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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

THE SENATE

TELECOMMUNICATIONS (CONSUMER PROTECTION AND SERVICE STANDARDS) BILL 1998

TELECOMMUNICATIONS (UNIVERSAL SERVICE LEVY) AMENDMENT BILL 1998

SUPPLEMENTARY EXPLANATORY MEMORANDUM

Amendments and requests for amendments to be moved on behalf of the Government

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

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TELECOMMUNICATIONS (CONSUMER PROTECTION AND SERVICE STANDARDS) BILL 1998

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OUTLINE

The Telecommunications (Consumer Protection and Service Standards) Bill 1998 (the Bill) brings together the consumer protection measures that were contained in the *Telecommunications Act 1997* to provide greater visibility and clarity. It also provides for new powers in relation to compliance to reflect the proposed sale of Telstra.

The proposed Government Amendments:

- amend Part 2 of the Bill to include a digital data service obligation in the universal service regime;

- amend Part 5 of the Bill to improve the operation of the customer service guarantee arrangements; and

- introduce a new Part 9A of the Bill to regulate telephone sex services.

The proposed Requests for Amendments make amendments to:

- clause 69 of the Bill (dealing with levy credit balance of a participating carrier for a financial year);

- clause 85 of the Bill (dealing with levy distribution to a universal service provider); and

- the long title of the *Telecommunications (Universal Service Levy) Act 1997*;

consequential upon the amendments to the Bill to include a digital data service obligation in the universal service regime.

Digital data service obligation

The amendments to Part 2 of the Bill (Amendments (1) to (4) and (6) to (36)) give effect to the Government's election commitment to legislate to include in the universal service obligation:

- access to a 64 kbps ISDN service on demand for 96% of the population;

- for the 4% not able to access ISDN on demand, the provision of an on-demand Internet-based asymmetric satellite service that delivers a satellite downlink

service comparable to the 64 kbps ISDN service; and reimbursement of up to 50% of the price of purchasing the necessary satellite receiving equipment.

In essence, the amendments insert new provisions into the Bill to include a separate 'digital data service obligation' within the overall universal service regime.

The amendments provide for a 'general digital data service' to be provided by a 'general digital data service provider' in areas specified by Ministerial determination. This is the ISDN equivalent service required to be available to 96 per cent of the population.

A 'special digital data service' is also to be provided by a 'special digital data service provider' in areas specified by Ministerial determination. This digital data service will provide a comparable 64 kbps data delivery service to the 4 per cent of the population unable to receive an ISDN service.

Funding arrangements will provide for a subsidy to be paid for the equipment necessary to receive the 'special digital data service'. This subsidy will be funded by the industry as part of modified universal service levy arrangements.

A new Division 4A will be inserted in Part 2 to require the preparation of digital data service plans.

A new Division 5A will be inserted to enable price control arrangements to apply to the digital data service obligation.

Customer service guarantee

Part 5 of the Bill continues the operation of the customer service guarantee (CSG) arrangements contained in Part 9 of the Telecommunications Act but also enables the ACA to look proactively into systemic problems (eg. consistent faults in a particular geographic area) and direct a carriage service provider about the things it should do to ensure those problems do not recur.

The proposed Government Amendments enhance the operation of the CSG, with effect 6 months after the commencement of the Bill, by providing arrangements for:

- the automatic payment of damages to customers in relation to a contravention of the CSG without the customer having to make a specific claim for payment (Amendment (37)); and

- a right to contribution to damages where the contravention of the CSG is wholly or partly attributable to the acts or omissions of another carriage service provider (Amendment (38)).

Telephone sex services

Amendments (5) and (39) deal with the regulation of telephone sex services.

Amendment (5) amends the simplified outline to the Bill to indicate that the Bill will regulate telephone sex services.

Amendment (39) introduces a new Part 9A into the Bill containing detailed provisions for the regulation of these services. Part 9A will prohibit unacceptable conduct by telephone sex service providers, and carriage service providers, in relation to telephone sex services. This new Part is intended to address community concerns that telephone sex lines are too easily accessed by children of standard telephone service customers.

Under the proposed amendments, before a telephone sex service which is billed on a telephone account is supplied, the phone customer must have agreed in writing to the supply of telephone sex services and been issued with a personal identification number (PIN) or some other means of limiting access by others to the telephone sex service. Such services will have to be supplied from a special number range (eg. 1901 numbers).

If a carriage service provider engages in unacceptable conduct in relation to a telephone sex service, charges for the service will not be able to included in a bill sent by or on behalf of the provider to the customer concerned.

The supply of other goods and services will not be able to be tied to the supply of a telephone sex service.

These arrangements are not proposed for the purpose of closing down the telephone sex industry. The arrangements allow the industry to operate by providing for the services to be supplied where telephone customers have ‘opted-in’ or where the telephone sex service customer pays for the service otherwise than by the telephone account, for example by using a credit card.

Telephone sex service providers and carriage service providers will have a period of 6 months after the commencement of the Bill to put arrangements in place to enable them to comply with Part 9A.

The regulations will be able to prohibit or regulate the supply, advertising or promotion of a specified telephone sex service.

FINANCIAL IMPACT STATEMENT

It is expected that the proposed Government amendments and Requests for Amendments will not have any significant financial impact on Commonwealth expenditure or revenue.

REGULATION IMPACT STATEMENT

Problem identification

Digital Data Services

Whilst the majority of households and businesses in Australia are technically capable of accessing digital data services such as the Internet, there are significant variations in the data rates that are achieved and hence the applications that are available for use. A number of factors affect the data rate that can be achieved by each user, including the type of customer equipment being used, the data capacity of the Internet Service Provider's equipment and the Internet itself. However, a major factor is the quality and structure of the carrier network.

The majority of data traffic is carried over the Public Switched Telephone Network (PSTN) which was originally designed to provide voice grade services only (equivalent to 2.4kbps). The PSTN can however provide data rates of 28kbps or more in certain circumstances. The data rate capability of the PSTN in rural and remote areas of Australia is generally significantly lower than in urban and provincial areas.

Users can also choose to subscribe to an ISDN service, instead of the PSTN, which provides two data channels at 64kbps. The *Telecommunications Act 1997* includes a requirement (section 66) that Telstra should, by 31 December 1998, be able to make available to at least 96% of the population a carriage service that provides a digital data capability broadly comparable to the capability provided by a 64kbps ISDN data channel.

The *Telecommunications Act 1997* also required a review to be conducted by September 1998 into whether such a data capacity should be prescribed as part of the Universal Service Obligation (USO). The *Digital Data Inquiry*, conducted by the ACA, concluded that the costs to the community of upgrading the USO to this level of data capacity would outweigh the benefits to the community. The review also noted that ISDN or broadly comparable data services would be available to all people in Australia either through Telstra meeting its licence condition, or through the introduction of new satellite based data services. Telstra had planned to commence a satellite data service at the end of 1998 however it is now expected to commence commercially in mid-1999.

In response to the review report the government announced, during the election campaign, the following commitments:

The Coalition will legislate to include in the Universal Service Obligation a requirement to provide a 64 kbps ISDN service on demand to at least 96 per cent of the Australian population (the 'non-satellite 64 kbps service').

The Coalition will legislate to include in the Universal Service Obligation a requirement that from 1 July 1999 the universal service provider make available to any Australian not able to obtain a 64 kbps ISDN service on demand, a broadly comparable 64 kbps digital data service using satellite technology to provide the downlink from the Internet ('the satellite 64 kbps service').

The Coalition will include in the Universal Service Obligation a requirement that anyone not able to receive the non-satellite 64 kbps service must, upon purchase of the satellite receiving equipment necessary to use the satellite 64 kbps service (typically a dish, a card inserted into the user's PC, a CD-ROM and associated wiring), be reimbursed for 50 per cent of the cost of purchase. This subsidy will be funded under the Universal Service Obligation.

Telephone Sex Services

Under current arrangements telephone sex lines are too easily accessed by children of standard telephone service customers. This may result in children being exposed to material of an 'adult' nature and telephone subscribers receiving large bills for services they did not want or authorise.

Customer Service Guarantee (CSG)

(a) Customers are not receiving damages to which they are entitled because of their failure to claim; and

(b) carriage service providers who are reliant on other carriage service providers for infrastructure and interconnection may be liable to pay damages to their customers under the CSG when the fault lies with another carriage service provider.

Specification of the desired objective

Digital Data Services

Digital data services are available to all people in Australia wherever they reside or carry on business.

Telephone Sex Services

Telephone sex services should only be accessible by customers who have agreed in writing to supply of those services and who have been issued with personal identification numbers (PIN) or some other means of limiting access by others.

Customer Service Guarantee (CSG)

(a) Customers should automatically receive damages to which they are entitled under the CSG without the need to lodge a claim; and

(b) the cost of damages should be borne by the carriage service provider responsible for the fault.

Identification of options

Digital Data Services

Option 1: Allow the market to provide services.

As noted above, the ACA Digital Data Inquiry noted that ISDN or comparable services would be available to all people in Australia in the near future. Several carriers have indicated an intention to operate digital data services by satellite. Telstra also continues to progressively upgrade its network to make ISDN available to more customers.

However, there is concern among rural interests that the timetable for provision of these services should be ensured. The government therefore made an election commitment to take action through the USO mechanism to ensure that services are made available. Without Government action the provision of a service to all consumers could not be guaranteed and aspects of the USO regime, such as the requirement to produce a USO Plan, would not apply. Inclusion in the Telecommunications Act would also allow price controls to be applied at a future date if considered necessary. The election commitment also included the provision of a subsidy for the cost of customer equipment for the satellite service, and this could not be provided without government intervention.

Option 2: Legislate to include a digital data service obligation in the Universal Service Obligation.

New provisions could be included in the Universal Service Regime to provide for, as a digital data service obligation, the provision of ISDN comparable services to at least 96% of the population and an obligation to make services which are capable, at a minimum, of delivering data at a data transmission speed comparable to the 64kbps service to the remainder of the population. The terms and conditions of the digital data service obligation would be similar to those applying to the current standard telephone service USO. The cost of the subsidy for customer satellite equipment would be included in the USO cost which is shared among telecommunications carriers. Although the government has proposed that the USO cost be capped for 1999-2000, the digital data cost will be separately calculated and added to the capped amount.

This option would provide all Australians with access to a service able to deliver most Internet and other data services. However, the satellite service would be an asymmetric service with a higher data rate to the consumer than from the consumer to other users. This may not meet the full needs of a small proportion of consumers with access only to the asymmetric service, particularly businesses, who wish to send large volumes of data as well as to receive it

Option 3: Amend legislation to require an upgrade of Telstra's customer access network to enable ISDN to be delivered to all households in Australia.

An alternative option to achieve the objective would be to upgrade the network to ensure that all people in Australia can have access to symmetrical high data speed services wherever they live. This option would, however, be very expensive. The ACA review estimated the capital cost at $800 million assuming current takeup rates. That cost would increase if takeup rates increased. If the obligation was not included in the USO but borne entirely by Telstra it would be passed on to Telstra customers. If it was included in the USO some of the cost would be passed on to other carriers. It would have a negative impact on the competitiveness of carriers and reduce competition in the telecommunications industry. Ultimately the cost would be passed on to consumers.

This option would not be consistent with the election commitment. The upgrade would take time to implement and improved services would not be available in all areas on 1 July 1999 as proposed.

Moreover, the ACA inquiry found that most customers do not require an ISDN equivalent level of services. Current takeup levels of ISDN services indicate they represent less than 1% of total fixed line services, suggesting that such an expensive upgrade would benefit only a very small proportion of consumers to the cost of the community generally. Many can access the data they need on the PSTN or do not require data services. The cost of this option, the ACA found in its digital data review, would outweigh the benefits to the community in the order of $155 million to $344 million over a ten year period.

Telephone Sex Services

Option 1: Leave to the telephone sex industry/telecommunications suppliers to self-regulate.

Current arrangements are largely self-regulatory, but neither the telecommunications carriage service providers nor the telephone sex service providers have demonstrated that they are able to appropriately balance their commercial interests and social responsibilities on their own. At present 1900 sex services are accessible by anyone who picks up a telephone and are automatically charged to the subscriber's telephone bill. The content of these lines is the equivalent of the 'R' rating for films and literature which are restricted to adults over 18 years. It seems inconsistent to allow unrestricted access to 'R' rated material simply because it is delivered by telephone.

Option 2: Limit access to telephone sex services

The Bill proposes to restrict access to telephone sex services to customers who agree in writing to supply of these services and who have been issued with a PIN or some other means to limit access. This would not close down the telephone sex industry but would limit the likelihood of children accessing the services.

Option 3: Limit access to all premium charge 1900 services

Telephone subscribers already have an option to bar access to 1900 numbers by contacting their carrier/service provider if they are concerned about unauthorised access to these services generating large bills. Delivery of these services is a legitimate business activity and they provide a far wider range of services than telephone sex. Consumers are able to assess the risks of financial loss and to make decisions accordingly. The telephone sex services are a particular concern to the community because the content is not suitable for children and warrant separate treatment.

Option 4: Ban the supply of telephone sex services entirely.

While a ban would eliminate the risk of inappropriate access to these services by children, it would also be inconsistent with supply of similar adult material being permitted in cinemas, bookshops etc with appropriate restrictions to limit access by children.

Customer Service Guarantee (CSG)

(a) Option 1 is to leave the current arrangement unchanged and Option 2 is to legislate for an automatic payment.

(b) Option 1 would be to leave the liability for CSG damages payments as a matter for commercial negotiation between carriage service providers; Option 2 might be to make a voluntary industry code through the ACIF process; and Option 3 is to legislate a right to contribution between carriage service providers.

Assessment of impacts (costs and benefits) of each option

Digital Data Services

Option 1 would most likely meet the desired objective. It would have no adverse impact on carriers who would continue to develop their services on a commercial basis. It would also have no positive or negative impact on consumers who do not need a digital data service, or on the ACA which would not be required to take any additional action to regulate or monitor the implementation of services. For consumers who want a digital data service but are currently unable to get one, however, it would not ensure that the service will be provided to all parts of Australia in a reasonable timeframe, and they would not receive a subsidy on the cost of equipment.

Option 2 would also meet the objective but would have some impacts on stakeholders. The impact on carriers would be minor: the designated digital data service provider(s) would be required to prepare digital data service plans and comply with other provisions of the universal service regime; all carriers would be required to share the cost of providing equipment subsidies to satellite service customers but this cost is expected to be small relative to the existing USO cost (about $2m depending

on take up rate). As the carrier with the largest share of the market, Telstra would bear most of the cost. The effect on customers who do not want data services would also be minimal. It is unlikely that the additional cost of the equipment subsidy would have an impact on overall telecommunications prices. Consumers who do want the service would have a guarantee of its availability, and access to a subsidy for satellite equipment. There would be some impact on the ACA which would be required to monitor delivery of the digital data service plan and implement cost sharing arrangements for the equipment subsidy.

Option 3 would clearly achieve the objective but would involve high costs and major impacts on all stakeholders. For Telstra there would be a need for major capital expenditure and expansion to achieve the objective. If implemented as part of the USO, a share of the cost would be borne by other carriers and may affect their commercial viability. Consumers who want a digital data service would obtain a benefit but would also be subject to higher telecommunications charges to cover the capital costs involved. The cost of access to data services is also likely to be higher than it otherwise would have been to take account of the need to provide a service to consumers in remote areas. Consumers who do not want a digital data service will be disadvantaged. The cost of upgrading the network would be passed on to all telecommunications consumers, yet, for the immediate future, only a few will use the service it provides. The ACA will have additional responsibilities and costs in regulating the obligation and assessing the costs to be shared among carriers. The ACA's costs are also passed on to carriers through licence fees.

Telephone Sex Services

The economic cost of the options escalates from Option 1 (the least restrictive on industry) to Option 4 (the most restrictive). The benefits also arguably increase, but the additional protection for children from Options 3 and 4 over Option 2 are comparatively minor. Option 3, however, will have a severe impact on the businesses operating non-telephone sex services using premium service numbers (such as 1900) and reduce consumer choice. Option 4 would eliminate the telephone sex service industry and the rights of legitimate users of those services to continue to use those services.

Customer Service Guarantee (CSG)

(a) Under current arrangements customers must first be aware of their CSG rights and make a claim before carriage service providers are liable for damages. While it is arguable that some customers do not claim because they are not unhappy with the service even when a breach of a CSG standard occurs, it is more likely that customers are not sufficiently aware of their entitlement to damages. To the extent that carriage service providers are avoiding damages payments then the incentive for them to meet the CSG standards is diminished.

(b) There is a concern in industry that carriage service providers (CSPs) who are substantially dependent on another CSP may be unfairly burdened by liability for CSG damages to their customers where the fault lies in the network of

another carriage service provider. While this could be handled in contract negotiations between carriage service providers, there is a concern that the negotiations are likely to unreasonably favour the infrastructure/interconnection provider. ACIF processes to develop a voluntary industry code would be unlikely to be effective because consensus on liability would be difficult to achieve in the absence of a principle established in legislation. The ACIF process is better fitted to establishing administrative arrangements between carriage service providers to implement the principle established in legislation. It is important that any arrangement to address these concerns should not require the customer to establish relationships with two CSPs (ie the customer owed CSG damages should not have to apply to the second CSP).

Consultation

<u>Digital Data Services</u>

There has been consultation over an extended period with major carriers about the technical options for providing data services and likely costs, particularly in the context of the ACA's digital data review.

<u>Telephone Sex Services</u>

A Senate Committee reported on this issue in 1992 and recommended restrictions on access to the then 0055 telephone sex services. These services have since been migrated to the 1900 series with some subsequent relaxation of the restrictions which were recommended. The proposed amendments are consistent with the objectives of the Senate Committee's recommendations in 1992.

<u>Customer Service Guarantee (CSG)</u>

These proposals were discussed in evidence before the Senate Committee Inquiry into the Telstra Sale Bills which took submissions and heard witnesses and derive from the Government's consideration of the Committee's report.

Conclusion and recommended option

<u>Digital Data Services</u>

Option 2 is the recommended option. It will make data services available to all Australians, and provide assurance to regional areas that services will be available, but will not impose a significant cost burden on the community.

<u>Telephone Sex Services</u>

Option 2 is recommended because it will provide appropriate protection from exposure to the content of telephone sex services for children in a manner consistent with the community's handling of this material delivered by other media.

Customer Service Guarantee (CSG)

(a) Option 2 is recommended because automatic payment is more equitable and enhances the incentive for CSPs to meet the CSG standards.

(b) Option 3 is recommended because it establishes in legislation the principle that the CSP responsible for the breach should ultimately be liable, but it does not require the customer to establish a second relationship with the CSP responsible for the breach.

Implementation and review

Digital Data Services

The arrangements will be implemented from 1 July 1999. In keeping with the government's policy of regular policy review, the digital data service obligation will be reviewed as part of the general review of the telecommunications legislation due in 2002. In addition there will be a review of USO funding arrangements during 1999.

Telephone Sex Services

Carriage service providers and telephone sex service providers will have six months after the commencement of the Bill within which to put in place arrangements which will enable them to comply with Part 9A. The Act will be reviewed in 2002.

Customer Service Guarantee (CSG)

The provisions will come into effect 6 months after the commencement of the Bill. This will afford carriage service providers an opportunity to put arrangements in place to ensure that they can comply with the provisions. Carriage service providers may need to improve their systems to provide for automatic payment to customers for CSG breaches. The Act will be reviewed in 2002.

NOTES ON AMENDMENTS

AMENDMENTS (1) TO (3)

Amendments (1) to (3) make consequential amendments to the commencement provision in clause 2 of the Bill as a result of proposed amendments relating to the digital data service regime.

Subclause 2(2), as proposed to be amended, will provide that certain definitions that are used in Part 2 (dealing with the universal service regime and the digital data service regime) as well as Part 2 itself and Part 3 (dealing with the National Relay Service) will commence on 1 July 1999.

This will ensure that Parts 7 and 7A of the *Telecommunications Act 1997* will apply in relation to the 1998-1999 financial year and that Parts 2 and 3 of this Bill will apply to subsequent financial years.

AMENDMENTS (4) AND (5)

Clause 4 of the Bill sets out a simplified outline of the Bill to assist readers.

Amendment (4) amends the simplified outline to indicate that one of the objects of the universal service regime will be to ensure that all people in Australia, wherever they reside or carry on business, should have reasonable access, on an equitable basis, to digital data services.

Amendment (5) amends the simplified outline as a consequence of Amendment (39). Amendment (39) will introduce a new Part 9A of the Bill to regulate telephone sex services.

AMENDMENT (6)

Amendment (6) amends the definitions contained in subclause 5(2) of the Bill as a consequence of the proposed amendments dealing with digital data services.

Subclause 5(1) of the Bill provides that unless the contrary intention appears, expressions used in the Bill and in the Telecommunications Act have the same meaning in the Bill as they have in that Act.

Subclause 5(2) sets out other definitions mainly for the purposes of Part 2 of the Bill (dealing with the universal service regime) and Part 6 of the Bill (dealing with the Telecommunications Industry Ombudsman).

AMENDMENTS (7) TO (11)

Clause 8 of the Bill sets out a simplified outline of Part 2 of the Bill which deals with the universal service regime.

Amendment (7) amends the simplified outline to provide that one of the objects of the universal service regime is to ensure that all people in Australia, wherever they reside or carry on business, should have reasonable access, on an equitable basis, to digital data services.

Amendments (8) to (11) amend the simplified outline to provide that the elements of the universal service regime include:

- the specification of the universal service obligation and the digital data service obligation;
- the declaration of universal service providers and digital data service providers;

- the carrying out of universal service plans and digital data service plans; and
- the regulation of universal service charges and digital data service charges.

AMENDMENTS (12) TO (14)

Amendments (12) to (14) make amendments to clause 9 of the Bill, which sets out the objects of Part 2 of the Bill, to include reference to digital data services.

The effect of the amendments is that the objects of Part 2 include giving effect to the following policy principles:

- all people in Australia, wherever they reside or carry on business, should have reasonable access, on an equitable basis, to digital data services;
- the digital data service obligation described in proposed section 19A should be fulfilled as efficiently and economically as practicable; and
- certain costs associated with fulfilling the digital data service obligation should be shared amongst carriers.

AMENDMENT (15)

Amendment (15) inserts a new clause 12A to define digital data services.

For the purposes of the Bill, a digital data service will be either a general digital data service or a special digital data service (subclause 12A(1)).

For the purposes of the Bill, subclause 12A(2) defines a general digital data service to be a carriage service that provides a digital data capability broadly comparable to that provided by a data channel with a data transmission rate of 64 kilobits per second supplied to end-users as part of the designated rate ISDN service. This definition is a replication of the carriage service definition under subsection 66(1) of the *Telecommunications Act 1997*. The general digital data service can be likened to the ISDN service currently available to 96% of the Australian population, as required by licence condition issued under paragraph 66(1)(b) of the Telecommunications Act.

For the purposes of the Bill, subclause 12A(3) defines a special digital data service as a carriage service that provides for a capability for the delivery of digital data to an end-user broadly comparable to the corresponding capability provided by a data channel with a data transmission speed of 64 kilobits per second supplied to end-users as part of the designated basic rate ISDN service. The special digital data service can be likened to an asymmetric service that provides a data capability in one direction (that is, to the end-user) broadly comparable to 64 kilobits per second with a lesser data rate return service. The Australian Communications Authority, in its report *Digital Data Inquiry: Public inquiry under section 486(1) of the Telecommunications Act 1997*, in August 1998, noted that satellite based data delivery systems are expected to be available in the near future that will provide a data rate capacity comparable to an ISDN line or a 56 kilobit per second modem. It is intended that

these types of asymmetric data services will meet the requirements of subclause 12A(3). Nothing in subclause (3), however, is intended to prevent a symmetric service (that is, one capable of providing the same data transmission capability in both directions) from meeting the requirements of that subclause.

Subclause 12A(4) defines the term ‘designated basic rate ISDN service’. To provide definitional certainty, the intention of this subclause is to refer to a basic rate ISDN service that Telstra actually supplied immediately before 1 July 1997, that service being Telstra’s ISDN service that is compliant with ETSI standards. ETSI has produced an extensive suite of standards in relation to ISDN and it is not intended that the carriage service supplied by a digital data service provider to provide the required digital data capability need comply with those standards.

Subclause 12A(5) explains how the comparability of digital data capability is to be determined. Subclause 12A(5) provides that for the purposes of subclause 12A(2), the determination of the comparability of the digital data capability of a carriage service is to be based solely on a comparison of the data transmission speed available to an end-user of the service.

AMENDMENT (16)

Amendment (16) inserts a new clause 14A dealing with the supply of digital data services.

Clause 14A is a definition provision that sets out what is included in a reference to the supply of a digital data service (for example, subclauses 19A(3) and 19A(5)) and thereby provides a means of adding further requirements to the digital data service obligation (DDSO).

A reference in Part 2 of the Bill to the supply of a general digital data service will include a reference to the supply of:

- customer equipment specified in the regulations; and
- other goods of a kind specified in the regulations; and
- services of a kind specified in the regulations;

where the equipment, goods or services, as the case may be, are for use in connection with the general digital data service and the supply complies with such requirements, restrictions or conditions as may be specified in the regulations (subclause 14A(1)).

The regulations will be able to require that the supply of a specified kind of customer equipment be by way of hire. If those regulations impose such a requirement, Part 2 of the Bill will have effect, in relation to the customer equipment concerned, as if a reference to ‘supply’ were a reference to supply by way of hire (subclause 14A(2)).

The regulations will also be able to require that specified customer equipment is to be supplied on the basis that the customer concerned enters into a legally enforceable

agreement containing such terms and conditions relating to the ownership, possession, location, disposal or use of the equipment, as are specified in, or ascertained in accordance with, the regulations (subclause 14A(3)).

Subclauses 14A(2) and (3), will not, by implication, limit paragraph 14A(1)(e) (subclause 14A(4)).

A reference in Part 2 of the Bill to the supply of a special digital data service will include a reference to the supply of:

- customer equipment of a kind specified in the regulations; and
- other goods of a kind specified in the regulations; and
- services of a kind specified in the regulations;

where the equipment, goods or services, as the case may be, are for use in connection with the special digital data service and the supply complies with such requirements, restrictions or conditions as may be specified in the regulations (subclause 14A(5)).

The regulations will be able to require that the supply of a specified kind of customer equipment is to be by way of hire. If those regulations impose such a requirement, Part 2 of the Bill will have effect, in relation to the customer equipment concerned, as if a reference to 'supply' were a reference to supply by way of hire (subclause 14A(6)).

The regulations will also be able to require that specified customer equipment is to be supplied on the basis that the customer concerned enters into a legally enforceable agreement containing such terms and conditions relating to the ownership, possession, location, disposal or use of the equipment, as are specified in, or ascertained in accordance with, the regulations (subclause 14A(7)).

It is intended that regulations will require the supply of customer equipment associated with the special digital data service (such as a satellite dish, associated wiring and a card inserted into the customer's personal computer) and that a subsidy exist for a proportion of the costs of that equipment. To ensure the integrity of that subsidy scheme, certain restrictions may be imposed on the supply of the customer equipment, including on the ownership, possession, location, disposal or use by the customer of equipment that has been subsidised.

Subclauses 14A(6) and (7), will not, by implication, limit paragraph 14A(5)(e) (subclause 14A(8)).

AMENDMENT (17)

Amendment (17) inserts a new Division 2A of Part 2 of the Bill to provide for a digital data service obligation (DDSO).

The DDSO involves a general digital data service, equivalent to an ISDN service, to be available on request to at least 96% of the Australian population. The DDSO also requires a special digital data service, with a data transmission speed comparable to 64 kilobits per second, to be available on request to those persons unable to receive a general digital data service. The DDSO is designed to ensure that a minimum digital data service is reasonably available to all people in Australia.

As an adjunct to imposing this obligation on the telecommunications industry, Part 2 also provides for the funding by telecommunications carriers of certain losses incurred in fulfilling the DDSO. It is intended that these losses will relate to the costs of supplying the equipment necessary to receive the special digital data satellite service at a subsidised rate and any other losses which may be specified in regulations (under proposed clause 61A). Contributions to DDSO losses are levied under the *Telecommunications (Universal Service Levy) Act 1997*.

The digital data service regime has key characteristics of the existing universal service regime under Part 2 of the Bill:

1. the definition of the DDSO;

2. identification of digital data service providers and participating carriers;

3. plans relating to the fulfilment of the DDSO;

4. flexibility to implement price controls on services supplied under the DDSO;

5. the calculation of digital data costs, that is, the costs incurred in fulfilling the DDSO;

6. the calculation of participating carriers' contributions to the net universal service cost (which include digital data costs);

7. the making of assessments;

8. the disclosure of information about the basis and methods of an assessment; and

9. collection, recovery and payment of levy.

Provisions relating to compliance, enforcement, penalties, inquiries, investigations, monitoring and reporting are relevant to the digital data universal service regime and are located in the Telecommunications Act.

Under clause 1 of Schedule 1 to the Telecommunications Act, as proposed to be amended by the Telecommunications Legislation Amendment Bill 1998, compliance with that Act and this Bill, and thus including the digital data service amendments to be included in Part 2 of this Bill, is a standard carrier licence condition. Section 68 of the Telecommunications Act provides that a carrier must not contravene a condition of a carrier licence held by the carrier and that this is a civil penalty provision. Part

31 of the Telecommunications Act provides for pecuniary penalties for breaches of civil penalty provisions.

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

Under Part 26 of the Telecommunications Act, as proposed to be amended by the Telecommunications Legislation Amendment Bill 1998, a person may complain to the ACA about, amongst other things, a contravention of the Telecommunications Act or this Bill, including a contravention of the digital data service regime to be included in Part 2 of this Bill and in particular, a failure to take all reasonable steps to fulfil the DDSO, or to comply with a digital data service plan. The ACA has the power to investigate such a complaint.

Under section 105 of the Telecommunications Act, as proposed to be amended by the Telecommunications Legislation Amendment Bill 1998, the ACA must monitor, and report each year to the Minister on the performance of carriers, including the adequacy of each digital service providers' compliance with its obligations under Part 2 of this Bill. The ACA has powers to require records to be kept and to gather information (Part 27 of the Telecommunications Act) that will assist it in its performance of its monitoring and reporting functions.

This Bill sets out the legislative framework for the delivery of the Digital Data Service Obligation for the 1999-2000 financial year and subsequent financial years. In terms of the services it requires to be delivered, the Bill increases existing service obligations.

Division 2A—Digital data service obligation

Clause 19A – Digital data service obligation

Clause 19A is a definitional clause which, because it defines the digital data service obligation, is a key provision of Part 2 of the Bill.

Subclause 19A(1) provides that for the purposes of the Bill, the digital data service obligation (DDSO) is the obligation:

- to ensure that either:

– general digital data services; or

– special digital data services;

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

- to ensure that general digital data services are reasonably accessible to at least 96% of the Australian population on an equitable basis; and

- to ensure that special digital data services are reasonably accessible to the remainder of the Australian population on an equitable basis.

The general digital data service obligation is defined in subclause 19A(2) as the obligation to ensure general digital data services are reasonably accessible to all people in general digital data service areas on an equitable basis.

The special digital data service obligation is defined in subclause 19A(4) as the obligation to ensure that special digital data services are reasonably accessible to all people in special digital data service areas on an equitable basis.

Subclause 19A therefore provides a broad conceptual definition of the digital data service obligation: people in Australia are to have reasonable access to certain specified digital data services. In relation to the concepts of 'reasonably accessible' and 'equitable basis' referred to in subclause 19A(2) and (4), it should be noted that these concepts are intended to relate primarily to access in geographical terms and equity in terms of equality of opportunity, rather than concepts of affordability.

This broad conceptual obligation is backed up by a further part of the obligation under clause 14A, namely to supply customer equipment or other goods or services necessary to achieve the objective of ensuring the specified services and customer equipment are reasonably accessible to people in Australia on an equitable basis.

Importantly, subclauses 19A(3) and (5) provide for the supply of the specified digital data services 'on request', that is, on the request of the person seeking supply of the relevant service. The 'on request' concept clarifies the nature of the digital data service obligation – it is not considered appropriate for the digital data service provider to be required to supply that customer with services the customer does not want (see subclauses 19A(6) and (7)).

Subclause 19A(8) provides for regulations that enable obligations that arise in relation to supplying customer equipment (subclauses 14A(1) and (5)), to be met through the involvement of a third party. The obligation is taken to have been met if the third party supplies the necessary customer equipment (through acquisition or hire), and any customer entitlement to a rebate on that equipment is met by the digital data service provider. This provision establishes a basis on which the Government's commitment to provide a subsidy for customer equipment necessary to receive the special digital data service may be given effect. The specific mechanism, however, is expected to be determined in consultation with relevant special digital data service providers.

Under subclause 19A(9) the customer's right to a rebate from a digital data service provider can be transferred to a third party supplying the equipment. These subclauses provide the flexibility for customer equipment to be supplied by persons other than a digital data service provider, and the customer to receive the rebate on

that equipment from the equipment supplier (who can seek compensation from the digital data service provider).

Subclause 19A(10) ensures that subclause 19A(8) is not read down by subclause 19A(9).

Clause 19B – General digital data service areas

The digital data service regime differs from the universal service regime in that it specifies two different levels of digital data service provision – a general digital data service, and a special digital data service.

Clause 19B provides for the Minister to determine service areas containing those parts of the Australian population to be covered by the general digital data service obligation. The clause provides the flexibility for the service areas to be ascertained according to geographical or other criteria. This recognises that the capability to supply the general digital data service (such as by means of an ISDN service) may be influenced by factors which are not capable of description solely by reference to geographical criteria (for example, the ability to supply ISDN services is influenced by the length of cable between a customer and their local exchange and the quality of that cable).

Subclause 19B(2) requires a copy of the Minister's determination under this clause to be published in the Commonwealth *Gazette*.

Subclause 19B(3) requires the Minister to exercise the powers conferred by clause 19B in a manner that is consistent with the fulfilment of the digital data service obligation (including the obligation to ensure that the general digital data service be reasonably accessible to at least 96% of the population).

Clause 19C – Special digital data service areas

Similarly to clause 19B, clause 19C enables the Minister to determine service areas containing those parts of the Australian population to be covered by the special digital data service obligation. The clause provides the flexibility for the service areas to be ascertained according to geographical or other criteria.

Subclause 19C(2) requires a copy of the Minister's determination under clause 19C to be published in the Commonwealth *Gazette*.

Subclause 19C(3) requires the Minister to exercise the powers conferred by clause 19C in a manner that is consistent with the fulfilment of the digital data service obligation (including the obligation to ensure that the special digital data service be available to that part of the population not covered by a general digital data service obligation).

AMENDMENT (18)

Amendment (18) inserts a new Division 3A into Part 2 of the Bill to deal with the regulation of digital data service providers.

Division 3A—Digital data service providers

Clause 26A – Digital data service providers

Clause 26A enables the Minister to declare in writing that a specified carrier is a general digital data service provider, or a specified carrier is a special digital data service provider.

Nothing in this clause is intended to limit the ability of the Minister to declare a carrier a general digital data service provider and/or a special digital data service provider.

It is not necessary to specifically authorise the Minister to declare multiple general digital data service providers, or multiple special digital data service providers, as subclause 26A(1) does not limit the Minister's ability to declare multiple general digital data service providers, and subclause 26A(2) does not limit the Minister's ability to declare multiple special digital data service providers (compare subclause 20(4) of the Bill).

Under clause 26B, a digital data service provider must take all reasonable steps to fulfil the digital data service obligation so far as it relates to the area for which it is the digital data service provider. Under clause 40N, a digital data service provider must take all reasonable steps to ensure that its digital data service plan, which sets out how it is to progressively fulfil its DDSO, is complied with. A digital data service provider must fulfil the DDSO in its respective area, and can claim for proceeds of the levy to compensate it for certain costs associated with fulfilling the DDSO.

There is nothing in the legislation to prevent a carrier who wishes to be declared a digital data service provider approaching the Minister to be so declared. Except where a system for selecting a digital data service provider has been determined under clause 26C or 26D, the Minister has full discretion as to who is declared to be a digital data service provider.

Subclause 26A(1) enables the Minister to declare that a specified carrier is a general digital data service provider for a specified general digital data service area. A 'general digital data service area' is determined by the Minister under clause 19B.

By virtue of subclause 26A(10), a 'carrier' must be a 'participating carrier'. The effect of being declared a digital data service provider, in terms of geographical responsibilities, is stated in clause 26B.

Clause 26C enables the Minister to determine in writing a selection system for the selection of a general digital data service provider. If a selection system for a general digital data service provider has been determined under clause 26C, a declaration

under subclause 26A(1) must be consistent with the selection system. In the absence of such a selection system, it is intended, however, that the Minister can declare a person to be a general digital data service provider at his or her discretion.

Subclause 26A(2) enables the Minister to declare that a specified carrier is a special digital data service provider for a specified special digital data service area. A 'special digital data service area' is determined by the Minister under clause 19C. By virtue of subclause 26(10), a 'carrier' must be a 'participating carrier'. The effect of being declared a special digital data service provider, in terms of geographical responsibilities, is stated in clause 26B. 'Service area' is defined in clause 15.

Clause 26D enables the Minister to determine in writing a selection system for the selection of a special digital data service provider. If a selection system for a special digital data service provider has been determined under clause 26D, a declaration under subclause 26A(2) must be consistent with the selection system. In the absence of such a selection system, it is intended, however, that the Minister can declare a person to be a special digital data service provider at his or her discretion.

Subclause 26A(3) provides that a declaration under subclause 26A(1) or (2) has effect accordingly. The effect of such declarations is stated in subclauses 26B(1), (2), (4) and (5).

Subclause 26A(4) makes a declaration take effect on the date specified in the declaration if it is the first declaration made under subclause 26A(1) or (2). In any other case the declaration takes effect at the start of the financial year after the financial year in which it is made, and ceases at the end of the financial year the declaration specifies unless it is sooner revoked. If the declaration does not include a cessation date, it continues in force until it is revoked. This provision is subject to subclauses 26A(6), (7) and (8) which deal with replacement of declarations and the cessation of a carrier licence. The digital data service regime will operate in relation to financial years.

Subclause 26A(5) makes a revocation take effect at the end of the financial year it specifies or the financial year in which it is made if it does not specify another financial year.

Subclause 26A(6) is designed to enable a carrier that is the existing general digital data service provider to be replaced by another carrier. It provides that if a fresh declaration declaring another carrier to be the general digital data service provider is made to replace an existing declaration (the 'original declaration') the fresh declaration takes effect, and the original declaration ceases to have effect, from the time specified in the fresh declaration. A fresh declaration may be made before the date it is to come into effect (ie. the date specified in the declaration), thereby providing a period for the new carrier to prepare itself for its role of general digital data service provider.

Subclause 26A(7) mirrors subclause 26A(6) but is designed to enable a carrier that is a special digital data service provider to be replaced by another carrier. It provides that if a fresh declaration declaring another carrier to be the special digital data

service provider for a particular area is made to replace an existing declaration (the 'original declaration') the fresh declaration takes effect, and the original declaration ceases to have effect, from the time specified in the fresh declaration. A fresh declaration may be made before the date it is to come into effect (ie. the date specified in the declaration), thereby providing a period for the new carrier to prepare itself for its role of special digital data service provider.

Subclause 26A(8) provides that if a carrier is a general digital data service provider, or a special digital data service provider, and the carrier ceases to hold a carrier licence, then the declaration in relation to that carrier ceases to be in force from that time. That is, on ceasing to be a carrier, the person is no longer a general digital data service provider or a special digital data service provider.

Subclause 26A(9) makes a declaration of a general digital data service provider, or a special digital data service provider, a disallowable instrument which accordingly must be notified in the Commonwealth *Gazette*, tabled in the Parliament and will be subject to Parliamentary disallowance.

Subclause 26A(10) provides that a reference in clause 26A to a carrier does not include a reference to a person of a kind declared by the regulations to be exempt from clause 16. That is, to be declared a general digital data service provider, or a special digital data service provider, a person must be a participating carrier.

Clause 26B – Effect of digital data service provider declaration

Clause 26B sets out the effect, in terms of geographical responsibilities and legal obligations, of being declared a digital data service provider. The explicit linkage between the DDSO and being a general digital data service provider, or special digital data service provider, is established in subclauses 26B(4) and (5), and is supported through the digital data service plans (proposed Division 4A of Part 2).

Subclause 26B(1) makes a digital data service provider in relation to a particular service area the digital data service provider for all of that area, and for each service area that is within that area.

It is worth noting that a digital data service provider may also be responsible for 'enclave' service areas within the service area of another digital data service provider if that service area is so designed.

Subclause 26B(2) provides that a person in relation to whom there is a declaration in force under subclause 26A(1) or (2) at any time during a financial year is a digital data service provider in relation to that financial year. This means that person is eligible to make a claim for levy credit under clause 54, even though the person may no longer be a digital data service provider.

Subclause 26B(3) provides that the areas for which a person is a digital data service provider are taken to be a single area. This means that although a digital data service provider may be responsible for fulfilling the DDSO in a number of non-contiguous areas (for example, Victoria and Western Australia) for the purposes of the Part, those

areas are treated as a single area. This assists with administration of the DDSO costing arrangements.

Subclause 26B(4) provides that a general digital data service provider for an area must take all reasonable steps to fulfil the general DDSO, so far as the obligation relates to that area. Subclause 26B(5) provides that a special digital data service provider for an area must take all reasonable steps to fulfil the special DDSO, so far as the obligation relates to that area.

These provisions (subclauses 26B(4) and (5)) perform the function of requiring a digital data service provider to fulfil the DDSO. Proposed Division 4A of Part 2 of the Bill places further obligations on a digital data service provider for a particular area in relation to digital data service plans, and clause 40N requires such a digital data service provider to take all reasonable steps to ensure that the plan is complied with. Under clause 40B, a digital data service plan sets out how a digital data service provider will progressively fulfil the DDSO in the provider's area. In considering whether a provider has taken all reasonable steps to fulfil the DDSO, regard should be had to whether the provider has complied with its digital data service plan.

The obligation in subclauses 26B(4) and (5) is expressed in terms of taking 'all reasonable steps'. The reasonableness requirement recognises that a digital data service provider may only be able to fulfil the DDSO progressively in its area as the rollout of additional network infrastructure may be required.

Section 581 of the Telecommunications Act, when read with the proposed amendments to the ACA Act and to the definition of 'ACA's telecommunications powers' in the Telecommunications Act proposed to be made by the Telecommunications Legislation Amendment Bill 1998, enables the ACA to give written directions to a carrier in connection with performing any of the ACA's telecommunications functions or exercising any of the ACA's telecommunications powers. Those functions include regulating telecommunications in accordance with the Telecommunications Act or this Bill. As subclauses 26B(4) and (5) requires the digital data service provider to take all reasonable steps to fulfil the DDSO, clause 1 of Schedule 1 to the Telecommunications Act, as proposed to be amended, makes this obligation a standard carrier licence condition and the ACA has the powers to enforce this carrier licence condition (see sections 68 and 69 and Parts 30 and 31 of the Telecommunications Act) and the ACA will have the power under section 581 of the Telecommunications Act to direct a digital data service provider in relation to its compliance with this obligation.

Clause 26C – Selection system for general digital data service providers

Clause 26C provides a head of power to enable the Minister to determine a selection system for selecting a general digital data service provider for general digital data service areas in Australia in relation to specified financial years. Amongst other things, the provision is intended to enable the general digital data service provider to be selected by tender (ie. with the tenderer submitting the lowest cost being declared the general digital data service provider).

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

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

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

Where the general digital data service provider is selected according to a selection process, it would still be necessary for that person to be declared the general digital data service provider under subclause 26A(1).

While clauses 26C and 26D provide a mechanism for tendering out the DDSO, the precise arrangements will be dealt with in the Minister's determination. Some comments, however can be made about envisaged linkages between the operation of clauses 26C and 26D and the remainder of Part 2 of the Bill. Where the selection system involves tendering, it is envisaged that the system would provide for the preparation of a tender specification. This specification would set out the requirements the Government would require of the successful tenderer. These requirements would largely derive from the DDSO as it is defined in clause 19A and any price control arrangements provided for under proposed Division 5A of Part 2 of the Bill.

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

Subclause 26C(1) enables the Minister, by written instrument, to determine a selection system for the purpose of selecting a carrier to be a general digital data service provider for specified general digital data service areas in relation to specified financial years.

Subclause 26C(2) requires that a selection system so determined must require the selected carrier to have elected that:

- an amount specified in the election will be the carrier's digital data cost for the financial year concerned; or

- a method of ascertaining an amount, being a method specified in the election, will apply for the purposes of determining the carrier's digital data cost for the financial year concerned.

Accordingly, subclause 26C(2) requires the selected carrier to have elected that a specific amount is to be its digital data cost (for example, an amount that it has tendered as its cost to fulfil the DDSO) or to have elected that its digital data cost will be ascertained by means of a particular method (again, for example, possibly as proposed by an applicant during a selection process).

Subclause 26C(3) provides that a selection system determined by the Minister may require an applicant for selection under such a system to give the Minister a copy of the document that the applicant would be required to give to the Minister under clause 40A, namely a draft digital data service plan, in the event that the applicant is successful. This provision is intended to enable the submission of a draft digital data service plan as part of the process for the selection of a digital data service provider. Whether a successful applicant (or the Minister) would be bound by such a document should the applicant be successful would depend on the details of the selection system determined by the Minister. This provision, does not, by implication, limit the kind of selection scheme the Minister can determine under subclause 26C(1).

Subclause 26C(4) prevents the Minister from exercising his or her power to declare a general digital data service provider under subclause 26C(1) in any way that is inconsistent with the determined selection system. That is, where a system is in place for determining the general digital data service provider, that system must be used. However, where no system has been determined, the Minister may exercise his or her discretion in selecting a general digital data service provider.

Nothing in clause 26C, however, is intended to prevent a selection system from being used to select additional general digital data service providers where one or more such providers have previously been declared and will continue to fulfil that role.

Subclause 26C(5) provides that Part 2 of the Bill does not prevent a method mentioned in paragraph 26C(2)(b) from being the same as a method that would have applied if the system concerned had not been determined. This means that even if a general digital data service provider is selected under clause 26C, the successful carrier may elect to have its digital data cost calculated according to a methodology determined by the Minister, with the agreement of all participating carriers under paragraph 61A(1)(c), or using the methodology under paragraph 61A(1)(d).

Subclause 26C(6) makes a selection system determination a disallowable instrument. The determination must therefore be notified in the Commonwealth *Gazette*, tabled in the Parliament and will be subject to Parliamentary disallowance.

Clause 26D – Selection system for special digital data service providers

Clause 26D is a parallel provision to clause 26C but provides for the determination of selection systems for special, rather than general, digital data service providers. Most of the explanation in relation to clause 26C is also applicable to this clause.

Clause 26D provides a head of power to enable the Minister to determine a selection system for selecting special digital data service providers for specified special digital data service areas in relation to specified financial years. Amongst other things, the provision is intended to enable a special digital data service provider for a particular area to be selected by tender (eg. where the tenderer submitting the lowest cost is declared the special digital data service provider). The precise requirements of the selection system are to be dealt with in subordinate legislation rather than the Act because of the significant detail that may need to be specified.

Where a special digital data service provider is selected according to a selection process, it would still be necessary for that person to be declared a special digital data service provider under subclause 26A(2).

Subclause 26D(1) enables the Minister, by written instrument, to determine a selection system for the purpose of selecting carriers to be special digital data service providers for specified special digital data service areas in relation to specified financial years.

Subclause 26D(2) provides that a selection system so determined must require the selected carrier to have elected that:

- an amount specified in the election will be the carrier's digital data cost for the financial year concerned; or

- a method of ascertaining an amount, being a method specified in the election, will apply for the purposes of determining the carrier's digital data cost for the financial year concerned.

Subclause 26D(3) provides that a selection system determined by the Minister may require an applicant for selection under such a system to give the Minister a copy of the document that the applicant would be required to give to the Minister under clause 40A, namely a draft digital data service plan, in the event that the applicant is successful. This provision is intended to enable the submission of a draft digital data service plan as part of the process for the selection of a digital data service provider. Whether a successful applicant (or the Minister) would be bound by such a document should the applicant be successful would depend on the details of the selection system determined by the Minister. This provision, does not, by implication, limit the kind of selection system the Minister can determine under subclause 26D(1).

Subclause 26D(4) prevents the Minister from exercising his or her power to declare a special digital data service provider under subclause 26A(2), in any way that is inconsistent with the determined selection system. That is, where a system is in place for determining the special digital data service provider for a particular area, that system must be used. However, where no system has been determined in relation to a particular area, the Minister may exercise his or her discretion in selecting a special digital data service provider for that area.

Nothing in clause 26D, however, is intended to prevent a selection system from being used to select additional special digital data service providers where one or more such providers have previously been declared and will continue to fulfil that role.

Subclause 26D(5) provides that Part 2 of the Bill does not prevent a method mentioned in paragraph 26D(2)(b) from being the same as a method that would have applied if the system concerned had not been determined. This means that even if a special digital data service provider is selected under clause 26D, the successful carrier may elect to have its digital data cost calculated according to a methodology determined by the Minister, with the agreement of all participating carriers under paragraph 61A(1)(c), or using the methodology under paragraph 61A(1)(d).

Subclause 26D(6) makes a selection system determination a disallowable instrument. The determination must therefore be notified in the Commonwealth *Gazette*, tabled in the Parliament and will be subject to Parliamentary disallowance.

Clause 26E – Selection systems – information gathering powers

Clause 26E is designed to enable information relevant to selection systems to be obtained from carriers and carriage service providers.

Subclause 26E(1) enables the Minister, by a written notice given to a carrier or carriage service provider, to require the carrier or carriage service provider to give the Minister, within the period and in the manner and form specified in the notice, any information that is relevant to:

- the exercise of the powers to determine a selection system for a general or special digital data service provider under clause 26C or 26D; or
- the administration of such a selection system.

A carrier or carriage service provider must comply with any such requirement for information (subclause 26E(2)).

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

AMENDMENT (19)

Amendment (19) inserts a new Division 4A of Part 2 of the Bill to deal with digital data service plans.

Division 4A provides for the development by digital data service providers of digital data service plans, for those plans to be approved by the Minister, and for digital data service providers to comply with approved plans. Digital data service plans are intended to assist with the achievement of the following objectives:

- better planning of DDSO delivery by requiring digital data service providers to focus on what they must do to fulfil their obligations and how they should do it;

- better community information about the DDSO and what the digital data service provider is doing to fulfil it (approved digital data service plans will be public documents);

- better monitoring of DDSO fulfilment through measuring a digital data service provider's performance against its plan;

- better enforcement of the DDSO (a plan will be able to be used in identifying failures to adequately fulfil the DDSO).

A digital data service provider has the obligation, under either subclause 26B(4) or (5), to take all reasonable steps to fulfil the DDSO. Digital data service plans are intended to support and supplement this obligation by setting out how the provider will progressively fulfil the DDSO.

Division 4A of Part 2 sets out a scheme under which a digital data service provider must develop plans about how it is to fulfil the DDSO in the area for which it is responsible. These plans will be subject to Ministerial approval and monitoring by the ACA. Through his or her ability to formulate requirements for plans, to approve or refuse plans and require variations or replacements of plans, the Minister will have considerable scope to oversee the fulfilment of the DDSO. At the same time, however, digital data service providers have primary responsibility for determining how they are to fulfil their DDSO and initiative in planning rests with them. The planning requirement will force digital data service providers to focus on the fulfilment of their responsibilities under the DDSO and set themselves concrete targets, timeframes and performance indicators.

Division 4A—Digital data service plans

Clause 40A – Digital data service provider must submit digital data service plan

Clause 40A requires a digital data service provider for a particular area to give the Minister a draft digital data service plan for that area (subclause 40A(1)) within 90 days of becoming the digital data service provider for that area (subclause 40A(2)).

Where a digital data service provider takes over responsibility for a service area from a digital data service provider that ceases to have responsibility for that service area, this requirement will apply to the new digital data service provider. Nothing would prevent that service provider adopting the plan of the former digital data service provider.

Clause 40B – Digital data service plans

Clause 40B states that a draft or approved digital data service plan for an area is a plan that sets out how the digital data service provider for that area will progressively fulfil the DDSO (in so far as it relates to that area).

The requirements imposed on the digital data service provider by the DDSO provide the basis for a digital data service plan. The plan is intended to set out the means by which the digital data service provider will fulfil those requirements. Given that it may take time for a digital data service provider to fulfil its obligations in an area, the plan may provide for the progressive fulfilment of the obligation.

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

- the levels of service quality, in terms of both technical performance and customer service, at which a digital data service provider intends to supply the services required under the DDSO;

- the timeframes within which a service would be made accessible within an area (for example, where significant network upgrading would be required);

- the timeframes within which services would be supplied (ie. connected) to a customer (which may vary from area to area, if such differences are reasonable).

Clause 40C – Replacement of approved digital data service plan

Clause 40C provides that a draft digital data service plan for an area may replace a pre-existing approved plan for an area if such a plan is in force. When the draft plan becomes an approved plan, the pre-existing plan ceases to be in force. This provides a means by which digital data service providers can change their digital data service plans as they consider it appropriate. Changes might be required, for example, if the DDSO is revised, an area's demographics change, a provider decides to deploy different technologies or experience reveals deficiencies in service provision, including quality.

Clause 40D – Approval of draft digital data service plan by Minister

Clause 40D provides for the approval or rejection of a draft digital data service plan by the Minister. The Minister's ability to refuse to approve a draft plan and to direct a digital data service provider to submit a new plan enables the Minister to contribute to the planning of fulfilment of the DDSO, and provides an active level of Governmental involvement appropriate to this important obligation.

Subclause 40D(1) requires the Minister to approve or refuse to approve a draft digital data service plan. In assessing a plan, the Minister must have regard to the criteria set out in clause 40F.

Subclause 40D(2) makes a draft plan approved by the Minister an approved digital data service plan. Under clause 40N, a digital data service provider must take all reasonable steps to ensure that an approved digital data service plan is complied with.

Subclause 40D(3) enables the Minister to direct a digital data service provider to give the Minister, within the period specified and in the terms specified in the direction, a fresh draft digital data service plan if the Minister refuses to approve a draft plan (for example, if the Minister considers the plan does not adequately provide for the fulfilment of the DDSO in an area). The content of such a direction can state where the Minister considers a draft plan was deficient and how those deficiencies should be rectified in a new draft plan. The provider must comply with a direction to submit a new draft plan.

Clause 40E – Public comment – draft plan

Clause 40E requires a digital data service provider to undertake public consultation on a draft digital data service plan before submitting it to the Minister for approval.

This provision is intended to ensure that the public has an opportunity to comment on draft digital data service plans as they are being developed.

Subclause 40E(1) requires that, before giving the Minister a draft digital data service plan under clause 40D, a digital data service provider must:

- publish a preliminary version of the draft plan and invite members of the public to make submissions to the provider about the preliminary version within a specified period; and

- give consideration to any submissions that were received from members of the public within that period.

This provision provides a mechanism for the public to comment on draft digital data service plans and for the public's comments to be considered. A digital data service plan sets out how a digital data service provider will progressively fulfil its DDSO (clause 40B).

Subclause 40E(2) requires that the period specified in the invitation to comment must run for at least 30 days. This provides the public with a guaranteed minimum period within which to make comments.

Subclause 40E(3) provides that clause 40E does not apply to a draft plan given to the Minister in accordance with a direction under subclause 40D(3). Subclause 40D(3) enables the Minister to direct a digital data service provider to provide a fresh draft digital data service plan where the Minister refuses to approve an original plan. Given that the Minister's direction will take into account the public comments which

occurred in relation to the original plan and there are timing pressures if a revised plan is required, it is not appropriate to require public consultation in these circumstances.

Subclause 40E(4) provides that clause 40E does not apply to a draft plan given to the Minister in accordance with a notice under clause 40M. Clause 40M enables the Minister to require a digital data service provider to give the Minister a draft variation of a current plan or draft replacement plan. Given that public consultation will have occurred in relation to the original plan and there are timing pressures if a revised plan is required, it is not appropriate to require public consultation in these circumstances.

Clause 40F – Minister to have regard to certain matters

Clause 40F sets out criteria the Minister must have regard to in considering whether or not to approve a draft digital data service plan. The criteria are designed to ensure the DDSO is fulfilled in a manner consistent with relevant objects of the Bill (including Part 2) and of the Telecommunications Act.

Subclause 40F(1) requires the Minister, in deciding whether to approve a draft digital data service plan for a general digital data service area, to have regard to whether:

- the plan provides for the DDSO (in so far as it relates to that area) to be fulfilled:
  - as efficiently and economically as practicable; and
  - at performance standards that reasonably meet the social, industrial and commercial needs of the Australian community; and
  - progressively throughout that area within such period as the Minister considers reasonable; and
- the draft plan complies with any requirements (formulated by the Minister) in force under clause 40G.

The three detailed criteria derive from the objects of the Bill (including Part 2) and the Telecommunications Act (see clauses 3 and 9).

Subclause 40F(1) does not, by implication, limit the matters to which regard may be had (subclause 40F(2)).

Subclause 40F(3) requires the Minister, in deciding whether to approve a draft digital data service plan for a special digital data service area, to have regard to whether:

- the plan provides for the DDSO (in so far as it relates to that area) to be fulfilled:
  - as efficiently and economically as practicable; and

– at performance standards that reasonably meet the social, industrial and commercial needs of the Australian community; and

– progressively throughout that area within such period as the Minister considers reasonable; and

- the draft plan complies with any requirement (formulated by the Minister) in force under clause 40G.

As mentioned above, the three detailed criteria derive from the objects of the Bill (including Part 2) and the Telecommunications Act (see clauses 3 and 9).

Subclause 40F(3) does not, by implication, limit the matters to which regard may be had (subclause 40F(4)).

As a matter of course, the Minister would have regard to any advice or report provided by the ACA to the Minister at the Minister's request, including any report on a public inquiry on a draft digital data service plan the Minister has asked the ACA to conduct.

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

Clause 40G – Minister may formulate requirements for draft plans

Clause 40G enables the Minister to formulate requirements to be complied with by a draft digital data service plan (subclause 40G(1)) and gives examples of possible types of requirements, including:

- timetables for the supply of services (for example, a service must be accessible to a particular percentage of the population or in particular areas by a particular time or within a particular period);

- performance standards relating to the fulfilment of the DDSO (relating to both the technical performance of a service and customer service in the supply of a service); and

- the form of a draft digital data service plan (eg. what must be included in a plan in terms of information).

The Minister's requirements must be consistent with the DDSO as it is defined in clause 19A. Under subsection 33(3A) of the *Acts Interpretation Act 1901*, different provision can be made for different types of providers. Subclause 40G(3) makes an instrument setting out such requirements a disallowable instrument. The instrument must therefore be notified in the Commonwealth *Gazette*, tabled in the Parliament and will be subject to Parliamentary disallowance.

Clause 40H – Notification of decision

Clause 40H requires the Minister to notify the digital data service provider that has submitted the draft plan and the ACA as to whether he or she has approved or refused to approve the draft plan (subclause 40H(1)). A copy of the Minister's notice must be published in the Commonwealth *Gazette* (subclause 40H(2)).

The Minister must give the digital data service provider submitting the plan a written notice setting out the reasons for refusing to approve the draft plan if the Minister has rejected the plan (subclause 40H(3)). Note that under subclause 40D(3) the Minister may direct the digital data service provider to give the Minister another draft plan, within the period and within the terms specified in the direction.

Clause 40J – Variation of approved digital data service plan

Clause 40J sets out the process for varying an approved digital data service plan, as may be necessary, for example, because of changes to the DDSO, changes in the demographics of a service area, or changes to the service provider's delivery strategy.

Subclause 40J(1) makes this clause apply if an approved plan ('the current plan') is in force and the digital data service provider concerned gives the Minister a draft variation of the plan.

Subclause 40J(2) requires the Minister to approve or refuse to approve the variation.

Subclause 40J(3) prevents the Minister from approving the variation unless the Minister is satisfied that he or she would approve a draft digital data service plan in the same terms as the current plan but varied as proposed in the draft variation.

Subclause 40J(4) requires the Minister to notify the digital data service provider that has submitted the draft plan and the ACA as to whether he or she has approved or refused to approve the variation. A copy of the notice must be published in the Commonwealth *Gazette* (subclause 40J(5)).

Subclause 40J(6) requires the Minister to give the digital data service provider submitting the draft variation a written notice setting out the reasons for refusing to approve the variation if the Minister has rejected it.

Subclause 40J(7) provides that a current plan is varied accordingly if the Minister approves a variation.

Clause 40K – Public comment – variation of plan

Clause 40K requires a digital data service provider to undertake public consultation on a variation of an approved digital data service plan before submitting the variation to the Minister for approval.

This clause is intended to ensure that the public has an opportunity to comment on variations to approved digital data service plans.

Subclause 40K(1) requires that, before giving the Minister a draft variation to a digital data service plan under clause 40J, a digital data service provider must:

- publish a preliminary version of the draft variation and invite members of the public to make submissions to the provider about the preliminary version within a specified period; and

- give consideration to any submissions received from members of the public within that period.

Subclause 40K(2) requires that the period specified in the invitation to comment must run for at least 30 days. This provides the public with a guaranteed minimum period within which to make comments.

Subclause 40K(3) provides that clause 40K does not apply to a draft variation given to the Minister in accordance with a notice under clause 40M. Clause 40M enables the Minister to require a digital data service provider to give the Minister a draft variation of a current plan or draft replacement plan. Given that public consultation will have occurred in relation to the original plan and there are timing pressures if a revised plan is required, it is not appropriate to require public consultation in these circumstances.

Clause 40L – Minister may direct the ACA to give reports and/or advice

Clause 40L enables the Minister to direct the ACA to give the Minister such reports and/or advice as the Minister requires to assist him or her in deciding whether to approve a draft digital data service plan or draft variation (subclause 40L(1)). The ACA must comply with the direction (subclause 40L(2)). The ACA's role here is to provide specialist research and advice to the Minister, particularly in light of its responsibility for monitoring and reporting on the fulfilment of the DDSO (paragraph 105(3)(e) of the Telecommunications Act). The provision does not by implication limit the Minister's powers in relation to public inquiries (subclause 40L(3)) and the Minister is able to direct the ACA to hold a public inquiry on a draft plan if he or she considers it is appropriate to do so.

Clause 40M – Minister may direct variation or replacement of plan

Clause 40M applies if an approved digital data service plan for an area is in force (subclause 40M(1)). The clause enables the Minister to give the digital data service provider concerned a notice requiring the provider to give the Minister a draft variation of its current plan or a fresh draft plan for the area that is expressed to replace the current plan (subclause 40M(2)). The provider must comply with the notice (subclause 40M(3)).

This clause enables the Minister to require changes to, or replacement of, an approved digital data service plan should the Minister form the view that the approved plan is no longer adequate. A plan may need to be changed, for example, because experience reveals deficiencies with the approved plan or circumstances within the service area

change (and the digital data service provider has failed to automatically vary its plan accordingly).

Clause 40N – Compliance with approved digital data service plan

Subclause 40N(1) requires a general digital data service provider to take all reasonable steps to ensure that it complies with a relevant approved digital data service plan.

Similarly, subclause 40N(2) requires a special digital data service provider to take all reasonable steps to ensure that it complies with a relevant approved digital data service plan.

Clause 40N provides a test of 'reasonableness' in relation to compliance with a digital data service plan in recognition that the supply of telecommunications services is a complex undertaking involving many factors, not all of which may be within the control of the digital data service provider. For example, compliance with a plan may be rendered difficult or impossible because of natural disasters or failure of suppliers (eg. satellite launch failure).

Clause 40N requires compliance with an approved digital data service plan. Clause 1 of Schedule 1 to the Telecommunications Act (as proposed to be amended by the Telecommunications Legislation Amendment Bill 1998) makes it a statutory condition of licence that a carrier (and a digital data service provider must be a carrier) comply with the Bill and that Act. Contravention of the Bill and the Telecommunications Act is subject to civil penalty provisions (see Part 31 as proposed to be amended) involving pecuniary penalties of up to $10 million.

Subclauses 26B(4) and (5) provide that the digital data service provider for an area must take all reasonable steps to fulfil the digital data service obligation, so far as the obligation relates to that area. Clause 40N requires a digital data service provider for a particular area to take all reasonable steps to ensure that the plan for the area is complied with. Under clause 40B, a digital data service plan sets out how the digital data service provider will progressively fulfil the DDSO in the provider's area. In considering whether a provider has taken all reasonable steps to fulfil the DDSO for the purpose of subclause 26B(4) or (5), it is intended that regard should be had to whether the provider has complied with its digital data service plan.

Clause 40P – Register of digital data service plans

Clause 40P requires the ACA to maintain a register including all approved digital data service plans currently in force (subclause 40P(1)). The register may be maintained by electronic means such as a computer database (subclause 40P(2)).

Subclause 40P(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 section 53 of the *Australian Communications Authority Act 1997*. 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.

Subclause 40P(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.

Subclause 40P(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 e-mail or on the Internet.

The register is similar to other public registers maintained by the ACA. The register should enable greater public awareness and scrutiny of how digital data service providers intend to fulfil their DDSOs and facilitate public action to ensure providers fulfil their obligations.

AMENDMENT (20)

Amendment (20) inserts a new Division 5A into Part 2 of the Bill to deal with the regulation of digital data service charges.

Division 5A of Part 2 of the Bill, together with Part 9 of the Bill, are intended to provide a means of ensuring the prices of services supplied under the digital data service obligation can be controlled, with a view to ensuring they are affordable. This is in recognition that the affordability of services is a central determinant of the use that is made of access. The affordability of services under the DDSO is intended to be addressed through external mechanisms such as competition, targeted assistance and price control; it is not intended to be inherent in the digital data service concept itself.

The DDSO set out in clause 19A will ensure that general digital data services and special digital data services are reasonably accessible to all people in Australia, regardless of where they reside or carry on business, and are supplied to people on reasonable request. Of itself, however, the DDSO does not ensure the prices at which such services are supplied are necessarily affordable for end-users. The obligation simply ensures the services are available. Division 5A enables price controls to be implemented for digital data services if the prices at which such services are being supplied are considered to be excessive for the purpose of supplying a service to end-users. The Government may, however, choose to use or rely on the use of other policy tools, such as the telecommunications access regime contained in Part XIC of the *Trade Practices Act 1974*, to facilitate competitive pressures to reduce prices.

This Division will only apply to Telstra to the extent that Telstra is not subject to price control under Part 9 of the Bill.

Consistent with the preference to rely on general regulation where practicable, the ACCC will administer Division 5A. The ACCC has responsibility for general prices surveillance. The ACCC will also continue to have responsibility for administration of the price controls currently imposed on Telstra under Part 6 of the Telstra Corporation Act (which is proposed to be dealt with in future by Part 9 of the Bill).

Division 5A—Regulation of digital data service charges

Clause 46A – Digital data service charges

Subclause 46A(1) provides that for the purposes of this Division, a 'digital data service charge' is a charge imposed or proposed to be imposed, by a general digital data service provider for a particular area for the supply of general digital data services to persons in the area.

Subclause 46A(2) provides that for the purposes of this Division, a 'digital data service charge' is also a charge imposed or proposed to be imposed, by a special digital data service provider for a particular area for the supply of special digital data services to persons in the area.

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

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

Clause 46B – Declaration subjecting digital data service charges to price control arrangements

Clause 46B enables the Minister, by a notice published in the Commonwealth *Gazette*, to declare that specified digital data service charges are subject to price control arrangements under this Division (subclause 46B(1)).

Subclause 46B(2) makes such a declaration a disallowable instrument. The instrument must therefore be notified in the Commonwealth *Gazette*, tabled in the Parliament and will be subject to Parliamentary disallowance.

Clause 46C – Price control determinations

Clause 46C enables the Minister to determine the actual price control arrangements to which declared digital data service charges are to be subject.

Subclause 46C(1) makes this clause apply if a declaration is in force under clause 46B in relation to a particular digital data service charge.

Subclause 46C(2) enables the Minister to make a written determination setting out:

- price-cap arrangements and other price control arrangements that are to apply in relation to the charge; or

- principles or rules in accordance with which the digital data service provider may impose or alter the charge;

or both.

Price control determinations may set out any manner of price controls, including maximum monetary charges, parity with charges in other areas, rates at which existing charges may change and notification and disallowance provisions. A price control determination will be able, for example, to stipulate the exact level of a particular charge. This is seen as particularly important where a new digital data service provider may be commencing service in an area and it does not yet have charges in the market place that may be otherwise regulated. Some further examples of the kinds of controls that may be included in a determination are given in subclause 46D(1). Subclause 46D(1) does not limit clause 46C (subclause 46D(2)).

Subclause 46C(3) makes a determination have effect in accordance with its content.

Subclause 46C(4) makes a determination under clause 46C take effect at the time specified in the determination.

Subclause 46C(5) provides that a price control determination under clause 46C may make different provision with respect to different customers. Clause 46C, however, does not, by implication limit subsection 33(3A) of the *Acts Interpretation Act 1901*.

It is intended that a price control determination may provide that different (two or more) price control arrangements apply in relation to one kind of digital data service charge, with each of the different price control arrangements relating to customers in a particular class. For example, a price control determination may apply different price control arrangements in relation to residential and business customers. (Such differentiation exists under the Telstra Carrier Charges—Price Control Arrangements, Notification and Disallowance Determination 1997). It is also intended that a price control determination be able to apply particular price controls in relation to more specific classes of customer, for example, educational institutions, medical facilities or public libraries. This would mean, for example, that where a digital data service is prescribed for the purposes of the DDSO, the Minister in a price determination could require that it be provided to schools, libraries and hospitals at a particular price, while it may be available to other customers at another regulated price, or an unregulated price.

It is also intended that separate determinations may apply to different digital data service providers and different service areas. That is, it is not intended that if there are two or more digital data service providers they must all be subject to a single price control determination under clause 46F. Subjecting all digital data service providers to a single price control determination would be too inflexible, enabling no account to be taken of the individual circumstances of each digital data service provider.

It is envisaged (but need not necessarily be the case) that if the provision of digital data service is tendered out using a selection system provided for in clause 26C or

26D, then price requirements in any tender specification would derive from a price control determination under Division 5A.

Subclause 46C(6) makes the determination a disallowable instrument. The determination must therefore be notified in the Commonwealth *Gazette*, tabled in the Parliament and will be subject to Parliamentary disallowance.

Clause 46D – Content of price control determinations

Clause 46D lists some of the price control arrangements, particularly involving notification and disallowance, that a determination under clause 46C may apply to a digital data service charge.

Subclause 46D(1) enables a price control determination to:

- prohibit a charge from being imposed or altered without the consent of the Minister or the ACCC (paragraphs 46D(1)(a) and (b)); or

- prohibit a charge from being imposed or altered without prior notice being given to the Minister or the ACCC (paragraphs 46D(1)(c) and (d)); or

- empower the Minister to direct the ACCC to give the Minister such reports and advice as he or she requires for the purposes of assisting the Minister in deciding whether to give consent in accordance with the determination (paragraph 46D(1)(e)).

Under these provisions both initial charges (where services have previously not existed or been charged for) and changes to existing charges for a service may be subject to consent or prior notification requirements.

Subclause 46D(2) states that subclause 46D(1) does not, by implication, limit clause 46C. This makes it clear that a price control determination may provide for price control arrangements other than those of the type described in clause 46D.

Clause 46E – Price control determinations subject to determinations under Part 9

Clause 46E renders a price control determination under clause 46 ineffective to the extent that it relates to a charge that is the subject of a price control determination under subclause 154(1) or 157(1) of the Bill.

Subclause 46E(1) makes this clause apply if a determination under subclause 154(1) or 157(1) of the Bill is in force in relation to a charge imposed by Telstra. If such a determination is in force, a determination under this Division is of no effect in so far as it relates to that charge (subclause 46E(2)).

Clause 46F – Compliance with price control determinations

Clause 46F requires a digital data service provider to comply with a determination in force under this Division. Clause 1 of Schedule 2 to the Telecommunications Act, as proposed to be amended by the Telecommunications Legislation Amendment Bill 1998, makes it a statutory condition of licence that a carrier (a digital data service provider must be a carrier) comply with the Bill. Contravention of the Bill and the Telecommunications Act is subject to civil penalty provisions (see Part 31 of that Act) involving pecuniary penalties of up to $10 million.

AMENDMENTS (21) TO (23)

Clause 47 provides a simplified outline of Division 6 of Part 2 to assist readers. This Division deals with the assessment, collection, recovery and distribution of universal service levy.

Amendment (21) amends clause 47 to explain that Division 6 sets out a scheme under which losses that result from supplying services in the course of fulfilling the universal service obligation and certain costs that are associated with fulfilling the digital data service obligation are shared among carriers.

Amendments (22) and (23) amend clause 47 to explain that if a universal service incurs a loss (called a 'net universal service cost') from supplying services to certain areas ('net cost areas') in the course of fulfilling the universal service obligation or a digital data service provider incurs certain costs (called 'digital data costs') in the course of the fulfilling the digital data service obligation, the provider may be entitled to a payment ('a levy credit') to recoup those losses or costs.

AMENDMENTS (24) TO (26)

Clause 54 of the Bill enables a person that is a universal service provider in relation to a financial year to submit a claim for levy credit, that is the credit it has in the event of levy being levied. A universal service provider accrues this levy credit in fulfilling the USO and the amount of its credit is, in effect, its USO loss.

Amendments (24) to (26) enable a person that is a digital data service provider in relation to a financial year to submit a claim for levy credit, that is the credit it has in the event of levy being levied. A digital data service provider accrues this levy credit in fulfilling the DDSO and the amount of its credit is, in effect, its DDSO cost.

Subclause 54(1), as proposed to be amended, makes clause 54 apply to a financial year if a person is a digital data service provider in relation to that financial year. Note, a person need no longer be a digital data service provider at the time of lodgement to be a digital data service provider in relation to a financial year.

Subclause 54(2) will enable a person who is a digital data service provider in relation to a financial year to give the ACA a written claim for levy credit within 90 days of the end of the financial year to which the claim relates. This period is not extendable. This period gives digital data service providers a reasonable period in which to

prepare their claims and aligns the claim process more closely to other business reporting requirements.

The claim must be in a form approved in writing by the ACA (subclause 54(3)).

Proposed subclause 54(4A) sets out the details that must be included in a levy credit claim for a digital data service provider, being the provider's digital data cost for the year, details of how that cost has been worked out, and such other information as the approved claim form requires.

The claim must be accompanied by a report by an approved auditor in a form approved by the ACA stating that the auditor has had sufficient access to the person's records in order to audit the claim, that the auditor has audited the claim and containing a declaration of the auditor's opinion, being a declaration in the terms specified in the form approved by the ACA (subclause 54(5)). 'Approved auditor' is defined in clause 18. The auditing requirement is intended to provide another check on the appropriateness of claims and place a greater onus on digital data service providers to ensure their claims are correct.

AMENDMENT (27)

Amendment (27) inserts clause 61A, dealing with the digital data cost of a digital data service provider for a financial year.

Clause 61A is central to the calculation of a digital data service provider's costs in fulfilling its DDSO. It is taken into account in determining participating carriers' respective credits and debits and levy entitlements and liabilities. The normal manner by which digital data service costs would be calculated would be using the customer equipment costs less customer charges plus supplementary amount methodology set out in the clause. Two other methods are available to accommodate the selection of digital data service providers using a system determined by the Minister and to enhance the overall flexibility of the costing process.

First, the clause provides for a digital data cost to be derived in accordance with a selection system under clause 26C or 26D. This sum may be an actual amount that a carrier has elected will be its digital data cost on being declared the digital data service provider (paragraph 26C(2)(a) or 26D(2)(a)) or an amount ascertained by means of a methodology that a carrier has elected will be used to determine its digital data cost on being declared the digital data service provider (paragraph 26C(2)(b) or 26D(2)(b)).

Second, the clause enables the Minister to determine, with the agreement of all participating carriers, a method for ascertaining a person's digital data cost. This second method enhances administration of the levy arrangements by enabling alternative methods of calculating the digital data cost to be utilised where all participating carriers agree.

Subclause 61A(1) enables a person's digital data cost for a financial year to be calculated in one of four mutually exclusive ways.

First, paragraph 61A(1)(a) sets out how a digital data service provider's digital data cost is to be determined where the person is a digital data service provider in relation to that financial year because of the operation of a selection system determined under clause 26C or 26D, and the person has elected that a specified amount will be the person's digital data cost for the financial year. In this instance, the person's digital data cost for the financial year is equal to the amount the person elected to be its digital data cost.

For example, the Minister may undertake a process by which to select a digital data service provider by a tender arrangement. The successful tenderer may have agreed to fulfil the DDSO that has been tendered for, say, $10 million per annum over a 3 year period. That digital data service provider's digital data cost would then be $10 million for each applicable year. This amount would then be factored into the overall DDSO assessment process as appropriate.

Second, paragraph 61A(1)(b) sets out how a digital data service provider's digital data cost is to be determined where the person is a digital data service provider in relation to that financial year because of the operation of a selection system determined under clause 26C or 26D, and the person has elected that a specified method of ascertaining an amount will apply for the purposes of determining the person's digital data cost for the financial year. In this instance, the person's digital data cost for the financial year is equal to the amount that is worked out using that method.

This provision reflects the flexibility that has been built into the selection system provisions which enables a selection system to not only generate a specific amount but alternatively, a methodology for ascertaining an amount.

As a purely hypothetical example, a person selected to be a digital data service provider may have elected that its digital data cost would be calculated on the basis of a certain amount per customer. Its cost would then be worked out according to that methodology. In the hypothetical example suggested above, if it is assumed that the service provider has a stable customer base of 3,000 customers and it claims $600 per customer, its net digital data cost would be $1.8 million ($600 x 3000).

Note that subclauses 26C(4) and 26D(4) do not prevent a method that a person elects to have used in determining its digital data cost in a selection system from being the same that would have applied if the system concerned had not been determined. That is, the methodology may be a methodology determined by the Minister with the agreement of participating carriers (see subclause 61A(4)) or the default, customer equipment costs less customer charges plus supplementary amount methodology.

Third, paragraph 61A(1)(c) sets out how a digital data service provider's digital data cost is to be determined where: the person is a digital data service provider in relation to that financial year; the person is <u>not</u> a digital data service provider in relation to that financial year because of the operation of a selection system determined under clause 26C or 26D; and a Ministerial determination is in force under subclause 61A(4) setting out an alternative methodology. In this instance the person's digital data cost for the financial year is worked out in accordance with the determination.

The ability for the Minister to determine an alternative methodology for calculating a digital data service provider's digital data cost is provided for in subclause 61A(4) and its use is discussed in detail in that context.

Fourth, paragraph 61A(1)(d) sets out how a digital data service provider's digital data cost is to be determined where: the person is a digital data service provider in relation to that financial year; the person is not a digital data service provider in relation to that financial year because of the operation of a selection system determined under clause 26C or 26D; and no determination is in force under subclause 61A(4) setting out an alternative methodology in relation to that financial year. In this instance, the default methodology, the customer equipment costs less customer charges plus supplementary amount methodology, is to be employed, the formula for which is set out in subclause 61A(3).

If the amount worked out using the customer equipment costs less customer charges plus supplementary amount methodology is greater than zero dollars, the person's digital data cost for the financial year is equal to that amount. This is because the person has incurred a loss in fulfilling the DDSO. If, however, the amount worked out using the customer equipment costs less customer charges plus supplementary amount methodology is not greater than zero dollars, the person's digital data cost for the financial year is zero dollars. This is because the person has not incurred a loss in fulfilling the DDSO and it is unnecessary for the person to be compensated for fulfilling the DDSO.

The methodology envisages at least 2 ways in which the Government may implement its commitment to subsidise the cost of customer equipment for special digital data services – the imposition of price controls on customer equipment supplied (either by way of sale or hire) by a special digital data service provider or by a requirement that the special digital data service provider give a rebate to customers who have sought the equipment from a third party. The net cost of either approach will be able to be claimed through the levy arrangement under the methodology proposed in subclause 61A(3).

Subclause 61A(2) outlines customer equipment costs for a financial year for the purposes of this clause and the methodology specified under subclause 61A(3). Customer equipment costs comprise the total costs incurred by a person in acquiring customer equipment that is covered by a declaration under clause 46B (and is of a kind specified in regulations made for the purposes of paragraph 14A(1)(a) or 5(a)), and was supplied by the person during the financial year to persons in the area concerned, and the total rebates that became payable during the financial year by the person (in accordance with regulations under subclause 19A(8)).

Subclause 61A(3) gives the formula for determining a person's digital data cost for a financial year when the digital data service provider has not been selected under clause 26C or 26D, and there is no Ministerial determination in force in relation to that financial year. The formula is:

Customer equipment costs – Customer charges + Supplementary amount

The formula provides for digital data costs to be calculated by subtracting the charges payable by persons for the supply of customer equipment covered by the DDSO from the supplier's customer equipment costs and adding a supplementary amount.

Supplementary amount means the amount (if any) determined through the use of regulations made for the purposes of this definition. It is not intended that digital data providers be able to claim losses in fulfilling their obligations in the same way as such losses are determined for universal service providers. This reflects the fact that all digital data services are either currently being supplied without subsidy or are expected to be offered commercially in the near future. In such circumstances any losses incurred in such commercial activities should not be shared with the remainder of the telecommunications industry. The inclusion of a 'supplementary amount' in the methodology provides a mechanism, however, for losses incurred as a result of possible regulated losses (in addition to that envisaged by the customer equipment scheme described above) being incurred by a digital data provider. Such losses may include, for example, losses which may be incurred as a direct result of the imposition of additional price control arrangements.

Subclause 61A(4) enables the Minister to make written determinations specifying a method of ascertaining an amount for the purposes of paragraph 61A(1)(c), that is, for determining a person's digital data cost. Such a determination has no effect unless each person who was a participating carrier immediately before the determination was made gave written consent to the making of the determination.

Subclause 61A(4) is designed to enable the easier calculation of digital data costs when all participating carriers agree. All participating carriers must agree because they are all contributing to total digital data costs and must be confident that those costs are reliable.

Subclause 61A(5) states that the amount worked out under a determination under subclause 61A(4) may be zero dollars.

Subclause 61A(6) requires that a determination under subclause 61A(4) must be published in the Commonwealth *Gazette*. This ensures the process for calculating digital data costs is publicly known and thus open to scrutiny.

AMENDMENT (28)

Amendment (28) inserts a new clause 61B into Part 2 of the Bill.

Clause 61B is intended to provide a further means for the Government to control excessive digital data costs of a digital data service provider as calculated using the customer equipment costs less customer charges plus supplementary amount methodology. The provision is largely intended as a reserve power to be used should it be apparent that a digital data service provider's costs are in excess of those which may be reasonably expected (for example, incurring costs associated with acquiring customer equipment which do not reflect commercially available prices or prices which might be available if adequate competition existed in the supply of such equipment).

Subclause 61B(1) enables the Minister, by written instrument, to formulate principles or rules that are to be applied in determining the extent (if any) to which costs of a kind mentioned in subclause 61A(2) are to be treated as excessive for the purposes of subclause 61B(2).

For the purposes of calculating the customer equipment costs less customer charges plus supplementary amount methodology in subclause 61A(3) in relation to a particular financial year, if the person who is a digital data service provider has incurred costs of a kind mentioned in the definition of 'customer equipment costs' in paragraph 61A(2)(a) and the costs are treated as excessive to any extent under the principles determined by the Minister, the amount of the costs is to be reduced by the amount of the excess. That is, a digital data service provider's customer equipment costs may be considered against the excessive cost principles or rules formulated by the Minister and if they are found to be excessive when considered against those principles, they are to be reduced by the amount of that excess.

A Ministerial determination setting excessive cost principles under subclause 61B(1) is a disallowable instrument for the purposes of s. 46A of the *Acts Interpretation Act 1901* (subclause 61B(3)). It must therefore be published in the Commonwealth *Gazette*, tabled in the Parliament and will be subject to Parliamentary disallowance.

Generally, it is envisaged such principles would be determined prior to the financial year in which they were to apply, thus providing the digital data service provider with an opportunity to achieve the cost levels provided for in the principles, or to enable the provider to calculate its costs in accordance with the principles. Note, however, that nothing in the legislation requires the principles to be determined in advance of the period to which they will apply. The Minister may choose to make a written instrument under subclause 61B(1) during a financial year if it became apparent that a digital data service provider's costs for that year were unacceptably high. In all instances, however, it is intended that the principles be applied by the digital data service provider in calculating its digital data cost and preparing its levy credit claim. Where principles have been formulated and applied to a year, the ACA will be required to examine the correctness of the claim having regard to such principles as have been formulated.

AMENDMENT (29)

Amendment (29) amends clause 63 of the Bill which allows the ACA to inquire into the correctness of a claim or return.

The ACA will be able to make whatever inquiries it thinks necessary or desirable to determine the correctness of a digital data service provider's digital data cost claim. Information and documents obtained as a result of such inquiries are to be used by the ACA in making its assessment of liabilities and entitlements.

AMENDMENTS (30) AND (31)

Amendments (30) and (31) amend clause 64 of the Bill which allows the ACA to assess liabilities and entitlement for the purposes of Part 2 of the Bill.

Subclause 64(1) requires the ACA to make a written assessment for the purposes of Part 2 for each financial year.

Subclause 64(2) identifies matters that the assessment must set out in relation to each participating carrier in relation to that financial year.

New subclause 64(3A) identifies matters that the assessment must set out in relation to each digital data service provider in relation to that financial year.

Subclause 64(4), as proposed to be amended by Amendment (31), sets out the basis on which the assessment must be made. The assessment must be made on the basis of the levy credit claims lodged under clause 54, information and documents obtained by the ACA because of its inquiries under clause 63, and any other information or documents the ACA has and thinks relevant to making the assessment. This subclause is important because it makes it clear that the ACA does not need to rely solely on the information provided to it in claims and returns to make its assessment. The clause gives the ACA considerable discretion to take into account the findings of its inquiries and other relevant matters in making its assessment.

AMENDMENT (32)

Amendment (32) amends clause 67, which deals with the levy debit of a participating carrier for a financial year, to take account of the total digital data costs of digital data service providers.

Clause 67, as amended, will set out the formula for determining each participating carrier’s levy debit, that is the amount it must contribute to the overall funding for the USO and the DDSO, and how elements of that formula are arrived at.

Subclause 67(1), as proposed to be amended, provides that a participating carrier’s levy debit for a financial year is worked out using the formula:

Contribution factor x (Total net universal service cost + Total digital data cost)

‘Contribution factor’ has the meaning given to it in subclause 67(2). ‘Total digital data cost’ means the total digital data costs for the financial year of all the digital data service providers in relation to the financial year. ‘Total net universal service cost’ means the total net universal service costs of all the universal service providers in relation to the financial year.

Subclause 67(2) provides that the ‘contribution factor’ depends on whether a determination in relation to determining the contribution factor is in force under subclause 67(3). If such a determination is in force, the contribution factor is worked

out in accordance with that determination. If there is no determination, the contribution factor is worked out in accordance with the formula:

$$\frac{\text{Carrier's eligible revenue}}{\text{Total eligible revenue.}}$$

In the formula, ‘carrier’s eligible revenue’ means the participating carrier's eligible revenue for the financial year and ‘total eligible revenue’ means the total eligible revenue for the financial year of all the participating carriers in relation to the financial year.

Application of this formula means that participating carriers’ contributions to the total net universal service cost are proportional to their share of total eligible revenue.

The amounts used for total net universal service cost, total digital data cost, total carrier’s eligible revenue and total eligible revenue would be taken from the ACA’s assessment under clause 64, which reflect the amounts involved after the ACA has inquired into the correctness of claims and returns (see clause 63) and taken the results of its inquiries and any other relevant information into account in completing its USO and DDSO assessments (paragraph 64(4)(c) and (d)).

Subclause 67(3) provides an alternative mechanism for determining the contribution factor for the purposes of the levy debit formula in subclause 67(1). It enables the Minister to make a written determination specifying a method of ascertaining the contribution factor for the purpose of the levy debit formula. Such a determination, however, has no effect unless each person who was a participating carrier immediately before the determination was made gave written consent to the making of the determination. A copy of such a determination must be published in the *Gazette* for public information purposes (subclause 67(4)). The determination is not a disallowable instrument because it is made with the agreement of all parties that it affects.

AMENDMENT (33)

Amendment (33) substitutes a new clause 68 of the Bill to take account of a participating carrier’s digital data cost for a financial year.

New clause 68 will set out the means of determining the levy debit balance of a participating carrier. If a person’s levy debit determined under clause 67 exceeds the person’s net universal service cost plus the person’s digital data cost, then the person has a levy debit balance. If the person’s share of the total net universal service cost and digital data cost exceeds its own net universal cost and digital data cost (the cost it has incurred in fulfilling its obligations under the USO and DDSO) the person is liable to pay levy equal to the amount of its levy debit.

Under the *Telecommunications (Universal Service Levy) Act 1997*, levy is imposed on a levy debit balance. The amount of the levy is equal to the amount of the levy debit balance.

AMENDMENTS (34) and (35)

Amendments (34) and (35) make consequential amendments to clause 71 of the Bill to take account of the digital data service amendments.

Clause 71, as proposed to be amended, will enable a person to request information about an assessment, namely information on which the assessment is based and about the methodology, and will require the ACA to comply with the request except in relation to certain information. The ACA will not be able to make available information obtained from, or relating to, a digital data service provider that could reasonably be expected to cause substantial damage to the digital data service provider, or information prescribed in regulations.

AMENDMENT (36)

Amendment (36) makes an amendment to clause 72 of the Bill consequential on the digital data service amendments.

Clause 72, as proposed to be amended, will enable a universal service provider, a digital data service provider, or a participating carrier in relation to a financial year to request the ACA to provide specified information, being information the ACA cannot provide under clause 71, and sets out rules in relation to the ACA's compliance with the request.

AMENDMENT (37)

Clause 117A – Time for payment of damages for breach of performance standards

Clause 117A provides for the automatic payment of CSG damages to customers without the customer having to make a specific claim for the CSG payment. This provision addresses the problem that customers may not be aware of entitlements to CSG payments. The provision will also mean carriage service providers will have a stronger incentive to meet the CSG.

Carriage service providers will be allowed a period of 6 months after commencement of the Bill to enable them to put arrangements in place to ensure that they can comply with clause 117A (see subclause 117A(7)).

It is intended that a carriage service provider automatically pay damages to a customer when it becomes aware that it has failed to meet a performance standard. A carriage service provider should not be able to avoid making a payment merely because a customer has not claimed the damages entitlement.

If, at a particular time (as defined in subclause 117A(7)), a carriage service provider has reason to believe that an event has occurred that is reasonably likely to result in the carriage service provider being liable to pay damages to a customer under clause 116, the carriage service provider will be required to decide within 14 days whether to accept that liability (subclause 117A(1)). In making this decision, the carriage service

provider must have regard to whether there is any reasonable basis for the carriage service provider to dispute the liability (subclause 117A(2)).

The provisions recognise that customer service guarantee standards set by the ACA under clause 115 of the Bill may include exemptions from particular standards in certain circumstances (such as severe weather or natural disasters). In these circumstances, the carriage service provider must decide whether their failure to meet connection or fault repair timeframes are covered by such exemptions and therefore whether a liability under the customer service guarantee exists in relation to the event.

The carriage service provider must advise the customer of its decision (including a decision not to accept the liability) within 14 weeks after the decision is made (subclause 117A(3)). This provision is intended to ensure that the relevant customer is made aware of the carriage service provider's decision whether to accept liability or not. If the carriage service provider advises the customer that it does not accept liability, the customer may choose to pursue the matter further with, for example, the Telecommunications Industry Ombudsman as provided for in clause 119 of the Bill.

If the carriage service provider decides to accept the liability to pay damages and the liability is to be discharged by giving the customer a credit in an account the customer has with the carriage service provider, the customer must be notified of the credit in the first bill in which it is practicable to include the notification. There is also provision to allow the carriage service provider and customer to come to an agreement about another manner for discharge of the liability. Regardless of the manner of payment, the liability must be discharged within 14 weeks after the decision is made (subclauses 117A(4) and (5)). The 14-week period is intended to take account of the quarterly billing cycle which applies to many customers, and allows an additional period for the carriage service providers' administrative processes.

If the customer dies, the legal personal representative of the customer will be entitled to the benefits of clause 117A (subclause 117A(6)).

AMENDMENT (38)

Clause 118A – Right of contribution

Clause 118A provides for establishing entitlement to contribution for damages for breach of performance standards due to one or more acts or omissions of another carriage service provider, for example, faults in a network (whether due to technical or human error) in situations in which a carriage service provider (the first provider) utilises the network of another carriage service provider (the second provider) to supply services to the customer.

Clause 118A will not apply to a breach of performance standards that occurs before the end of the period of 6 months beginning on the date of commencement of the clause (subclause 118A(7)). This will allow carriage service providers an opportunity to put in place arrangements to enable them to comply with clause 118A.

If a carriage service provider (the first provider) is liable to pay damages for the contravention to the customer (primary damages), and the contravention is wholly or partly attributable to one or more acts or omissions of another carriage service provider, the first provider is then entitled to claim damages from the other provider (secondary damages) to the extent that the contravention is attributable to those acts or omissions (subclause 118A(1)).

If the contravention is wholly attributable to those acts or omissions, the secondary damages payment will be equal to the primary damages payment. If the contravention is partly attributable to the acts or omissions, the secondary damages payment will be an amount (not more than the primary damages) which the court determines to be fair and reasonable (subclause 118A(2)).

If the second provider makes payments to the first provider as a result of a right or remedy that was available to the first provider otherwise than under this clause and arose out of the same act or omissions (for example through contractual arrangements between the carriage service providers concerned), the amount of secondary damages is to be reduced (but not below zero) by the amount of the payment under the other right or remedy (subclause 118A(3)).

It is expected that carriage service providers will address the administrative arrangements for the discharge of liabilities under this clause in relevant interconnection agreements with other carriage service providers, or through an industry-wide code of practice which may be registered under Part 6 of the *Telecommunications Act 1997*.

The first provider may recover the amount of the secondary damages by action against the second provider in a court of competent jurisdiction (subclause 118A(4)).

Any court action by the first provider to recover secondary damages from the second provider must be instituted within 2 years after the first provider discharged the liability for the primary damages (subclause 118A(5)).

If the customer dies, a reference in clause 118A to the ‘customer’ includes a reference to the legal personal representative of the customer (subclause 118A(6)).

AMENDMENT (39)

Proposed Part 9A – Telephone sex services

Part 9A is a proposed new Part of the Bill. It is intended to address community concerns that telephone sex lines are too easily accessed by children of standard telephone service customers.

The provisions in Part 9A prohibit the supply of telephone sex services where the telephone company bills the customer for the service except where the telephone customer has:

- given their prior written agreement to telephone sex services being accessed using their telephone service;

- been given a personal identification number (PIN) or some other means to limit access; and

- the service is supplied using a specific number range (1901 or another prefix determined by the Minister or the Australian Communications Authority).

These arrangements should prevent most children from accessing these services.

The purpose of these arrangements is not to close down the telephone sex industry. The arrangements allow the industry to operate by providing for the services to be supplied where telephone customers have 'opted-in' or where the telephone sex service customer pays for the service otherwise than by the telephone account, for example by using a credit card.

Clause 158A – Simplified outline

Clause 158A provides a simplified outline of proposed Part 9A to assist readers.

Clause 158B – Unacceptable conduct in relation to a telephone sex service

Clause 158B sets out the conduct that is prohibited in relation to the supply of telephone sex services.

Subclause 158B(1) prohibits a telephone sex service provider or a carriage service provider engaging in unacceptable conduct in relation to the supply of a telephone sex service.

A telephone sex service is defined in clause 158J to mean a commercial service supplied by way of a voice call using a standard telephone service where the majority of persons who call the service are likely to do so with the sole or principal object of deriving sexual gratification from the call. A telephone sex provider is defined in clause 158K to mean a person who uses, or proposes to use, a standard telephone service to supply one or more telephone sex services.

Subclause 158B(2) establishes the circumstances under which providers are considered to have engaged in unacceptable conduct in relation to the supply of telephone sex services. Unacceptable conduct involves:

- the supply of telephone sex services to an end-user in Australia by way of a voice call using a standard telephone service;

- where the charge for the telephone sex service is expected to be included in a bill sent to a relevant customer by or on behalf of a carriage service provider;

except where the customer has 'opted-in' to telephone sex services by agreeing in writing, the service is supplied only on the use of the customer's PIN number (or

some other means of limiting access to the service by others) and the call is made to a number with an approved prefix such as 1901 (see clause 158H).

Subclause 158B(2)(d) is intended to apply where a carriage service provider includes the charge for the telephone sex service in the telephone account. This would be the case for premium information services. It is not intended, for example, to apply where a carriage service provider charges a customer for a telephone call charged at normal rates (such as local or STD rates) and where payment for the sex service is made separately by credit card.

Subclause 158B(2) refers to the standard telephone service as being the medium for the supply of a telephone sex service. This will mean the rules will apply essentially to any service for voice telephony such as services supplied over mobile phones and fixed services as well as to telephone companies that may be supplying STD and IDD call services to the customer but not be supplying the local telephone service.

Subclause 158B(3) provides that subclause 158B(1) is a civil penalty provision. Part 31 of the *Telecommunications Act 1997* provides for pecuniary penalties for breaches of civil penalty provisions.

Section 570 of the Telecommunications Act, which is contained in Part 31, provides that 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.

As a result of subsections 570(3) to (6) of the Telecommunications Act, the maximum pecuniary penalty applying to a contravention of subclause 158B(1) will be, for a body corporate, $250,000 for each contravention and, for an individual, $50,000 for each contravention.

In determining the pecuniary penalty, the Court will be required to have regard to all relevant matters including whether the person has previously been found by the Court in proceedings under ‘this Act’ to have engaged in any similar conduct (subsection 570(2)). As a result of item 40 of Schedule 3 to the Telecommunications Legislation Amendment Bill 1998, a reference in section 570 to ‘this Act’ will include the proposed *Telecommunications (Consumer Protection and Service Standards) Act 1998* and regulations under that Act.

Subclause 158B(4) prohibits the inclusion of a charge for telephone sex services in a bill sent to a customer by or on behalf of the carriage service provider where the carriage service provider engages in unacceptable conduct. This will provide a significant incentive for service providers not to ‘push the boundaries’ of the rules concerning the supply of telephone sex services.

Subclause 158B(5) provides that subclause 158B(4) is a civil penalty provision. As a result of subsections 570(3) to (6) of the Telecommunications Act, the maximum pecuniary penalty applying to a contravention of subclause 158B(4) will be up to $250,000 (see sections 98 and 101 and Schedule 2 to the Telecommunications Act, as

proposed to be amended by item 58 of Schedule 3 to the Telecommunications Legislation Amendment Bill 1998).

As a result of subclause 158B(6), any ‘opt-in’ agreement will be ineffective for the purposes of clause 158B if it deals with a matter other than the use of a standard telephone service to supply telephone sex services. This will prevent suppliers bundling the ‘opt-in’ agreement with other dealings a customer may have with a telephone company. An example of the type of behaviour this provision seeks to prevent would be including the agreement to ‘opt-in’ in a standard contract for a mobile telephone service.

Subclauses 158B(7) and (8) provide a defence for carriage service providers in any proceedings brought under Part 31 of the Telecommunications Act for the recovery of a pecuniary penalty in relation to a contravention of subclause 158B(1) or (4) where the telephone sex service is supplied without their knowledge or where the supply could not have been ascertained with reasonable diligence. This provision acknowledges that it could be possible for a service supplier to surreptitiously supply a telephone sex service without the knowledge of the carriage service provider.

However, carriage service providers will not be able to turn a blind eye or to ignore breaches of the rules. Carriage service providers will be required to use reasonable diligence to ascertain whether the information service suppliers using their network are supplying telephone sex services, including making inquiries of those intending to supply information services, imposing contractual obligations regarding the type of services supplied and reasonable monitoring of advertising of such services.

Clause 158C – Supply of goods or services not to be tied to the supply of telephone sex services

Clause 158C is intended to prevent suppliers getting customers to ‘opt-in’ to telephone sex services by requiring them to ‘opt-in’ as a condition of purchasing certain services, or by giving discounts or special offers if they do ‘opt-in’.

Subclause 158C(1) is a civil penalty provision (see subclause 158C(2)). Part 31 of the *Telecommunications Act 1997* provides for pecuniary penalties for breaches of civil penalty provisions.

Section 570 of the Telecommunications Act, which is contained in Part 31, provides that 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.

As a result of subsections 570(3) to (6) of the Telecommunications Act, the maximum pecuniary penalty applying to a contravention of subclause 158C(1) will be, for a body corporate, $250,000 for each contravention and, for an individual, $50,000 for each contravention.

As a result of subclause 158C(3), the definitions of ‘goods’, ‘price’, ‘services’ and ‘supply’ in section 4 of the *Trade Practices Act 1974* will apply for the purposes of clause 158C.

Clause 158D – Regulations may prohibit or regulate certain telephone sex services

Clause 158D provides the ability for the Governor-General to make regulations to prohibit or regulate certain telephone sex services (including the advertising or promotion of such services).

Subclause 158D(2) provides that regulations made for the purposes of subclause 158D(1) will be able to make provision with respect to a matter by conferring on the Australian Communications Authority (ACA) or the Australian Broadcasting Authority (ABA) a power to make a decision of an administrative character.

Subclause 158D(3) prohibits a telephone sex service provider or a carriage service provider contravening regulations in force for the purposes of subclause 158D(1).

Subclause 158D(4) provides that subclause 158D(3) is a civil penalty provision. Part 31 of the *Telecommunications Act 1997* provides for pecuniary penalties for breaches of civil penalty provisions.

Section 570 of the Telecommunications Act, which is contained in Part 31, provides that 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.

As a result of subsections 570(3) and (4) of the Telecommunications Act, the maximum pecuniary penalty applying to a contravention of subclause 158D(3) will be, for a body corporate, $250,000 for each contravention and, for an individual, $50,000 for each contravention.

Clause 158E – Aiding, abetting etc.

The effect of clause 158E is that a person who:

- aids, abets, counsels or procures a contravention of any of the civil penalty provisions in subclauses 158B(1), 158B(4), 158C(1) and 158D(3); or

- induces a contravention of any of these provisions; or

- is in any way, directly or indirectly, knowingly concerned in, or party to, a contravention of any of these provisions; or

- conspires with others to effect a contravention of any of these provisions;

will be taken to have contravened a civil penalty provision.

Part 31 of the *Telecommunications Act 1997* provides for pecuniary penalties for breaches of civil penalty provisions. Section 570 of the Telecommunications Act, which is contained in Part 31, provides that 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.

As a result of subsections 570(3) to (6) of the Telecommunications Act, the maximum pecuniary penalty applying to a contravention of subclause 158E(1) will be, for a body corporate, $250,000 for each contravention and, for an individual, $50,000 for each contravention.

Clause 158F – Evidentiary certificate—telephone sex service

The ABA will be able to issue a written certificate stating that a specified service is, or was, a telephone sex service (subclause 158F(1)).

In any proceedings under the Telecommunications Act that relate to this Part (in particular, proceedings for the recovery of a pecuniary penalty under Part 31 of that Act), the ABA's certificate will be prima facie evidence of the matters in the certificate (subclause 158F(2)). It will be a matter for the relevant telephone sex service provider or carriage service provider to whom the certificate relates to lead evidence to rebut this prima facie evidence.

A document purporting to be a certificate under subclause 158F(1) will be taken, unless the contrary is established, to be a certificate and to have been properly given (subclause 158F(3)).

Clause 158G – Onus of proof—agreement and limiting access

The effect of clause 158G is that in any proceedings under the Telecommunications Act that relate to this Part (in particular, proceedings for the recovery of a pecuniary penalty under Part 31 of that Act), the onus will be on the relevant telephone sex service provider or carriage service provider to prove that:

- the relevant customer has agreed in writing to the use of the standard telephone service to supply telephone sex services in general (paragraph 158B(2)(e));

- the telephone sex provider has reason to believe that the relevant customer has been issued with a PIN or some other means of limiting access to telephone sex services (paragraph 158B(2)(f)); and

- the telephone sex service provider has reason to believe that the end-user of the telephone sex service has used the PIN or other means of limiting access in order to access the telephone sex service (paragraph 158B(2)(g)).

Clause 158H – Approved prefix

Clause 158H defines the term 'approved prefix' for the purposes of Part 9A. This term is used in paragraph 158B(2)(h).

An approved prefix will be:

- the prefix 1901; or

- if there is a written Ministerial determination or ACA determination in force specifying another prefix instead of 1901 – that other prefix; and

- if there is a written Ministerial determination or ACA determination in force specifying another prefix – that prefix (subclause 158H(1)).

A Ministerial determination under paragraph 158H(1)(a) or (b) will be a disallowable instrument for the purposes of section 46A of the *Acts Interpretation Act 1901*. It must therefore be published in the Commonwealth *Gazette*, tabled in the Parliament and will be subject to Parliamentary disallowance (subclause 158H(2)).

Clause 158J – Telephone sex service

Clause 158J defines the term 'telephone sex service' for the purposes of Part 9A.

For the purposes of Part 9A, a telephone sex service will be a commercial service supplied using a standard telephone service where:

- the supply is by way of a voice call made using the standard telephone service; and

- having regard to the way in which the service is advertised or promoted and the content of the service;

it would be concluded that most persons who call the service are likely to do so with the sole or principal object of deriving sexual gratification from the call (subclause 158J(1)).

A service will not be a telephone sex service if it is a therapeutic or counselling service provided by a person registered or licensed as a medical practitioner, or as a psychologist, under State or Territory law (subclause 158J(2)).

Clause 158K – Telephone sex service provider

Clause 158K provides that for the purposes of Part 9A, a person will be a telephone sex service provider if the person uses, or proposes to use, a standard telephone service to supply one or more telephone sex services.

Clause 158L – Voice call

Subclause 158L(1) provides that, to avoid doubt, a reference to a voice call includes a call that involves a recorded or synthetic voice rather than an actual voice.

Subclause 158L(2) quarantines the operation of subclause 158L(1). It will have effect only for the purposes of Part 9A of the Bill.

Clause 158M – Savings of other laws

Clause 158M provides that Part 9A is not intended to exclude or limit the concurrent operation of any law of a State or Territory (such as State or Territory criminal laws).

Clause 158N – Transitional

Clause 158N is a transitional provision that will allow telephone sex service providers and carriage service providers a period of 6 months after commencement of the Bill to put arrangements in place to enable them to comply with Part 9A.

When read with subclause 2(1) of the Bill, subclause 158N(1) provides that Part 9A does not apply to a telephone sex service that is supplied before the end of the period of 6 months beginning on a date that is 28 days after the Bill receives Royal Assent.

However, an ‘opt in’ agreement referred to in paragraph 158B(2)(e) will be able to be entered into before, at or after the commencement of the clause 158N (which is 28 days after the Bill receives Royal Assent) (subclause 158N(2)).

NOTES ON REQUESTS FOR AMENDMENTS

TELECOMMUNICATIONS (CONSUMER PROTECTION AND SERVICE STANDARDS) BILL 1998

AMENDMENT (1)

Amendment of clause 69 – Levy credit balance for a financial year

The Telecommunications (Consumer Protection and Service Standards) Bill 1998, as proposed to be amended, will establish a digital data service obligation.

This obligation will have the following characteristics:

- a ‘general digital data service’ to be provided by a ‘general digital data service provider’ in areas specified by Ministerial determination;

- a ‘special digital data service’ to be provided by a ‘special digital data service provider’ in areas specified by Ministerial determination;

- funding arrangements provide for a subsidy to be paid for the equipment necessary to receive the ‘special digital data service’ – this subsidy will be funded by the industry as part of existing universal service levy arrangements;

- a requirement for digital data providers to develop digital data service plans; and

- price control arrangements.

The amendment of clause 69 of the Bill is consequential on the above amendments, and is required in order to implement the digital data service regime.

Clause 67 of the Bill, as proposed to be amended, sets out the formula for determining each participating carrier’s levy debit, that is the amount it must contribute to the overall funding for the universal service obligation (USO) and the digital data service obligation (DDSO), and how elements of that formula are arrived at.

Clause 69 of the Bill, as proposed to be amended by the Request for Amendment, sets out the means of determining the levy credit balance of a participating carrier. If a carrier’s net universal service cost plus digital data cost exceeds the carrier’s levy debit determined under clause 67, then the carrier will have a levy credit balance and will be entitled to receive an amount equal to the amount of its levy credit.

AMENDMENT (2)

Amendment to heading of clause 85 – Levy credit balance of a universal service provider for a financial year

Clause 85 of the Bill provides that if a person has a levy credit balance because of clause 69 for a financial year, an amount equal to the amount of that balance is payable to that person out of the Universal Service Reserve. The Reserve is a component of the Reserved Money Fund under the *Financial Management and Accountability Act 1997* administered by the Department of Communications, Information Technology and the Arts.

The establishment of the digital data service regime means that levies are now payable to digital data service providers as well as universal service providers. The title of this clause is therefore requested to be amended by removing the words ‘to a universal service provider’.

NOTES ON REQUESTS FOR AMENDMENTS

TELECOMMUNICATIONS (UNIVERSAL SERVICE LEVY) AMENDMENT BILL 1998

AMENDMENT (1)

The Telecommunications (Consumer Protection and Service Standards) Bill 1998, as proposed to be amended, will establish a digital data service obligation.

This obligation will have the following characteristics:

- a ‘general digital data service’ to be provided by a ‘general digital data service provider’ in areas specified by Determination;
- a ‘special digital data service’ to be provided by a ‘special digital data service provider’ in areas specified by Determination;
- funding arrangements provide for a subsidy to be paid for the equipment necessary to receive the ‘special digital data service’ – this subsidy will be funded by the industry as part of existing universal service levy arrangements;
- a requirement for digital data providers to develop digital data service plans; and
- price control arrangements.

The *Telecommunications (Universal Service Levy) Act 1997*, as proposed to be amended by the Request for Amendment, will impose a levy on telecommunications carriers with a view to funding losses incurred by universal service providers and digital data service providers in fulfilling the Universal Service Obligation (USO) and Digital Data Service Obligation (DDSO) under the Telecommunications (Consumer Protection and Service Standards) Bill 1998.

The establishment of the digital data service obligation requires the long title of the *Telecommunications (Universal Service Levy) Act 1997* to be amended to omit ‘payphones and prescribed carriage services’, and substitute ‘payphones, prescribed carriage services and digital data services’.