).

Clause 270(2) defines terms used in this clause.

Clause 271 – Calls to emergency service number

This clause exempts persons from the prohibitions relating to disclosures in clauses 262 and 263, where the information or document disclosed:

- came to the person’s knowledge or possession as a result of a call to an emergency service number (paragraph (a)); and
- the information relates to any of the matters specified (paragraph (b)); and
- the disclosure is to a member of an organisation concerned with the provision of, or response to, emergency call services to facilitate dealing with the matters raised by the call (paragraph (c)).

Clause 272 – Threat to person’s life or health

This clause exempts persons from the prohibitions in clauses 262 and 263, where the information or document disclosed or used: relates to an individual’s affairs or personal particulars (paragraph (a)); and the person making the disclosure or use reasonably believes that the disclosure or use is necessary to respond to a serious and imminent threat to the life or health of a person (paragraph (b)).

Clause 273 – Communications for maritime purposes

This clause exempts eligible persons and emergency call persons from the prohibitions in clauses 262 and 263 respectively, where the disclosure or use: is reasonably necessary for preserving human life at sea (paragraph (a)); or relates to locating a vessel at sea and is made for maritime communications purposes (paragraph (b)).

Clause 274 – Knowledge or consent of person concerned

This clause exempts persons from the prohibitions in clauses 262 and 263, where: the information or document disclosed or used relates to an individual's affairs or personal particulars (paragraph (a)); and that individual is reasonably likely to have been aware or made aware, that the information or document of that kind is usually disclosed or used in the circumstances concerned, or that individual has consented to the disclosure or use.

Clause 275 – Implicit consent of sender and recipient of communication

This clause exempts persons from the prohibition in clause 262 where the information or document disclosed or used relates to the content of a communication (paragraph (a)) and it might reasonably be expected that the sender and recipient of the communication would have consented to the disclosure or use, had they been aware of it (paragraph (b)).

This clause is intended to allow disclosure of public communications, for example, where a carrier employee discusses the content of an on-line bulletin board, or the content of a pay-television program carried on a cable network.

Clause 276 – Business needs of other carriers or service providers

This clause exempts persons from the prohibition in clause 262 where the disclosure or use is: made by or on behalf of a carrier or carriage service provider (paragraph (a)), for the purposes of facilitating another carrier or service provider (that is, a carriage service provider or content service provider) providing a service (paragraph (b)), to the person who is the subject of the information or document (paragraph (d)), and that person has been or is a customer of the disclosing carrier or carriage service provider or the other carrier or service provider (paragraph (c)).

Clauses 276(2) and (3) contain special rules that allow the disclosure or use of information about customers for a purpose connected with a carriage service intermediary arranging the supply of a carriage service by a carriage service provider to a third person.

Clause 277 – Circumstances prescribed in the regulations

This clause exempts persons from the prohibitions in clauses 262 (clause 277(1)) and 263 (clause 277(2)) in circumstances prescribed in the regulations.

This power enables any further situations to be addressed where an eligible person or emergency call person, or persons previously in those categories, may need to be able to disclose information. It is possible that such situations will emerge during the operation of the new legislation.

Clause 278 – Uses connected with exempt disclosures

This clause exempts persons from the prohibitions in clauses 262 (clause 278(1)) and 263 (clause 278(2)) where the use of information or a document is made in connection with a disclosure that is authorised by this Division.

Clause 279 – Generality of Subdivision not limited

This clause makes it clear that none of the provisions in Subdivision A of Division 3 of Part 13 can be used to ‘read down’ any of the other provisions in that Subdivision. In particular, the regulation-making power in clause 277 cannot be read down by reference to the specific exemptions in this Division to prevent the regulations creating similar exemptions. This is important because the prohibitions in the Part have been significantly widened from those applying in s.88 of the 1991 Act and the regulation-making powers will be needed to address any unintended consequences which may arise.

Subdivision B—Burden of proof

Clause 280 – Burden of proof

This clause provides for the party who bears the burden of proof in relation to exceptions raised in any proceedings instituted under Division 2 of Part 13. This clause does not apply to the exemption in clause 272.

Clause 280(1) provides that the exceptions specified in the Division are to be taken to be part of the description of the offence. The consequence of this is that the prosecution would have the persuasive burden of disproving any of the exceptions applied at the time of the alleged offence. However, the defendant is to bear the evidential burden in relation to an exception (clause 280(2)), that is, that defendant would have the burden of adducing sufficient evidence to raise the existence of the exception as an issue (clause 280(3)).

The reason the burdens of proof have been allotted in this way is because it is Commonwealth criminal law policy that it is not appropriate to place on a defendant the onus of proving exceptions to an offence unless the matters to be proved are peculiarly within the knowledge of the defendant and are difficult and costly for the prosecution to disprove beyond reasonable doubt (and easy for the defendant to establish). The exceptions provided for in this Division (other than clause 272) do not relate to matters peculiarly within the defendant’s knowledge.

Division 4—Secondary disclosure/use offences

This Division creates further offences for secondary or later disclosure or use of information or documents that have been disclosed or used under certain exceptions provided under Division 3 of Part 13.

Clause 281 – Performance of person’s duties

This clause prohibits secondary or later disclosure or use of information or documents disclosed in the performance of the duties of the person making the primary disclosure unless the later disclosure or use is for the same purpose for which the information or document was originally disclosed. The prohibition does not apply where the information or document relates to the affairs or personal particulars of the person to whom it has been disclosed.

Clause 282 – Authorisation by or under law

This clause prohibits secondary or later disclosure or use of information or documents disclosed as required or authorised by or under law unless the later disclosure or use is required or authorised by or under law.

Clause 283 – Law enforcement and protection of public revenue

This clause prohibits secondary or later disclosure or use of information or documents disclosed where the primary disclosure was reasonably necessary for:

- the enforcement of the criminal law (clause 283(1));
- the enforcement of a law imposing a pecuniary penalty (clause 283(2)); or
- for the protection of the public revenue (clause 283(3));

unless the later disclosure or use is for the same purpose for which the information or document was originally disclosed.

Clause 284 – Assisting the ACA, the ACCC or the Telecommunications Industry Ombudsman

This clause prohibits secondary or later disclosure or use of information or documents disclosed for the purpose of:

- the ACA carrying out its functions or powers (clause 284(1));
- the ACCC carrying out its functions or powers (clause 284(2)); or
- assisting the TIO in the consideration of a complaint made to it (clause 284(3));

unless the later disclosure or use is for the same purpose for which the information or document was originally disclosed.

Clause 285 – Threat to person’s life or health

This clause prohibits secondary or later disclosure or use of information or documents disclosed, where the discloser believed it reasonably necessary to respond to a serious and imminent threat to the life or health of a person, unless the same criteria apply to the person who makes the later disclosure.

Clause 286 – Communications for maritime purposes

This clause prohibits secondary or later disclosure or use of information or documents disclosed where:

- the disclosure was reasonably necessary for preserving human life at sea (paragraph (a)); or
- relates to locating a vessel at sea and is made for maritime communications purposes (paragraph (b));

unless the same criteria apply to the later disclosure or use.

Clause 287 – Business needs of other carriers or service providers

This clause prohibits secondary or later disclosure or use of information or documents disclosed to meet certain business needs of other carriers and service providers except where similar criteria apply.

Clause 288 – Secondary offence - contravening this Division

This clause makes it an offence to contravene Division 4 of Part 13, the penalty for which is a maximum of 2 years imprisonment. [Note that the *Crimes Act 1914* provides for conversion of imprisonment terms into penalty units: for a natural person the number of penalty units is equal to five times the number of months of the term of imprisonment (s. 4B(2)); for a body corporate, it is five times the number of penalty units that are applicable to a natural person, including penalty units applicable by virtue of s. 4B(2) (s. 4B(3))].

Division 5—Record-keeping requirements

This Division provides for new requirements relating to the recording and reporting of certain primary disclosures or uses of information or documents.

Clause 289 – Associate

This clause defines the term ‘associate’ as used in this Division.

Clause 290 – Certificates issued by authorised officers of enforcement agencies

This clause sets out certain requirements in relation the issuing, handling and retention of certificates issued by authorised officers under clause 267(3), (4) or (5) (clause 290(1)).

The authorised officer must give the carrier or carriage service provider concerned a copy of the certificate within 5 days of issuing the certificate, if not sooner, whether the certificate authorises the carrier/carriage service provider, or an associate of the carrier/carriage service provider, to make the disclosure (clauses 290(2) and (3)). Those copies may be given in electronic or written form (clause 290(4)).

A carrier or carriage service provider must retain the copy of a certificate for 3 years (clause 290(5)) in an electronic or written form (clause 290(6)). This will facilitate the monitoring function of the Privacy Commissioner under clause 294.

Clause 291 – Record of disclosures

This clause provides for records to be kept of exempt disclosures made under Division 3, other than under clause 264, 268, 270, 275 or 276 (clause 291(1)).

Carriers and carriage service providers must make a record of such disclosures they have made within 5 days of the disclosures and retain the record for 3 years (clause 291(2)). This will facilitate the monitoring function of the Privacy Commissioner under clause 294.

Associates of carriers and carriage service providers must make a record of such disclosures they have made within 5 days of the disclosures and give a copy of the record to the associated carrier or carriage service provider (clause 291(3)), which the carrier or carriage service provider must retain for 3 years (clause 291(4)).

Clause 291(5) sets out the details that must be included in a record of a disclosure required by clause 291(2) or (3).

Clause 291(6) makes it clear that the record or a copy of it may be kept in electronic or written form.

Clause 291(7) makes it an offence to contravene the record-keeping requirements of this clause, the penalty for which, in the case of a natural person, is a maximum of 300 penalty

units and in the case of a body corporate is a maximum of 1500 penalty units (under s. 4AA of the *Crimes Act 1914*, a penalty unit is worth \$100 - see also s. 4B(3) of that Act).

Clause 292 – Incorrect records

This clause makes it an offence (clause 292(2)) to incorrectly make a record in purported compliance with clause 291 (clause 292(1)), the penalty for which is imprisonment for 6 months. [Note that the *Crimes Act 1914* provides for conversion of imprisonment terms into penalty units: for a natural person the number of penalty units is equal to five times the number of months of the term of imprisonment (s. 4B(2)); for a body corporate, it is five times the number of penalty units that are applicable to a natural person, including penalty units applicable by virtue of s. 4B(2) (s. 4B(3))].

Clause 293 – Annual reports to the ACA by carriers or carriage service providers

This clause requires reports to be given annually to the ACA regarding exempt disclosures to which the recording requirements of clause 291 apply.

Within 2 months of the end of each financial year, carriers and carriage service providers must give a written report to the ACA regarding the disclosures made during the financial year just ended (clause 293(1)).

The report to the ACA must include such details as the ACA requires (clause 293(2)).

Clause 294 – Monitoring by the Privacy Commissioner

This clause allows the Privacy Commissioner to monitor compliance with the record-keeping requirements under clause 291 relating to exempt disclosures. This is to be a function of the Commissioner additional to those conferred on the Commissioner by the *Privacy Act 1988* (clause 294(1)).

Clause 294(2) makes it clear that matters included in the monitoring function are: whether the details of the record-keeping requirements of clause 291 have been complied with, particularly the requirement to record the grounds for a recorded disclosure (paragraph (a)); and whether the grounds are covered by the exceptions provided in Division 3 (paragraph (b)).

Clause 294(3) requires carriers and carriage service providers to give the Privacy Commissioner such access to their records as the Commissioner reasonably requires for the purposes of his/her monitoring function.

Clause 294(4) allows the Privacy Commissioner to make a written report to the Minister concerning any matters arising from the performance of his/her functions under this clause.

Clause 294(5) applies s. 99 of the *Privacy Act 1988*, which deals with delegation of functions, to this clause as if it were a provision of that Act.

Division 6—Instrument-making powers not limited

Clause 295 – Instrument-making powers not limited

This clause makes it clear that none of the provisions of Part 13 is to be taken to limit: any instrument-making power under this Act (clause 295(1)); the scope of codes or standards referred to in Part 6 (clause 295(2)); or the operation of s. 33(3B) of the *Acts Interpretation Act 1901* which allows different aspects of matters to be dealt with in an exercise of legislative power even if that particular aspect is not specified in the relevant enabling legislation.

Part 14—National interest matters

This Part imposes obligations on the ACA, carriers and carriage service providers in relation to national interest matters. The provisions re-enact, with some changes, s. 47 of the 1991 Act, the most significant changes being an extension of the obligations to carriage service providers and the inclusion of a power for carriage service providers to suspend the supply of a carriage service in an emergency if requested to do so by a senior police officer.

Clause 296 – Simplified outline

Clause 296 provides a simplified outline of this Part to assist readers.

Clause 297 – ACA’s obligations

Clause 297 imposes certain obligations on the ACA in relation to national interest matters. The ACA is required, in performing its telecommunications functions or exercising its telecommunications powers, to do its best to prevent telecommunications networks and facilities from being used to commit offences. The ACA is also required to give officers and authorities such help as is reasonably necessary for enforcing the criminal law and laws imposing pecuniary penalties, protecting the public revenue, and safeguarding national security. The ACA and its officers, employees or agents are granted immunity from liability for damages for an act done or an omission made in good faith in performance of the duties imposed by clause 297.

Clause 298 – Obligations of carriers and carriage service providers

This clause imposes obligations on carriers and carriage service providers similar to those imposed on the ACA in relation to national interest matters. Carriers and carriage service providers are required to do their best to prevent telecommunications networks and facilities from being used to commit offences. Carriers and carriage service providers are also required to give officers and authorities such help as is reasonably necessary for enforcing the criminal law and laws imposing pecuniary penalties, protecting the public revenue, and safeguarding national security. Carriers and carriage service providers, and their officers, employees or agents, are granted immunity from liability for damages for an act done or an omission made in good faith in performance of the duties imposed by clause 298. These obligations and protections extend to a special class of carriage service providers - carriage service intermediaries who do not themselves supply a carriage service, but have ongoing arrangements with a third party for the supply of such services.

The reason for the provisions regarding immunity is to protect a carrier or carriage service provider where actions are taken to assist law enforcement agencies. For example, if a carrier is asked to disconnect a service on the grounds that the police have evidence that it is being used for illegal SP bookmaking purposes, the carrier should not be liable in damages for acting in good faith to disconnect the service. Action could still be brought by the person affected to seek a declaration that the service should be reconnected or an injunction requiring reconnection.

Clause 299 – Terms and conditions on which help is to be given

Clause 299 is a new provision which applies if a person is required to provide help under clause 298. It requires the person to provide help in accordance with the requirement and on such terms and conditions as are agreed between the parties, or failing agreement as determined by an arbitrator appointed by the parties. If the parties fail to agree on the appointment of an arbitrator, then the ACA is to appoint an arbitrator specified in a written determination made by the Minister, after consulting with the Attorney-General. If an arbitration is conducted by an arbitrator appointed by the ACA then the cost of the arbitration must be shared equally between the parties.

Clause 300 – Suspension of supply of carriage service in an emergency

This clause allows a senior officer of a police force or service to request a carriage service provider to suspend the supply of a carriage service in an emergency. This provision is intended to authorise the carriage service provider to suspend the supply of a carriage service in the circumstances envisaged, should it decide to comply with the senior police officer's request.

An emergency is defined in clause 300(1) as a situation in which a senior police officer has reasonable grounds to believe that an individual has access to a particular carriage service, and the individual has:

- done an act that has resulted, or is likely to result, in loss of life or the infliction of serious personal injury; or

- made an imminent threat to kill or seriously injure another person; or
- made an imminent threat to cause serious damage to property; or
- made an imminent threat to commit suicide; or
- made an imminent threat to do an act that will, or is likely to, endanger his or her own life or create a serious threat to his or her own health or safety.

In any of these situations, a senior officer can request the relevant carriage service provider to suspend the supply of the carriage service, if the suspension is reasonably necessary to prevent a recurrence of an act such as that mentioned above, or prevent or reduce the likelihood of a threat such as those mentioned above being carried out.

A senior officer is defined as a commissioned officer of a police force or service who holds a rank not lower than the rank of Assistant Commissioner.

Clause 301 – Generality of Part not limited

This clause ensures that none of the provisions in this Part can be read down by reference to other provisions of the Part.

Part 15—Co-operation with law enforcement agencies

This Part deals with interception capability requirements. The provisions re-enact, with some changes, clauses 3.1 and 3.2 of the Telecommunications (General Telecommunications Licences) Declaration (No. 2) of 1991 and clauses 8.1 and 8.2 of the Telecommunications (Public Mobile Licences) Declaration (No. 2) of 1991 and s. 73A of the 1991 Act.

Division 1—Simplified outline

Clause 302 – Simplified outline

Clause 302 provides a simplified outline of this Part to assist readers.

Division 2—Execution of warrants under the *Telecommunications (Interception) Act 1979*

Clause 303 – Scope of Division

Division 2 applies to all carriers, and classes of carriage service providers specified in a written determination made by the Minister after consulting the Attorney-General. A determination is a disallowable instrument which accordingly must be published in the *Gazette*, tabled in the Parliament and is subject to disallowance by the Parliament.

Clause 304 – Execution of warrants

Clause 304 requires persons to whom the Division applies to ensure that it is possible to execute a warrant issued under the *Telecommunications (Interception) Act 1979* in relation to carriage services supplied by means of their controlled networks and controlled facilities. In other words, if a warrant were issued to a law enforcement agency authorising the interception of a communication passing over the telecommunications network, facility or carriage service in question, the network, facility or carriage service would be required to be capable of enabling that interception to take place.

Clause 305 – Exemptions

Clause 305 allows the Minister to make a written determination exempting a specified person from the requirements under clause 304, after consulting the Attorney-General. The exemption may be unconditional or subject to specified conditions, such as a requirement that the controlled network or facility be modified within a certain period of time so that it is possible, at the end of that period, to execute a warrant.

Division 3—Interception capability

Clause 306 – Scope of Division

Division 3 applies to a carrier or carriage service provider who has been exempted by a determination under clause 305 from the general rule in clause 304.

Clause 307 – Requirement to provide interception capability

This clause provides that, notwithstanding an exemption from clause 304, the Minister may give a carrier or carriage service provider a written notice requiring it to have a specified kind of interception capability.

Clause 308 – Interception capability to be provided

Clause 308 applies if a person is subject to a requirement under clause 307. It requires the person to provide interception capability in accordance with the requirement and on such terms and conditions as are agreed between the person and the agency specified in the requirement or, failing agreement, as determined by an arbitrator appointed by the parties. If the parties fail to agree on the appointment of an arbitrator, then the ACA is to appoint an arbitrator specified in a written determination made by the Minister, after consulting with the Attorney-General. If an arbitration is conducted by an arbitrator appointed by the ACA then the cost must be shared equally between the parties.

Clause 309 – Terms and conditions – compliance with principles

Clause 309 provides that the terms and conditions in place under clause 308 must comply with the principles that:

- the carrier or carriage service provider is to incur the costs of creation or development of the interception capability; and
- the carrier or carriage service provider can recover the costs of providing interception capability over time from the agency or agencies concerned.

Clause 310 – Terms and conditions – timing of implementation of requirement

This clause provides that the terms and conditions in place under clause 308 may relate to the timing of implementation of interception capability.

Clause 311 – Meaning of *interception capability*

This clause defines ‘interception capability’ to mean that if a warrant were issued to an agency authorising the interception of a communication passing over the telecommunications network, facility or carriage service in question, the network, facility or carriage service would be capable of enabling that interception to take place.

Clause 312 – Expressions to have the same meaning as in the *Telecommunications (Interception) Act 1979*

Expressions used in Division 3 and the *Telecommunications (Interception) Act 1979* have the same meaning.

Clause 313 – Meaning of *agency*

Clause 313 provides that ‘agency’ includes Commonwealth and State law enforcement agencies which may apply for warrants under Part III of the *Telecommunications (Interception) Act 1979*, as well as the Australian Security Intelligence Organisation.

Division 4—Consultation about new technology

Clause 314 – Designated agency

Clause 314 lists a number of law enforcement agencies which are ‘designated agencies’ for the purposes of Division 4.

Clause 315 – Consultation about new technology – advisory committee established

Clause 315 applies if the ACA has established an advisory committee for the purposes of consulting with law enforcement agencies about new technology. It requires carriers and carriage service providers to consult designated agencies about the use and development of new technology using the advisory committee as the forum.

Clause 316 – Consultation about new technology – no advisory committee established

Clause 316 applies if there is no advisory committee established by the ACA. In that case, carriers and carriage service providers are to consult designated agencies about the use and development of new technology in accordance with ACA directions.

The requirement to consult about new technology under clauses 315 and 316 is intended to provide law enforcement agencies with an opportunity to assess whether or not prospective new telecommunications services should have interception capability.

Clause 317 – Exemptions

This clause allows the Minister to exempt specified classes of persons from the requirements of this Division, after consulting the Attorney-General. An exemption may be subject to conditions.

Part 16—Defence requirements and disaster plans

This Part imposes community service obligations on carriers and carriage service providers in relation to defence purposes and the management of disasters.

Division 1—Introduction

Clause 318 – Simplified outline

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

Clause 319 – Defence authority

Clause 319 defines a ‘defence authority’ as the Secretary to the Department of Defence, or the Chief of the Defence Force.

Division 2—Supply of carriage services

Clause 320 – Requirement to supply carriage services for defence purposes or for the management of natural disasters

Clause 320 allows a defence authority to require, by written notice, a carriage service provider to supply a specified carriage service for the use of the Department of Defence or the Defence Force. The carriage service must be required for defence purposes, or the management of natural disasters, or both. ‘Defence purposes’ is defined in clause 7. A defence authority may issue a notice which requires a carriage service provider to supply a carriage service in particular circumstances, however this notice is of no effect if the ACA issues a written certificate stating that it would be unreasonable for the provider to be required to supply the service in those circumstances. If a requirement is in force, the provider must supply the carriage service in accordance with the requirement and on such

terms and conditions as are agreed between the parties, or failing agreement, as are determined by an arbitrator appointed by the parties. If the parties fail to agree on the appointment of an arbitrator, then the ACCC is to be the arbitrator. It is expected that the ACCC will have regard to the types of issues it is required to consider in arbitrating disputes under proposed Part XIC of the TPA to be inserted by the proposed *Trade Practices Amendment (Telecommunications) Act 1996* and would follow similar procedures. The regulations may make provision for and in relation to the conduct of an arbitration under this clause.

Division 3—Defence planning

Clause 321 – Definitions

Clause 321 defines certain terms used in Division 3.

Clause 322 – Preparation of draft agreement

Under this clause a defence authority may prepare a draft agreement between the defence authority and a carrier or carriage service provider, about planning for network survivability or operational requirements in times of crisis, or both. The draft agreement must be prepared in consultation with the carrier or carriage service provider concerned.

Clause 323 – ACA’s certification of draft agreement

Clause 323 allows the ACA to certify a draft agreement prepared under clause 322 if it believes that the agreement is reasonable. In deciding whether to certify a draft agreement, the ACA must have regard to whether the agreement deals with listed matters in a reasonable way. These matters are: consultation with a defence authority about maintenance, installation, modification and removal of networks or facilities; consultation with a defence authority about operational requirements in times of crisis; protection of confidential information; grants of financial assistance by the Commonwealth. In determining what is ‘reasonable’, the ACA must have regard to the needs of the Department of Defence and the Defence Force, and the interests of the carrier or carriage service provider concerned. This does not limit the meaning of ‘reasonable’. The ACA must consult the parties to the agreement, and must give each party a written notice setting out its decision whether or not to certify a draft agreement.

Clause 324 – Requirement to enter into certified agreement

Clause 324 applies if the ACA has certified a draft agreement under clause 323. A defence authority may give the carrier or carriage service provider concerned a written notice requiring it to enter into the agreement within 30 days after receipt of the notice. The carrier or carriage service provider must comply with the notice.

Clause 325 – Compliance with agreement

This clause requires a carrier or carriage service provider who has entered into a certified agreement to comply with the agreement for as long as it remains in force.

Clause 326 – Withdrawal of certification of agreement

Clause 326 requires the ACA to withdraw certification of an agreement in force at a particular time if it believes that it would refuse certification at that time if the agreement were a draft agreement. The ACA must give each party to the agreement written notice that it has withdrawn its certification as soon as practicable after its withdrawal.

Clause 327 – Duration of agreement

A certified agreement remains in force until it is revoked under this clause, either by the parties entering into a fresh certified agreement expressed to replace the original agreement, or by the ACA withdrawing certification of the agreement under clause 326.

Clause 328 – Variation of agreement

Clause 328 applies if a certified agreement is in force. A defence authority may prepare a draft variation of the agreement, in consultation with the carrier or carriage service provider concerned. The ACA must certify the variation if the agreement as varied would have been certified were it a draft agreement. The ACA must consult the parties to the agreement, and must give each party a written notice setting out its decision whether or not to certify the variation.

Division 4—Disaster plans**Clause 329 – Designated disaster plans**

This clause defines a ‘designated disaster plan’ as a plan that is for coping with disasters and/or civil emergencies, and is prepared by the Commonwealth, a State or a Territory.

Clause 330 – Carrier licence conditions about designated disaster plans

Clause 330 provides that an instrument under clause 63 may require compliance with one or more specified disaster plans as a carrier licence condition.

Clause 331 – Service provider determinations about designated disaster plans

Clause 331 provides that a service provider determination under clause 98 may require specified carriage service providers to comply with one or more specified disaster plans.

Division 5—Delegation**Clause 332 – Delegation**

Under this clause, the Secretary to the Department of Defence may, by writing, delegate any or all of his or her powers under this Part to a person holding or performing the duties of a Senior Executive Service office within the meaning of the *Public Service Act 1922*. Similarly, the Chief of the Defence Force may, by writing, delegate all or any of his or her powers under this Part to a person holding a senior rank (Commodore in the Royal

Australian Navy, Brigadier in the Australian Army, Air Commodore in the Royal Australian Air Force).

Part 17—Pre-selection in favour of carriage service providers

Pre-selection requirements are intended to facilitate competition by enabling customers to choose their preferred carriage service provider and change that preference from time to time, or make use of over-ride dial codes to choose a different carriage service provider, on a call-by-call basis. This is important to facilitate the development of competition in the supply of telecommunications services. This Part requires the ACA to set a minimum requirement of pre-selection in relation to calls made using a standard telephone service. It is intended that this determination will apply to end-users' requirements for domestic long-distance and international calls. The provisions provide flexibility for pre-selection requirements to be extended to other carriage services in the future.

Clause 333 – Simplified outline

Clause 333 provides a simplified outline of this Part to assist readers.

Clause 334 – Requirement to provide pre-selection

Clause 334 gives the ACA responsibility for setting pre-selection requirements. Clause 334(1) requires the ACA to make a written determination requiring carriers and carriage service providers supplying a standard telephone service to provide pre-selection in favour of a specified carriage service provider in relation to the standard telephone service. Clause 334(5) makes it clear that a reference to a standard telephone service in this case is not a reference to a service supplied by means of a public mobile telecommunications service. Clause 334(2) allows the ACA to make a written determination requiring carriers and carriage service providers supplying a specified carriage service to provide pre-selection in favour of a specified carriage service provider in relation to calls made using that carriage service. In making determinations under clause 334 the ACA must have regard to the technical feasibility and the costs and benefits of providing pre-selection, and must consult the ACCC.

A determination under this clause may specify a carriage service provider in favour of whom pre-selection is to be provided. It is expected that the ACA will have regard to whether the carriage service provider is able to terminate all calls ('universal terminating access'). This is to ensure that carriage service providers are not able to limit their pre-selection to certain calls only (for example, domestic long-distance between Sydney and Melbourne) but must be able to terminate in relation to all calls for which they are pre-selectable.

Clause 334(3) requires the ACA to have regard to the technical feasibility and costs and benefits of pre-selection when making a determination under clause 334(1) or (2). It is intended that in relation to a determination made under clause 334(1) the ACA will have regard to the criteria when considering the manner in which pre-selection is provided and any ancillary or incidental rules, as well as, for example, which of the end-users' requirements are to be specified and which carriage service provider should be specified

in the determination. In relation to a determination made under clause 334(2), it is intended that the ACA will have regard to the criteria when considering whether the carriage service in question should be made subject to the pre-selection requirement, as well as the other matters it would have regard to when making a determination under clause 334(1).

In making a determination, the ACA may apply, adopt or incorporate matters contained in codes or standards of any body or association (clause 334(7)). This will enable the ACA to readily adopt pre-selection arrangements that the industry has been able to reach agreement upon itself.

Clause 334(8) indicates that this clause does not apply to the use of public mobile telecommunications services. Pre-selection is of assistance to end-users with fixed line local access to telecommunications networks because it is difficult for such end-users to change carriage service providers. End-users of public mobile telephone services do not have the same problem when they wish to change carriage service providers because there is competitive supply of readily accessible services.

Clause 334(9) provides that a determination is a disallowable instrument which must be published in the *Gazette* and is subject to Parliamentary disallowance.

Clause 335 – When pre-selection is provided in favour of a carriage service provider

Clause 335 defines pre-selection. It provides that a determination made under clause 334 must meet certain criteria if it is to establish pre-selection: controlled networks and facilities enable an end-user to pre-select their preferred carriage service provider in relation to calls made using a carriage service, and change that selection from time to time; controlled networks and facilities enable an end-user to make separate pre-selection for the end-user's requirements, in relation to that carriage service, as specified in the determination; controlled networks and facilities provide over-ride dial codes for selecting alternative carriage service providers, in relation to that carriage service, on a call-by-call basis. 'Controlled network' and 'controlled facility' are defined in clause 14. 'End-user' is defined in relation to a network or facility as an end-user of a carriage service that involves the use of the network or facility. 'End-user's requirements' includes, at a minimum, requirements relating to domestic long-distance and international calls. It is expected that pre-selection for domestic long-distance and international calls will initially be provided as a single basket, however the ACA may determine whether there should be multi-basket pre-selection in future, having regard to the criteria listed in clause 334(3).

Clause 336 – Pre-selection to be provided

Clause 336 applies if a determination under clause 334 requires a person to provide pre-selection. It requires the person to provide pre-selection in accordance with the determination and on such terms and conditions as are agreed between the parties, or failing agreement, as are determined by an arbitrator appointed by the parties. If the parties fail to agree on the appointment of an arbitrator, then the ACCC is to be the arbitrator. It is expected that the ACCC will have regard to the types of issues it is required to consider in arbitrating disputes under proposed Part XIC of the TPA to be inserted by the proposed *Trade Practices Amendment (Telecommunications) Act 1996*

and would follow similar procedures. The regulations may make provision for and in relation to the conduct of an arbitration under this clause.

Clause 337 – Exemptions from requirement to provide pre-selection

Clause 337 enables the ACA to exempt a specified carrier or carriage service provider from a requirement imposed in a determination under clause 334. In deciding whether a carrier or carriage service provider should be exempted, the ACA must have regard to whether it would be technically feasible to comply with the requirement, and whether compliance with the requirement would impose unreasonable financial hardship. This list does not limit the matters to which the ACA may have regard when deciding whether to grant an exemption. A decision to refuse to make an exemption is subject to merits review under Part 29 (see Schedule 4).

Clause 338 – Use of over-ride dial codes

Clause 338 applies to a carriage service provider who is required to provide over-ride dial codes in accordance with a determination under clause 334. That carriage service provider must ensure that each end-user is able to make use of over-ride dial codes for selecting alternative carriage service providers on a call-by-call basis, unless in the ACA's opinion it would not be technically feasible or would impose unreasonable financial hardship on the carriage service provider. This is intended to ensure that a carriage service provider does not restrict customers who are pre-selected to it from using over-ride dial codes, for example, to take the benefit of a special deal offered by another carriage service provider. This clause does not prevent a carriage service provider who has been selected by an over-ride dial code from refusing to supply a carriage service to the end-user concerned. For example, where a carriage service provider who is selected by use of an over-ride dial code is aware that the customer has a history of bad debts, this clause does not oblige the carriage service provider to supply the service to that customer.

Part 18—Calling line identification

Calling line identification was previously addressed in Telecommunications (General Telecommunications Licences) Declaration (No. 2) of 1991 and Telecommunications (Public Mobile Licences) Declaration (No. 2) of 1991. Calling line identification is useful in fulfilling community service obligations imposed on the industry, including those relating to disclosure of information to emergency service organisations and law enforcement agencies. Calling line identification is also useful for inter-carrier billing purposes, but note that standard access rights under proposed Part XIC of the TPA to be inserted by the proposed *Trade Practices Amendment (Telecommunications) Act 1996* also address access to billing information.

Clause 339 – Simplified outline

Clause 339 provides a simplified outline of this Part to assist readers.

Clause 340 – Calling line identification

Clause 340 requires carriers and carriage service providers whose controlled facilities consist of a switching system used in connection with the supply of a standard telephone

service to take all reasonable steps to ensure that the system is capable of providing calling line identification. The ACA may make a written determination for the purposes of extending this requirement to switching systems for services other than the standard telephone service. The requirements apply to switching systems installed on or after 1 July 1997, and to switching systems capable of providing calling line identification immediately before 1 July 1997.

A determination made under this clause is a disallowable instrument which must be published in the *Gazette* and is subject to Parliamentary disallowance.

Clause 341 – Exemptions from calling line identification requirement

This clause allows the ACA to exempt persons from the requirements set out in clause 340. In deciding whether a person should be exempt from those requirements, the ACA must have regard to whether it would be unreasonable to impose the requirement and whether it is in the public interest to impose the requirement. This list does not limit the matters to which the ACA may have regard when granting an exemption.

The exposure draft of the provisions also required the ACA to have regard to whether the switching system in question was purchased for maintenance or upgrade purposes. This requirement has not been specifically included as it is a matter that the ACA could consider in deciding whether it would be unreasonable to impose the requirement under clause 341(2)(a).

A decision to refuse to make an exemption is subject to merits review under Part 29 (see Schedule 4).

Part 19—Advanced Mobile Phone System (AMPS)

This Part provides for the Advanced Mobile Phone System (AMPS) to be phased out by 1 January 2000. This replicates the existing phase-out arrangements in the Telecommunications (Public Mobile Licences) Declaration (No. 1) of 1991.

Clause 342 – Simplified outline

Clause 342 provides a simplified outline of this Part to assist readers.

Clause 343 – Meaning of *AMPS*

Clause 343 defines ‘AMPS’, and notes that it does not incorporate digital modulation techniques. The phase-out plan is intended to apply only to the analogue AMPS system currently supplied by Telstra’s AMPS network. It does not apply to the separate technology known as Digital AMPS or ‘D-AMPS’.

Clause 344 – Scope of Part

Clause 344 provides that this Part applies to carriers and carriage service providers.

Clause 345 – No new AMPS

Clause 345 provides that before 1 January 2000 only Telstra may install or operate an AMPS network.

Clause 346 – AMPS to be phased out

Clause 346 provides that on or after 1 January 2000, no person may install or operate an AMPS network. Before 1 January 2000, a person must comply with any written plan determined by the Minister in relation to the phasing out of AMPS. A plan determined by the Minister for this purpose may apply, adopt or incorporate the provisions of any frequency band plan made under the Radcom Act.

Clause 347 – Limited exemption from phase-out of AMPS

Clause 347 provides for a limited exemption from the phase-out of AMPS. A person may install or operate an AMPS network on or after 1 January 2000 if the Minister and each eligible mobile carrier agree in writing, or the Minister agrees in writing after consulting each eligible mobile carrier and having determined that there would not be an undue erosion of the practical value to an eligible mobile carrier of the phase-out of AMPS provided for under clauses 345 and 346. ‘Eligible mobile carrier’ means a person who was a mobile carrier under the 1991 Act immediately before 1 July 1997.

Clause 348 – Competition not to be reduced

Clause 348 prohibits a person who installs or operates an AMPS network from using the installation or operation of the network in a way that could unfairly reduce competition in the market for public mobile telecommunications services. This clause replicates clause 2.4 of the Telecommunications (Public Mobile Licences) Declaration (No. 1) of 1991.

Part 20—International aspects of activities of the telecommunications industry

This Part deals with three aspects of international telecommunications activities: access to INTELSAT and Inmarsat via their Australian Signatories; compliance with international conventions; and Rules of Conduct to apply to carriers and carriage service providers in their dealings with international telecommunications operators.

The Part is closely modelled on Division 4 of Part 5 of the 1991 Act. The major changes in the new Part are as follows:

- the new provisions apply to carriage service providers as well as carriers;
- the removal of the requirements in the 1991 Act for carriers to comply with foreign laws;
- the merging of approaches to regulate carrier and service provider dealings with international telecommunications operators;
- clarification of the purpose of the Rules of Conduct; and

- making the ACCC responsible for the administration of the Rules of Conduct.

Division 1—Simplified outline

Clause 349 – Simplified outline

This clause provides an outline of Part 20 to assist readers.

Division 2—Compliance with international agreements

Clause 350 – INTELSAT and Inmarsat – directions to Signatories

Clause 350 is based on s. 74 of the 1991 Act, but includes substantial modifications. The clause gives the Minister a power of direction over a carrier or carriage service provider that has been designated by the Commonwealth as an Australian Signatory to the international satellite consortia, INTELSAT or Inmarsat. The Commonwealth requires such a power for two reasons.

First, and most tangibly, as INTELSAT and Inmarsat currently operate, a Signatory may control Australian access to INTELSAT or Inmarsat satellite capacity and it may use that position to damage competition. This is because each organisation currently only allows one Signatory per member country. While any access issues should generally be resolved under the Part XIC access arrangements, as an additional safeguard this clause provides the Commonwealth with a reserve power of intervention, consistent with the special rights and obligations a Signatory derives from its designation. If multiple Signatoryship is adopted in INTELSAT and Inmarsat, this reason for the direction power is likely to lessen in importance.

Second, while Signatories are principally concerned with operational matters, the positions they adopt in international meetings and their decisions may have broader policy implications and it may be appropriate, in some instances, for the Commonwealth to be able to direct a Signatory in relation to certain issues. These issues may include institutional reform, reform of the international satellite market and the delivery of international public service obligations. Article 4(b) of the Inmarsat Convention also requires a Party to ‘provide such guidance and instructions as are appropriate and consistent with its domestic law to ensure that the Signatory fulfils its responsibilities’.

Clause 350(1) makes the clause apply to a person that is a carrier or a carriage service provider and that has been designated by the Commonwealth as a Signatory within the meaning of the INTELSAT Agreement or Inmarsat Convention.

Clause 350(2) enables the Minister to give a person designated as a Signatory such written directions as the Minister thinks necessary in relation to the person’s performance of the person’s functions as a Signatory within the meaning of the INTELSAT Agreement or Inmarsat Convention. Both carriers and carriage service providers can be directed because it is conceivable that both may be designated as Signatories.

To streamline the legislation, this provision merges the powers of notification and direction that existed under the 1991 Act into a single but wider power. This is achieved because the Minister is able to give such directions as he or she ‘thinks necessary in relation to the person’s performance of the person’s functions as a Signatory’. The power should enable the Minister to give directions setting out both general policies as well as more specific actions with which the Signatory is to comply.

Clause 350(3) prevents the Minister giving a direction under clause 350(2) that relates to the manner in which the person is to deal with a particular customer. This provision is intended to prevent the Minister making directions that may favour particular persons seeking access to INTELSAT or Inmarsat capacity. It is intended that any direction made by the Minister should be generic.

Clause 350(4) requires a person to comply with a direction under clause 350(2). Under the standard licence conditions and standard service provider rules it is a requirement to comply with the Act (including this provision).

Clause 351 – Compliance with conventions

The provision enables the Minister to require carriers and carriage service providers to comply with conventions or parts of conventions of which they are notified. The provision is based on ss. 74 and 75 of the 1991 Act but includes substantial modifications. The provision will enable the Minister to require carriers and carriage service providers to comply with conventions or parts of conventions not otherwise incorporated into Australian law.

Clause 351(1) makes this clause apply to a person that is a carrier or carriage service provider.

Clause 351(2) enables the Minister to declare, by a notice published in the *Gazette*, that a specified convention is binding in relation to members of a specified class of persons. Notification by gazettal, rather than individual notification, has been chosen to minimise the administrative burden in a multi-carrier environment.

Clause 351(3) requires a person in a specified class to act in a way consistent with Australia's obligations under a notified convention in connection with the operation of telecommunications networks or facilities or the supply of carriage services.

Clause 351(4) is similar to clause 351(2) but enables the Minister to declare, by a notice published in the *Gazette*, that a specified part of a convention is binding in relation to members of a specified class of persons. The ability to specify a part of a convention will enable compliance to be limited to particular appropriate sections of a convention which also deals with other matters. Notification by gazettal, rather than individual notification, has been chosen to minimise the administrative burden in a multi-carrier environment.

Clause 351(5) requires a person in a specified class to act in a way consistent with Australia's obligations under a notified part of a convention in connection with the telecommunications networks or facilities or the supply of carriage services.

Clause 351(6) defines 'convention' for the purposes of this clause. 'Convention' means a convention to which Australia is a party or an agreement or an arrangement between Australia and another country. The term 'convention' includes a treaty.

Division 3—Rules of Conduct about dealings with international telecommunications operators

In introducing competition in telecommunications in 1991, Australia recognised the potential for telecommunications businesses based in other countries to take unfair advantage of Australia's liberal market. The two key concerns were the abuse by international telecommunications operators outside Australia of power in a market outside of Australia, especially where they had a monopoly, and the unfair advantage that international service providers operating in Australia might derive through affiliation with such a partner outside Australia.

These matters are likely to continue to be of concern after 1 July 1997. It is envisaged that the new access and anti-competitive conduct provisions will be able to be used to deal with some aspects of unacceptable conduct by an international telecommunications operator where the operator or an affiliate has a commercial presence in Australia (eg. where the operator engages in preferential far-end termination of its own or an affiliate's traffic.) In addition, clause 352 enables the Government to deal with such concerns by empowering the Minister to make Rules of Conduct to govern dealings between carriers and service providers supplying international carriage services in Australia and their correspondents outside Australia.

Division 3 effectively merges and streamlines the International Code of Practice and relevant class licence provisions under s. 77 and Part 10 of the 1991 Act. Steps have also been taken to clarify the concept under the 1991 Act of 'misuse of market power', which in the Bill has been replaced by the concept of 'engaging in unacceptable conduct'.

To ensure Australia's national interest can be protected, the head of power for the Rules of Conduct is broad, as is the case with the corresponding head of power in the 1991 Act. The extent to which the power is invoked will depend on actual circumstances. It is possible that the power will be held in reserve, to be invoked should the need arise. Before making Rules, the Minister would have regard to Australia's international obligations, including those in relation to the World Trade Organisation (WTO), which are still being formulated in the negotiations of the Group on Basic Telecommunications (GBT).

While the Act is expressed to have extraterritorial effect (thus not constraining the ability of the Rules to address matters of concern arising because of activities undertaken in foreign markets), the Rules themselves apply to carriers and service providers operating in Australia, rather than their correspondents outside Australia. This is because of the legal and practical difficulties in imposing and enforcing Australian law outside Australia.

Clause 352 – Rules of Conduct about dealings with international telecommunications operators

Clause 352(1) is an interpretation provision that defines when, for the purposes of clause 352, an international telecommunications operator 'engages in unacceptable conduct'. The idea of 'unacceptable conduct' has been used instead of the concept of 'misuse of market power' used in the 1991 Act to avoid semantic arguments as to whether certain conduct might in fact be a 'misuse' of market power. References to 'national interest' are, of course, references to Australia's national interest. 'International telecommunications operator' is defined in clause 352(6). An international telecommunications operator engages in unacceptable conduct if, and only if, one of three situations occur.

First, under clause 352(1)(a), an operator engages in unacceptable conduct if the operator uses, in a manner that is, or is likely to be, contrary to the national interest, the operator's power in a market for carriage services; goods or services for use in connection with the supply of carriage services; or the installation of, maintenance of, or provision of access to telecommunications networks or facilities.

In this provision, power in a market is intended to refer to actual commercial power rather than power that may derive from legal status (which is dealt with in the following paragraph). Unlike in s. 4E of the TPA, 'market' is not constrained to being a market in Australia. It is also intended that power in a market may refer to power in a market in Australia or any other country. This explicitly recognises that an international telecommunications operator's ability to engage in unacceptable conduct may derive from power in a market in Australia, not necessarily from power in a market overseas. For example, a person who is a carrier in Australia may have only a small operation in another country and not have power in a market in that country, but may still be able to engage in unacceptable conduct, particularly in relation to telecommunications traffic between that country and Australia because of its power in a market in Australia.

Second, under clause 352(1)(b), a person engages in unacceptable conduct if the operator uses, in a manner that is, or is likely to be, contrary to the national interest, any legal rights or status that the operator has because of foreign laws that relate to carriage services; goods or services for use in connection with the supply of carriage services; or the installation of, maintenance of, or provision of access to telecommunications networks or facilities.

Third, under clause 352(1)(c), a person engages in unacceptable conduct if the operator engages in any other conduct that is, or is likely to be, contrary to the national interest. This provision is intended to be a general catch-all provision enabling the Government to respond to unacceptable conduct that does not derive from the sources specified in clause 352(1)(a) or (b). In particular, the paragraph is intended to safeguard against arguments that conduct is not unacceptable because it does not meet the criteria specified in clause 352(1)(a) and (b).

A range of conduct could potentially be addressed under clause 352(1), including refusal to deal and preferential termination arrangements.

In exercising the power, the Minister will have due regard to Australia's international obligations, including those under the WTO.

Clause 352(2) provides that the Minister may make Rules of Conduct with a view to preventing, mitigating or remedying unacceptable conduct by an international telecommunications operator. These rules may:

- prohibit or regulate dealings by either or both carriers and carriage service providers with international telecommunications operators and with other people;
- authorise the ACCC to make determinations of a legislative character in relation to dealings with international telecommunications operators;
- authorise the ACCC to give directions of an administrative character in relation to dealings with international telecommunications operators;
- require carriers and carriage service providers to comply with ACCC legislative determinations and administrative directions; or

- authorise the ACCC to make information available to the public, a specified class of person or a specified person.

The Rules of Conduct may, therefore, enable the Minister to specify the precise requirements to apply to carriers and carriage service providers in their dealings with international telecommunications operators or enable the Minister to delegate this role to the ACCC. This dual capability reflects the Minister's power to determine the International Code of Practice and AUSTEL's ability to issue a class licence in relation to international services under the 1991 Act. The involvement of the ACCC reflects the large extent to which the Rules will deal with matters affecting competition in the supply of international services. The ability for the ACCC to perform this role, as well as administer the Rules of Conduct, is seen as desirable given that close supervision of this area of activity may be appropriate, particularly in the early period of open competition.

The Rules may, for example, require carriers or carriage service providers to use all reasonable endeavours to prevent unacceptable conduct by an international telecommunications operator. The disclosure of information relating to dealings is seen as both a potential disincentive, and remedy, for unacceptable conduct.

Clause 352(3) provides that before the ACCC makes a determination or gives a direction under the Rules of Conduct, it must consult with the ACA. This is to ensure the ACA, as a specialist telecommunications regulator, has an opportunity to comment on the ACCC's proposed course of action, particularly in recognition that the ACCC's determinations and directions under the Rules of Conduct may have implications for areas in telecommunications other than competition.

Rules of Conduct are disallowable instruments (clause 352(4)). An ACCC determination of a legislative character is also a disallowable instrument (clause 352(5)).

Clause 352(6) defines an 'international telecommunications operator' as a person carrying on activities outside Australia that involve:

- the supply of carriage services where the carriage service is: between a point in Australia and one or more other points, at least one of which is outside Australia; or between a point outside Australia and one or more other points, at least one of which is in Australia; and
- the supply of goods and services for use in connection with the supply of the aforementioned carriage services; and
- the installation of, maintenance of, operation of, or provision of access to, telecommunications networks or facilities used to supply the aforementioned services.

An 'international telecommunications operator' is intended to include a person who is a transit carrier, that is, a third person who carries a communication between its origination and termination points but neither originates nor terminates the call. The concept of 'international telecommunications operator' is indifferent to nationality and is intended to include Australian persons operating outside Australia.

Clause 352(7) defines the terms ‘engaging in conduct’, ‘foreign law’ and ‘international telecommunications operator’.

Clause 353 – ACCC to administer Rules of Conduct

Given that one of the main purposes of the Rules of Conduct is promoting fair competition in the supply of carriage services between Australia and places outside of Australia, this clause provides that the Rules of Conduct will be administered by the ACCC.

To support the ACCC in its administration of its functions under clause 352, it is proposed to amend the TPA to enable the ACCC to make record-keeping rules (proposed s. 151BU of the TPA to be inserted by item 6 of Schedule 1 to the proposed *Trade Practices Amendment (Telecommunications) Act 1996*) and to obtain information (see items 7 to 9 of Schedule 1 to the proposed *Trade Practices Amendment (Telecommunications) Act 1996*) for the purposes of Part 20. The ACCC may investigate a contravention of the Rules of Conduct (clause 356). The ACCC must also review and report on the operation of Division 3 dealing with the Rules of Conduct each financial year or if directed by the Minister (clause 357).

Clause 354 – Rules of Conduct to bind carriers and carriage service providers

The Rules of Conduct are binding on carriers and carriage service providers and any agreement made by a carrier or carriage service provider that is inconsistent with the Rules of Conduct is unenforceable (see clause 355).

Clause 355 – Unenforceability of agreements

If an agreement or provision of an agreement is unenforceable because of clause 354, that agreement or provision cannot be enforced or relied on by way of defence or otherwise. A party to the agreement is not entitled to recover by any means any amount payable under or in connection with such an agreement or provision (clause 355(3)).

Clause 356 – Investigations by the ACCC

The ACCC is not prevented from carrying out an investigation of a contravention of Rules of Conduct in force under clause 352. If the ACCC begins an investigation of a contravention of the Rules of Conduct, the ACCC must notify the ACA accordingly; and consult the ACA about any significant developments that occur in the course of that investigation.

Clause 357 – Reviews of the operation of this Division

The ACCC must review, and report each financial year to the Minister on, the operation of this Division (clause 357(1)). It must do this as soon as practicable after the end of the financial year concerned (clause 357(2)).

If directed by the Minister, the ACCC must also review and report to the Minister, within the time specified in the direction, on specified matters relating to the operation of this Division (clauses 357(3) and (4)).

The Minister must cause a copy of a report under clause 357 to be laid before each House of the Parliament within 15 sitting days of that House after receiving the report (clause 357(5)).

Part 21—Technical regulation

This Part establishes a scheme for the technical regulation of telecommunications. The fundamental policy approach reflected in the scheme is to rely primarily on industry self-regulation with the regulatory body empowered to intervene only where it is considered necessary for limited purposes relating to ensuring certain safeguards are maintained. It is industry that has the technical expertise and commercial motivation to devote resources to standards development and ensure that appropriate standards are adopted. This approach is similar to that already practised by the Spectrum Management Agency under the Radcom Act for the technical regulation of radiocommunications. Amendments to the Radiocommunications Act, to align the technical regulation of radiocommunications closely with the new scheme for telecommunications, are set out in Part 4 of Schedule 2 to the proposed *Telecommunications (Transitional Provisions and Consequential Amendments) Act 1996* which forms part of the same legislative package of which this Bill is a part.

The ACA is given the power to make technical standards about customer equipment and customer cabling that is connected to public networks or facilities, but the ACA is restricted to matters which are inappropriate for self-regulation, namely:

- protecting:
 - the integrity of a telecommunications network or a facility; or
 - the health and safety of persons operating or working on a telecommunications network or a facility, or who use services supplied by means of a telecommunications network or a facility, or who are likely to be affected by the operation of a telecommunications network or a facility;
- ensuring that customer equipment can be used to give direct access to an emergency service number, as specified in the numbering plan made under clause 439 of this Bill;
- ensuring, for the purpose of the supply of a standard telephone service in fulfilment of the universal service obligation, the interoperability of customer equipment with a telecommunications network to which the equipment is proposed to be connected; or
- achieving an objective specified in the regulations.

It is intended that the ACA will only use the power to make technical standards where it is necessary to achieve the objects in clause 3 and having regard to the regulatory policy in clause 4. The regulatory policy in clause 4 of the Bill discourages regulation where it is not necessary to achieve the objects in clause 3.

The ACA is given the power to make standards relating to the interconnection of networks and facilities, but is empowered to make such standards only if the ACCC has directed it to do so. The ACCC may give such a direction only if it is satisfied that industry processes have failed to produce a standard or have produced a standard which the ACCC considers is not adequate for the needs of the access regime.

The ACA may make disability standards, which specify features designed to cater for the needs of persons with disabilities, for customer equipment that is provided for persons without a disability and that is used for the standard telephone service.

The connection of customer equipment or customer cabling to a telecommunications network or facility will be controlled through a labelling scheme. Where there is an ACA standard in force applying to a particular type of equipment or cabling, a person is prohibited from connecting equipment or cabling of that type to a network or facility unless the equipment or cabling has a label on it indicating compliance with relevant standards. Where the equipment or cabling has a label indicating non-compliance with any relevant standards, the person is prohibited from making the connection unless:

- the person has a connection permit for the equipment or cabling;
- the connection would accord with the connection rules; or
- the operator of the network consents to the connection.

Breach of this prohibition would allow the operator of the relevant network to disconnect the equipment or cabling and sue the person who made the connection for any damage or loss suffered as a result of the connection.

Connection permits are intended for exceptional circumstances and may be issued by the ACA upon application. The ACA must have regard to matters relating to health and safety and the integrity of networks in deciding whether to issue a permit. The ACA will also be able to have regard to other matters such as the purpose for which the connection is to be made.

Where a person wishes to connect an item of customer equipment or cabling that has a label indicating compliance with a relevant standard, the operator must not refuse to consent to the connection.

However, an operator of a network will be able to disconnect customer equipment or cabling where the operator genuinely believes the connection is or would be a threat to health and safety or to the integrity of the network. The operator could also sue for any damage or loss suffered as a result of the connection. Should the ACA consider there were no reasonable grounds for the disconnection, it may direct the operator to reconnect. In such case, the person who was disconnected could sue for any damage or loss suffered as a result of the disconnection.

Where:

- a person applies a label to equipment or cabling without satisfying the requirements that must be met before or after application of the relevant label; and

- a person (who could be the one who applied the label) connects to a network equipment or cabling that is so labelled; and
- as a result of that connection the operator of the network suffers damage or loss,

the operator may sue the first mentioned person for that damage or loss.

The ACA is to have the power to require manufacturers and importers to apply a label to customer equipment or cabling indicating whether the equipment or cabling complies with a specified mandatory standard. The notice which requires the labelling may also specify what must be done before or after applying a label. One of the things that may be required is the obtaining of either a certificate from a *certification body* indicating compliance with the specified mandatory standard, or a written statement from a *competent body* indicating that all reasonable steps have been taken to ensure the equipment or cabling complies with the standard. Another thing that may be required is to have a *recognised testing body* test the equipment or cabling.

Recognised testing bodies are to be determined by certification bodies. Certification bodies are approved by an *approving body*. An approving body is to be approved by the ACA.

It shall be an offence to make a false statement in a label about compliance with a mandatory standard, or to apply a label before satisfying the requirements that must be met before applying a label.

The licensing regime for cabling installers will remain largely unchanged from that under the 1991 Act. The ACA is to be able to specify the types of cabling work for the purposes of licensing and will have to maintain a register of cabling licences. The ACA will also be able to make general *cabling provider rules*. Performing specified cabling work without a licence, or other than in accordance with the cabling provider rules, is to be an offence. Licences may be obtained upon application to the ACA and where certain criteria relating to knowledge and experience and compliance with cabling standards are satisfied. The Minister will be able to direct the ACA in relation to the performance of its functions or exercise of its powers relating to cabling.

The ACA is to have the power to declare that the whole or a part of the licensing regime does not apply to cabling which may be identified by reference to its technical characteristics, functions or location. This will enable cabling which does not raise regulatory concerns to be excluded from the operation of the Part.

The ACA will also be able to delegate most of its powers relating to cabling licensing to a person, which is expected to be an industry body.

When exercising its technical regulation powers, the ACA is expected to do so in accordance with relevant Government policy, particularly the COAG guidelines on regulatory standards-making. The regulatory policy in clause 4 will be an important consideration for the ACA as will the requirements of s. 10 of the proposed ACA Act.

Division 1—Simplified outline

Clause 358 – Simplified outline

This clause provides an outline of Part 21 to assist the reader.

Division 2—Interpretative provisions

Clause 359 – Part applies to networks or facilities in Australia operated by carriers or carriage service providers

This clause sets the general ambit of technical regulation including technical standards made for customer equipment or customer cabling. Such standards will apply only in relation to equipment or cabling that is to be connected to a network or facility in Australia operated by a carrier or carriage service provider. This will ensure that those standards apply only to equipment and cabling that is to be used in relation to carriage services provided to the public, and avoids the regulation of equipment or cabling that is used only in connection with a private network.

Clause 360 – Manager of network or facility

This clause defines the meaning of the term ‘manager’ of a network or facility for the purposes of this Part. The term is used in clauses 395 and 396 and in Division 10. Essentially the term refers to the carrier or carriage service provider who operates, rather than owns, the relevant network or facility.

Clause 395 creates an offence for connecting customer equipment or cabling to telecommunications networks or facilities where the equipment or cabling is unlabelled or labelled as non-compliant with section 361 standards. An exception to the offence applies where the equipment or cabling is labelled as non-compliant and the manager of the network or facility consents in writing to the connection. Note that this Part is not intended to prevent any contract between the owner of a network or facility and the operator of the network or facility from dealing with matters such as the giving of such consents, as long as the terms of the contract are not inconsistent with the requirements of the Part.

Clause 396 creates an offence for the manager of a network or facility refusing to consent to the connection of labelled customer equipment or cabling to the network or facility. An exception to the offence applies where the manager has reasonable grounds to believe certain things. Note that this Part is not intended to prevent any contract between the owner of a network or facility and the operator of the network or facility from also dealing with matters such as the refusal to give such consents, as long as the terms of the contract are not inconsistent with the requirements of the Part.

Division 10 gives the manager of a network or facility the right to bring certain actions before the Federal Court. Note that this Part is not intended to prevent any contract between the owner of a network or facility and the operator of the network or facility from dealing with matters such as the bringing of such actions, as long as the terms of the contract are not inconsistent with the requirements of the Part.

Division 3—Technical standards about customer equipment and customer cabling

This Division deals with the making of technical standards by the ACA for customer equipment and customer cabling. The scope of such standards is restricted to matters relating to the integrity of telecommunications networks, health and safety, and ensuring customer equipment can be used to dial an emergency call number. Provision is made for the ACA to adopt whole or parts of industry voluntary standards.

Clause 361 – ACA’s power to make technical standards

This clause allows the ACA to make a technical standard relating to particular customer equipment or customer cabling (clause 361(1)).

The scope of technical standards made by the ACA under clause 361(1) is restricted under clause 361(2) to such requirements as are necessary or convenient to:

- protect the integrity of a telecommunications network or a facility (paragraph (a));
- protect the health and safety of persons operating or working on a telecommunications network or a facility, or using services supplied by means of a network or a facility, or who are otherwise reasonably likely to be affected by the operation of a network or a facility (paragraph (b));
- ensure that customer equipment can be used to give direct access to an emergency call number (paragraph (c));
- ensuring interoperability of customer equipment for the purpose of the supply of a standard telephone service in fulfilment of the universal service obligation (paragraph (d)); or
- to achieve an objective specified in the regulations (paragraph (e)).

Direct access to an emergency service number is defined in clause 18 to mean that in the event that a person attempts to place a call to an emergency service number, the call can be established and maintained.

The scope of these technical standards is restricted because the basic approach in the technical regulation regime is to use industry self-regulation for the development of industry standards which would involve affected groups, including consumers. It is only in those areas where industry self-regulation is inappropriate that the ACA has been given the power to make standards for customer equipment and cabling.

The basic intention underlying the power for technical standards for customer equipment or customer cabling to protect the integrity of telecommunications networks or facilities (see paragraph (2)(a)), is to protect the networks or facilities from harm from the equipment or cabling. That is, so the equipment or cabling does not adversely affect:

- the switching, signalling, transmission, metering, charging and billing systems and equipment; or

- the reliability;

of telecommunications networks and facilities.

It should be noted that the power to make standards under this clause relating to interoperability (see paragraph (2)(d)) is limited to equipment to be used for the purpose of the supply of a standard telephone service in fulfilment of the universal service obligation. The interoperability power cannot be exercised in relation to equipment for any other services, such as cable television carriage and public mobile telecommunications services which are not supplied in fulfilment of the universal service obligation. The interoperability requirements included in such standards would only relate to those functions of the equipment that relate to the equipment's interoperability with a telecommunications network for the purpose of the supply of a standard telephone service. The reason this paragraph refers to interoperability with a network and does not refer to interoperability with a facility is because the interoperability requirement relates to the objective of any-to-any connectivity across telecommunications networks used to supply a standard telephone service.

Regulations made under paragraph (2)(e) may not specify an objective that allows a standard to be made which effectively requires a network to have particular design characteristics or performance requirements. This implements the policy intention that carriers be able to design and operate their networks subject only to requirements for certain performance or features at the boundary or interface (for example, CLI, pre-selection and the requirements under the access regime). It is intended to ensure that the design of customer equipment or cabling will not be used to dictate the design of carriers' or carriage service providers' networks and facilities (clause 361(3)). However, it is intended that regulations could be made, for example, to require customer equipment or cabling to incorporate features to facilitate the tracing of malicious calls, if this should prove necessary.

A standard made under this clause could include the testing procedures for ascertaining compliance with the standard. This reflects both domestic and international established practice in making technical standards. This practice recognises that in many cases the performance requirements specified in a standard are integrally linked with the testing procedures for those performance requirements.

Related radiofrequency and electromagnetic compatibility requirements will be covered by standards made under s. 162 of the Radcom Act. Standards made under clause 361 may not be made concerning matters relating to radiofrequency and electromagnetic compatibility requirements unless they also relate to any or all of the matters set out in clauses 361(2)(a) to (e).

Technical standards, for example, may be expressed to apply generally or may be expressed to be limited, for example to certain circumstances, to specified networks or facilities, or to certain equipment or cabling (clause 361(4)).

The commencement of a technical standard is the day specified in the instrument or, where there is no day specified, the date of notification in the *Gazette* (clause 361(5)).

A standard is a disallowable instrument, which means it is subject to disallowance by either House of Parliament (clause 361(6)).

Clause 362 – Adoption of voluntary standards

This clause allows the ACA to adopt the whole or a part of a voluntary standard when making a technical standard. The scope of what may be adopted will be limited to those matters set out in clause 361(2), that is, protecting the integrity of telecommunications networks and health and safety, ensuring equipment can be used to give direct access to an emergency call number, and achieving an objective specified in the regulations. What may be adopted can be modified by the ACA if necessary. Those voluntary standards that may be adopted can be standards proposed or approved by: the Standards Association of Australia; or any other body or association. When adopting standards the ACA would be expected to consider the regulatory policy specified in clause 4.

Clause 363 – Procedures for making technical standards

This clause sets out the procedures that must and may be followed by the ACA in making technical standards. The two main elements of these procedures are the requirement for public consultation, and discretion for the ACA to make arrangements for a body or association to prepare and consult on draft standards. In exercising this discretion the ACA would be expected to consider the regulatory policy specified in clause 4.

The ACA is required to ensure that interested persons have had an opportunity to comment on proposed standards, and that due consideration is given to such comments (clause 363(1)).

In keeping with the theme that regulation that is generated from the industry which is to be regulated is more likely to benefit from the experience and expertise derived from industry input, the ACA is to have a discretion to make arrangements with a range of bodies or associations whereby those bodies or associations are responsible for the development of a draft standard, publishing it, consulting publicly on the draft, and reporting on that consultation to the ACA (clause 363(2)). The ACA can then take the final step of making the industry-developed standards into technical standards. Clauses 363(3) and (4) require the approval or determination respectively of a body for the purposes of clause 363(2) to be published in the *Gazette*. The term ‘body or association’ is used to make it clear that a body or association need not be a legal entity in its own right, but could, for example, be a committee made up of industry representatives.

Clause 364 – Making technical standards in cases of urgency

There may be an occasion on which the ACA considers that, for reasons related to the health or safety of persons, or the integrity of a network, it is necessary to make a standard more quickly than possible by the usual development and consultation processes. In such cases it would not be appropriate for the ACA to have to comply with the consultation requirements under clause 363(1) because of the time delay involved.

This clause allows the ACA to make a standard without having to comply with clause 363 where the ACA is satisfied that it is necessary to make a standard as a matter of urgency for the above-mentioned reasons (clause 364(1)). However, such a standard will cease

to have effect after 12 months unless the urgent standard is replaced earlier by a standard made in accordance with clause 363 (clause 364(2)).

Division 4—Disability standards

This Division provides for the making of standards for standard-issue customer equipment, that is to be used in the provision of the standard telephone service, relating to certain special features to assist a person with a disability to use the equipment/service. There is no provision for enforcement of such standards under this Bill. Rather, compliance with a disability standard will be a matter to be taken into account in any action taken under the DDA for breach of that Act. This method of enforcement has been adopted because the DDA represents the decided Commonwealth policy on matters relating to disabilities and it is more appropriate that the remedies and sanctions provided under the DDA apply to disability standards and not be subject to a separate overlapping enforcement regime under this Bill.

Clause 365 – Disability standards

This clause enables the ACA to make a disability standard relating to customer equipment to be used in connection with the standard telephone service (clause 365(1)). The standard may require the equipment to have certain features that are designed to cater for the special needs of a person with a disability (paragraph (1)(c)). Examples of such features are set out in clause 365(2).

It should be noted that this power cannot be exercised to make standards for customer equipment which is for use primarily by persons with disabilities, such as teletypewriter equipment.

A standard made under this clause could include the testing procedures for ascertaining compliance with the standard. This reflects both domestic and international established practice in making technical standards. This practice recognises that in many cases the performance requirements specified in a standard are integrally linked with the testing procedures for those performance requirements.

Clause 365(3) makes it clear that a disability standard may apply generally or may be limited in its application.

A disability standard commences either on the day specified in the standard, or on the day on which it is notified in the *Gazette* (clause 365(4)).

A disability standard is a disallowable instrument (clause 365(5)).

Clause 365(6) defines the term ‘disability’ used in this clause.

Clause 366 – Adoption of voluntary standards

This clause makes it clear that the ACA may adopt the whole or a part of a standard made by any body or association. This will enable the ACA to adopt by reference standards that have already been made by industry. See the notes on clause 362.

Clause 367 – Procedures for making disability standards

This clause sets out the procedures that must and may be followed by the ACA in making disability standards. The two main elements of these procedures are the requirement for public consultation, and discretion for the ACA to make arrangements for a body or association to prepare and consult on draft standards.

The ACA is required to ensure that interested persons have had an opportunity to comment on proposed standards, and that due consideration is given to such comments (clause 367(1)).

In keeping with the theme that regulation that is generated from the industry which is to be regulated is more likely to benefit from the experience and expertise derived from industry input, the ACA is to have a discretion to make arrangements with a range of bodies or associations whereby those bodies or associations are responsible for preparing a draft standard, publishing it, consulting publicly on the draft, and reporting on that consultation to the ACA (clause 367(2)). The ACA can then take the final step of making the draft standards into disability standards. Clauses 367(3) and (4) require the approval or determination respectively of a body for the purposes of clause 367(2) to be published in the *Gazette*. The term ‘body or association’ is used to make it clear that a body or association need not be a legal entity in its own right, but could, for example, be a committee made up of industry representatives.

Clause 368 – Effect of compliance with disability standards

This clause makes provision for the effect of disability standards. It provides that in relation to any action for infringement of s. 24 of the DDA in relation to the supply or provision of customer equipment, regard must be had to whether the customer equipment complies with a relevant disability standard.

Division 5—Technical standards about the interconnection of facilities

This Division provides for the making of interconnection standards as a fall-back position for industry processes in the telecommunications access regime. Interconnection standards would relate to technical matters concerning interconnections between facilities. It is not intended that this standards-making power be used pro-actively - it is not meant as a substitute for the access regime. Rather, it is provided as a ‘last resort’ for technical matters should the operation of the access regime fail, in a more general sense, to achieve the objects of the access provisions in relation to any particular sector of the telecommunications industry. To emphasise the ‘last resort’ role of this Division, provision is made to prevent the ACA from making a standard unless it has first requested an industry body to make an interconnection standard, and that body has either failed to make a standard, has made one that the ACA considers inadequate, or has made one that is not operating effectively.

Clause 369 – ACA’s power to make technical standards

This clause allows the ACA to make an interconnection standard relating to interconnection of facilities (clause 369(1)).

A standard made under this clause could include the testing procedures for ascertaining compliance with the standard. This reflects both domestic and international established practice in making technical standards. This practice recognises that in many cases the performance requirements specified in a standard are integrally linked with the testing procedures for those performance requirements.

The ACA may make an interconnection standard only if it has been directed to do so by the ACCC (clause 369(2)) and must do so in a manner consistent with the ACCC direction (clause 369(4)).

The ACCC may direct the ACA to make an interconnection standard only if it is of the opinion that it is necessary for there to be a standard in order to: promote the long-term interests of end-users of carriage services (clause 369(5)(a)); or reduce or eliminate the likelihood of hindrance of access to services that have been declared for the purposes of the access regime (clause 369(5)(b)).

Clause 369(6) makes it clear that an interconnection standard may apply generally or be expressed to apply to a more narrowly focussed class of interconnections.

An interconnection standard commences either on the day specified in the standard, or on the day on which it is notified in the *Gazette* (clause 369(7)).

An interconnection standard is a disallowable instrument (clause 369(8)).

Clause 369(9) defines the term 'declared service' used in this clause.

Clause 370 – Adoption of voluntary standards

This clause makes it clear that the ACA may adopt the whole or a part of a standard made by any body or association. This will enable the ACA to adopt by reference standards that have already been made by industry.

Clause 371 – Procedures for making technical standards

This clause sets out the procedures that must and may be followed by the ACA in making interconnection standards. The two main elements of these procedures are the requirement for public consultation, and discretion for the ACA to make arrangements for a body or association to prepare and consult on draft standards.

The ACA is required to ensure that interested persons have had an opportunity to comment on proposed standards, and that due consideration is given to such comments (clause 371(1)).

In keeping with the theme that regulation that is generated from the industry which is to be regulated is more likely to benefit from the experience and expertise derived from industry input, the ACA is to have a discretion to make arrangements with a range of bodies or associations whereby those bodies or associations are responsible for preparing

a draft standard, publishing it, consulting publicly on the draft, and reporting on that consultation to the ACA (clause 371(2)). The ACA can then take the final step of making the draft standards into interconnection standards. Clauses 371(3) and (4) require the approval or determination respectively of a body for the purposes of clause 371(2) to be published in the *Gazette*. The term 'body or association' is used to make it clear that a body or association need not be a legal entity in its own right, but could, for example, be a committee made up of industry representatives.

Clause 372 – Procedures for making technical standards

This clause prevents the ACA from making an interconnection standard unless it has first requested an industry body to make an interconnection standard (clause 372(1)(a)), and that body has either failed to make a standard, has made one that the ACA is not satisfied deals with the matter in an adequate way, or has made one that is not operating adequately (clause 372(1)(b)).

Clause 372(2) requires the ACA, in deciding on the adequacy or effectiveness of an industry interconnection standard, to have regard to the same access criteria the ACCC is required to consider under the access regime in proposed Part XIC of the TPA to be inserted by the proposed *Trade Practices Amendment (Telecommunications) Act 1996*.

Clause 372(3) makes it clear that the ACA is not limited in the matters to which it may have regard in exercising its powers under this clause.

Clause 372(4) requires the ACA to consult with the ACCC when making a decision whether a standard deals with a matter in an adequate way or is operating adequately.

Clause 373 – Provision of access

This clause defines the meaning of the term ‘provision of access’ as used in this Division.

Clause 374 – Promotion of the long-term interests of end-users of carriage services and of services supplied by means of carriage services

This clause defines the meaning of the phrase ‘promotion of the long-term interests of end-users of carriage services and of services supplied by means of carriage services’ as used in this Division.

Division 6—Connection permits and connection rules

This Division provides for the ACA to issue connection permits and make connection rules. Compliance with a permit or the connection rules would permit a person to connect specified non-standard customer equipment or cabling to a telecommunications network or facility. A person would have to rely on a permit or conformance with the rules where the person was proposing to connect equipment or cabling that does not have a label (required by a notice under clause 391) or has such a label that indicates the equipment or cabling does not comply with a relevant technical standard made under clause 361. Otherwise, the person would have to obtain the written permission of the manager of the network or facility to make the proposed connection.

It should be understood that connection rules are not standard conditions applying to connection permits. Connection rules are a separate mechanism, compliance with which would authorise a person to connect customer equipment or cabling to a telecommunications network or facility.

It should be noted that where a person complies with any relevant labelling requirements (as required by a notice under clause 391) the person is permitted to make the proposed

connection (see clause 395); indeed, the operator of a network or facility would be prohibited from refusing to permit the connection (see clause 396).

Connection permits are intended for circumstances which the labelling provisions in Division 6 are unable to address. They are not intended in normal circumstances to be used for equipment that is required to be labelled but had failed a labelling requirement, for example, where a particular aspect of a testing requirement under clause 392(5)(b) was not met. Such equipment continues to be required to meet any pre- or post-labelling requirements and be labelled, unless there are good reasons for that requirement not to apply to the particular equipment.

Subdivision A—Connection permits authorising the connection of non-standard customer equipment and non-standard cabling

Clause 375 – Application for connection permit

This clause enables a person to apply to the ACA for a connection permit to connect customer equipment or cabling by the person or a person nominated by the person (clauses 375(1) and (2)) to a telecommunications network or facility and to maintain such a connection.

Note that the reference to ‘maintain’ such a connection is intended to be a reference to continuing the connection, or keeping it in existence, rather than a reference to repairing the connection (see also clause 395).

Clause 376 – Form of application

This clause requires an application for a connection permit to be in writing and in accordance with the form approved by the ACA.

Clause 377 – Application to be accompanied by charge

This clause requires an applicant for a permit to pay any charge fixed by the ACA under the provision in the ACA Act that allows the ACA to make charges to recover its costs for the provision of services and performance of its functions.

Clause 378 – Further information

This clause allows the ACA to request an applicant for a connection permit to provide further information relating to the application (clause 378(1)). The ACA may refuse to process the application unless and until the requested information is provided by the applicant (clause 378(2)). The reason this provision has been included is because, in deciding whether to issue a connection permit, the ACA is required to have regard to certain matters relating to network integrity and health and safety, and is also permitted to have regard to other matters relating to the person’s technical knowledge and skill. The ACA may need to obtain further information from an applicant in order to have proper regard to such matters.

Clause 379 – Issue of connection permits

This clause provides for the issue of connection permits. These permits allow the connection to telecommunications networks or facilities of customer equipment or cabling that does not meet applicable labelling requirements. Such permits are not equivalent to, or a replacement for, permits issued under s. 257 of the 1991 Act. Labels required to be applied under Division 6 of this Part will perform an equivalent function to the current use of permits.

Clause 379(1) gives the ACA a discretion to issue a connection permit after considering an application for a permit.

Clause 379(2) sets out the matters to which the ACA may have regard in deciding whether to issue a connection permit. Those matters relate to whether the purpose for the proposed permit relates to certain matters such as: education or research (subparagraph (2)(a)(i)); testing of customer equipment or cabling (subparagraph (2)(a)(ii)); the demonstration of customer equipment or cabling (subparagraph (2)(a)(iii)); or the knowledge and experience of the applicant (paragraph (2)(b)). It should be noted that the specification of these matters in this clause is not meant to limit the matters to which the ACA may have regard in deciding whether to issue a permit (see clause 379(4)) but is intended to indicate that permits should be treated as an exception, rather than the normal practice, and should not provide a means of avoiding compliance with clause 361 technical standards.

Clause 379(3) sets out the matters to which the ACA must have regard in deciding whether to issue a connection permit. These matters relate to: network integrity (paragraph (3)(a)); and the health or safety of persons operating, working on, using services supplied by the means of, or otherwise are reasonably likely to be affected by the operation of, a telecommunications network or facility (paragraph (3)(b)). It is reasonable to expect that the ACA, in particular cases, may need to seek the views of one or more carriers or carriage service providers to assist it in considering the matters set out in clause 379(3).

Clause 379(4) makes it clear that nothing in clause 379(2) or (3) is meant to limit the matters to which the ACA may have regard in deciding whether to issue a connection permit.

Clause 379(5) requires the ACA to notify the applicant in writing of a decision to refuse to issue a connection permit.

A decision to refuse to issue a connection permit is subject to merits review under Part 29 of the Bill (see Schedule 4).

Clause 380 – Connection permit has effect subject to this Act

This clause makes it clear that a connection permit has effect subject to the Act.

Clause 381 – Nominees of holder

This clause defines who are the nominees of the holder of a connection permit.

Clause 382 – Duration of connection permits

This clause provides for the period during which a connection permit is in force. Where the permit specifies a period, the permit expires at the end of that period (paragraph (1)(a)). Where the permit does not specify the period, the permit remains in force indefinitely (paragraph (1)(b)).

Clause 382(2) allows the ACA to reduce an indefinite connection permit term to a specified (finite) period. This will allow for any occasion where, for reasons that may relate to changes in technology, the connection of equipment or cabling that was previously considered permissible and was therefore covered by a connection permit with an indefinite term, may become considered to no longer be permissible.

Clause 382(3) makes it clear that the ACA cannot change an indefinite term to a retrospective finite one.

A decision to change the term of a connection permit is subject to merits review under Part 29 of the Act (see Schedule 4).

Clause 383 – Conditions of connection permits

This clause provides for the conditions of connection permits.

Clause 383(1) requires the holder of the permit and the holder's nominees to comply with Division 6 of Part 21 (paragraph (1)(a)). Other conditions may be specified in the permit (paragraph (1)(b)).

Clause 383(2) allows the ACA to determine conditions that apply to each connection permit or a specified class of connection permits. Such a determination is disallowable by Parliament (clause 383(6)).

Clause 383(3) allows the ACA to impose further conditions on connection permits and vary or revoke such conditions.

Clause 383(4) makes it clear that the ACA may specify a condition that relates to the kinds of nominees that a permit holder may have. This is not to limit the types of conditions that may be imposed on a connection permit (clause 383(5)).

A decision to change the conditions of a connection permit is subject to merits review under Part 29 of the Act (see Schedule 4).

Clause 384 – Offence of contravening condition

This clause makes it an offence for a permit holder, or a nominee, to contravene a permit condition (clause 384(1)). The maximum penalty for a reckless or intentional contravention of a permit condition is, in the case of an individual, 100 penalty units or, in the case of a body corporate, 500 penalty units (clause 384(2)) (under s. 4AA of the *Crimes Act 1914* a penalty unit is worth \$100 - see also s. 4B(3) of that Act).

Clause 385 – Formal warnings – breach of condition

This clause allows the ACA to give a permit holder or nominee a formal warning where there has been a breach of a permit condition. The ACA may decide to take this action instead of deciding to cancel a permit (see clause 387) or to prosecute for a breach of permit condition. However, in the circumstances of a particularly serious or flagrant breach, the ACA may decide to cancel a permit or prosecute without first issuing a formal warning.

Clause 386 – Surrender of connection permit

This clause allows a permit holder to surrender a connection permit by giving a written notice of the surrender to the ACA. Note that it is not possible for a nominee to surrender a permit.

Clause 387 – Cancellation of connection permit

This clause allows the ACA to cancel a connection permit by written notice to the permit holder (clause 387(1)).

The ACA may have regard to any matter relevant to deciding whether to issue a permit in deciding whether to cancel a permit (clause 387(2)).

In deciding whether to cancel a permit, the ACA is required to have regard to the matters relating to network integrity and health and safety to which it must have regard when deciding whether to issue a connection permit (clause 387(3)). It is also required to have regard to whether the permit holder, or a nominee, has been convicted of an offence against Division 6 of Part 21.

A decision to cancel a connection permit is subject to merits review under Part 29 of the Act (see Schedule 4).

Subdivision B—Connection rules

This Subdivision provides for the making of connection rules, which are a form of standing authorisation to make certain connections to telecommunications networks or facilities, provided the connections comply with the rules.

Compliance with relevant connection rules will authorise a person to connect non-standard customer equipment or cabling to a network or facility (see clause 395(4)).

Clause 388 – Connection rules

This clause enables the ACA to make rules, known as ‘connection rules’ relating to the connection of customer equipment or cabling to telecommunications networks or facilities (paragraph (1)(b)). Connection rules may be expressed to apply to specified persons (paragraph (1)(a)) - this will allow for the making of rules that apply to broadcasters and their employees or defence personnel, for example, or other classes of persons who may be considered to have sufficient technical expertise in relation to making connections to networks or facilities.

Clause 388(2) is a formal provision clarifying the meaning of the phrase ‘subject to the connection rules’.

Clause 388(3) makes it clear that connection rules may create discretions for the ACA to exercise in relation to those rules.

Clause 388(4) makes connection rules a disallowable instrument.

Clause 389 – Procedures for making connection rules

This clause sets out the procedures that must and may be followed by the ACA in making connection rules. The two main elements of these procedures are the requirement for public consultation, and discretion for the ACA to make arrangements for a body or association to prepare and consult on draft rules.

The ACA is required to ensure that interested persons have had an opportunity to comment on proposed connection rules, and that due consideration is given to such comments (clause 389(1)).

In keeping with the theme that regulation that is generated from the industry which is to be regulated is more likely to benefit from the experience and expertise derived from industry input, the ACA is to have a discretion to make arrangements with a range of bodies or associations whereby those bodies or associations are responsible for preparing draft rules, publishing them, consulting publicly on the draft, and reporting on that consultation to the ACA (clause 389(2)). The ACA can then take the final step of making the draft into formal connection rules. Clauses 389(3) and (4) require the approval or determination respectively of a body for the purposes of clause 389(2) to be published in the *Gazette*.

The term ‘body or association’ is used to make it clear that a body or association need not be a legal entity in its own right, but could, for example, be a committee made up of industry representatives.

Division 7—Labelling of customer equipment and customer cabling

This Division provides for the ACA to require the labelling of customer equipment or customer cabling. The requirement for labelling is the means adopted under the Act for the enforcement of technical standards made under clause 361. If the ACA has not required labelling in relation to a particular clause 361 standard, the standard has no mandatory effect.

Where the ACA has required equipment or cabling to be labelled, a person will be prohibited from connecting that equipment or cabling to a telecommunications network or facility if the equipment or cabling is either unlabelled or has a label indicating that it does not comply with a relevant standard made under clause 361. The only exceptions to this would be where the person has a connection permit, makes the connection in accordance with relevant connection rules, or the manager of the network or facility gives written permission for the connection.

Through the device of specifying certain requirements that must be met before a label may be applied, the ACA will facilitate the implementation of industry self-regulation of compliance with a greater part of the technical regulation regime. The following types of industry bodies will be involved in this self-regulation, with the functions as indicated:

- ‘accreditation body’ determined by the ACA by notice in the *Gazette*
 - functions are to determine by written instrument:
 - : a ‘recognised testing authority’; and
 - : a ‘competent body’
- ‘approving body’ determined by the ACA by notice in the *Gazette*
 - functions are to determine a ‘certification body’ by written instrument;
- ‘recognised testing authority’
 - functions are to test equipment or cabling and issue a test report;
- ‘certification body’
 - functions are to issue a written statement certifying that equipment or cabling complies with a specified clause 361 standard;
- ‘competent body’
 - functions are to issue a written statement certifying that reasonable efforts have been made to ensure that equipment or cabling does not breach a specified clause 361 standard.

Clause 390 – Application of labels

This clause clarifies the meaning of terms used in Division 7.

A ‘label’ includes a statement (clause 390(1)).

The meaning of ‘applied’ in relation to labels has been given a broad meaning to allow for the wide range of shapes, sizes and types of equipment and cabling to which a label may be required to be applied (clause 390(2)).

Clause 391 – Labelling requirements

This clause allows the ACA to make a disallowable instrument (clause 391(2)) that requires manufacturers and importers of customer equipment or cabling to apply a label to the equipment or cabling. The label must indicate whether the equipment or cabling complies with a relevant standard made under clause 361 (clause 391(1)).

Clause 392 – Requirements to apply labels - ancillary matters

This clause allows the ACA to include in an instrument made under clause 391 (clause 392(1)) certain requirements relating to the labelling of customer equipment or cabling.

The ACA may specify the form of any required label (clause 392(2)) and how it is to be applied to the equipment or cabling (clause 392(3)). For example, it could specify the size and method of applying a label to the specified equipment or cabling.

Clause 392(4) provides that an instrument under clause 391 may state that the labelling requirement does not apply to imported equipment or cabling bearing specified international labels or labels of another country. This will allow for those situations where Australia is a signatory to an international agreement, or has a mutual recognition agreement with another country, that provides for the recognition of labels. For example, it will facilitate visiting end-users to use an overseas-approved mobile phone while in Australia without the need for separate compliance checking.

Clause 392(5) allows the clause 391 instrument to specify certain requirements that must be met before a manufacturer or importer applies a label to equipment or cabling. It is through this device that the ACA is to facilitate industry self-regulation of compliance with the technical regulation regime. Under this clause, the ACA will be able to require:

- that a certificate be obtained from a certification body stating that the equipment or cabling complies with an applicable clause 361 standard (paragraph (a)); or
- the testing of equipment or cabling by a recognised testing authority (see clause 393) for compliance with an applicable clause 361 standard (paragraph (b)); or
- the conduct of quality assurance programs (paragraph (c)); or
- the obtaining of a written statement from a competent body certifying that reasonable efforts have been made to ensure that equipment or cabling does not breach a specified clause 361 standard (paragraph (d)); or

- the manufacturer or importer to make a written declaration that all other pre-labelling requirements have been met, known in the industry as ‘self-declaration’ (paragraph (e)) - (clause 392(6) allows a requirement that the declaration be retained for a period specified in the clause 391 notice).

Clause 392(6) allows the clause 391 instrument to specify certain requirements that must be met after a manufacturer or importer applies a label to equipment or cabling. Such requirements may include retention of records relating to quality assurance programs, test results, or self-declarations.

Clause 393 – Recognised testing authorities and competent bodies

This clause allows the ACA to determine a person or association to be an *accreditation body* for the purposes of this clause (clause 393(1)). The determination is to be done by *Gazette* notice. When making such a determination the ACA is expected to take account of relevant Government policy for the appointment of appropriate accreditation bodies. The reference to an association is intended to include an unincorporated association.

An accreditation body may, by written instrument, determine a person to be a *recognised testing authority* for the purposes of Division 7 (clause 393(2)). Recognised testing authorities test equipment or cabling for compliance with a standard made under clause 361 and issue tests results.

An accreditation body may also, by written instrument, determine a person or association to be a *competent body* (clause 393(3)). The reference to an association is intended to include an unincorporated association. Competent bodies issue statements to the effect that reasonable efforts have been made to avoid a contravention of a standard made under clause 361. Such a statement could be useful in circumstances where because of the size or location of certain equipment or cabling, or for some other reason, it is not possible to conduct a proper test of the equipment or cabling for compliance with a clause 361 standard, and an assessment is made based on other material such as the design documents.

Clause 394 – Certification bodies

This clause allows the ACA to determine a person or association to be an *approving body* for the purposes of this clause (clause 394(1)). The determination is to be done by *Gazette* notice. The reference to an association is intended to include an unincorporated association.

An approving body may, by written instrument, determine a person or association to be a *certification body* for the purposes of Division 7. The reference to an association is intended to include an unincorporated association. A certification body issues certificates that certify that certain equipment or cabling complies with applicable standards made under clause 361. In deciding whether to issue a certificate, the body would have regard to test results issued by any recognised testing authority and other relevant material.

Clause 395 – Connection of customer equipment or customer cabling – breach of section 361 standards

This clause prohibits the connection of customer equipment or cabling to a telecommunications network or facility in certain circumstances, and provides for exceptions to those prohibitions.

Where the ACA has required labelling of equipment or cabling under clause 391, a person is prohibited from connecting, or maintaining a connection of, such equipment or cabling to a network or facility, if the equipment or cabling is either not labelled or has a label that indicates non-compliance with an applicable clause 361 standard (clause 395(1)).

Breach of this prohibition is an offence carrying a maximum penalty in the case of an individual of 120 penalty units, or in the case of a body corporate, 600 penalty units (clause 395(2)) (under s. 4AA of the *Crimes Act 1914*, a penalty unit is worth \$100 - see also s. 4B(3) of that Act).

Note that the reference to ‘maintaining’ a connection is intended to be a reference to continuing the connection, or keeping it in existence, rather than a reference to repairing the connection.

Exceptions to the prohibition under clause 395(1) are where the connection is made or maintained in accordance with:

- a connection permit (clause 395(3)); or
- the connection rules (clause 395(4)).

Clause 395(5) provides an exception to the prohibition under clause 395(1) where the manager of the network or facility to which the connection is made or maintained gives written consent to the connection of labelled non-standard equipment or cabling. This will allow managers the flexibility to approve connection of non-standard equipment or cabling to networks or facilities they operate. It will not allow connections to networks or facilities operated by other persons, unless those other operators gave written permission for the connection.

Clause 396 – Connection of labelled customer equipment or customer cabling not to be refused

This clause is one of the critical technical regulation provisions in that it provides a right to connect customer equipment or customer cabling to a network or facility, where the equipment or cabling is correctly labelled in accordance with a clause 391 instrument and the label indicates the equipment or cabling complies with applicable clause 361 standards (clause 396(1)). This will ensure that a manager cannot restrict the range of equipment or cabling it will permit to be connected to its network or facility.

A manager who refuses connection of correctly labelled and compliant equipment or cabling would be guilty of an offence the maximum penalty for which is, in the case of an individual, 100 penalty units or, in the case of a body corporate, 500 penalty units (clause 396(2)) (under s. 4AA of the *Crimes Act 1914*, a penalty unit is worth \$100 - see also s. 4B(3) of that Act).

Clause 396(3) exempts the manager of a network or facility from the obligation to connect under clause 396(1) where the operator has reasonable grounds to believe that certain specified circumstances prevail or would prevail. One circumstance is where the manager believes that the label was applied before satisfying pre-labelling requirements, or that there has been a failure to retain relevant records required by a clause 391 instrument (paragraph (a)). Another is where the manager believes that the connection of the equipment or cabling would be a threat to the integrity of the network or facility (paragraph (b)). A further circumstance is where the manager believes that the connection of the equipment or cabling would be a threat to the health or safety of a person operating, working on, using services supplied by means of, or may otherwise be reasonably likely to be affected by the operation of, the network or facility (paragraph (c)). These last 2 exemptions would apply in a situation where the equipment or cabling was compliant at one stage, but had since deteriorated to a state where it no longer operated in compliance with a relevant standard.

Clause 396(4) makes it clear that this clause establishes a right to connect labelled equipment only, not a right to be supplied a carriage service. A carriage service provider would take other factors into account in deciding whether to supply a service to a customer, such as the creditworthiness of the customer.

Clause 397 – Supply of unlabelled customer equipment or unlabelled customer cabling

This clause prohibits the supply of unlabelled customer equipment or cabling where labelling has been required by an instrument under clause 391 (clause 397(1)). The meaning of 'supply' will include re-supply, sell, hire, lease, exchange or hire-purchase (clause 397(3)). Breach of this prohibition is an offence carrying a maximum penalty, in the case of an individual, of 100 penalty units or, in the case of a body corporate, of 500 penalty units (clause 397(2)) (under s. 4AA of the *Crimes Act 1914*, a penalty unit is worth \$100 - see also s. 4B(3) of that Act).

Clause 398 – Applying labels before satisfying requirements under subsection 392(5)

This clause prohibits a person from applying a label to equipment or cabling before satisfying any pre-labelling requirements specified in an applicable instrument under clause 391 (clause 398(1)). Breach of this prohibition is an offence carrying a maximum penalty, in the case of an individual, of 100 penalty units or, in the case of a body corporate, of 500 penalty units (clause 398(2)) (under s. 4AA of the *Crimes Act 1914*, a penalty unit is worth \$100 - see also s. 4B(3) of that Act).

Clause 399 – Failure to retain records etc.

This clause prohibits a manufacturer or importer from not retaining records, or failing to meet some other post-labelling requirement that has been specified in an applicable instrument under clause 391 (clause 399(1)). Breach of this prohibition is an offence carrying a maximum penalty, in the case of an individual, of 100 penalty units or, in the case of a body corporate, of 500 penalty units (clause 399(2)) (under s. 4AA of the *Crimes Act 1914*, a penalty unit is worth \$100 - see also s. 4B(3) of that Act).

Clause 400 – Application of labels containing false statements about compliance with standards

This clause prohibits a person from making a false or misleading statement on a label regarding compliance with an applicable clause 361 standard (clause 400(1)). Breach of this prohibition is an offence carrying a maximum penalty, in the case of an individual, of 120 penalty units or, in the case of a body corporate, of 600 penalty units (clause 400(2)) (under s. 4AA of the *Crimes Act 1914*, a penalty unit is worth \$100 - see also s. 4B(3) of that Act).

Division 8—Protected symbols

Clause 401 – Protected symbols

This clause prohibits the use of certain symbols, relating to compliance with telecommunications or radiocommunications standards, other than in accordance with the provisions of this Act or the Radcom Act (clauses 401(1) and (6)). Breach of this prohibition is an offence the maximum penalty for which is, in the case of an individual, 30 penalty units or, in the case of a body corporate, 150 penalty units (clause 401(2)) (under s. 4AA of the *Crimes Act 1914*, a penalty unit is worth \$100 - see also s. 4B(3) of that Act). Clause 401(3) is an interpretive provision that makes it clear that the use of any term in clause 401(1) is not meant to limit the meaning of any other term used in that provision.

However, this clause does not purport to interfere with any pre-existing trade mark or design rights, or uses that were in good faith that could have been protected by passing off actions prior to the date these provisions were exposed for public comment (clauses 401(4) and (5)). The ACA may make a written determination that the prohibition does not apply to a person who uses or applies a protected symbol for a particular purpose (clause 401(7)). The meaning of protected symbol is defined in clause 401(8).

Clause 401(9) is important to the operation of the labelling regime in that it provides that the application of a label, containing a protected symbol referred to in paragraph (8)(a) or (b), to customer equipment or cabling is taken to indicate that the equipment or cabling complies with all applicable clause 361 standards.

Conversely, clause 401(10) provides that the application of a label, containing a protected symbol referred to in paragraph (8)(c) (that is, a symbol indicating non-compliance), to customer equipment or cabling is taken to indicate that the equipment or cabling does not comply with any applicable clause 361 standard. Applicable clause 361 standards are those that are specified in an instrument under clause 391 requiring the equipment or cabling to be labelled (clause 401(11)).

Determinations made under clause 401(7) or (8) are disallowable instruments (clause 401(12)).

Clause 401(13) and (14) provide additional constitutional support for the operation of clause 401(1).

Division 9—Cabling providers

This Division relates to the regulation and licensing of persons who perform cabling work such as installing and maintaining customer cabling, and making connections of such cabling with telecommunications networks or facilities. While provision is made for the ACA to administer the cabling licensing regime, provision is also made for the ACA to delegate the more mechanical functions of the administration to an industry body. It is expected that such delegation could be made to further facilitate industry self-regulation.

Clause 402 – Cabling work

This clause defines the meaning of the term ‘cabling work’ for the purposes of this Division.

Clause 403 – Types of cabling work

This clause allows the ACA to make a disallowable declaration (clause 403(4)) that cabling work of a kind specified in the declaration is a type of cabling work to which Division 9 applies (clause 403(1)). Clause 403(3) makes it clear that a type cabling work is to be understood only in terms of a declaration made under this clause.

Clause 404 – Prohibition of unauthorised cabling work

This clause prohibits the performance of a type of cabling work (specified in a declaration under clause 403) unless the person performing the work satisfies one of a number of criteria (clause 404(1)). Breach of the prohibition under clause 404(1) is an offence the maximum penalty for which is, in the case of an individual, 120 penalty units or, in the case of a body corporate, 600 penalty units (clause 404(2)) (under s. 4AA of the *Crimes Act 1914*, a penalty unit is worth \$100 - see also s. 4B(3) of that Act).

The criteria specified in clause 404(1) are where:

- cabling provider rules (made under clause 405) apply to the person performing the work (paragraph (a));
- those rules apply to the person supervising the work (paragraph (b));
- the person holds a relevant cabling licence (paragraph (c)); or
- the work is performed under the supervision of the holder of a relevant cabling licence (paragraph (d)).

Clause 405 – Cabling provider rules

This clause allows the ACA to make general (disallowable - clause 405(6)) rules for the performance or supervision of cabling work (paragraph (1)(b)). The rules must be expressed to apply to specified persons or a class of persons (paragraph (1)(a)). A person who is subject to the rules must comply with the rules (clause 405(3)). Breach of this prohibition is an offence the maximum penalty for which is, in the case of an

individual, 100 penalty units or, in the case of a body corporate, 500 penalty units (clause 405(4)) (under s. 4AA of the *Crimes Act 1914*, a penalty unit is worth \$100 - see also s. 4B(3) of that Act).

These rules would amount to a standing authorisation to persons covered by the rules to perform or supervise the types of cabling work specified in the rules. Performance of a type of cabling work in accordance with applicable rules would obviate the requirement to hold a cabling licence. It is anticipated that such rules could be applied to broadcasters and members of the defence forces in relation to cabling work performed for the purposes of their respective operations, but they could have wider application.

Clause 405(5) makes it clear that the rules may provide for the ACA to exercise discretions in administering the rules. It would be expected that the rules would provide that such decisions would be subject to merits review.

Clause 406 – Procedures for making cabling provider rules

This clause sets out the procedures that must and may be followed by the ACA in making cabling provider rules. The two main elements of these procedures are the requirement for public consultation, and discretion for the ACA to make arrangements for a body or association to prepare and consult on draft rules.

The ACA is required to ensure that interested persons have had an opportunity to comment on proposed rules, and that due consideration is given to such comments (clause 406(1)).

In keeping with the theme that regulation that is generated from the industry which is to be regulated is more likely to benefit from the experience and expertise derived from industry input, the ACA is to have a discretion to make arrangements with a range of bodies or associations whereby those bodies or associations have the responsibility for preparing draft rules, publishing them, consulting publicly on the draft, and reporting on that consultation to the ACA (clause 406(2)). The ACA can then take the final step of making the draft rules into formal cabling provider rules. Clauses 406(3) and (4) require the approval or determination respectively of a body for the purposes of clause 406(2) to be published in the *Gazette*.

The term ‘body or association’ is used to make it clear that a body or association need not be a legal entity in its own right, but could, for example, be a committee made up of industry representatives.

Clause 407 – Application for cabling licence

This clause allows a natural person to apply to the ACA for a cabling licence. The application would be for a licence to perform a particular type of cabling work.

Clause 408 – Form of application

This clause requires a cabling licence application to be in a written form required by the ACA and to specify the relevant knowledge and experience of the applicant (clause 408(1)).

Clause 408(2) allows the ACA to require an application to include a statutory declaration of matters covered by the application.

Clause 409 – Application to be accompanied by charge

This clause requires a cabling licence application to be accompanied by any charge determined by the ACA in relation to cabling licence applications under s. 52 of the ACA Act. That section limits ACA charges to cost recovery amounts so as not to amount to taxation.

Clause 410 – Further information

This clause allows the ACA to require a cabling licence applicant to provide it with further information relating to the licence application (clause 410(1)). The request must be made within 7 days of the making of the application, that is, within 7 days of the ACA receiving the application. Unless and until the applicant provides the requested information, the ACA may refuse to consider the licence application (clause 410(2)).

Clause 411 – Grant of cabling licence

This clause gives the ACA a discretion to grant a cabling licence after having considered the licence application. The licence granted would have to be in accordance with the application, that is it would have to authorise the type of cabling work referred to in the application (clause 411(1)).

However, the ACA's discretion is circumscribed by certain conditions (clause 411(2)). It must not grant a licence unless it is satisfied that: the applicant has the requisite knowledge and experience for the relevant type of cabling work (paragraph (2)(a)); the cabling work performed under the licence would conform with applicable cabling standards made under clause 361 (paragraph (2)(b)); and the issue of the licence would not be contrary to a Ministerial direction made under clause 424 (paragraph (2)(c)).

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

Clause 412 – Time limit on licence decision

This clause imposes a time limit on licence decisions and deems certain decisions to have been made in certain circumstances.

If the ACA has not made a decision 30 days after receiving either the licence application (paragraph (a)), or any further information requested under clause 410 (paragraph (b)), or after the period required for providing the information where the information has not been provided (paragraph (c)), the ACA is deemed to have made a decision refusing to grant a cabling licence in accordance with the application.

Clause 413 – Notification of refusal of application

This clause requires the ACA to notify the applicant in writing of a refusal to grant a licence in accordance with the application.

Clause 414 – Cabling licence has effect subject to this Act

This clause makes it clear that a cabling licence has effect subject to the rest of this Act.

Clause 415 – Duration of cabling licence

This clause provides for the term or period during which a cabling licence has effect.

A cabling licence commences to have effect on the day on which it is issued, and continues to have effect until the day specified in the licence (paragraph (a)). If no day is specified, the licence has effect indefinitely (paragraph (b)).

Clause 416 – Conditions of cabling licence

This clause enables the ACA to impose conditions on cabling licences by a number of means. The ACA may make a disallowable determination (clause 416(5)) of licence conditions (clause 416(1)). The determined conditions may apply to all cabling licences, or to only those types of cabling licences specified in the determination. The ACA may specify conditions in a licence (clause 416(2)). The ACA may impose further conditions, or revoke or vary conditions (except conditions determined under clause 416(1)) by written notice to the licensee (clause 416(3)).

Clause 416(4) sets out examples of the types of conditions that may be imposed on cabling licences.

A decision to change the conditions of a cabling licence is subject to merits review under Part 29 of the Act (see Schedule 4).

Clause 417 – Procedures for changing licence conditions

This clause sets out the procedures the ACA must follow when it changes cabling licence conditions.

Clause 417(1) makes it clear that the ACA powers under clause 416(3) to impose further conditions, or vary or revoke conditions, may be exercised on the ACA's own initiative or on application from the licensee.

Where a licensee makes application, the application must be in a written form approved by the ACA (clause 417(2)).

Clause 417(3) allows the ACA to require an application to include a statutory declaration about matters covered by the application.

Clause 417(4) requires the ACA to notify the applicant in writing of a refusal to change licence conditions as requested in the application.

Clause 417(5) deems the ACA to have refused to change licence conditions as requested under paragraph (1)(b) if it has not notified the licensee of a decision within 30 days of receiving the application.

Clause 418 – Offence of contravening condition

This clause prohibits a cabling licensee from breaching a condition of the licence when performing cabling work covered by the licence (clause 418(1)).

This clause also prohibits a cabling licensee from breaching a condition of the licence when supervising cabling work under the licence (clause 418(2)).

Breach of either prohibition is an offence the maximum penalty for which is, in the case of an individual, 100 penalty units or, in the case of a body corporate, 500 penalty units (clause 418(3)) (under s. 4AA of the *Crimes Act 1914*, a penalty unit is worth \$100 - see also s. 4B(3) of that Act).

Clause 419 – Formal warnings – breach of condition

This clause allows the ACA to give a licensee a formal warning where the licensee breaches a licence condition. This would afford a licensee adequate opportunity to remedy the situation and avoid any further action being taken. The ACA may decide to take this action instead of deciding to cancel a licence (see clause 422) or to prosecute for a breach of the licence. However, in the circumstances of a particularly serious or flagrant breach, the ACA may decide to cancel a licence or prosecute without first issuing a formal warning.

Clause 420 – Surrender of cabling licence

This clause makes it clear that a licensee may surrender a cabling licence by returning the licence to the ACA, and notifying the ACA in writing that the licence is surrendered (clause 420(1)). The surrender has effect on the day the ACA receives the written notification of surrender (clause 420(2)).

Clause 421 – Suspension of cabling licence

This clause allows the ACA to suspend a cabling licence for a period of no longer than 28 days (clause 421(1)). This period would allow the ACA time to consider whether it should cancel the licence or commence prosecution proceedings against the licensee for any breach relating to the licence. The suspension of a licence can provide a means of reinforcing the ACA's concerns where a formal warning has not been effective. However, in the circumstances of a particularly serious or flagrant breach, the ACA may decide to cancel a licence or prosecute without first suspending the licence.

Clause 421(2) requires the ACA to have regard to certain matters in deciding whether to suspend a licence. Those matters relate to the matters to which it must have regard under clause 411 when deciding whether to grant a licence (paragraph (a)); and whether the licensee has been convicted of an offence against this Division (paragraph (b)).

Clause 421(3) makes it clear that the ACA is not limited in the matters to which it may have regard in deciding whether to suspend a licence.

During a period of suspension the licence is treated as if it does not exist for the purposes of the prohibitions under clause 404 on unauthorised cabling work (clause 421(4)).

Clause 422 – Cancellation of cabling licence

This clause allows the ACA to cancel a cabling licence (clause 422(1)). The ACA would also be able to prosecute the licensee for any breach relating to the licence.

Clause 422(2) requires the ACA to have regard to certain matters in deciding whether to cancel a licence. Those matters relate to the matters to which it must have regard under clause 411 when deciding whether to grant a licence (paragraph (a)); and whether the licensee has been convicted of an offence against this Division (paragraph (b)).

Clause 422(3) makes it clear that the ACA is not limited in the matters to which it may have regard in deciding whether to cancel a licence.

A decision to cancel a cabling licence is subject to merits review under Part 29 (see Schedule 4).

Clause 423 – ACA may limit application of Division in relation to customer cabling

This clause allows the ACA to make a disallowable (clause 423(5)) declaration that Division 9 of Part 21, or specified provisions of that Division, do not apply to specified kinds of customer cabling (clause 423(1)). (It should be clearly understood that the reference in this clause is to a ‘kind’ of customer cabling, not a ‘type’ as referred to in clause 403 - if the ACA wished to exclude a ‘type’ of customer cabling from the operation of this Division, it could vary or revoke the relevant declaration under clause 403 so that the ‘type’ was no longer declared for the purposes of Division 9.)

This power could be exercised in situations where a determination is in force under clause 403 that applies to a more generic type of customer cabling, and to address special circumstances, it is necessary to exclude certain kinds of cabling from the cabling licensing provisions, for example, cabling work done by members of the armed forces during field operations, where that cabling connects to a network or facility operated by a carrier or carriage service provider. The effect of such a declaration would be that those doing such cabling work would not be required to be licensed or comply with cabling provider rules. It is expected that the power under this clause would be exercised only where the ACA is satisfied that the cabling work done would not be a threat to the health or safety of a person, or to the integrity of a network or facility.

Clause 423(2) allows the kind of cabling declared under clause 423(1) to be identified in terms of various characteristics relating to: technical characteristics (paragraph (a)); functions (paragraph (b)); purposes for which the cabling is to be used (paragraph (c)); or its location (paragraph (d)).

Clause 423(3) makes it clear that clause 423(2) is not exhaustive of the ways in which cabling may be identified in a declaration under clause 423(1).

Clause 423(4) makes it clear that the operation of Division 9 is subject to any declaration made under clause 423(1).

Clause 424 – Ministerial directions

This clause allows the Minister to direct the ACA as to the performance of its functions or exercise of its powers under Division 9 (clause 424(1)). However, Ministerial directions are not permitted to be concerned with how the ACA is to deal with a particular cabling licence application (clause 424(3)).

Such a direction is disallowable (clause 424(2)).

Clause 424(4) prevents the Minister from giving a direction under s. 12 of the proposed ACA Act where such a direction could have been given under this clause.

Clause 425 – Delegation

This clause allows the ACA to delegate many of its powers and functions under Division 9 relating to cabling licensing (clause 425(1)). It is expected that the ACA will make such a delegation to an industry body in keeping with the approach of industry self-regulation reflected in the provisions of Part 21.

However, the power of delegation does not extend (clause 425(2)) to the power to: refuse a licence application (paragraph (a)); impose, revoke or vary a licence condition (paragraph (b)); cancel or suspend a licence (paragraph (c)); or declare that the cable licensing provisions do not apply to a kind of customer cabling (paragraph (d)). These powers cannot be delegated as they are either subject to merits review processes in accordance with Commonwealth administrative law policy or legislative instruments.

Clause 425(3) allows the ACA to direct a delegate under clause 425(1) in relation to the exercise or performance of a delegated power or function.

Clause 425(4) makes it clear that the power of delegation under this clause is not meant to affect the operation of the ACA's power of delegation to the ACA members and staff under s. 49 of the ACA Act.

Clause 426 – Register of cabling licences

This clause requires the ACA to maintain a Register of current cabling licences and the conditions applying to those licences (clause 426(1)).

Clause 426(2) allows the Register to be kept in an electronic form such as a computer database.

Clause 426(3) allows a person to inspect the Register and take copies or extracts from it. For this the person is required to pay any charge determined by the ACA under s. 52 of the ACA Act. That provision restricts the ACA to recovery of its costs in relation to the provision of the service to which the charge applies so that a charge may not amount to taxation.

Clause 426(4) makes it clear that a printout from the Register, if it is kept in an electronic form, is to be taken to be an extract from the Register.

Clause 426(5) makes it clear that the ACA may provide extracts or copies of the Register in the form of a data processing device (paragraph (a)) such as a floppy disk or a CD; or by way of electronic transmission (paragraph (b)) such as email or on the Internet.

Division 10—Remedies for unauthorised connections to telecommunications networks etc.

Clause 427 – Civil action for unauthorised connections to telecommunications networks etc.

This clause provides for a manager of a network or facility to take civil action in the Federal Court against a person in relation to damage, loss or liabilities arising from certain unauthorised connections to the manager's network or facility (clause 427(1)). An application for such an action must be made within 3 years of the damage being caused, loss suffered, or liability incurred (clause 427(6)).

Such an action can be taken where the manager suffers a loss, damage, or incurs a liability (paragraph (b)), because the person who is the subject of the action is responsible for connecting customer equipment or cabling, or for maintaining a connection, in contravention of clause 395, that is, a connection of equipment or cabling that does not comply with an applicable standard made under clause 361 (paragraph (a)).

Clause 427(2) makes it clear that the range of remedies that may be granted by the Federal Court to a manager who takes action under clause 427(1) includes an injunction and either damages or an account of profits.

Clause 427(3) makes it clear that an interim injunction may be granted in relation to an action brought under clause 427(1).

Clause 427(4) sets out the circumstances in which the Federal Court may grant a restraining injunction in relation to an action brought under clause 427(1).

Clause 427(5) sets out the circumstances in which the Federal Court may grant a performance injunction in relation to an action brought under clause 427(1).

Clause 428 – Remedy for contravention of labelling requirements

This clause allows a manager of a network or facility to take action in the Federal Court against a person who has contravened clause 397 (relating to supply of unlabelled customer equipment or cabling), clause 398 (relating to applying labels to customer equipment or cabling before satisfying pre-labelling requirements), or clause 399 (relating to failure to retain records relating to labelling), in relation to equipment or cabling that is connected, or a connection that is maintained, by that person or another person to the manager's network or facility thereby causing the manager to suffer a loss or damage (clause 428(1)).

This will enable manufacturers, importers and other suppliers of equipment or cabling to be sued in relation to the connection of equipment or cabling, where there has been a breach of clause 397, 398 or 399, and the connection of that equipment or cabling to a network or facility causes damage.

An application for such an action must be made within 3 years of the damage being caused or loss suffered (clause 428(2)).

Clause 429 – Remedies for connection of unlabelled customer equipment or unlabelled customer cabling

This clause allows the manager of a network or facility to take action in the Federal Court (clause 429(2)) against a person in relation to the connection, or maintenance of a connection, of unlabelled equipment or cabling to the manager's network or facility, where the equipment or cabling was required under an instrument made under clause 391 to be labelled (clause 429(1)). This applies to equipment or cabling that is labelled as not complying with applicable standards made under clause 361 (subparagraph (1)(c)(ii)). The action may relate to any loss or damage suffered by the manager as a result of the connection (clause 429(2)). An application for such an action must be made within 3 years of the damage being caused, loss suffered, or liability incurred (clause 429(9)).

Clause 429(3) makes it clear that the range of remedies that may be granted by the Federal Court to a manager who takes action under clause 429(2) includes an injunction and either damages or an account of profits.

Clause 429(4) allows the manager to disconnect the equipment or cabling from the manager's network or facility. In such circumstances, the connection could constitute a threat to the health or safety of a person, or to the integrity of the network or facility.

Clause 429(5) makes it clear that any disconnection under clause 429(4) may be effected by the disconnection of some other customer equipment or cabling.

Clause 429(6) makes it clear that an interim injunction may be granted in relation to an action brought under clause 429(2).

Clause 429(7) sets out the circumstances in which the Federal Court may grant a restraining injunction in relation to an action brought under clause 429(2).

Clause 429(8) sets out the circumstances in which the Federal Court may grant a performance injunction in relation to an action brought under clause 429(2).

Clause 430 – Disconnection of dangerous customer equipment or customer cabling

This clause allows the manager of a network or facility to disconnect customer equipment or cabling connected to the manager's network or facility where the manager honestly believes that the connection would constitute a threat to the health or safety of persons operating (subparagraph (1)(b)(i)), working on (subparagraph (1)(b)(ii)), using services supplied by means of (subparagraph (1)(b)(iii)), or otherwise reasonably likely to be affected by the operation of (subparagraph (1)(b)(iv)), the network or facility.

Clause 430(2) allows the ACA to direct the manager to re-connect equipment or cabling disconnected by the manager under clause 430(1). The ACA may only give the direction if it is satisfied that the manager did not have reasonable grounds for the belief that was claimed to justify the disconnection. The manager must comply with a direction from the ACA under clause 430(2) (clause 430(3)).

Clause 430(4) allows a person to take action in the Federal Court for loss or damage against a manager who disconnects the person's equipment or cabling without reasonable

grounds. An application for such an action must be made within 3 years of the damage being caused or the loss suffered (clause 430(5)).

Clause 431 – Disconnection of customer equipment or customer cabling – protection of the integrity of networks and facilities

This clause allows the manager of a network or facility to disconnect customer equipment or cabling connected to the manager's network or facility where the manager honestly believes that the connection would constitute a threat to the integrity of the network or facility.

Clause 431(2) allows the ACA to direct the manager to re-connect equipment or cabling disconnected by the manager under clause 431(1). The ACA may only give the direction if it is satisfied that the manager did not have reasonable grounds for the belief that was claimed to justify the disconnection. The manager must comply with a direction from the ACA under clause 431(2) (clause 431(3)).

Clause 431(4) allows a person to take action in the Federal Court for loss or damage against a manager who disconnects the person's equipment or cabling without reasonable grounds. An application for such an action must be made within 3 years of the damage being caused or the loss suffered (clause 431(5)).

Clause 432 – Civil action for dangerous connections to telecommunications networks etc.

This clause provides for a manager of a network or facility to take civil action in the Federal Court against a person in relation to damage or loss arising from certain dangerous connections of customer equipment or cabling to the manager's network or facility (clause 432(1)). An application for such an action must be made within 3 years of the damage being caused, or loss suffered (clause 432(2)).

Such an action can be taken where the manager suffers a loss or damage (paragraph (c)), because the person who is the subject of the action is responsible for connecting customer equipment or cabling, or maintaining a connection, where that connection is a threat to the health or safety of persons operating (subparagraph (1)(b)(i)), working on (subparagraph (1)(b)(ii)), using services supplied by means of (subparagraph (1)(b)(iii)), or otherwise reasonably likely to be affected by the operation of (subparagraph (1)(b)(iv)), the network or facility.

Clause 433 – Other remedies not affected

This clause makes it clear that none of the provisions in Division 10 is to be taken to limit the remedies a person might seek or a court may grant in relation to the connection of customer equipment or cabling to networks or facilities.

Division 11—Prohibited customer equipment and prohibited customer cabling

Clause 434 – Declaration of prohibited customer equipment or prohibited customer cabling

This clause allows the ACA to make a written disallowable (clause 434(4)) declaration that operation or supply, or possession for the purpose of operation or supply, of specified customer equipment or cabling is prohibited (clause 434(1)). The declaration must set out the reasons for the declaration. It is anticipated that this power would only be exercised in the event of a serious threat to health or safety, or network integrity and may be applied to the importation of dangerous equipment.

The reasons for a declaration under clause 434(1) must relate to the protection of either the integrity of a network or facility (paragraph (2)(a)) or the health or safety of persons operating (subparagraph (2)(b)(i)), working on (subparagraph (2)(b)(ii)), using services supplied by means of (subparagraph (2)(b)(iii)), or otherwise reasonably likely to be affected by the operation of (subparagraph (2)(b)(iv)), the network or facility.

A declaration made under clause 434(1) must be published in one or more newspapers circulating in the capital city of each State, the ACT and the Northern Territory (clauses 434(3) and (5)).

Clause 434(5) defines terms used in this clause.

Clause 435 – Consultation on proposed declaration

This clause requires the ACA to engage in at least 28 days of public consultation on a proposed declaration of prohibited equipment or cabling (clause 435(1)). The ACA is required to take into consideration any representations made during the public consultation (clause 435(2)).

However, the ACA is not required to carry out the public consultation where the ACA is satisfied that the making of the proposed declaration is a matter of urgency (clause 435(3)).

Clause 436 – Operation of prohibited customer equipment or customer cabling

This clause makes it an offence to operate, supply, or possess for the purposes of operation or supply, prohibited customer equipment or cabling (clause 436(1)). The maximum penalty for the offence is, in the case of an individual, 2,000 penalty units, or in the case of a body corporate, 10,000 penalty units (clause 436(2)) (under s. 4AA of the *Crimes Act 1914*, a penalty unit is worth \$100 - see also s. 4B(3) of that Act).

Clause 436(3) defines terms used in this clause.

Division 12—Pre-commencement labels

Clause 437 – Pre-commencement labels

This clause is a transitional provision which deems labels required and applied to customer equipment under the 1991 Act to be labels applied under Part 21 of this Act.

Part 22—Numbering of carriage services and regulation of electronic addressing

This Part provides for the regulation of numbering and electronic addressing in relation to carriage services. Strictly, all numbering used for carriage services is a form, or subset, of electronic addressing, which is essentially a series of alphanumeric characters that enables a network to recognise the intended destination of a communication carried across the network, or to establish a connection between two or more points. The distinction drawn in this Part between numbering and electronic addressing is merely that numbering is any sequence of characters specified in the numbering plan made under clause 439, and electronic addressing is any other sequence, not specified in the numbering plan, used in relation to communication by a carriage service.

The ACA is required to prepare a numbering plan for carriage services in Australia. A numbering plan is important to providing any-to-any connectivity for end-users.

The plan may provide rules for the use of numbers. Most importantly, that plan may provide rules concerning the portability of numbers. Portability is the ability for a customer of a carriage service provider to change their carriage service provider but retain the same telephone number. The provision of number portability is important to opening up the market in the provision of carriage services to competition because the need to change telephone numbers is removed as a barrier to end-users changing carriage service providers. Where there is a dispute arising about the terms and conditions under which portability is to be provided to carriage service providers, and the parties cannot agree on an arbitrator, the ACCC may arbitrate the dispute. Any rules or arbitration on portability, concerning the terms on which portability is to be provided, must be determined in accordance with pricing principles determined by the Minister.

The ACA will be able to delegate to an industry body its powers and functions provided by the numbering plan, including its function of maintaining a register of allocated numbers. This reflects the general regulatory approach adopted in this Act of promoting the greatest practicable use of industry self-regulation (see clause 4).

Electronic addressing is expected to continue to be industry self-regulated, but will be underpinned by a reserve regulatory power. It is only if there is a serious failure of that industry self-regulation that the ACA is empowered to declare a manager of electronic addressing in relation to a particular form of electronic addressing. Even then, the manager is subject only to direction by the ACA or the ACCC. This is not intended as a means for the ACA or ACCC to manage any electronic addressing.

Division 1—Simplified outline

Clause 438 – Simplified outline

This clause provides an outline of Part 22 to assist the reader.

Division 2—Numbering of carriage services

Subdivision A—Numbering plan

This Subdivision provides for the regulation of numbers for use in connection with carriage services provided to the public in Australia. Numbers may include a letter or a symbol such as the hash key on most standard telephone handsets (clause 457).

Clause 439 – Numbering plan

This clause requires the ACA to make a numbering plan for numbering of carriage services in Australia, and the use of numbers for those services (clause 439(1)). The numbering plan (clause 439(2)) is a disallowable instrument (clause 439(11)).

The first level of reference to numbers in the plan is the ‘specification’ of numbers that are available for use with carriage services supplied to the public in Australia (clause 439(3)). At this level no number is allocated for use by any particular carriage service provider. At this level whole blocks or number ranges will be used. Indeed, at this level of reference, and at the other levels, numbers in most cases will be referred to merely in terms of prefixes with the final four to six and above digits or characters specified as ranges.

Clause 439(4) makes it clear that the numbering plan may specify different numbers to be used in relation to different carriage services.

Clause 439(5) specifies, for the purposes of clarification (see clause 439(8)), a number of matters that may be provided for in the numbering plan. Those matters are: allocation of numbers to carriage service providers (paragraph (a)); transfer of numbers between carriage service providers (paragraph (b)); surrender or withdrawal of numbers (paragraph (c)); portability of numbers (paragraph (d)); and the use of numbers (paragraph (e)).

The concept of ‘allocation’ is the second level of reference to numbers in relation to the numbering plan. ‘Allocation’ to a carriage service provider will enable that provider exclusively to use the number in relation to the provision of carriage services in Australia. A carriage service provider has the discretion to transfer any of its allocated numbers to another carriage service provider (paragraph (5)(b)) (which may not occur without some form of consideration), or to surrender any of its allocated numbers back to the ‘pool’ of numbers specified in the numbering plan so that the numbers will be available for allocation to another carriage service provider. A carriage service provider might consider surrendering numbers allocated to it because it does not use those numbers but

continues to be liable for the payment of numbering charges under the proposed *Telecommunications (Numbering Charges) Act 1996*. Rules in the numbering plan about the allocation of numbers may authorise ‘over the counter’ or administrative allocation, or allocation under an allocation system determined under clause 447 (clause 439(6)).

It is not expected that the power to withdraw numbers under clause 439(5)(c) would be exercised in relation to numbers that have been allocated by price-based allocation without the agreement of the parties who hold those numbers or as specified as part of the allocation process.

Portability rules may include the provision of a portability capability for specified numbers, how portability transfers numbers between carriage service providers and may relate to the maintenance of, and access to, databases that facilitate portability (clause 439(5)(d)).

Rules about the use of numbers for the provision of carriage services to the public in Australia are expected to include rules relating to the third level of reference to numbers in the numbering plan, that of numbers issued by carriage service providers to their customers for use in connection with the supply of carriage services (clause 439(5)(e)). These are the numbers that are normally understood as a person’s or business’ telephone number or fax number for example. It is at the discretion of a carriage service provider as to which of its allocated numbers it issues to any of its customers, subject to any relevant rules in the numbering plan.

Clause 439(7) allows the numbering plan to provide for the ACA to exercise discretions under the plan when administering the plan. The exercise of such discretions would be expected to be subject to merits review for which it is expected that the plan would provide.

Clause 439(9) makes it clear that a number may be ‘renumbered’, ordinarily by adding one or two digits, but still be considered to be the same number as was allocated under the plan. An example of this would be the recent adding of the nine digit to Sydney and Melbourne telephone numbers. The numbers before and after the change are considered to be the same for the purposes of considering any allocation made under the numbering plan - the changed numbers are considered to be allocated to the same carriage service providers as the ‘old’ numbers. This is relevant for the purposes of any rules under the numbering plan relating to allocations, but also is relevant for the purposes of numbering charges. The renumbering of allocated numbers will not affect the continuity of the allocations, so that no new ‘allocation’ charges are payable because of the renumbering. Similarly, the charge payable under the proposed *Telecommunications (Numbering Charges) Act 1996* in relation to a ‘renumbered’ allocated number applies to the number as renumbered, so that any anniversary applicable under that Act applies to the renumbered number. The issue of a number to a customer similarly is not to be affected by the renumbering of the number - this will be relevant for any agreement made between the carriage service provider and the customer relating to the use of the number by the customer.

Clause 439(10) makes it clear that the ACA must have regard to the obligations (under Part 8) of carriage service providers to provide continued access to untimed local calls,

and to any international standards relating to numbering, when making or varying the numbering plan.

Clause 440 – Numbering plan – supply to the public

This clause defines what is meant by the provision of carriage services supplied to the public. The definition is based on the same concepts used in the carrier licensing provisions in Part 3 relating to the provision of service beyond a person’s ‘immediate circle’.

Clause 441 – Numbering plan – allocation otherwise than in accordance with an allocation system

This clause requires the numbering plan to make special provision in relation to ‘over the counter’ or administrative allocations of numbers for use in connection with the supply of carriage services in Australia. This applies to any allocations not made under clause 447. The plan must require an applicant for such an allocation to pay any relevant ACA cost recovery charges, as well as any charges payable under the proposed *Telecommunications (Numbering Charges) Act 1996* (clause 441(1)).

Any charges paid under the proposed *Telecommunications (Numbering Charges) Act 1996* must be refunded if the applicant for the allocation is unsuccessful (clause 441(2)).

Clause 442 – Numbering plan – rules about portability of allocated numbers

This clause prevents the ACA from including in the numbering plan any rules about the portability of numbers unless it is directed to do so by the ACCC (clause 442(1)).

Clause 442(2) allows the ACCC to give a written direction to the ACA in relation to the power to specify number portability rules in the numbering plan. In giving such a direction to the ACA, the ACCC must have regard to whether portability is required for the promotion of the long-term interests of the end-users of carriage services or the services supplied by means of such carriage services (clause 442(4)). These long-term interests are to be determined in the same manner as they are determined under Part XIC of the TPA (clause 442(5)). These requirements reflect the importance of number portability in achieving competition objectives for telecommunications.

It is intended that a direction may, for example, relate to specified services or ranges of numbers.

The ACA is required to comply with an ACCC direction in making or varying a numbering plan (clause 442(3)).

Clause 443 – ACA to administer numbering plan

This clause makes it clear that the ACA is responsible for the general administration of the numbering plan. Where possible, it is expected that the ACA will delegate its powers that are conferred by the numbering plan to a body corporate (see clause 451).

Clause 444 – Consultation about numbering plan

This clause requires the ACA to engage in public consultation on a draft of a numbering plan, or a proposed variation of the plan. The clause sets out specific requirements for that consultation (clause 444(1)).

Clause 444(2) requires the ACA to have due regard to any comments made by interested persons during the consultation process.

Clause 444(3) makes it clear that the consultation requirements under clause 444(1) do not apply in relation to variations of a numbering plan where those variations are of a minor nature. A variation would not be considered to be minor if a substantial number of end-users would be affected by the change (for example, required to change number), or significant holders of numbers, such as carriers or carriage service providers, would be significantly affected by the change.

Clause 444(4) defines the term ‘State’ used in this clause.

Clause 445 – Consultation with ACCC

This clause requires the ACA to consult with the ACCC when making or varying a numbering plan (clause 445(1)).

Clause 445(2) also allows the numbering plan to require the ACA to consult with the ACCC before exercising any discretions conferred on the ACA by the numbering plan.

Clause 446 – Compliance with the numbering plan

This clause requires carriers and carriage service providers to comply with the numbering plan (clause 446(1)).

Clause 446(2) applies where the numbering plan requires a carrier or carriage service provider to provide number portability in relation to the customers of a carriage service provider (paragraphs (a) and (b)). In those circumstances the person subject to the requirement must provide the portability on such terms as it agrees with the provider in relation to whom portability is to be provided. If those parties cannot agree on terms, then the terms are to be settled by an arbitrator appointed by those parties. Where the parties cannot agree on an arbitrator, the ACCC is to arbitrate the matter. Any arbitration determination made under this clause must comply with any disallowable (clause 446(7)) pricing principles determined by the Minister under clause 446(6), and with the numbering plan (clause 446(6)). The pricing principles must relate to price-related terms and conditions relating to number portability required by the numbering plan.

Clause 446(3) enables regulations to be made relating to the conduct of an arbitration under this clause, whether it is an arbitration conducted by an arbitrator appointed by the parties referred to in clause 446(2), or by the ACCC. Such regulations may relate to the constitution of the ACCC for the purposes of the arbitration, such constitution to be made up of members nominated by the Chairperson of the ACCC (clause 446(4)).

Clause 446(5) makes it clear that clause 446(4) is not meant to limit what may be prescribed under the regulations made under clause 446(3).

Clause 446(8) defines the term ‘price-related terms and conditions’ used in this clause.

Subdivision B—Allocation system for numbers

This Subdivision provides for the determination of a number allocation system and the procedures to be followed in determining such a system.

Clause 447 – Allocation system for numbers

This clause allows the ACA to determine an allocation system for allocating specified numbers to carriage service providers (clause 447(1)).

Clause 447(2) requires the ACA to consult the ACCC before determining such an allocation system.

Clause 447(3) allows a determination system to apply generally or in relation to a specified area, and to require the payment of an application fee by an applicant under the allocation system.

Clause 447(4) allows a determination system to impose limits on the quantity of numbers that may be allocated to a person generally, a particular person, or a particular group of persons. This power has been included in recognition that the holding of allocated numbers can have an effect on competition by limiting another person’s ability to provide carriage services.

Clause 447(5) makes it clear that clauses 447(3) and (4) are not meant to limit what may be included in an allocation system determined made under clause 447(1).

Clause 447(6) requires an allocation system determined under clause 447(1) to make provision for successful applicants, and their successful bid amounts, to be determined by the results of a tender, public auction, or other process conducted under the system.

Clause 447(7) allows the ACA to make arrangements with a person for the collection of application fees under an allocation system.

Clause 448 – Consultation about an allocation system

This clause requires the ACA to engage in public consultation on a draft of an allocation system, or a proposed variation of the system. The clause sets out specific requirements for that consultation (clause 448(1)).

Clause 448(2) requires the ACA to have due regard to any comments made by interested persons during the consultation process.

Clause 448(3) makes it clear that the consultation requirements under clause 448(1) do not apply in relation to variations of an allocation system where those variations are of a

minor nature. A variation that significantly affected the bid preparations of potential applicants in an allocation system would not be considered to be of a minor nature.

Clause 448(4) defines the term 'State' used in this clause.

Subdivision C—Miscellaneous

Clause 449 – Register of allocated numbers

This clause requires the ACA, or a person with whom the ACA enters into an arrangement for the purposes of this clause (clause 449(1)), to establish and maintain a Register of numbers that have been allocated under the numbering plan to carriage service providers (paragraph (2)(a)), including the names of persons to whom numbers were allocated 'over the counter' or administratively. The Register must also include details of successful applicants under an allocation system determined under clause 447, and their winning bids (paragraph (2)(b)). The Register may be maintained in an electronic form (clause 449(4)).

Clause 449(3) allows the Register to include details on who holds a number at the relevant time for ascertaining to whom the charge liability for holding a number applies under the proposed *Telecommunications (Numbering Charges) Act 1996*. This will enable the Register to be updated to take account of the trading in allocated numbers by carriage service providers and any numbers that have been ported by the customer of a carriage service provider in accordance with any portability rules specified in the numbering plan.

Where the ACA is maintaining the Register, a person wishing to inspect and make extracts from the Register must pay to the ACA any cost recovery charges the ACA has determined under s. 52 of the proposed ACA Act (clause 449(5)).

Where another person is maintaining the Register by arrangement with the ACA under clause 449(1), the fee payable for inspection of and extracting from the Register is an amount prescribed in the regulations (clause 449(6)).

Clause 449(7) makes it clear that a printout from the Register, if it is kept in an electronic form, is to be taken to be an extract from the Register.

Clause 449(8) makes it clear that the ACA may provide extracts or copies of the Register in a form of a data processing device (paragraph (a)) such as a floppy disk or a CD; or by way of electronic transmission (paragraph (b)) such as email or on the Internet. This applies where a person has requested an extract or copy in an electronic form.

Clause 450 – Emergency service numbers

This clause provides that an emergency service number is one that is specified as such in the numbering plan made under clause 439 (clause 450(2)).

Clause 450(1) sets out the object of the clause.

Clause 450(3) makes it clear that different emergency service numbers may be specified in the numbering plan in relation to different areas. Different numbers may also be specified in relation to different types of services (clause 450(4)). It is intended that there should not be a proliferation of emergency service numbers - it is recognised that it is in the public interest to keep the number of emergency service numbers to the minimum necessary to ensure that a member of the public can contact an emergency service when required. However, there may be reasons why the current '000' emergency number cannot be used in all circumstances, for example, for reasons relating to technical feasibility, Australia's international obligations or requirements of particular end-users (such as persons with disabilities).

Clause 450(5) allows the numbering plan to set out rules about the use of emergency service numbers.

Clause 451 – Delegation

This clause allows the ACA to delegate to a body corporate all of the powers conferred on it by the numbering plan (clause 451(1)). This is to further facilitate industry self-regulation. It is expected that such a delegation would only occur in circumstances where the body concerned was independent of the interests of any particular carrier or carriage service provider so as to ensure the impartial exercise of any delegated power.

Clause 451(2) makes it clear the ACA may direct a delegate in relation to the exercise of a delegated power. The ACA must consult with the ACCC before giving a direction to a delegate under clause 451(2) (clause 451(3)).

Clause 452 – Collection of numbering charges

This clause provides for the collection of numbering charges imposed under the proposed *Telecommunications (Numbering Charges) Act 1996*.

Clause 452(1) defines terms used in this clause.

Clause 452(2) provides that an allocation charge for a number is due and payable when the number is allocated.

Clause 452(3) provides that the time an annual number charge is due and payable is the time ascertained by reference to a disallowable determination (clause 452(11)) made by the ACA.

Clause 452(4) allows the ACA to determine penalties for the late payment of number charges at the rate of up to a maximum of 20% per annum. Such a determination is disallowable (clause 452(11)).

Clause 452(6) makes it clear that a determination of late payment penalties may also provide for the ACA to grant remissions of the whole or a part of those penalties. Decisions about such remissions will be subject to merits review under Part 29 of the Act (see Schedule 4).

Clause 452(7) makes it clear that number charges are payable to the ACA on behalf of the Commonwealth. All number charges are to be paid into the Consolidated Revenue Fund (clause 452(9)).

Clause 452(8) provides that number charges, including late payment penalties incurred, are debts due the Commonwealth and may be recovered as such.

Clause 452(10) enables the ACA to withdraw a number from a person if an annual charge payable in relation to the number remains unpaid after the time it became due for payment. Decisions about withdrawing numbers will be subject to merits review under Part 29 of the Act (see Schedule 4).

Clause 453 – Collection of charges on behalf of the Commonwealth

This clause allows the ACA to make arrangements with a person for the collection of number charges on behalf of the Commonwealth.

Clause 454 – Cancellation of certain exemptions from charge

This clause ceases the exemptions from payment of a charge payable under the proposed *Telecommunications (Numbering Charges) Act 1996* (clause 454(1)) where the exemptions are provided by any Act or provision enacted before the commencement of this clause (clause 454(2)).

Clause 455 – Commonwealth not liable to charge

This clause makes it clear that the Commonwealth is not liable to pay a number charge payable under the proposed *Telecommunications (Numbering Charges) Act 1996* (clause 455(1)). This is because there are certain constitutional problems with the notion of the Commonwealth taxing itself.

However, clause 455(2) makes it clear that Parliament intends that certain Commonwealth agencies, including Departments of State and Parliament, should be treated as being notionally liable for the payment of number charges. This will enable the financial arrangements for these agencies to take account of the liabilities, equivalent to number charges, incurred by those agencies.

The Minister for Finance will be able to give any necessary directions to give effect to this notional liability, particularly with respect to the transfer of money in the Public Account or its equivalent (clause 455(3)). Agencies will be required to comply with such Ministerial directions (clause 455(4)).

Clause 455(5) makes it clear that the term ‘Commonwealth’ in this clause includes a Commonwealth authority that cannot be liable to taxation because of the operation of a Commonwealth law.

Clause 456 – Integrated public number database

It is intended that Telstra will be obliged under its licence conditions to provide and maintain an integrated public number database. However, a mechanism is included in this clause for the Minister to determine that another specified person or association is to provide and maintain an integrated public number database. This mechanism will be used if the industry can reach agreement for a body other than Telstra to perform the function.

This clause enables the Minister to determine, by disallowable instrument (clause 456(6)), that a person or association must provide and maintain an integrated public number database (clause 456(1)). The person must not be Telstra. Any such person or association is required to comply with such a determination (clause 456(2)).

The Minister will be able to direct any such person or association to do or refrain from doing something in relation to the provision or maintenance of the database (clause 456(3)), which may include a requirement to include specified information (clause 456(4)).

Part 4 of Schedule 2 to the Bill requires carriage service providers to provide such information as is reasonably necessary for the provision and maintenance of the integrated public number database to a person or association specified in a determination under clause 456(1).

Clause 456(5) makes it clear, however, that if Telstra is required by a licence condition to provide and maintain an integrated public number database, a determination under clause 456(1) does not have any effect.

Clause 456(7) defines the term ‘public number’ used in this clause.

Clause 457 – Letters and symbols taken to be numbers

This clause makes it clear that for the purposes of Division 2 of Part 22, letters and symbols may be treated as numbers. An example of a symbol being treated as such would be the hatch symbol on most telephone handsets.

Division 3—Regulation of electronic addressing

This Division provides an approach to the management of electronic addressing that is in the first instance industry self-regulated, but under-pinned by a reserve power for the ACA and the ACCC. It is only in very narrow circumstances that the regulators may become involved in regulating electronic addressing, and then only to a limited degree.

The distinction drawn between numbering (dealt with in Division 2) and electronic addressing is merely that numbering is any sequence of characters specified in the numbering plan made under clause 439, and electronic addressing is any other sequence, not specified in the numbering plan, used in relation to communication by a carriage service.

Clause 458 – Declared manager of electronic addressing

This clause provides for the ACA to declare, by gazettal notice, a person or association to be a manager of electronic addressing in relation to a specified kind of listed carriage service (clause 458(1)). A listed carriage service is defined in clause 16 and would include, for example, a service for the carriage of Internet communications.

However, the ACA is prevented from making such a declaration unless it is directed to do so by the ACCC under clause 458(4) (paragraph (3)(a)), or the ACA considers the person is not managing the relevant type of electronic addressing according to generally accepted principles (paragraph (3)(b)). The ACA is required to comply with any direction given by the ACCC under clause 458(4) (clause 458(5)).

Clause 458(6) makes it clear that the ACCC may not give a direction to the ACA under clause 458(4) unless it considers it necessary for the purposes of competition.

Clause 459 – ACA may give directions to declared manager of electronic addressing

This clause allows the ACA to give a disallowable direction (clause 459(8)) to a declared manager of electronic addressing in relation to the management of the type of electronic addressing in relation to which the manager was declared under clause 458 (clause 459(1)). The person must comply with the direction (clause 459(6)). Contravention of a direction is an offence, the maximum penalty for which is, in the case of an individual, 10 penalty units or, in the case of a body corporate, 50 penalty units (clause 459(7)) (under s. 4AA of the *Crimes Act 1914*, a penalty unit is worth \$100 - see also s. 4B(3) of that Act).

However, the ACA must not give such a direction unless it considers the type of electronic addressing to be of public importance (clause 459(2)). This reflects the strong preference for self-regulation adopted in this Division. When deciding if the addressing is of public importance, the ACA must have regard to whether the addressing is of significant social or economic importance to service providers and end-users of carriage services (clause 459(3)). Also, the ACA must consult with the ACCC before it gives such a direction (clause 459(5)).

Clause 459(4) makes it clear that clause 459(3) is not meant to limit what the ACA may have regard to in determining whether a type of electronic addressing is of public importance.

Clause 460 – ACCC may give directions to declared manager of electronic addressing

This clause allows the ACCC to give a disallowable direction (clause 460(8)) to a declared manager of electronic addressing in relation to the management of the type of electronic addressing in relation to which the manager was declared under clause 458 (clause 460(1)). The person must comply with the direction (clause 460(6)). Contravention of a direction is an offence, the maximum penalty for which is, in the case of an individual, 10 penalty units or, in the case of a body corporate, 50 penalty units (clause 460(7)) (under s. 4AA of the *Crimes Act 1914*, a penalty unit is worth \$100 - see also s. 4B(3) of that Act).

However, the ACCC must not give such a direction unless it considers the type of electronic addressing to be of public importance and compliance with the direction would have a bearing on competition (clause 460(2)) (relevant here is also whether non-compliance with the direction would have a bearing on competition). This reflects the strongly self-regulatory approach adopted in this Division. When deciding if the addressing is of public importance, the ACCC must have regard to whether the addressing is of significant social or economic importance to service providers and end-users of carriage services (clause 460(3)).

Also, the ACCC must consult with the ACA before it gives such a direction (clause 460(5)).

Clause 460(4) makes it clear that clause 460(3) is not meant to limit what the ACCC may have regard to in determining whether a type of electronic addressing is of public importance.

Clause 461 – ACCC’s directions to prevail over the ACA’s directions

This clause makes it clear that if there is any inconsistency between an ACCC direction under clause 460 and a direction of the ACA under clause 459, the ACCC direction is to prevail to the extent of the inconsistency.

Part 23—Standard agreements for the supply of carriage services

Part 23 is based on ss. 200 and 201 of the 1991 Act but has been extended to apply not just to carriers but to all carriage service providers supplying a standard telephone service, or a carriage service, ancillary goods or an ancillary service of a kind specified in the regulations. Part 23 enables carriers and carriage service providers to lodge standard terms and conditions with the ACA and to rely on them in the supply of the standard telephone service and other goods or services. This overcomes the need for a carrier or carriage service provider to enter into separate agreements with each of their customers.

Clause 462 – Simplified outline

Clause 462 provides a simplified outline of Part 23.

Clause 463 – Standard terms and conditions apply unless excluded

If a carriage service provider agrees with a residential or business customer (other than a carrier or a carriage service provider) on the terms and conditions on which a standard telephone service, or a prescribed carriage service or prescribed ancillary goods or a prescribed ancillary service, is supplied, the terms and conditions on which the goods or services are supplied will be the agreed terms and conditions. Otherwise, subject to any express law to the contrary, if terms and conditions are set out in a standard form of agreement formulated by the carriage service provider and that agreement is in force at the time of the supply of the goods or services, those terms and conditions will apply so far as they are applicable (clauses 463(1), (2) and (3)).

‘Terms and conditions’ is defined in clause 463(4) along similar lines to the definition of that term in ss. 5 and 200(2) of the 1991 Act. It now, however, also includes any commissions or similar benefits payable or given in relation to the supply of the goods or services.

Clause 464 – Standard form of agreement to be publicly available

If a carriage service provider has formulated a standard form of agreement for the purposes of clause 463, the provider must ensure that copies of the agreement are made available for inspection and purchase at each of its business offices (clauses 464(1) and (2)).

If so requested, the carriage service provider that has formulated a standard form of agreement will be required to provide a copy of the whole, or of a specified part, of the agreement to the person who has requested the copy on payment by that person of such reasonable charge (if any) as the provider requires (clauses 464(3) and (4)).

If the agreement is relevant to ascertaining the terms and conditions governing the commercial relationship between the provider and a customer, the provider will be required:

- if so requested by the customer, to give the customer a free copy of a summary of the material terms and conditions set out in the agreement; and
- before varying the agreement, to arrange for a copy of a summary of the effect of the proposed variation to be published in one or more newspapers circulating generally in the capital city of each State, the Northern Territory and the Australian Capital Territory (clauses 464(5), (6) and (7)).

Clause 465 – Standard form of agreement to be given to the ACA

A copy of the standard agreement and any variation to it will be required to be given to the ACA as soon as practicable after the agreement or variation comes into force (clause 465).

Clause 466 – Concurrent operation of State/Territory laws

Part 23 will not prevent or limit the operation of State and Territory legislation (such as legislation dealing with fair trading and unfair contracts) that is capable of operating concurrently with Part 23 (clause 466).

Clause 467 – Trade Practices Act not affected by this Part

Part 23 will have no effect to the extent (if any) to which it is inconsistent with the TPA.

Part 24—Carriers’ powers and immunities

Clause 468 – Schedule 3

Clause 468 gives effect to Schedule 3 to the Bill which sets out carriers’ powers and immunities. The provisions are discussed in detail in the notes on Schedule 3.

Part 2 of Schedule 3 gives transitional operation to certain provisions contained in Part 7 of the current 1991 Act dealing with carriers’ powers and immunities.

Part 25—Public inquiries

Part 25 is based on Part 14 of the 1991 Act. It enables the ACA and the ACCC to conduct public inquiries in connection with certain matters relating to telecommunications. Public inquiries may be conducted either on the initiative of the ACA or the ACCC or following a request from the Minister.

Public inquiries by the ACA into the management of the radiofrequency spectrum and other aspects of radiocommunication will continue to be dealt with under Part 5.2 of the Radcom Act. Part 5.2 will, however, be amended by Part 3 of Schedule 2 to the proposed *Telecommunications (Transitional Provisions and Consequential Amendments) Act 1996* to allow the ACA to hold hearings for the purposes of a public inquiry and to require it to prepare a report setting out its findings as a result of the inquiry.

Division 1—Simplified outline

Clause 469 – Simplified outline

Clause 469 gives a simplified outline of Part 25.

Division 2—Inquiries by the ACA

Clause 470 – When inquiry must be held

The Minister will be empowered to direct the ACA to hold a public inquiry about a specified matter concerning carriage services, content services or the telecommunications industry (clause 470(1)). To avoid any conflict with the BSA, the Minister will not, however, be able to give the ACA a direction to hold a public inquiry about a matter concerning the content of a content service (clause 470(2)).

If the Minister gives the ACA a direction to hold a public inquiry, the Minister will also be able to direct the ACA to consult with specified persons, bodies or agencies in connection with the conduct of the inquiry and to have regard to one or more specified matters in connection with the inquiry (clause 470(3)).

The ACA will be required to comply with any Ministerial direction under clause 470 (clause 470(4)).

Clause 471 – When inquiry may be held

If the ACA considers that it is appropriate and practicable to hold a public inquiry about a matter relating to the performance or exercise of any of the ACA's telecommunications functions or powers, it will be able to hold such an inquiry about the matter (clause 471). (The ACA's telecommunications functions are those set out in s. 6 of the proposed ACA Act and include regulating telecommunications in accordance with the Telecommunications Bill. The ACA's telecommunications powers are those conferred by the Act, new Part XIC of the TPA and s. 9 of the ACA Act which allows the ACA to do all things necessary and convenient in connection with the performance of its functions.)

Clause 472 – Informing the public about an inquiry

If the ACA holds a public inquiry, it will be required to publish details of the inquiry including its nature, duration and the public submission process (clause 472).

Clause 473 – Discussion paper

After deciding to hold a public inquiry about a matter, the ACA will be required to arrange for the preparation of a discussion paper identifying relevant issues and setting out appropriate background and discussion material (clause 473(1)).

The ACA will be required to make copies of the discussion paper available at each of its offices and, if it considers it appropriate, will be able to charge a reasonable price for supplying copies of the discussion paper (clause 473(2)).

The ACA will also be able to publish the discussion paper by other means, including in electronic form. If it does so, it will be able to charge for supplying the publication in accordance with a cost recovery determination under s. 52 of the proposed ACA Act (clause 473(3)).

Clause 474 – Written submissions and protection from civil actions

The ACA will be required to provide a reasonable opportunity for any member of the public to make a written submission to it about the matter to which a public inquiry relates (clause 474(1)).

Any member of the public who, in good faith, makes a statement or gives a document or information to the ACA in connection with a public inquiry (whether in connection with a written submission or at a public hearing) will not be liable to any defamation action or other civil proceedings in respect of loss, damage or injury thereby suffered by another person (clauses 474(2) and (3)).

Clause 475 – Hearings

The ACA will be able to hold hearings for the purposes of a public inquiry (clause 475(1)). The ACA may, for example, choose to hold hearings to receive public submissions about a matter to which the inquiry relates or to provide a forum for public discussion of issues relevant to that matter (clause 475(2)).

A hearing may be constituted by such ACA members as the ACA Chairman determines or by ACA delegates ie. ACA members, associate members, ACA staff members or persons whose services have been made available to the ACA by a Commonwealth Department, agency or company and to whom relevant ACA functions and powers have been delegated (clause 475(3)).

The Chairman is to preside at all hearings at which he or she is present (clause 475(4)). If the Chairman is not present at a hearing and an ACA delegate does not constitute the ACA for the purposes of the hearing, the member determined by the Chairman as the presiding member is to preside (clause 475(5)).

The ACA will be able to regulate the conduct of proceedings at a hearing in whatever way it considers appropriate (clause 475(6)).

Clause 476 – Hearing to be in public except in exceptional cases

As a general rule, hearings will be required to be held in public (clauses 476(1) and (2)). If the hearing is to be conducted in public, the ACA will be required to give reasonable public notice of the conduct of the hearing (clause 476(4)).

A hearing, or part of a hearing, will, however, be able to be conducted in private if the ACA is satisfied that confidential evidence may be given or other confidential matters may arise during the hearing, or that hearing a matter, or part of a matter, in public would not be conducive to the due administration of the Act (clause 476(3)).

Clause 477 – Confidential material not to be published

The ACA will be able to order that confidential evidence or other confidential material presented to a public hearing or confidential material in a written submission lodged with the ACA should not be published or should be disclosed only in restricted circumstances (clauses 477(1) and (2)).

The intentional or reckless failure, without reasonable excuse, to comply with such an order will be an offence punishable on conviction by a maximum fine, in the case of an individual, of 50 penalty units and, in the case of a body corporate, 250 penalty units (clauses 477(3) and (4)) (under s. 4AA of the *Crimes Act 1914* a penalty unit is worth \$100 - see also s. 4B(3) of that Act).

Clause 478 – Direction about private hearings

If a hearing, or part of a hearing, takes place in private, the ACA will be required to give directions as to those who may be present at the hearing or the part of the hearing and will be able to give directions restricting the disclosure of evidence or other material presented at the hearing or part of the hearing (clauses 478(1) and (2)).

The intentional or reckless failure, without reasonable excuse, to comply with a direction regarding who may be present at a hearing or part of a hearing will be an offence punishable on conviction by a maximum fine, in the case of an individual, of 10 penalty units and, in the case of a body corporate, 50 penalty units (clauses 478(3) and (4)(a)) (under s. 4AA of the *Crimes Act 1914* a penalty unit is worth \$100 - see also s. 4B(3) of that Act).

The intentional or reckless failure, without reasonable excuse, to comply with a direction restricting the disclosure of evidence or other material will be an offence punishable on conviction by a maximum fine, in the case of an individual, of 50 penalty units and, in the case of a body corporate, 250 penalty units (clauses 478(3) and (4)(b)) (under s. 4AA of the *Crimes Act 1914* a penalty unit is worth \$100 - see also s. 4B(3) of that Act).

Clause 479 – Reports on inquiries

The ACA will be required to prepare a report setting out its findings as a result of any public inquiry it holds (clause 479(1)).

If the Minister directed the holding of the inquiry, the ACA will be required to give a copy of its report to the Minister (clause 479(2)). If the inquiry is held on the ACA's own initiative, the ACA will be required to publish the report (clause 479(3)).

The ACA's report will not be required to include:

- confidential material;
- material the disclosure of which is likely to prejudice the fair trial of a person; or
- material that is subject to an ACA order or an ACA direction prohibiting or restricting its publication or disclosure (clause 479(4)).

Division 3—Inquiries by the ACCC

Clause 480 – When inquiry must be held

The Minister will be empowered to direct the ACCC to hold a public inquiry about a specified matter concerning carriage services, content services or the telecommunications industry (clause 480(1)). To avoid any conflict with the BSA, the Minister will not, however, be able to give the ACCC a direction to hold a public inquiry about a matter concerning the content of a content service (clause 480(2)).

If the Minister gives the ACCC a direction to hold a public inquiry, the Minister will also be able to direct the ACCC to consult with specified persons, bodies or agencies in connection with the conduct of the inquiry and to have regard to one or more specified matters in connection with the inquiry (clause 480(3)).

The ACCC will be required to comply with any Ministerial direction under clause 480 (clause 480(4)).

Clause 481 – When inquiry may be held

If the ACCC considers that it is appropriate and practicable to hold a public inquiry about a matter relating to the ACCC's telecommunications functions or powers, it will be able to hold such an inquiry about the matter (clause 481).

The ACCC's telecommunications functions and powers are defined in clause 7 of the Bill to mean the functions and powers conferred on the ACCC by or under:

- the Act (such as Part 20 which provides that the ACCC has the general administration of Rules of Conduct about dealings with international telecommunications operators);
- the *Telstra Corporation Act 1991* (under Part 6 of this Act, as proposed to be amended, the ACCC will have responsibility for administering the price cap rules applying to Telstra's charges);
- Part XIB of the TPA, which sets up a special regime for regulating anti-competitive conduct in the telecommunications industry;
- Part XIC of the TPA, which sets out a telecommunications access regime; and
- any other provision of the TPA, in so far as that provision applies to a matter connected with telecommunications – for this purpose 'telecommunications' means the carriage of communications by means of guided and/or unguided electromagnetic energy.

Clause 482 – Informing the public about an inquiry

If the ACCC holds a public inquiry, it will be required to publish details of the inquiry including its nature, duration and the public submission process (clause 482).

Clause 483 – Discussion paper

After deciding to hold a public inquiry about a matter, the ACCC will be required to arrange for the preparation of a discussion paper identifying relevant issues and setting out appropriate background and discussion material (clause 483(1)).

The ACCC will be required to make copies of the discussion paper available at each of its offices and, if it considers it appropriate, will be able to charge a reasonable price for supplying copies of the discussion paper (clause 483(2)).

The ACCC will also be able to publish the discussion paper by other means, including in electronic form. If it does so, it will be able to charge a fee for supplying the publication (clause 483(3)).

Clause 484 – Written submissions and protection from civil actions

The ACCC will be required to provide a reasonable opportunity for any member of the public to make a written submission to it about the matter to which a public inquiry relates (clause 484(1)).

Any member of the public who, in good faith, makes a statement or gives a document or information to the ACCC in connection with a public inquiry (whether in connection with a written submission or at a public hearing) will not be liable to any defamation action or other civil proceedings in respect of loss, damage or injury thereby suffered by another person (clauses 484(2) and (3)).

Clause 485 – Hearings

The ACCC will be able to hold hearings for the purposes of a public inquiry (clause 485(1)). The ACCC may, for example, choose to hold hearings to receive public submissions about a matter to which the inquiry relates or to provide a forum for public discussion of issues relevant to that matter (clause 485(2)).

A hearing may be constituted by such ACCC members as the ACCC Chairperson determines (clause 485(3)). The Chairperson is to preside at all hearings at which he or she is present (clause 485(4)). If the Chairperson is not present at a hearing, the member determined by the Chairperson as the presiding member is to preside (clause 485(5)).

The ACCC will be able to regulate the conduct of proceedings at a hearing in whatever way it considers appropriate (clause 485(6)).

Clause 486 – Hearing to be in public except in exceptional cases

As a general rule, hearings will be required to be held in public (clauses 486(1) and (2)). If the hearing is to be conducted in public, the ACCC will be required to give reasonable public notice of the conduct of the hearing (clause 486(4)).

A hearing, or part of a hearing, will, however, be able to be conducted in private if the ACCC is satisfied that confidential evidence may be given or other confidential matters may arise during the hearing, or that hearing a matter, or part of a matter, in public would not be conducive to the due administration of the Act (clause 486(3)).

Clause 487 – Confidential material not to be published

The ACCC will be able to order that confidential evidence or other confidential material presented to a public hearing or confidential material in a written submission lodged with the ACCC should not be published or should be disclosed only in restricted circumstances (clauses 487(1) and (2)).

The intentional or reckless failure, without reasonable excuse, to comply with such an order will be an offence punishable on conviction by a maximum fine, in the case of an individual, of 50 penalty units or, in the case of a body corporate, 250 penalty units (clauses 487(3) and (4)) (under s. 4AA of the *Crimes Act 1914* a penalty unit is worth \$100 - see also s. 4B(3) of that Act).

Clause 488 – Direction about private hearings

If a hearing, or part of a hearing, takes place in private, the ACCC will be required to give directions as to those who may be present at the hearing or the part of the hearing and will be able to give directions restricting the disclosure of evidence or other material presented at the hearing or part of the hearing (clauses 488(1) and (2)).

The intentional or reckless failure, without reasonable excuse, to comply with a direction regarding who may be present at a hearing or part of a hearing will be an offence punishable on conviction by a maximum fine, in the case of an individual, of 10 penalty units or, in the case of a body corporate, 50 penalty units (clauses 488(3) and (4)(a)) (under s. 4AA of the *Crimes Act 1914* a penalty unit is worth \$100 - see also s. 4B(3) of that Act).

The intentional or reckless failure, without reasonable excuse, to comply with a direction restricting the disclosure of evidence or other material will be an offence punishable on conviction by a maximum fine, in the case of an individual, of 50 penalty units or, in the case of a body corporate, 250 penalty units (clauses 488(3) and (4)(b)) (under s. 4AA of the *Crimes Act 1914* a penalty unit is worth \$100 - see also s. 4B(3) of that Act).

Clause 489 – Reports on inquiries

The ACCC will be required to prepare a report setting out its findings as a result of any public inquiry it holds (clause 489(1)).

If the Minister directed the holding of the inquiry, the ACCC will be required to give a copy of its report to the Minister (clause 489(2)). If the inquiry is held on the ACCC's own initiative, the ACCC will be required to publish the report (clause 489(3)).

The ACCC's report will not be required to include:

- confidential material;
- material the disclosure of which is likely to prejudice the fair trial of a person; or
- material that is subject to an ACCC order or an ACCC direction prohibiting or restricting its publication or disclosure (clause 489(4)).

Clause 490 – ACCC's other powers not limited

Nothing in Division 3 of Part 25 will limit other powers conferred on the ACCC by the TPA (such as s. 155 of that Act dealing with the ACCC's powers to obtain information, documents and evidence) (clause 490).

Part 26—Investigations

Part 26 is based on Part 15 of the 1991 Act, which deals with AUSTEL's investigatory powers, with some modifications to take account of the proposed new regulatory arrangements.

Under Part 26, the ACA will be able to investigate certain matters relating to telecommunications, such as suspected contraventions of the Act, on its own initiative or in response to written complaints made to the ACA. The ACA will be required to investigate any matter concerning carriage services or the telecommunications industry if requested to do so by the Minister.

Clause 491 – Simplified outline

Clause 491 provides a simplified outline of Part 26.

Clause 492 – Matters to which this Part applies

Clause 492 specifies those matters that the ACA may investigate of its own volition and must investigate if so requested by the Minister.

These matters are as follows:

- a contravention of the Act;
- a contravention of an industry code registered under proposed Part 6 of the Act (no specific reference is required to a contravention of an industry standard under Part 6 as such a contravention is a contravention of the Act – see clause 125);
- a failure by a carriage service provider to comply with an obligation, or discharge a liability, under proposed Part 9 of the Act dealing with performance standards to be complied with by carriage service providers in relation to customer service;
- a matter relating to the supply of, or a refusal or failure to supply, a carriage service;
- a matter relating to the connection of, or a refusal or failure to connect, customer equipment;
- a matter relating to the performance of the ACA’s telecommunications functions, or the exercise of the ACA’s telecommunications powers – the ACA’s telecommunications functions and powers will include functions and powers conferred on the ACA by or under the Act and proposed Part XIC of the TPA to be inserted by the proposed *Trade Practices Amendment (Telecommunications) Act 1996*, dealing with the access regime.

To avoid any conflict with the operation of the BSA, the ACA will not, however, be able to investigate a matter to the extent to which it relates to the content of a content service.

Clause 493 – Complaints to the ACA

A person will be able to complain in writing to the ACA about a matter (clauses 493(1) and (2)). The ACA will only be able to investigate complaints about those matters set out in clause 492.

A complaint will be required to specify, as the respondent in respect of the complaint, the person against whom the complaint is made (clause 493(3)).

If it appears to the ACA that a person wishes to make a complaint and that person needs assistance to formulate the complaint or to put it in writing, the ACA will be required to take reasonable steps to provide appropriate assistance to that person (cf. s. 69(2) of the DDA).

Clause 494 – Investigations by the ACA

The ACA will be empowered to investigate a matter of a kind referred to in clause 492 if:

- in the case of a contravention of the Act, the ACA has reason to suspect that a person may have contravened the Act – the High Court has held that the term ‘suspect’ essentially means to conjecture or surmise, where proof is lacking and ‘reasonable suspicion’ is something that creates a mere idle wondering whether it exists or not: *George v Rockett* (1990) 64 ALJR 384 at 388–9;
- a complaint is made to the ACA under clause 493; or
- the ACA thinks that it is desirable to investigate the matter (clause 494(1)).

The ACA will not be able to conduct such an investigation if it thinks that the subject matter of the investigation would not be a matter relevant to the performance of any of its functions (clause 494(2)).

If the Minister requests the ACA to investigate a matter of a kind referred to in clause 492 or any other matter concerning carriage services or the telecommunications industry, the ACA will be required to investigate that matter (clause 494(3)).

Clause 495 – Preliminary inquiries

If a person has made a complaint to the ACA under clause 493, the ACA will be able to make inquiries of the respondent identified by the complainant for the purposes of determining whether the ACA has power to investigate the matter to which the complaint relates or whether the ACA should, in its discretion, investigate the matter (clause 495).

Clause 496 – Conduct of investigations

Before it begins to investigate a matter to which a complaint relates, the ACA will be required to inform the respondent identified by the complainant that the matter is to be investigated (clause 496(1)).

The ACA will be able to conduct an investigation under Part 26 in such manner as the ACA thinks fit (clause 496(2)).

For the purposes of an investigation, the ACA will be empowered to obtain information from such persons, and to make such inquiries, as it thinks fit (clause 496(3)).

As a general rule, the ACA will not be required to give a complainant or a respondent an opportunity to appear before the ACA in connection with an investigation. The exception to this rule is if the ACA, as a result of an investigation, makes a finding that is adverse to a complainant or a respondent. In such a case, the ACA will be required to give the complainant or respondent an opportunity to make submissions about the matter to which the investigation relates (clauses 496(4) and (5)).

Clause 497 – Complainant and certain other persons to be informed of various matters

If the ACA decides not to investigate a matter to which a complaint relates, or not to investigate it further, it will be required, as soon as practicable and in such manner as it thinks fit, to inform the complainant and the respondent of its decision and of the reasons for it (clause 497).

Clause 498 – Reference of matters to Ombudsman or other responsible person

The ACA may decide not to investigate a matter to which a complaint relates, or not to investigate it further if, either before or after the ACA starts its investigation, it forms the opinion that:

- the complainant has made, or could have made, a complaint relating to that matter to the Commonwealth Ombudsman under the *Ombudsman Act 1976*, the TIO or another person or body responsible for handling complaints under an industry code registered under Part 6 of the Act;
- the matter could be more conveniently or effectively dealt with by the Commonwealth Ombudsman, the TIO or another person or body responsible for handling complaints under an industry code registered under Part 6 (clause 498(1)).

If the ACA makes a decision under clause 498(1):

- the ACA will be required to transfer the complaint to the Commonwealth Ombudsman, the TIO or another person or body responsible for handling complaints under an industry code registered under Part 6, as the case requires and to notify the complainant of the transfer;

- the ACA will be required to give the Commonwealth Ombudsman any information or documents relating to the complaint that are in the ACA's possession or under its control in a case where the ACA has formed the opinion that the complainant has, or could have, made a complaint relating to the matter to the Ombudsman;
- the ACA will be empowered to give the TIO such relevant information or documents relating to the complaint that are in the ACA's possession or under its control in a case where the ACA has formed the opinion that the complainant has, or could have, made a complaint relating to the matter to the TIO;
- the ACA will be empowered to give another person or body responsible for handling complaints under an industry code registered under Part 6 such relevant information or documents relating to the complaint that are in the ACA's possession or under its control or copies of , or extracts from, such information or documents (clauses 498(2) and (3)).

A complaint transferred under clause 498(2) to the Commonwealth Ombudsman will be taken to be a complaint made to the Commonwealth Ombudsman under the *Ombudsman Act 1976* (clause 498(4)).

Clause 499 – Reference of matters to the ACCC

The ACA will also be able to decide not to investigate a matter to which a complaint relates or not to investigate it further if, before or after commencing an investigation of the matter, it forms the opinion that the matter could be more conveniently or effectively dealt with by the ACCC (clause 499(1)).

If the ACA makes a decision under clause 499(2), it will be required to transfer the complaint to the ACCC, notify the complainant of the transfer and give the ACCC any information or documents relating to the complaint that are in the ACA's possession or under its control (clause 499(2)).

The ACCC will have a discretion about whether it holds an investigation into the matter. If the ACCC decides to investigate the matter, it will be required to report to the ACA on the conduct of the investigation, any findings it has made as a result of the investigation, the evidence and other material on which those findings were based and such other matters relating to, or arising out of, the investigation as the ACCC thinks fit (clause 499(3)).

If the ACCC decides not to investigate the matter, it will be required to notify the ACA of its decision and the reasons for it (clause 499(4)).

Clause 500 – Reports on investigations

After concluding an investigation which the ACA has itself initiated, the ACA will have a discretion about whether or not it prepares a report of its investigation and gives it to the Minister (clause 500(1)).

After concluding an investigation which the Minister has requested the ACA to conduct, the ACA will be required to prepare a report of its investigation and give it to the Minister (clause 500(2)).

A report of an investigation prepared under clause 500 will be required to contain details of the conduct of the investigation concerned, any findings that the ACA has made as a result of the investigation, the evidence and other material on which those findings were based and such other matters relating to, or arising out of, the investigation as the ACA thinks fit or as the Minister directs (clause 500(3)).

If, as a result of an investigation, the ACA discovers that a carrier licence condition or a service provider rule has been contravened, the ACA will be able to issue a remedial direction or a formal warning under clause 68, 69, 101 or 102 or seek an injunction under Part 30 or the recovery of a pecuniary penalty under Part 31 of the Bill.

Clause 501 – Publication of reports

If the ACA prepares a report about an investigation which the ACA has itself initiated, the ACA will have a discretion about whether or not it publishes the report (clauses 501(1) and (2)).

If the ACA prepares a report about an investigation which the Minister has requested the ACA to conduct, the ACA will be required to publish the report if the Minister directs it to do so. Otherwise, the ACA will not be permitted to publish the report (clauses 501(1) and (3)).

The ACA will not be required to publish, or to disclose to a person to whose affairs it relates, a report about an investigation, or part of such a report, if the publication or disclosure would disclose confidential material or be likely to prejudice a person's fair trial (clause 501(4)).

Clause 502 – Person adversely affected by report to be given opportunity to comment

If the publication of a matter in a report or part of a report about an investigation would, or would be likely to, adversely affect the interests of a person, the ACA will not be permitted to publish the report or the part of the report, as the case may be, until the ACA has given the person a reasonable period of up to 30 days to make representations in relation to the matter (clause 502).

Clause 503 – Protection from civil actions

Civil proceedings (including proceedings for defamation) will not be able to be brought in respect of loss, damage or injury suffered because of any of the following acts done in good faith:

- the making of a complaint to the ACA under clause 493;
- the making of a statement to, or the giving of a document or information to, the ACA in connection with an investigation by the ACA under clause 494;
- the making of a complaint to the TIO;
- except in the case of a carrier or a service provider who is participating in the TIO scheme, the making of a statement to, or the giving of a document or information to, the TIO in connection with the TIO's consideration of a complaint (clause 503).

Part 27—The ACA's information gathering powers

Part 27 is based on Part 4.9 of the *Employment Services Act 1994*, a more up-to-date model for the ACA's information-gathering powers than AUSTEL's information gathering powers under ss. 400 and 401 of the 1991 Act.

Part 27 will 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.

Division 1—Simplified outline

Clause 504 – Simplified outline

Clause 504 provides a simplified outline of Part 27.

Division 2—Information-gathering powers

Clause 505 – The ACA may obtain information and documents from carriers and service providers

If the ACA has reason to believe that a carrier or a service provider has information or a document that is relevant to the performance or exercise of any of the ACA's telecommunications functions or powers or is capable of giving evidence which the ACA has reason to believe is relevant to the performance or exercise of those functions or powers, it will be able to require the carrier or provider:

- to give any such information to the ACA within a specified period and in a specified manner and form;
- to produce any such documents, or copies of such documents, to the ACA within a specified period and in a specified manner;
- if the carrier or service provider is an individual, to appear before the ACA at a specified time and place and to give any such evidence and produce any such documents;
- if the carrier or service provider is a body corporate or a public body (such as a statutory authority or Government Business Enterprise), to arrange for a competent officer of the body to appear before the ACA at a specified time and place to give any such evidence and to produce any such documents; or
- if the carrier or service provider is a partnership, to arrange for a partner or employee of the partnership to appear before the ACA at a specified time and place and give any such evidence and produce any such documents (clauses 505(1) and (2)).

The requirement in clause 505(1) for the ACA to have ‘reason to believe’ will require ‘an inclination of the mind towards assenting to, rather than rejecting, a proposition’: *George v Rockett* (1990) 64 ALJR 384 at 388–9.

The ACA’s telecommunications functions and powers will include those conferred on the ACA by or under the Act and proposed Part XIC of the TPA, dealing with the access regime (see definitions of ‘ACA’s telecommunications functions’ and ‘ACA’s telecommunications powers’ in clause 7 of the Bill).

A carrier or service provider will be required to comply with a requirement of the ACA under clause 505(2) to produce information or documents or to give evidence (clause 505(3)). As a result of the operation of clauses 61 and 97 and Part 1 of Schedules 1 and 2 to the Bill, failure to comply with such a requirement will be a breach of a carrier licence condition or service provider rule and the ACA will be able to take appropriate remedial action under clause 68, 69, 101 or 102 and under Parts 30 and 31 of the Bill.

An ACA notice given by the ACA to a carrier or service provider under clause 505 will be required to set out the effect of provisions:

- requiring the carrier or service provider to comply with a requirement of the ACA under clause 505(2) (clause 505(3));
- prohibiting a carrier from contravening a condition of the carrier licence held by the carrier or a service provider from contravening a service provider rule that applies to the provider, as the case may be (clauses 67 and 100);
- providing for the recovery of pecuniary penalties for contravention of civil penalty provisions including clauses 67 and 100 (clause 554);

- providing that it is a carrier licence condition or a service provider rule that a carrier or service provider must comply with the Act (Part 1 of Schedules 1 and 2);
- providing penalties for the giving of false or misleading information or evidence or for providing false or misleading documents to the ACA under clause 505 (clauses 509 and 510).

(clauses 505(4) and (5)).

Clause 506 – The ACA may obtain information and documents from other persons

If the ACA has reason to believe that a person other than a carrier or a service provider has information or a document that is relevant to the performance or exercise of any of the ACA's telecommunications functions or powers or is capable of giving evidence which the ACA has reason to believe is relevant to the performance or exercise of those functions or powers, it will be able to require the person:

- to give any such information to the ACA within a specified period and in a specified manner and form;
- to produce any such documents, or copies of such documents, to the ACA within a specified period and in a specified manner;
- if the person is an individual, to appear before the ACA at a specified time and place and to give any such evidence and produce any such documents;
- if the person is a body corporate or a public body, to arrange for a competent officer of the body to appear before the ACA at a specified time and place to give any such evidence and to produce any such documents; or
- if the person is a partnership, to arrange for a partner or employee of the partnership to appear before the ACA at a specified time and place and give any such evidence and produce any such documents (clauses 506(1) and (2)).

A person who intentionally or recklessly fails to comply with a requirement of the ACA under clause 506(2) to produce information or documents or to give evidence will be guilty of an offence punishable on conviction by a fine not exceeding 20 penalty units (clauses 506(3) and (4)). As a result of the operation of s. 4B of the *Crimes Act 1914*, where a body corporate is convicted of an offence under clause 506(4), the court will be able to impose a fine of up to 100 penalty units.

An ACA notice given by the ACA to a person under clause 506 will be required to set out the effect of provisions:

- providing for a penalty for the intentional or reckless contravention of a requirement of the ACA under clause 506(2) (clause 506(4)); and
- providing penalties for the giving of false or misleading information or evidence or for providing false or misleading documents to the ACA under clause 506 (clauses 509 and 510).

(clauses 506(4) and (5)).

Clause 507 – Copying documents – reasonable compensation

A carrier, service provider or other person who is required to make copies of documents and produce them to the ACA under clause 505(2)(c) or 506(2)(c) is entitled to be paid by the ACA reasonable compensation for complying with the requirement (clause 507).

Clause 508 – Self-incrimination

An individual will not be excused from giving information or evidence or producing a document under Division 2 of Part 27 on the ground that the information or evidence or the production of the document might tend to incriminate the individual or expose him or her to a penalty (clause 508(1)).

However, as a general rule the information, evidence or document and anything obtained as a direct or indirect consequence of giving the information or evidence or producing the document will not be admissible in evidence in criminal proceedings, or in proceedings for recovery of a pecuniary penalty for the failure to comply with an ACA notice under clause 505 or 506. The exceptions to this rule are:

- criminal proceedings under, or arising out of, clause 506(4), for failure by a person other than a carrier or service provider to comply with an ACA requirement under clause 506(2) to provide information or documents or to give evidence to the ACA;
- criminal proceedings under, or arising out of, clause 509 or 510 for the giving of false or misleading information or evidence or the provision of false or misleading documents to the ACA; and
- proceedings under clause 554 for recovery of a pecuniary penalty in relation to a contravention by a carrier or service provider of the requirement under clause 505 to provide information or documents or to give evidence to the ACA

(clause 508(2)).

Clause 509 – Giving false or misleading information or evidence

It will be an offence for a person, in response to an ACA notice under clause 505 or 506, intentionally or recklessly to provide information or documents or to give evidence to the ACA that is false or misleading. The maximum penalty for committing this offence will be imprisonment for 12 months (clause 509).

As a result of the operation of s. 4B of the *Crimes Act 1914*:

- where an individual is convicted of an offence under clause 509, the court will be able to impose, instead of, or in addition to, a penalty of imprisonment, a pecuniary penalty of up to 60 penalty units; and

- where a body corporate is convicted of an offence under clause 509, the court will be able to impose a pecuniary penalty of up to 300 penalty units.

Clause 510 – Provision of false or misleading documents

It will be an offence for a person, in response to an ACA notice under clause 505 or 506, knowingly to produce a document to the ACA that is false or materially misleading. The maximum penalty for committing this offence will be imprisonment for 12 months (clause 510(1)).

The offence in clause 510(1) will not apply to a person who produces a document that the person knows is false or materially misleading if the document is accompanied by a written statement signed by the person or, in the case of a body corporate, by a competent officer of the body corporate:

- stating that the document is, to the person's knowledge, false or materially misleading; and
- setting out, or referring to, the material particular in which the document is, to the person's knowledge, false or misleading (clause 510(2)).

As a result of the operation of s. 4B of the *Crimes Act 1914*:

- where an individual is convicted of an offence under clause 510, the court will be able to impose, instead of, or in addition to, a penalty of imprisonment, a pecuniary penalty of up to 60 penalty units; and
- where a body corporate is convicted of an offence under clause 510, the court will be able to impose a pecuniary penalty of up to 300 penalty units.

Clause 511 – Copies of documents

The ACA will be empowered to inspect a document or a copy produced under Division 2 of Part 27 and make and retain copies of, or take and retain extracts from, such a document (clause 511(1)).

The ACA will also be able to retain possession of a copy of a document produced to it in accordance with a requirement under clause 505(2)(c) or 506(2)(c) (clause 511(2)).

Clause 512 – ACA may retain documents

The ACA will be able to retain possession of a document produced under Division 2 of Part 27 for as long as is necessary (clause 512(1)).

A person who is otherwise entitled to possession of the document is entitled to be supplied, as soon as practicable, with a copy certified by the ACA to be a true copy (clause 512(2)). The certified copy will be required to be received in all courts and tribunals as evidence as if it were the original (clause 512(3)). Until the certified copy is supplied, the ACA will be required, at such times and places as the ACA thinks appropriate, to permit the person otherwise entitled to possession of the document, or a

person authorised by that person, to inspect and make copies of, or take extracts from, the document (clause 512(4)).

Division 3—Record-keeping rules

Clause 513 – ACA may make record-keeping rules

The ACA will be empowered to make rules, known as record-keeping rules, requiring specified carriers and carriage service providers or specified classes of carriers and carriage service providers, to keep and retain records (clause 513(1)).

The ACA’s record-keeping rules will be able to specify the manner and form in which the records are to be kept (clause 513(2)).

The ACA will be required to give a copy of the record-keeping rules to the carrier or service provider to whom the rules apply (clause 513(3)).

The ACA will not be permitted to make record-keeping rules requiring the keeping or retention of records unless the records contain, or will contain, information that is relevant to the performance by the ACA of a function, or the exercise by the ACA of a power, conferred on the ACA by or under Part 5 (dealing with the monitoring of carrier and carriage service provider performance) or Part 7 (dealing with universal service) (clause 513(4)).

Under clause 505, the ACA will be able to require a carrier or carriage service provider to produce a document, including a record kept in accordance with the record-keeping rules.

Clause 514 – Compliance with record-keeping rules

A carrier or carriage service provider will be required to comply with any record-keeping rules that are applicable to the carrier or provider (clause 514). As a result of the operation of clauses 61 and 97 and Part 1 of Schedule 1 and 2 of the Bill, failure to comply with such a requirement will be a breach of a carrier licence condition or service provider rule and the ACA will be able to take appropriate remedial action under clause 68, 69, 101 or 102 and under Parts 30 and 31 of the Bill.

Clause 515 – Incorrect records

It will be an offence for a person, in purported compliance with a requirement imposed by the record-keeping rules, intentionally or recklessly to make a record of any matter or thing in such a way that it does not correctly record the matter or thing (clause 515(1)).

The maximum penalty for committing this offence, in the case of an individual, will be 100 penalty units (clause 515(2)). As a result of the operation of s. 4B of the *Crimes Act 1914*, where a body corporate is convicted of an offence under clause 515(1), the court will be able to impose a fine of up to 500 penalty units.

Part 28—Enforcement

This Part provides for the enforcement of the Act and sets out the powers of inspectors under the Act in relation to offences against Part 21 of the Act dealing with technical regulation. The provisions in this Part are based on a combination of the provisions in Part 5.5 of the Radcom Act and those in Division 3 of Part 16 of the 1991 Act. Wherever one of those Acts provides a power or function not provided by the other Act, the function or power is included in this Part. This will ensure that inspectors have the full range of powers to address situations where action may need to be taken in relation to offences against both the new Act and the Radiocommunications Act as amended as part of the post-97 regulatory arrangements.

Searches relating to offences against Part 21 of the new Act will be able to be conducted under the authority of a search warrant, with the consent of the owner or occupier concerned or in an emergency. Searches to monitor compliance with Part 21 will be able to be conducted with the consent of the occupier concerned.

An inspector will be able to require the production of a carrier licence and the giving of certain information, and the production of certain documents, relevant to compliance with Part 21.

A court will be able to order forfeiture of goods used or otherwise involved in the commission of an offence against the Act.

Division 1—Simplified outline**Clause 516 – Simplified outline**

This clause provides an outline of Part 28 to assist the reader.

Division 2—Inspectors and identity cards

Clause 517 – Inspectors

This clause provides for the appointment of inspectors by the ACA (clause 517(1)). Such appointments may be made in relation to the whole Act (subparagraph (1)(a)(i) or (1)(b)(i)); a particular provision of the Act (subparagraph (1)(a)(ii) or (1)(b)(ii)); a particular officer (paragraph (1)(a)); or a class of officers (paragraph (1)(b)). Members, other than special members, of the Australian Federal Police, or of a Territory police force, are to be inspectors by force of paragraph (1)(c) without the need for an ACA instrument of appointment.

Clause 517(2) defines terms used in this clause.

Clause 518 – Identity cards

This clause provides for the ACA to be able to issue identity cards to appointed inspectors (clause 518(1)).

Should a person cease to be an inspector, he or she must return the issued identity card to the ACA as soon as practicable (clause 518(2)). Failure to return the card is an offence the maximum penalty for which is 5 penalty units (clause 518(3)) (under s. 4AA of the *Crimes Act 1914*, a penalty unit is worth \$100).

Division 3—Search warrants relating to offences against Part 21

This Division provides for application for, and issue of, search warrants in relation to offences against Part 21 of the Act.

Clause 519 – Magistrate may issue warrant

This clause enables a magistrate to issue a warrant that authorises an inspector (named in the warrant) to enter land, premises, a vessel, aircraft or vehicle; search those places; break open and search things; and examine and seize anything that the inspector has reasonable grounds for suspecting is connected with an offence against Part 21 (clause 519(1)) (see also clauses 526(2)(b), (c) and (d)). The magistrate may only issue a warrant in response to the laying of an information alleging that an inspector suspects on reasonable grounds that there may be, in the places covered by the warrant, anything: relating to an offence committed; that may afford evidence relating to the commission of an offence; or that was used, or is intended for use in relation to the commission of an offence (paragraph (1)(a)). The information must set out the grounds for the information (paragraph (1)(b)).

Clause 519(2) makes it clear that certain accessory, attempt and conspiracy offences set out in the *Crimes Act 1914* are to be taken to be included in the meaning of the phrase ‘offence against Part 21’.

Clause 520 – Reasonable grounds for issuing warrant etc.

This clause prevents a magistrate from issuing a warrant under clause 519 unless: further information required by the magistrate relating to the grounds for the warrant application is provided either orally or by affidavit (paragraph (a)); and the magistrate is satisfied there are reasonable grounds for issuing the warrant (paragraph (b)).

Clause 521 – Contents of warrant

This clause sets out certain requirements in relation to what must be specified in a warrant issued under clause 519.

Clause 522 – Warrants may be issued by telephone etc.

This clause allows a warrant to be applied for by various electronic means, including telephone, telex, fax, or other means. The circumstances in which such an application is made must be urgent in the opinion of the inspector. Clause 523 requires certain things to be done after the issuing of a warrant in this form.

Clause 523 – Provisions relating to issue of warrant by telephone etc.

This clause provides that certain things be done before and after a warrant being applied for in an electronic form under clause 522.

Before applying for a warrant under clause 522, an inspector must prepare an information in the form required by clause 519 (clause 523(1)). However, this requirement does not require the information to be sworn before the application is made to the magistrate for the warrant.

Clause 523(2) allows a magistrate who has received a warrant application in an electronic form to issue a signed warrant as if the application had been in the form required under clause 519. The magistrate may only issue the warrant where he or she is satisfied there are reasonable grounds having considered the information communicated under clause 522 and any other information the magistrate has required to be given in relation to the application.

Clause 523(3) sets out certain requirements that the magistrate must fulfil and other requirements that the inspector must fulfil, where the magistrate has signed a warrant under clause 523(2).

Clause 523(4) requires the inspector to send to the magistrate, before the expiry date on the warrant, the form of the warrant required to be completed by the inspector under clause 523(3), and the information which must be duly sworn.

Clause 523(5) requires the magistrate to take certain actions in relation to the documents referred to in clause 523(4).

Clause 523(6) makes it clear that if the form of warrant duly completed by the inspector under clause 523(3) accords with the warrant signed by the magistrate under clause 523(2), then that inspector's warrant constitutes authority for the inspector to take the actions authorised by the warrant.

Clause 524 – Proceedings involving warrant issued by telephone etc.

This clause provides that a court is to assume that any act purportedly done under the authority of a warrant issued under clause 523, was not so authorised, unless the warrant signed by the magistrate under that clause is produced in evidence. This may be proved otherwise by other evidence.

Division 4—Searches and seizures relating to offences against Part 21

This Division provides for the conduct of searches and seizures by inspectors in relation to offences against Part 21.

Clause 525 – When is a thing connected with an offence?

This clause is an interpretative provision that makes it clear when a thing is to be taken to be connected with an offence.

Clause 526 – Offence-related searches and seizures

This clause provides for the conduct of searches and seizures where an inspector suspects on reasonable grounds that there is something in the place to be searched that is connected with an offence against Part 21 (clause 526(1)).

Clause 526(2) allows an inspector to enter places (paragraph (a)), search those places (paragraph (b)), break open and search things (paragraph (c)), and examine and seize things (paragraph (d)), where the inspector has the consent of the owner, or is authorised to do so by a warrant issued under Division 3 of Part 28. Such things may be done with the permission of the owner or occupier of the place, or in accordance with a warrant.

Clause 526(3) allows an inspector to stop and detain a vessel, aircraft, or vehicle that the inspector is permitted to enter under clause 526(2).

Clause 526(4) makes it clear that certain accessory, attempt and conspiracy offences set out in the *Crimes Act 1914* are to be taken to be included in the meaning of the phrase ‘offence against Part 21’.

Clause 527 – Production of identity card etc.

This clause requires an inspector (other than a uniformed member of a police force) to produce his or her inspector identity card, or police badge (for police not in uniform), before entering places under clause 526 (clause 527(1)). If the card or badge is not produced, the entry is not authorised.

Where an entry is made under clause 526 in accordance with a warrant, that entry is not authorised by clause 527(1) unless a copy of the warrant is also produced for inspection by the owner or occupier (clause 527(2)).

Clause 528 – Evidence of commission of other offences

This clause allows an inspector to seize a thing found in the course of a search conducted under a warrant issued under Division 3 of Part 28, even if that thing is not specified in the warrant, if the inspector has reasonable grounds to believe that the thing is connected with the commission of an offence against Part 21, whether or not the warrant was issued in relation to the offence (clause 528(1)). This power to seize the thing may only be exercised if the inspector has reasonable grounds to believe the seizure is necessary in order to prevent the thing being concealed, lost, destroyed, or used in the commission of the offence.

Clause 528(2) makes it clear that certain accessory, attempt and conspiracy offences set out in the *Crimes Act 1914* are to be taken to be included in the meaning of the phrase ‘offence against Part 21’.

Clause 529 – Emergency entry, search and seizure

This clause allows an inspector to stop and search persons (clause 529(1)), or enter and search places (clause 529(2)), where the inspector has reasonable grounds to believe that it is necessary to do so immediately because of the seriousness and urgency of the circumstances pertaining to the inspector’s actions. The inspector is also able to seize things found in the course of such a search. These powers may only be exercised where the inspector has reasonable grounds to believe that the person has, or there is in the place, a thing connected with an offence against Part 21.

Clause 529(3) allows an inspector to stop and detain a vessel, aircraft, or vehicle that the inspector is permitted to enter under clause 529(2).

Clause 529(4) makes it clear that certain accessory, attempt and conspiracy offences set out in the *Crimes Act 1914* are to be taken to be included in the meaning of the phrase ‘offence against Part 21’.

Clause 530 – Retention of things seized

This clause allows things seized by an inspector under this Division to be retained by the ACA for 60 days following the seizure, or at the end of any proceedings for an offence to which the thing is connected (clause 530(1)).

Clause 530(2) allows the ACA to authorise the release of seized things to the owner of the thing, or to the person from whom the thing was seized. Such an authorisation must be in writing. The ACA may impose conditions on the release of the seized things including requiring the person to pay a security equal to the value of the thing, in case it is ordered to be forfeited by a court under clause 535.

Division 5—Searches to monitor compliance with Part 21

This clause allows inspectors to conduct searches in order to monitor compliance with Part 21.

Clause 531 – Searches to monitor compliance with Part 21

This clause allows an inspector to enter premises for the purposes of ascertaining whether Part 21 has been complied with (clause 531(1)). The inspector may only exercise this power to the extent that it is reasonably necessary to do so. In conducting the search, the inspector may do a number of things in relation to the premises and to documents found on those premises. Such a power may be exercised in relation to certain records that are required to be kept under Part 21, such as test results, compliance certificates, statements issued by competent bodies, self-declarations, or records relating to quality assurance programs.

Clause 531(2) makes it clear that the power under clause 531(1) may only be exercised in relation to a residence where the owner or occupier consents.

Clause 531(3) makes it clear that the power under clause 531(1) may not be exercised in relation to a residence where the owner or occupier has asked to see the inspector's identity card, and the card has not been provided to the owner or occupier.

Clause 531(4) makes it clear that the power under clause 531(1) may only be exercised in relation to premises at which activities regulated by Part 21 are engaged in, or records relating to those activities are kept.

Division 6—Other powers of inspectors

This Division provides for the general powers of inspectors not provided for elsewhere in Part 28.

Clause 532 – General powers of inspectors

This clause allows an inspector to require a person to produce certain documents relating to such matters as carrier licensing, or documents relating to the technical regulation regime, where the person is required to have or keep those documents (clause 532(1)).

The relevant person is required comply with a request from an inspector under clause 532(1) (clause 532(2)). The maximum penalty for non-compliance is, in the case of an individual, 20 penalty units or, in the case of a body corporate, 100 penalty units (under s. 4AA of the *Crimes Act 1914*, a penalty unit is worth \$100 - see also s. 4B(3) of that Act).

Clause 532(3) defines terms used in this clause.

Clause 533 – Power to require information etc.

This clause allows an inspector, who has entered a place under Division 4 or 5 of Part 28 to require a person an answer questions or produce documents (clause 533(1)). The inspector may make such a requirement only to the extent that is reasonably necessary to ascertain whether Part 21 has been complied with.

Clause 533(2) makes it clear that an inspector may only exercise the power under clause 533(1) where he or she has produced his or her inspector identity card, or is wearing his or her uniform in the case of a member of a police force.

The relevant person is required to comply with a request from an inspector under clause 533(1) (clause 533(3)). The maximum penalty for non-compliance is, in the case of an individual, 20 penalty units or, in the case of a body corporate, 100 penalty units (under s. 4AA of the *Crimes Act 1914*, a penalty unit is worth \$100 - see also s. 4B(3) of that Act).

Clause 533(4) makes it clear that an individual who is required to comply with a requirement made under clause 533(1) is excused from doing so if to do so might tend to incriminate the individual or expose the individual to a penalty.

Clause 534 – Retention of documents

This clause allows an inspector to retain possession of any document seized (under clause 526 or 531) or produced to the inspector (under clause 533(1)). The inspector may only retain the document for as long as is reasonably necessary to ascertain whether Part 21 has been complied with. The inspector is also required to allow the person access to the document at all reasonable times.

Division 7—Forfeiture

This Division provides for forfeiture of things seized, and for what may be done with those things.

Clause 535 – Court may order forfeiture

This clause allows a court to order the forfeiture to the Commonwealth of anything involved in the commission of an offence for which a person has been convicted (clause 535(1)).

Clause 535(2) makes it clear that certain accessory, attempt and conspiracy offences set out in the *Crimes Act 1914* are to be taken to be included in the meaning of the phrase ‘offence against Part 21’.

Clause 536 – Forfeited goods may be sold

This clause allows the sale or disposal of things forfeited under clause 535 in accordance with the directions of the ACA (paragraph (a)). In the absence of any directions, the thing must be kept in such custody as the ACA directs (paragraph (b)).

Division 8—Future offences

This Division applies Part 28 to future offences.

Clause 537 – Offences that are going to be committed

This clause allows Part 28 to apply where there are reasonable grounds for believing that an offence against the Act is going to be committed, and if committed the offence would be a threat to the safety of human life, or cause substantial loss or damage. Such a ‘future offence’ is deemed to be an offence that has been committed for the purposes of Part 28 (clause 537(1)).

Clause 537(2) makes it clear that certain accessory, attempt and conspiracy offences set out in the *Crimes Act 1914* are to be taken to be included in the meaning of the phrase ‘offence against Part 21’.

Part 29—Review of decisions

This Part provides for merits review of decisions taken under this Act. Provision is made for internal review of such decisions with further review of the reconsidered decision by the Administrative Appeals Tribunal.

Clause 538 – Simplified outline

This clause provides an outline of Part 29 to assist the reader.

Clause 539 – Decisions that may be subject to reconsideration by the ACA

This clause enables application to be made to the ACA for reconsideration of decisions (made under this Act) referred to in Part 1 of Schedule 4.

Clause 540 – Deadlines for reaching certain decisions

This clause requires the ACA to make a decision on an application for reconsideration of a decision referred to in clause 539 within 90 days of having received the application (paragraph (2)(a)). If, within that 90 days, the ACA has requested the applicant to provide further information in relation to the application, the ACA must make its reconsidered decision within 90 days of having received that information (paragraph (2)(b)). These deadlines do not apply in relation to certain decisions specified in Part 2 of Schedule 4 (clause 540(1)). Those decisions are subject to other specified deadlines.

If the ACA has not advised the applicant of its reconsidered decision within the deadlines imposed under clause 540(2), the ACA is taken to have refused the application for reconsideration (clause 540(3)).

Clause 541 – Statements to accompany notification of decisions

This clause requires the ACA, when giving written notice of its initial decision referred to in clause 539, to advise the person concerned of their rights in relation to applying for reconsideration of the decision, and if unsuccessful at that stage, their rights to apply to the AAT for a review of the reconsidered decision (clause 541(1)).

Should the ACA fails to comply with this notification requirement, the initial decision is not invalidated because of that failure (clause 541(2)).

Clause 542 – Application for reconsideration of decisions

This clause allows a person whose interests are affected by a decision referred to in clause 539 to apply to the ACA for reconsideration of that decision (clause 542(1)).

Any such application must be in a form approved by the ACA and must also set out the reasons for requesting the reconsideration (clause 542(2)).

An application for reconsideration must be made within 28 days of the decision being notified to the applicant, or within any extended period allowed by the ACA (clause 542(3)).

Clause 542(4) makes it clear that an approved reconsideration application form may require an applicant to make a statutory declaration of statements made in the application.

Clause 543 – Reconsideration by the ACA

This clause requires the ACA to make a decision on an application for reconsideration of a decision referred to in clause 539 (clause 543(1)). Having reconsidered the decision, the ACA may affirm, revoke or vary the decision. In considering the decision, the ACA stands in the shoes of the original ACA decision-maker so that any reconsidered decision is treated as if it were made under the provision the initial decision was, or was purported to be, made by the ACA (clause 543(2)).

Clause 543(3) requires the ACA to give the applicant a statement of reasons for its reconsidered decision. Under s. 25D of the *Acts Interpretation Act 1901* a statement of reasons is required to set out the findings on material questions of fact, the evidence or other material on which those findings were based, and the reasons for the decision.

Clause 544 – Deadlines for reconsiderations

This clause requires the ACA to make a reconsideration decision within 90 days of having received the application made under clause 542 (clause 544(1)). Should the ACA not notify the applicant of its reconsidered decision within that deadline, it is taken to have affirmed the initial decision, that is, to have refused the request for the decision to be overturned (clause 544(2)). This is expected to encourage the ACA to reconsider decisions in a timely manner.

Clause 545 – Statements to accompany notification of decisions on reconsideration

This clause requires the ACA, when notifying the applicant of its reconsidered decision, to advise the applicant of its rights under the *Administrative Appeals Tribunal Act 1975* to apply to the AAT for a review of the reconsidered decision, and for a statement of reasons for the reconsidered decision (clause 545(1)).

Should the ACA fail to comply with this notification requirement, the reconsidered decision is not invalidated because of that failure (clause 545(2)).

Clause 546 – Review by the Administrative Appeals Tribunal

This clause allows for application to be made to the AAT for review of a reconsidered decision that affirmed or varied the initial decision. The review would allow the AAT to stand in the shoes of the initial decision-maker.

Part 30—Injunctions

Part 30 enables the Federal Court to grant injunctions in relation to contraventions or proposed contraventions of the Act.

Clause 547 – Simplified outline

Clause 547 provides a simplified outline of Part 30.

Clause 548 – Injunctions

If a person has engaged, is engaging or is proposing to engage in any conduct in contravention of the Act, the Minister, the ACA (subject to the limitations outlined below) or the ACCC will be able to apply to the Federal Court for an injunction to restrain the person from engaging in the conduct. If, in the Federal Court's opinion, it is desirable to do so, the Court will also be able to require the person to do something (clause (548(1)).

If a person has refused or failed, or is refusing or failing, or is proposing to refuse or fail, to do an act or thing and the refusal or failure was, is or would be a contravention of the Act, the Minister, the ACA (subject to the limitations outlined below) or the ACCC will be able to apply to the Federal Court for an injunction requiring the person to do that act or thing (clause 548(2)).

Examples of contraventions of the Act include:

- using a network unit without a carrier licence or a nominated carrier declaration (clause 42); and
- failure of a carrier to comply with the conditions of its carrier licence (clause 67).

The ACA will not be able to apply to the Federal Court for an injunction in relation to a contravention of:

- the requirements in Part 1 of Schedules 1 and 2 in so far as they relate to clause 354 for a carrier or carriage service provider to comply with Rules of Conduct about dealings with international telecommunications operators;
- a carrier licence condition set out in Part 3 or 4 of Schedule 1, dealing with access to supplementary facilities and network information; and
- the carrier licence condition and the service provider rule set out in proposed ss. 152AZ and 152BA of the TPA dealing with standard access obligations.

These are matters administered by the ACCC and accordingly it is more appropriate for the ACCC to apply to the Court for an injunction in relation to these matters.

Clause 549 – Interim injunctions

Provision is also made for the Federal Court to grant interim injunctions before the Court considers an application for an injunction (clause 549(1)).

The Federal Court will not be able to require an applicant for an injunction under clause 548, as a condition of granting an interim injunction, to give any undertakings as to damages (clause 549(2)).

Clause 550 – Discharge etc. of injunctions

The Federal Court will be able to discharge or vary an injunction granted under Part 30.

Clause 551 – Certain limits on granting injunctions not to apply

The power of the Federal Court to grant an injunction restraining a person from engaging in conduct or requiring a person to do an act or thing will be able to be exercised whether or not:

- it appears to the Court that the person intends:
 - to engage again, or continue to engage, in conduct of that kind; or
 - to refuse or fail again, or to continue to refuse or fail, to do that act or thing;
- the person has previously engaged in conduct of that kind or has previously refused or failed to do that act or thing; and

- there is an imminent danger of substantial damage to any person if the first-mentioned person engages in conduct of that kind or refuses or fails to do that act or thing (clause 551).

Clause 552 – Other powers of the court unaffected

The powers conferred on the Federal Court under Part 30 will not limit any other powers of the Court, whether conferred by the Act or otherwise.

Part 31—Civil penalties

Part 31 deals with pecuniary penalties that are payable for contraventions of the civil penalty provisions of the Act. Civil penalty provisions include clauses 67(1) and (2), dealing with compliance with carrier licence conditions and clauses 100(1) and (2), dealing with compliance with service provider rules.

Part 31 is based on ss. 349, 350 and 352 of the 1991 Act.

Clause 553 – Simplified outline

Clause 553 provides a simplified outline of Part 31.

Clause 554 – Pecuniary penalties for contravention of civil penalty provisions

If the Federal Court is satisfied that a person has contravened a civil penalty provision, it will be able to order the person to pay the Commonwealth such pecuniary penalty as the Court determines to be appropriate (clause 554(1)).

The following are civil penalty provisions (as defined in clause 7):

- clauses 67(1) and (2), dealing with compliance with carrier licence conditions;
- clauses 100(1) and (2), dealing with compliance with service provider rules;
- clauses 119(2) and (3), dealing with compliance with ACA directions about compliance with industry codes;
- clauses 125(1) and (2), dealing with compliance with industry standards;
- clauses 212(1) and (2), dealing with compliance with universal service levy guarantee obligations; and
- clauses 256(1) and (3), dealing with compliance with an ACA determination imposing requirements in relation to emergency call services.

In determining the pecuniary penalty, the Court will be required to have regard to all relevant matters including:

- the nature and extent of the contravention;
- the nature and extent of any loss or damage suffered as a result of the contravention;
- the circumstances in which the contravention took place; and
- whether the person has previously been found by the Court in proceedings under the Act to have engaged in any similar conduct (clause 554(2)).

The maximum pecuniary penalty payable by a body corporate for each contravention of a carrier licence condition or a service provider rule will be \$10 million. The maximum pecuniary penalty payable by a body corporate in other cases will be \$250,000 for each contravention (clause 554(3)).

The maximum pecuniary penalty payable by a person other than a body corporate will be \$50,000 for each contravention (clause 554(4)).

Subject to clause 554(6), if conduct constitutes a contravention of 2 or more civil penalty provisions, proceedings will be able to be instituted under the Act against a person in relation to the contravention of any one or more of those provisions. The person will not, however, be liable to more than one pecuniary penalty under clause 554 in respect of the same conduct (clause 554(5)).

If conduct constitutes a contravention of a carrier licence condition or a service provider rule (clauses 67 and 100), and one or more other civil penalty provisions, proceedings will not be able to be instituted under the Act against the person in relation to a contravention of clause 67 or 100, as the case may be (clause 554(6)).

Clause 555 – Civil action for recovery of pecuniary penalties

The Minister, the ACA (subject to the limitations set out below) or the ACCC will be able to institute a proceeding in the Federal Court for the recovery of a pecuniary penalty within 6 years after the contravention of a civil penalty provision (clauses 555(1) and (2)).

The ACA will not be able to institute a proceeding for the recovery of a pecuniary penalty in respect of a contravention of:

- the requirements in Part 1 of Schedules 1 and 2 in so far as they relate to clause 354 for a carrier or carriage service provider to comply with Rules of Conduct about dealings with international telecommunications operators;
- a carrier licence condition set out in Part 3 or 4 of Schedule 1, dealing with access to supplementary facilities and network information; and
- the carrier licence condition and the service provider rule set out in proposed ss. 152AZ and 152BA of the TPA (to be inserted by the proposed *Trade Practices Amendment (Telecommunications) Act 1996*) dealing with standard access obligations.

These are matters administered by the ACCC and accordingly it is more appropriate for the ACCC to apply to the Court for the recovery of a pecuniary penalty in relation to these matters.

Clause 556 – Criminal proceedings not to be brought for contravention of civil penalty provisions

Criminal proceedings will not be able to be brought for a contravention of a civil penalty provision (clause 556).

Part 32—Vicarious liability

Part 32 deals with the proof of matters that involve directors of corporations, employees and agents in connection with civil and criminal proceedings under the Act. It may be compared with s. 84 of the TPA.

Clause 557 – Simplified outline

Clause 557 provides a simplified outline of Part 32.

Clause 558 – Proceedings under this Act

Clause 558 is an interpretative provision providing that a reference in Part 32 to a ‘proceeding under this Act’ includes a reference to:

- an action under the Act;
- a proceeding for an offence against the Act; and
- a proceeding for an offence created by:
 - s. 6 of the *Crimes Act 1914*, dealing with persons who are accessories after the fact;
 - s. 7 of the *Crimes Act 1914*, dealing with attempts to commit offences against Commonwealth laws;
 - s. 7A of the *Crimes Act 1914*, dealing with inciting or urging the commission of offences against Commonwealth laws; or
 - s. 86(1) of the *Crimes Act 1914*, dealing with conspiracy to commit an offence against a law of the Commonwealth;

that relates to the Act.

Clause 559 – Liability of corporations

If a corporation has committed an offence under the Act or has breached a civil penalty provision such as clause 67 (failure to comply with a condition of a carrier licence) and it

is necessary in proceedings to establish the state of mind of the corporation, it will be sufficient to show that:

- a director, employee or agent of the corporation, acting within the scope of his or her authority, engaged in that conduct; and
- the director, employee or agent had that state of mind (clause 559(1)).

For the purposes of this provision, the state of mind of a person will include the person's knowledge, intention, opinion, belief or purpose and the person's reasons for the intention, opinion, belief or purpose (clause 559(3)).

If conduct is engaged in on behalf of a corporation by a director, employee or agent of the corporation and the conduct is within the scope of his or her authority, the conduct will be taken, for the purposes of a proceeding under the Act, to have been engaged in by the corporation unless the corporation establishes that it took reasonable precautions and exercised due diligence to avoid the conduct (clause 559(2)).

A reference in clause 559 to a director of a corporation will include a reference to a constituent member of a body corporate incorporated for a public purpose by Commonwealth, State or Territory law (clause 559(4)).

A reference in clause 559 to 'engaging in conduct' will include a reference to refusing to engage in conduct (clause 559(5)).

Clause 560 – Liability of persons other than corporations

Clause 560, dealing with the liability of individuals, partnerships and other non-corporations, will not apply to:

- proceedings for an offence against proposed s. 42 of the Act, which prohibits network units being used without a carrier licence or nominated carrier declaration; or
- proceedings for an offence created by:
 - s. 6 of the *Crimes Act 1914*, dealing with persons who are accessories after the fact;
 - s. 7 of the *Crimes Act 1914*, dealing with attempts to commit offences against Commonwealth laws;
 - s. 7A of the *Crimes Act 1914*, dealing with inciting or urging the commission of offences against Commonwealth laws; or
 - s. 86(1) of the *Crimes Act 1914*, dealing with conspiracy to commit an offence against a law of the Commonwealth;

that relates to the proposed s. 42 of the Act (clause 560(1)).

If, in proceedings under the Act in respect of conduct engaged in by a person other than a corporation, it is necessary to establish the state of mind of the person, it will be sufficient to show that the conduct was engaged in by an employee or agent of the person within the scope of his or her authority and the employee or agent had that state of mind (clause 560(2)).

If conduct is engaged in on behalf of a person other than a corporation by an employee or agent of the person and the conduct is within the scope of his or her authority, the conduct will be taken, for the purposes of a proceeding under the Act to have been engaged in by the person unless the person establishes that he or she took reasonable precautions and exercised due diligence to avoid the conduct (clause 560(3)).

If a person is convicted of an offence for which the person would not have been convicted if clauses 560(2) and (3) had not been in force, the person will not be liable to be punished by imprisonment for that offence (clause 560(4)).

For the purposes of clause 560, the state of mind of a person will include the person's knowledge, intention, opinion, belief or purpose and the person's reasons for the intention, opinion, belief or purpose (clause 560(5)).

A reference in clause 560 to 'engaging in conduct' will include a reference to refusing to engage in conduct (clause 560(6)).

Part 33—False or misleading statements

Part 33 creates 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.

Clause 561 – Simplified outline

Clause 561 provides a simplified outline of Part 33.

Clause 562 – False or misleading statements

A person who intentionally or recklessly makes a false or materially misleading statement, or gives false or materially misleading information, to an ACA employee or delegate exercising or performing functions relating to the regulation of telecommunications matters will be guilty of offence punishable on conviction by a maximum fine, in the case of an individual, of 100 penalty units or, in the case of a body corporate, 500 penalty units (clause 562(1)) (under s. 4AA of the *Crimes Act 1914*, a penalty unit is worth \$100 - see also s. 4B(3) of that Act).

This offence will not apply where the ACA employee or delegate is exercising or performing the ACA's information-gathering functions or powers under Part 27. This is because clauses 509 and 510 provide for offences for the giving of false or misleading information or evidence or the provision of false or misleading documents in connection with a notice given under that Part.

Part 34—Special provisions relating to the ACA's telecommunications functions and powers

Clause 563 – Simplified outline

Clause 563 outlines Part 34 of the Bill.

Clause 564 – ACA must have regard to conventions

In performing its telecommunications functions and exercising its telecommunications powers, the ACA will be required 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 (clause 564). This clause re-enacts the requirement on AUSTEL contained in s. 48(c) of the 1991 Act.

In addition, as a result of s. 10 of the proposed ACA Act, the ACA will be required to perform its functions in a manner consistent with any Commonwealth Government policies notified by the Minister and any directions given by the Minister (cf. ss. 48(a) and (b) of the 1991 Act).

Clause 565 – Power to give directions to carriers and service providers

The ACA will be empowered to give written directions to a carrier or service provider in connection with the ACA's performance of any of its telecommunications functions or the exercise of any of its telecommunications powers (clause 565(1)). A carrier or a service provider receiving such directions will be required to comply with them (clause 565(3)).

Clause 565 is not limited by any other provision of a law, including the Act, that:

- (a) confers a function or power on the ACA;
- (b) prescribes the mode in which the ACA is to perform a function or exercise a power; or
- (c) prescribes conditions or restrictions which must be observed in relation to the performance by the ACA of a function or the exercise by the ACA of a power.

(clause 565(2)).

Paragraphs 565(2)(b) and (c) are intended to override the following principle set out by Gavan Duffy CJ and Dixon J in *Anthony Hordern & Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia* (1932) 47 CLR 1 at 7:

‘When the Legislature explicitly gives a power by a particular provision which prescribes the mode in which it shall be exercised and the conditions and restrictions which must be observed, it excludes the operation of general expressions in the same instrument which might otherwise have been relied upon for the same power’.

Part 35—Miscellaneous

Part 35 deals with the following miscellaneous matters.

Provision is made in relation to continuing offences (see clauses 567 and 568).

Partnerships are to be treated as persons for the purposes of the Act (clause 569).

Provision is made in relation to the service of documents (clauses 570, 571 and 572).

Instruments under the Act will be able to apply, adopt or incorporate the provisions of certain other instruments (clause 573).

There will be Constitutional protections to avoid invalidity on the basis of the operation of provisions of the Act in contravention of paragraph 51(xxxi) of the Constitution (clauses 574 and 575).

The Act will not affect the performance of State or Territory functions (clause 576).

The Governor-General will be able to make regulations for the purposes of the Act (clause 577).

Clause 566 – Simplified outline

Clause 566 provides a simplified outline of Part 35.

Clause 567 – Penalties for certain continuing offences

If an offence against the Act is a continuing offence (whether under that Act or because of s. 4K of the *Crimes Act 1914*), the maximum penalty for each day that the offence continues is 10% of the maximum penalty that could be imposed in respect of the principal offence (clause 567).

One example of a continuing offence is the prohibition under clause 42 against a network unit being used without a carrier licence or nominated carrier declaration (see clause 43).

Clause 568 – Procedure relating to certain continuing offences

If the prohibition under clause 42 against a network unit being used without a carrier licence or nominated carrier declaration has been contravened and the offence continues, clause 43 creates a separate continuing offence in respect of each day during which the contravention of clause 42 continues.

Clause 568 allows charges against the same person for any number of offences against clause 42 to be joined in the same information, complaint or summons if those charges are founded on the same facts or if they form, or are part of, a series of offences of the same or a similar character (clause 568(1)).

If a person is convicted of 2 or more offences against clause 42, the court will be able to impose one penalty in respect of both or all of those offences provided the penalty does not exceed the sum of the maximum penalties that could be imposed if a separate penalty were imposed in respect of each offence (clause 568(2)).

Clause 569 – Treatment of partnerships

Clause 569 is relevant to carriers or carriage service providers that are partnerships. It provides that the Act applies to a partnership as if the partnership were a person, with the following changes:

- obligations that would be imposed on the partnership are imposed instead on each partner, but may be discharged by any of the partners;
- any offence against the Act that would otherwise be committed by the partnership is taken to have been committed by each partner who:
 - aided or abetted, counselled or procured the relevant act or omission; or
 - was in any way knowingly concerned in, or party to, the relevant act or omission (whether directly or indirectly and whether by any act or omission of the partner).

Clause 570 – Giving of documents to partnerships

The effect of clause 570 is that, for the purposes of the Act, if a document is delivered personally to the partner of a partnership or is left, or posted to, the partner's last known residential or business address, the document is taken to have been given to the partnership.

Clause 571 – Nomination of address for service of documents

Clause 571 provides that for the purposes of the Act a person may nominate an address in Australia for service in an application made by the person under the Act or any other document given by the person to the ACCC or the ACA. If this is done, a document may be given to the person for the purposes of the Act by leaving it at, or by posting it to, the nominated address for service. The document may also be delivered to the person personally or left at, or posted to, the person's last known residential or business address.

Clause 572 – Service of summons or process on foreign corporations – criminal proceedings

Clause 572 provides that a summons or process in any criminal proceedings under the Act against a foreign corporation may be effected by serving it on the Australian agent of the corporation if the corporation does not have a registered office or a principal office in Australia but does have an agent in Australia. In other cases, the summons or process will be able to be served by leaving it at, or by posting it to, the corporation's head office, registered office or principal office.

Clause 573 – Instruments under this Act may provide for matters by reference to other instruments

Clause 573 is based on s. 407 of the 1991 Act.

Notwithstanding anything in the *Acts Interpretation Act 1901* (see in particular s. 49A of that Act) or in the proposed *Legislative Instruments Act 1996*, regulations or any other instrument made under the Act will be able to make provision in relation to a matter by applying, adopting, or incorporating (with or without modifications) provisions of any Commonwealth Act or of any regulations or rules under a Commonwealth Act as in force at a particular time or as in force from time to time (clauses 573(1), (5) and (6)).

In addition, notwithstanding anything in the *Acts Interpretation Act* or in the proposed *Legislative Instruments Act*, regulations or any other instrument made under the Act will be able to make provision in relation to a matter by applying, adopting or incorporating (with or without modifications) matter contained in any other instrument or writing whatever as in force or existing at a particular time or from time to time even if the other instrument or writing does not yet exist when the instrument under the Act is made (clauses 573(2), (5) and (6)). This power is essential for the ACA's delegated legislation making, including the making of standards.

The reference in clause 573(2) to 'writing' will include any mode of representing or reproducing words, figures, drawings or symbols in a visible form (see s. 25 of the *Acts Interpretation Act 1901*).

A reference in clause 573(2) to any other instrument or writing is defined widely to include a reference to an instrument or writing made by any person or body in Australia or elsewhere (including, for example, the Commonwealth, a State or Territory or one of its officers or authorities or an overseas entity) whatever its nature and whether or not it has legal force or effect. Examples will include:

- regulations or rules under a Commonwealth Act;
- a State Act, a Territory law or regulations or any other instrument made under such an Act or law;
- an international technical standard or performance indicator; or
- a written agreement such as a contract or an arrangement or an instrument or writing made unilaterally (clause 573(3)).

Nothing in clause 573 limits the generality of anything else in it (clause 573(4)).

Clause 574 – Arbitration – acquisition of property

Clause 574 provides that any provision of the Act that authorises the conduct of arbitration by the ACCC or another person (see, for example, clauses 299, 308, 320 and 336) will have no effect to the extent (if any) to which it purports to authorise the acquisition of property otherwise than on just terms in contravention of paragraph 51(xxxi) of the Constitution.

Clause 575 – Compensation – constitutional safety net

If, apart from clause 575, the operation of the Act would result in the acquisition of property from a person otherwise than on just terms in contravention of paragraph 51(xxxi) of the Constitution, the Commonwealth will be liable to pay reasonable compensation to the person in respect of the acquisition (clauses 575(1) and (3)).

If the Commonwealth and the person cannot agree on the amount of the compensation, the person will be able to institute proceedings in the Federal Court for the recovery from the Commonwealth of such reasonable amount of compensation as the Court determines (clause 575(2)).

Clause 576 – Act not to affect performance of State or Territory functions

Clause 576 provides that a power conferred by the Act must not be exercised in such a way as to prevent the exercise of the powers, or the performance of the functions, of government of a State, the Northern Territory, the Australian Capital Territory or Norfolk Island.

Clause 577 – Regulations

Clause 577 contains the standard regulation making power.

The Governor-General will be empowered to make regulations prescribing matters required or permitted by the Act to be prescribed or necessary or convenient to be prescribed for carrying out or giving effect to the Act (clause 577(1)).

The regulations will be able to prescribe penalties of up to 10 penalty units for offences against the regulations (clause 577(2)).