CHAPTER 2

TELECOMMUNICATIONS BILL 1996: PARTS 1 TO 11 (VOLUME 1)

Background

2.1 The Telecommunications Bill 1996 (the Bill) forms part of a package of legislation designed to introduce a greater level of competition in the telecommunications market from 1 July 1997. The package will repeal the *Telecommunications Act 1991* (the 1991 Act) and replace it with a new regulatory framework principally contained in the proposed Telecommunications Act and proposed new Parts of the *Trade Practices Act 1974* (TPA).

2.2 The Bill :

- identifies carriers and carriage service providers as the participants in the telecommunications industry who are to be subject to regulation and creates the mechanisms to impose any necessary regulation upon them;
- creates obligations on carriers and carriage service providers for the benefit of consumers (such as universal service, untimed local calls and the customer service guarantee (CSG));
- creates obligations on carriers and carriage service providers for the benefit of the general community (such as provision of emergency call services, protection of the privacy of communications and requirements to co-operate with law enforcement agencies);
- creates obligations on carriers and carriage service providers which will promote competition (such as provision of pre-selection and requirements for calling line identification);
- provides for technical regulation and management of numbering; and
- gives benefits to carriers in the form of certain powers and immunities which assist them in carrying out the obligations which the legislation places on them.[1]

2.3 Volume 1 of the Bill contains Parts 1 to 11 of the Bill. These Parts:

1 Explanatory Memorandum, Telecommunications Bill 1996, Vol 1, p 1.

(a) contain the objects of the Bill, a statement on the telecommunications regulatory policy, a simplified outline and index to the Bill, clarification in relation to the application and effect of the Bill and various fundamental definitions (including that of the standard telephone service (STS)) (Part 1);

(b) define what constitutes network units (Part 2);

(c) create prohibitions which require the licensing of carriers, establish the mechanisms for carrier licences to be issued and provide for the imposition of licence conditions on carriers (Part 3);

(d) define service providers (including carriage service providers and content service providers) and the outline the rules with which service providers must comply (Part 4);

(e) require the Australian Communications Authority (ACA) to monitor, and report each year to the Minister on, significant matters relating to the performance of carriers and service providers (Part 5);

(f) set out arrangements for industry codes and industry standards as part of a predominantly self-regulatory framework for the telecommunications industry (Part 6);

(g) establish a regime for delivering universal service in telecommunications (Part 7);

(h) provide for (i) residential/charity customers who had access to untimed local calls, whether voice or data, immediately before 20 September 1996 to continue to have access to them; and (ii) other customers who had access to untimed local calls for voice telephony immediately before 20 September 1996 to continue to have access to them (Part 8);

(i) establish the CSG which involves the ACA setting performance standards for carriage service providers, and payment of specified damages to customers where those standards are contravened (Part 9);

(j) require carriers and certain carriage service providers to enter into a Telecommunications Industry Ombudsman (TIO) scheme which is a central element of the self-regulatory arrangements for the telecommunications industry provided for by the Act (Part 10); and

(k) protect residential customers from losing prepaid monies if a new carriage service provider fails to supply standard carriage services through circumstances such as insolvency (Part 11).[2]

2.4 Recommendations for amendment have been made by the Committee in regard to each of Parts 1 to 10.

Definitions (Clause 7, Part 1)

2.5 Clause 7 of the Bill provides for a range of definitions for the purposes of the Bill. The clause provides that an 'emergency call service' means:

> a service for:
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> (a) receiving and handling calls to an emergency service number; and
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> (b) providing information about such calls to:
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> (i) a police force or service; or
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> (ii) a fire service; or
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> (iii) an ambulance service; or
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> (iv) a service specified in the numbering plan for the purposes of this subparagraph;
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> for purposes connected with dealing with the matter or matters raised by the call.[3]

2.6 The National Emergency Calltaking Working Group (NECWG), Australian Telecommunications Users Group (ATUG) and Government of Western Australia recommended that this definition be amended to clarify that such a service includes transferring emergency calls and related information to an appropriate emergency service organisation.[4]

2.7 The Committee believes it important that obligations in regard to emergency call services be defined as clearly as possible. It accepts the need that clause 7 be amended to ensure that this is achieved.

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2 Explanatory Memorandum, Telecommunications Bill 1996, Vol 1, pp 2-5.

3 Clause 7, Telecommunications Bill 1996.

4 National Emergency Calltaking Working Group, Submission 14, Vol 1, p 96; Australian Telecommunications Users Group, Submission 41, Vol 3, p 387; and Government of Western Australia, Submission 42, Vol 3, p 428.

RECOMMENDATION 2.1

The Committee recommends that the definition of emergency call service in clause 7 of the Telecommunications Bill 1996 be amended to provide that such a service includes transferring the call to an appropriate emergency service organisation.

2.8 Further recommendations regarding emergency call service arrangements are included in discussion of Parts 12 (Emergency call services) and 22 (Numbering of carriage services and regulation of electronic addressing) in Chapter 3 of this Report.

Carriers and service providers (Clause 23 and Parts 2 to 4)

2.9 Parts 2 and 3 of the Bill contain a framework to determine the circumstances in which carrier licences are necessary, the process relating to the application for carrier licences and provisions enabling the imposition of conditions on those licences. A prohibition is placed on the use of 'network units' to supply carriage services to the public without a carrier licence being held, either by the owner of the units or by a person with a nominated carrier declaration in regard to the units. Exemptions are made for particular persons or services (such as defence, electricity supply bodies and broadcasters). A network unit is defined as any of the following:

(a) line links connecting places in Australia more than 500 metres apart or multiple links connecting places with an aggregate distance of over 5 km;

(b) satellite-based facilities;

(c) base stations used for public mobile services or radiocommunications customer access networks;

(d) double-ended interconnected fixed radiocommunications links; and

(e) other radiocommunications facilities specified by the Minister.[5]

2.10 A carriage service is considered to be supplied to the public if it is supplied to a person outside the immediate circle (clause 23, Part 1) of the

5 Explanatory Memorandum, Telecommunications Bill 1996, Vol 1, p 31.

owner of the unit or, if a nominated carrier declaration is in place, the nominated carrier.

2.11 Provisions exist which enable licensed carriers to apply to the ACA to be declared a nominated carrier in relation to specified network units owned by another person. Where a nominated carrier declaration is in force, the carrier must take on all the carrier-related responsibilities imposed in relation to the specified network units and any obligation on the owner of the network unit to be licensed as a carrier in regard to that unit ceases.

2.12 Part 4 of the Bill defines carriage and content service providers. A carriage service provider includes persons supplying carriage services to the public using networks owned by carriers or international links and persons who act as intermediaries between consumers and persons who supply those services. Exemptions similar to the carrier licensing exemptions are included, as is a further exemption for hotels, motels, hospitals, nursing homes and similar organisations. A content service provider (a new concept for telecommunications legislation) includes any person using carriage services to supply a content service to the public.

Immediate circle

2.13 The Australian Vice Chancellors' Committee (AVCC) expressed concerns that the legislation may require them to hold a carrier licence because of its existing communications network (AARNet). To address its concerns it submitted that the 'immediate circle' of a university should be extended to include its students. In addition, the AVCC recommended that an exemption be included in provisions relating to carriers and carriage service providers to ensure those obligations do not apply to Australian universities.[6]

2.14 The Committee notes that the AVCC AARNet represents a network encompassing 37 Australian universities and all CSIRO Divisions in eight self-managed Regional Network Organisations connected nationally and internationally by leased capacity. It also notes the primary purpose of the networks is for administrative, research and teaching functions of the network members.[7]

2.15 The Department of Communications and the Arts (DOCA) advised the Committee that the request for students of a university to be included within the

6 Australian Vice Chancellors' Committee, Submission 21, Vol 2, p 190.

7 Australian Vice Chancellors' Committee, Submission 21, Vol 2, pp 188-190.

university's immediate circle is reasonable.[8] The Committee agrees with this suggestion. It considers that there should be no obligation on a university, or other tertiary education institution, to seek a carrier licence in circumstances where it owns network units for the purposes of undertaking its own educational functions.

2.16 The Committee is concerned, however, that a blanket exemption of university networks from carrier licensing obligations, as proposed by the AVCC, may provide incentives for these networks to be used for broader purposes and does not recommend that the proposed exemption be incorporated into the legislation.

RECOMMENDATION 2.2

The Committee recommends that clause 23 of the Telecommunications Bill 1996 be amended so that students of any tertiary education institution are within that institution's immediate circle.

2.17 The Australian Broadcasting Corporation (ABC) expressed concerns that the concept of the immediate circle as currently drafted may prevent government authorities or institutions which do not carry on a business as a core function from sharing capacity with other like bodies in the same government. The ABC noted that this resulted in an apparent lack of reciprocal rights between a government and its authorities or agencies.[9]

2.18 The Committee considers that a lack of reciprocity as described by the ABC would not be consistent with the intention of the Bill to enable persons within a defined immediate circle to supply communications services to each other without being required to hold a carrier licence or regulated as a service provider.

8 Mr Rohan Buettel, Assistant Secretary, Planning and Review Division, Department of Communications and the Arts, *Committee Hansard*, p 137.

9 Australian Broadcasting Corporation, Submission 52, Vol 3, p 633.

RECOMMENDATION 2.3

The Committee recommends that clause 23 of the Telecommunications Bill 1996 be amended to ensure that persons within an immediate circle have reciprocal rights to supply communications services to each other without requiring licensing as a carrier or becoming a carriage service provider.

2.19 Clause 23 of the Bill provides that government authorities or institutions which carry on a business as a core function are excluded from the immediate circle of the relevant Commonwealth, State or Territory government. The Australian Telecommunications Users Group (ATUG) expressed concern that the use of a test of whether a government authority or institution carries on a business as a core function may give rise to excessive uncertainty regarding the position of these bodies and therefore what constitutes their immediate circles. It recommended that a procedure be adopted enabling the Minister to declare that specified authorities or institutions fall outside the immediate circle of the relevant government.[10]

2.20 The Committee believes it is important that certainty be achieved in regard to the status of government authorities or institutions within the immediate circle concept. It holds the view, however, that in determining the immediate circle of government authorities or institutions, whether such an authority or institution carries on a business as a core function is an appropriate test. The Committee concluded that a power for the Minister to make declarations in regard to the status of specific government authorities or institutions would assist in circumstances where those bodies sought clarification.

RECOMMENDATION 2.4

The Committee recommends that clause 23 of the Telecommunications Bill 1996 be amended to enable the Minister to declare whether a government authority or institution is carrying on a business as a core function.

10 Australian Telecommunications Users Group, Submission 41, Vol 2, p 392.

Exemptions from carrier licensing and service provider regulation

2.21 A number of broadcasting bodies made submissions in regard to the exemptions provided for broadcasters from carrier licensing and carriage service provider requirements.

2.22 The Federation of Australian Commercial Television Stations (FACTS) suggested that the exemption of broadcasting transmitters from the definition of a radiocommunications customer access network (clause 34(2)) fails to achieve its objective because it requires the broadcasting network to be used 'solely' to supply broadcasting services to the public, while in practice these networks are used for other related services (such as transmission of programming between studios).

2.23 FACTS also recommended amendments to the exemptions contained in clauses 48 and 92 of the Bill (which are intended to exempt network units used for 'pre-broadcast' purposes from triggering a requirement for a broadcaster to be licensed as a carrier or from becoming a carriage service provider). It proposed that the exemption be clarified so as enable broadcasters to supply pre-broadcast communications that are necessary or desirable for the supply of broadcasting services to the public.[11]

2.24 The ABC and Special Broadcasting Service expressed similar concerns.[12] The ABC suggested that all radiocommunications facilities used by broadcasters for or in connection with broadcasting be excluded from the concept of a 'network unit'.

2.25 The Committee notes that the policy intention of the Bill is to exclude transmitters used for broadcasting purposes from the definition of a terrestrial radiocommunications customer access network and that a more general exemption for broadcasters from carrier and carriage service provider obligations should apply to network units used for broadcasting purposes up until, but not including, transmission to the end user.[13] The Committee also notes, however, that specific provision is made to enable these facilities to be brought within the regime if necessary.[14]

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11 Federation of Australian Commercial Television Stations, Submission 54, Vol 4, pp 652-654.

12 Australian Broadcasting Corporation, Submission 52, Vol 3, pp 631-632; Special Broadcasting Service, Submission 59, Vol 4, p 679.

13 Explanatory Memorandum, Telecommunications Bill 1996, Vol 1, pp 34 and 40.

14 The Explanatory Memorandum to the Telecommunications Bill 1996 notes in regard to clause 31(7) that: 'For example, clause 34(2) excludes a network solely used for broadcasting services from being a terrestrial radiocommunications customer access network. Clause 31(7) makes it clear that this specific

2.26 The Committee believes, however, that the recommendations made by FACTS in regard to these matters have some merit and may serve to achieve greater certainty regarding the position of broadcasters under the proposed regime.

RECOMMENDATION 2.5

The Committee recommends that the Minister amend clauses 34, 48 and 92 of the Telecommunications Bill 1996 taking into account the issues raised by the Federation of Australian Commercial Television Stations and the Australian Broadcasting Corporation regarding the boundaries of the exemption of broadcasters from carrier and service provider regulation.

2.27 Queensland Rail and the State Rail Authority of New South Wales expressed concern that the exemptions for transport authorities from carrier licensing (clause 47) and service provider regulation (clause 91) do not adequately reflect evolving industry structures, including moves to structurally separate transport authorities.[15]

2.28 During the Committee's hearings DOCA agreed that these concerns should be considered.[16] The Committee considers that the exemption provided to transport authorities should be drafted in terms broad enough to accommodate changes in the structural arrangements of transport authorities.

RECOMMENDATION 2.6

The Committee recommends that the exemptions for transport authorities from carrier licensing and service provider regulation contained in clauses 47 and 91 of the Telecommunications Bill 1996 be amended to reflect changing structural arrangements in those industries.

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exemption cannot be used to read down the scope of clause 31(2) [which enables the Minister to determine that specified radiocommunications transmitters or receivers are designated radiocommunications facilities].'

15 Queensland Rail, Submission 29, Vol 2, p 275; State Rail Authority of New South Wales, Submission 27, Vol 2, pp 248-249.

16 Mr Anthony Shaw, First Assistant Secretary, Planning and Review Division, Department of Communications and the Arts, *Committee Hansard*, p 142.

Performance monitoring (Part 5)

2.29 Part 5 of the Bill will require the ACA to monitor, and report each financial year to the Minister on, all significant matters relating to the performance of carriers and service providers, with particular reference to consumer satisfaction, consumer benefit and quality of service.

2.30 The ABC drew attention to the Australian Broadcasting Authority's overall responsibility for the broadcasting industry and recommended that the ACA not have duplicate or contradictory powers to monitor content service providers.[17]

2.31 The Committee agrees with the ABC's views that the broadcasting industry should not be exposed to the possibility of duplicated monitoring. It also notes that the primary purpose of introducing the concept of content service providers into telecommunications legislation is to confer on those persons rights of access to carriage services, not to impose significant additional regulation.[18]

RECOMMENDATION 2.7

The Committee recommends that clause 104 of the Telecommunications Bill 1996 be amended to exclude content service providers from the Australian Communications Authority's monitoring obligations under Part 5 of that Bill.

Industry codes and standards (Part 6)

2.32 Part 6 of the Bill sets out arrangements for industry codes and industry standards as part of a predominantly self-regulatory framework for the telecommunications industry.

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

17 Australian Broadcasting Corporation, Submission 52, Vol 3, p 641.

18 Explanatory Memorandum, Telecommunications Bill 1996, Vol 1, p 3.

2.34 Clause 112 includes a list of examples of matters that industry codes or standards may deal with. The Privacy Commissioner recommended that the list of privacy-related matters be extended to include privacy issues relating to 'directory products and services'.[19] The Committee supports this proposal.

RECOMMENDATION 2.8

The Committee recommends that clause 112(3)(f) of the Telecommunications Bill 1996 be amended to provide that privacy issues relating to directory products and services are examples of matters which may be dealt with by an industry code or industry standard.

2.35 Clause 114 provides that, among other things, industry codes and industry standards may not deal with matters requiring customer equipment, customer cabling, a telecommunications network or a facility to have particular design features or to meet particular performance requirements. Certain exceptions apply, including where the code or standard would have any of those effects directly or indirectly by addressing billing accuracy or standard telephone service quality.

2.36 The Consumers Telecommunications Network (CTN) opposed the provisions in clause 114.[20] In support of its position, CTN noted:

> In our view, there is a somewhat artificial distinction between things that relate to behaviour and things that relate to technical capacities in the sense of to what extent consumers or the public are enabled to participate in the process of developing a standards setting or establishing rules or agreements about how those things will be developed and delivered. That differentiation seems to be that there is less capacity for public access and public comment in relation to things to do with technical and design features than there is in relation to other aspects of behaviour.[21]

2.37 The Privacy Commissioner recommended that clause 114 be adjusted to enable codes or standards to address design features, performance requirements or content where that relates to privacy matters.[22]

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19 Privacy Commissioner, Submission 25, Vol 2, p 226.

20 Consumers Telecommunications Network, Submission 49, Vol 3, p 554.

21 Ms Helen Campbell, Co-ordinator, Consumer Telecommunication Network, *Committee Hansard*, p 143.

22 Privacy Commissioner, Submission 25, Vol 2, p 223.

2.38 DOCA noted that the intention behind the restrictions imposed on industry codes is to establish a clear demarcation between technical regulatory mechanisms and industry code arrangements which are intended to focus on matters such a price, cost, behaviour and habits.[23]

2.39 The Committee is conscious of the problems associated with establishing multiple and potentially conflicting mechanisms for addressing any one issue. It is of the view that retaining the demarcation between the industry codes and standards mechanism and technical standards arrangements is therefore appropriate. Nevertheless, the Committee considers it appropriate that an exception be made where privacy considerations are likely to have the effect of requiring customer equipment to have certain characteristics.

RECOMMENDATION 2.9

The Committee recommends that the exceptions contained in clause 114(2) of the Telecommunications Bill 1996 enable codes or standards addressing privacy-related matters to have effect despite directly or indirectly requiring customer equipment, cabling, networks or facilities to have certain characteristics.

2.40 Both the ABC and FACTS recommended that the restrictions contained in clause 114 be extended to provide industry codes and standards under Part 6 may not deal with codes registered and standards made under the *Broadcasting Services Act 1992*.[24]

2.41 The Committee notes that it is not the intention of this legislation to regulate content and considers the proposed restriction to be appropriate.[25]

23 Mr Anthony Shaw, First Assistant Secretary, Planning and Review Division, Department of Communications and the Arts, *Committee Hansard*, p 144.

24 Australian Broadcasting Corporation, Submission 52, Vol 3 p 641; Federation of Australian Commercial Television Stations, Submission 54, Vol 4, p 657.

25 Explanatory Memorandum, Telecommunications Bill 1996, Vol 1, p 3.

RECOMMENDATION 2.10

The Committee recommends that clause 114 of the Telecommunications Bill 1996 be amended to prevent codes or standards made under Part 6 from dealing with matters addressed by a code registered, or standard made, under the *Broadcasting Services Act 1992*.

2.42 ATUG suggested that the minimum period the ACA may give in a request to the industry to develop a code (clause 115) should be extended from 90 days to 120 days, including at least a 30 day period for public consultation. The submission suggested that the shorter timeframe contained in the Bill would be impractical. The submission also proposed that public consultation periods for an industry standard developed by the ACA (clause 129) be reduced from 90 to 30 days with a requirement that any consultation with the ACCC, Telecommunications Industry Ombudsman and the Privacy Commission occur before the draft is released for public comment.

2.43 In evidence before the Committee regarding the timeframe for code development, DOCA noted:

> There may be an existing code where the ACA thinks there needs to be a minor adjustment. In those sort of circumstances, you would not want a long period. These things will have to be administered with flexibility and recognition of the complexity of the particular issues involved.[26]

2.44 The Committee notes the flexibility given to the ACA to provide the industry with periods beyond 90 days for developing or varying an industry code. It also notes that an industry standard may be developed where no code, or an unsatisfactory code has been developed. In these circumstances, an adequate period of public consultation, in many cases as long as the 90 days currently required in the Bill, would be necessary. The Committee is of the view, however, that a level of flexibility similar to that contained in the code process should be available to the ACA to determine an appropriate period of public consultation having regard to, among other things, prior code development processes and the extent to which the proposed standard reflects those documents.

RECOMMENDATION 2.11

26 Mr Rohan Buettel, Assistant Secretary, Planning and Review Division, Department of Communications and the Arts, *Committee Hansard*, p 145.

The Committee recommends that the public consultation requirements imposed by clause 129 of the Telecommunications Bill 1996 be amended to require a minimum consultation period of 30 days.

2.45 CTN noted that clause 129 provides for copies of draft industry standards or variations to be made available for purchase, and recommended that access to those documents should be free.

2.46 The Committee notes the potentially significant impact that industry standards may have on consumer interests and welfare and considers that assisting consultative processes by providing free access to draft standards is therefore appropriate.

RECOMMENDATION 2.12

The Committee recommends that clause 129(1)(b) of the Telecommunications Bill 1996 be amended to require the Australian Communications Authority to make copies of draft industry standards available without charge.

Universal Service Regime (Clause 17 and Part 7)

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

2.48 As discussed, the Part sets out the legislative framework for the delivery of the USO after 1 July 1997. Clause 144 of the Bill maintains existing service obligations, that is, it ensures that the standard telephone service (STS), payphones and prescribed carriage services are reasonably accessible to all people in Australia on an equitable basis, wherever they reside or carry on business.

2.49 The Bill's definition of a STS (clause 17) is based on the concept of voice telephony (or its equivalent for people with a disability) reflecting the view

that, in the first instance, the 'standard' service is for basic voice communications.

2.50 The Committee understands that the question of whether the USO as a whole should be upgraded to include, for example, digital data capability is currently under consideration by the Government in light of the review undertaken by the STS Review Group released during the inquiry proceedings.[27] Committee recommendations in relation to the report prepared by the majority of the Group, and a dissenting report by one member, Professor Henry Ergas, are located in Chapter 9.

Equipment for people with disabilities

2.51 Clause 138 of the Bill is a definitional provision that sets out what is included in a reference to the supply of the STS and thereby provides a means of adding further requirements (for example, equipment) to the USO.

2.52 The definition of the STS at clause 17 of the Bill provides that, where voice telephony is not practical for a particular end-user with a disability, then the STS is a reference to another form of communication that is equivalent to voice telephony and would be required to be supplied to the end-user in order to comply with the *Disability Discrimination Act 1992* (DDA).

2.53 In evidence before the Committee, DOCA advised that:

> The Telecommunications Bill is drafted to ensure that it is absolutely clear that the Disability Discrimination Act applies across the board but makes specific reference in areas where disabilities are particularly of important concern. So, in the area of the standard telephone service, the definition in clause 17 of the Bill clearly indicates that it is not just a service for voice telephony but that if voice telephony is not practical and another form of equipment is required to the end-user in order to comply with the DDA then that is an inherent part of the standard telephone service. Therefore, it automatically builds in for people who are disabled the obligation on the industry to provide equipment that would meet the DDA.[28]

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27 On 6 February 1997 the Minister for Communications and the Arts, Senator the Hon Richard Alston released the *Review of the Standard Telephone Service* containing a majority report prepared by nine of the ten members of the STS Review Group, including the Chairman, and a dissenting report prepared by the remaining member of the Group, Professor Henry Ergas.

28 Mr Anthony Shaw, First Assistant Secretary, Planning and Review Division, Department of Communications and the Arts, *Committee Hansard*, p 204.

2.54 Thus the universal service regime includes an obligation to supply, on request, a voice equivalent service for people with disabilities in Australia where that would be required under the DDA.

2.55 In its report, the STS Review Group noted that an important function of the USO is to ensure that people with disabilities are not disadvantaged in their access to basic telecommunications services.

> The Telecommunications Bill 1996 goes a considerable way towards ensuring that this objective is achieved. It requires appropriate customer equipment to be offered to people with disabilities by providers of the standard telephone service or prescribed carriage services to the extent required by the *Disability Discrimination Act 1992* or as required by regulations made by Government....
>
> However, there are a number of issues about the provision of services to people with disabilities under the USO that deserve attention.
>
> One issue is that the precise extent of the obligation to provide particular products or services can only be resolved through formal Disability Discrimination Act processes, or through Government regulation. Disability Discrimination Act processes can be time-consuming, adversarial and costly for the individuals affected and the industry. On the other hand, making a regulation can be an inflexible approach in an area where circumstances may change over time.[29]

2.56 The Group acknowledged that current arrangements have led to a significant improvement in the availability of telecommunications customer equipment for people with disabilities. It suggested, however, that a clearer and more pro-active mechanism for determining what customer equipment needs to be provided by universal service carriers should be established to satisfy the requirements of the DDA. It noted that, in particular, this should be undertaken in relation to the forms of customer equipment which are required to be offered at the commencement of the post-1997 legislation.

2.57 Accordingly, the Group recommended that:

> The provision of customer equipment for persons with disabilities to meet USO requirements...should be dealt with through a self regulatory approach linked to the operation of the *Disability Discrimination Act 1992*...

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29 Standard Telephone Service Review Group, *Review of the Standard Telephone Service*, released by the Minister for Communications and the Arts, Senator the Hon Richard Alston, on 6 February 1997, p 138.

> Legislation should allow the industry, in consultation with consumers and users, to determine through a code development process whether to accept liability for providing particular customer equipment to meet USO requirements, without going through the formal processes of the DDA.
>
> In the event that industry does not accept liability for supply of the particular customer equipment through this process, liability should be determined through those processes.
>
> Liabilities at the commencement of the post 1997 legislation should be established in a regulation developed in consultation with the industry and relevant consumers. This regulation should clarify the range of products required as at 1 July 1997 under the *Telecommunications Act 1991* and *Disability Discrimination Act 1992*.[30]

2.58 In a similar vein, the Deafness Forum of Australia and the National Relay Service Advisory Council (NRSAC) suggested in their submissions that revision of the Bill was needed to ensure that the supply of disability customer equipment was incorporated in the USO.[31] In support of its recommendation, the NRSAC argued:

> Why should the onus be on the individual to force an access issue? It should not be necessary for any one to mount a court challenge [under the DDA] to get access to a basic service. This is untenable and inequitable.[32]

2.59 The Committee acknowledges the difficulties that people with disabilities may face if required to enforce their rights under the DDA. It is of the view, however, that it would not be appropriate to establish a separate and potentially inconsistent approach to dealing with the rights of people with disabilities to telecommunications equipment and services.

2.60 The Committee believes that a self-regulatory approach, as proposed by the STS Review Group, would go some way to facilitate the development of clear rights for people with disabilities in a manner consistent with the DDA. A recommendation in regard to such an approach is made in Chapter 9 of this Report. The Committee believes this approach would be further enhanced if the provisions of Part 7 were amended to enable the outcomes to be clearly prescribed as part of the USO.

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30 Recommendation 7, Review of the Standard Telephone Service - December 1996, p 10.

31 Deafness Forum of Australia, Submission 10, Vol 1, p 60; National Relay Service Advisory Council, Submission 38, Vol 2, pp 331-2.

32 National Relay Service Advisory Council, Submission 38, Vol 2, pp 330.

RECOMMENDATION 2.13

The Committee recommends that clause 138 of the Telecommunications Bill 1996 be amended to enable equipment for people with a disability to be specified as part of the Universal Service Obligation.

Net cost areas

2.61 Division 6 of Part 7 of the Bill provides for the assessment, collection, recovery and distribution of the universal service levy.

2.62 The identification of areas where a *net cost* is expected to be incurred at the commencement of the financial year is central to the operation of the avoidable cost methodology used to determine net universal service costs.

2.63 The Explanatory Memorandum to the Bill notes that the:

> main purpose of identifying net cost areas in advance is to encourage universal service providers to control their total universal service cost by removing the opportunity for them to claim costs in areas that they expected to be profitable, but through careless management, could be loss-making. Without net cost areas being declared in advance, a universal service provider would have less incentive to control costs in marginal areas because it knew if it did not, and it did incur a loss, it could, nevertheless, seek compensation under the universal service fund at the end of the year.[33]

2.64 The ACA must scrutinise proposed net cost areas carefully and reject those that do not qualify as net cost areas. Scrutiny of proposed net cost areas and its approval or rejection of them helps to establish the boundaries of the costs that can be claimed under the USO and as such, acts as a discipline on the universal service provider to contain its overall costs by not providing access to subsidies for areas that, in the ACA's opinion, should not be loss making.

2.65 The net cost area process is also intended to:

- give greater certainty to the identification of costs using the avoidable cost less revenue forgone methodology;

33 Explanatory Memorandum, Telecommunications Bill 1996, Vol 1, p 107.

- allow the ACA to judge whether proposed net cost areas should be eligible for inclusion in the total cost for calculating the levy in accordance with the criteria set down by the Minister under clause 173 of the Bill;

- provide a framework for the ACA to assess whether adequate revenue and cost details will be available; and

- provide a streamlined procedure to audit the net costs at the end of the financial year.[34]

2.66 Clause 171 of the Bill requires a person who is a universal service provider in relation to a financial year, to give the ACA, within 60 days of commencement of the financial year, a notice specifying service areas for which the person is a universal service provider and which the person considers the ACA should declare as net cost areas for the financial year (clause 171(2) of the Bill).

2.67 Clause 172 of the Bill enables the ACA to declare areas as net cost areas for a financial year. An area declared to be a net cost area is taken into account in determining whether the universal service provider has incurred a net universal service cost and whether the universal service provider is therefore entitled to proceeds of the levy.

2.68 Clauses 191 and 192 of the Bill enable members of the public and participating carriers ('eligible persons') to obtain from the ACA information about the basis on which the ACA has made its assessment in relation to liabilities and entitlements in relation to the universal service levy and information about how it has worked out that assessment.

2.69 In relation to the declaration of net cost areas, Optus Communications/Optus Vision (Optus) submitted that:

> An essential element of the universal service regime should be visibility of the basis on which the universal service provider elects to claim that an area is a net cost area and what those net cost areas are. The process for limited disclosure as prescribed by proposed sections 191 and 192 requires prior request by an eligible person and therefore does not ensure that relevant information is brought into the public domain.[35]

34 Explanatory Memorandum, Telecommunications Bill 1996, Vol 1, p 107.

35 Optus Communications/Optus Vision, Submission 40, Vol 2, p 374.

2.70 Accordingly, Optus suggested that clause 172 of the Bill be amended to require the ACA to publish details of the basis and reasons for any decision to declare areas as net cost areas at the time of making that decision, including matters referred to in any notice given to the ACA pursuant to clause 171(2) to the extent necessary or desirable to explain its decision.

2.71 While sympathetic to the views expressed by Optus, the Committee is of the view that requiring mandatory publication of decisions as to why areas have been declared net cost areas would prove administratively onerous and potentially make available commercially confidential information to an inappropriate range of parties. However, the Committee concluded that the legislation should be amended to enable the public and participating carriers to request information in relation to an ACA decision to declare an area as a net cost area in addition to the calculation of assessments to provide for greater transparency.

2.72 The Committee notes the purpose behind requiring the declaration of net cost areas in advance is to retain appropriate incentives on the Universal Service Provider to operate marginal areas in an efficient manner. It is of the view, however, that should there be exceptional circumstances beyond the control of the Provider, which results in a net cost being incurred in an area, the ACA should have the discretion to retrospectively declare the area as a net cost area.

RECOMMENDATION 2.14

The Committee recommends that Part 7 of the Telecommunications Bill 1996 be amended to ensure that "eligible persons" for the purposes of clause 192 may request information in relation to an Australian Communications Authority decision to declare an area a net cost area.

In deciding whether to make such information available under clause 192(4), the Australian Communications Authority should be given the discretion to release information which would otherwise be considered confidential if it seeks and receives undertakings, such as solicitors' undertakings, that the information will not be divulged to any person other than those specified in the undertaking. The Explanatory Memorandum to the Bill should note that such undertakings might, for example, restrict access to the information to a carrier's accountant, solicitor and Finance Director.

RECOMMENDATION 2.15

The Committee recommends that Part 7 of the Telecommunications Bill 1996 should be amended to provide the Australian Communications Authority with a discretion to retrospectively declare an area to be a net cost area where a universal service provider incurs a substantial unanticipated loss in the area as a result of circumstances beyond its control.

Untimed local calls (Part 8)

2.73 Part 8 of the Bill provides for residential/charity customers who had access to untimed local calls, whether voice or data, immediately before 20 September 1996 to continue to have access to them. It further provides for other customers who had access to untimed local calls for voice telephony immediately before 20 September 1996 to continue to have access to them.

2.74 To a large degree the Part re-enacts the untimed local provision in the 1991 Act, with necessary amendments to provide for:

- its extension for residential/charity customers to calls of a kind provided on an untimed basis immediately before 20 September 1996;

- its extension (for voice calls of a kind provided on an untimed basis immediately before 20 September 1996) to customers other than residential/charity customers;
- the extension of the obligation so that it is placed on all carriage service providers who charge customers in standard local call zones for eligible local calls made using a standard telephone service; and
- the possibility that the universal service obligation may in future be fulfilled for some customers by other technologies, and the need to ensure that those customers continue to have access to untimed local calls via their universal service provider.

2.75 The Part requires carriage service providers who charge customers located in standard call zones for eligible local calls to offer those customers the option of having local calls charged on an untimed basis.

2.76 It does not require carriage service providers who offer other standard telephone services (for example, long-distance calls) but not local calls to commence offering local calls. However, where a customer in a traditional local call zone is supplied with a standard telephone service by the relevant universal service provider for the customer, the untimed local call obligation applies to eligible local calls made using that service. This ensures that customers continue to have access to local calls which are untimed.[36]

Business exploitation

2.77 Telstra expressed concern that, without safeguards, the drafting of the legislation might create unintended consequences. It felt that there was a risk that the manner in which the untimed local call option has been extended to business might encourage the systematic exploitation of the option and have the consequence of significantly reducing the incentives for market entry, particularly by wireless based carriers.

2.78 Telstra believed that a number of business applications (eg. hold mode calling, calls to Internet service providers, etc) might emerge to exploit the option if it became a mandated right with no checks and balances on the availability or use of the call. Given the existence of some exploitation of the untimed local call provision at present, and the potential for further systematic exploitation, Telstra believed that a safeguard was required to ensure that

36 Explanatory Memorandum, Telecommunications Bill 1996, Vol 1, pp 131-132.

reasonable use was made of the untimed local call right. Telstra suggested that the Minister should be provided with a reserve power to determine that particular types of use of the untimed local call option were not eligible local calls.[37]

2.79 The retention of untimed local voice calls has long been accepted as being of considerable importance to the community generally and in particular for individuals in the community who, for example because of age, disability, or infirmity, rely on telecommunications as their main source of social contact. The extension of this principle to residential and charity data calls is welcomed by the Committee as a reflection that communications by data are becoming just as important to many people as voice communications.

2.80 The Committee carefully considered the views put by Telstra and found some merit in its argument. The Committee does not believe that the Government should allow these guarantees to be exploited by some to the cost of consumers in general. However, the evidence put before the Committee did not persuade it that there was a widespread problem of exchange congestion or that, where such problems existed, they were leading to significant costs being passed on to other consumers. The Committee does not consider that there is any current justification for extended data calls, such as those used by consumers to access the Internet, being excluded from the untimed local data call provisions.

2.81 The Committee accepts, however, that future developments may make it necessary to take action to prevent the untimed local call provisions being exploited in a way that raises the cost of local calls for the whole community. In the long term the Minister may have to develop a detailed policy response to this issue. This may involve an innovative approach to defining eligible untimed local data calls or developing a pricing structure which distinguishes between ordinary users of local calls and those whose call duration far exceeds what is acceptable to the community as a whole. As an interim measure the Committee believes that the Bill should be amended to require the Minister to undertake a review on the issue over the next year and report to Parliament by 1 July 1998.

37 Telstra Corporation Ltd, Submission 43, Vol 3, pp 450-454.

RECOMMENDATION 2.16

The Committee recommends that the Telecommunications Bill 1996 be amended to require the Minister to review the issue of alleged exploitation of the legislative requirement of untimed local calls and provide a written report to Parliament by 1 July 1998. The report should consider whether clause 216 of the Bill should be amended to prevent significant exploitation of the untimed local call provision, for example, by

a) imposing unreasonable costs on carriage service providers, or
b) excessive cross-subsidisation from one sector of the community to another.

The report should also consider whether any such amendment will substantially lessen competition in any telecommunications market in Australia.

Customer Service Guarantee (Part 9)

2.82 Part 9 of the Bill establishes the Customer Service Guarantee (CSG). The CSG involves the ACA setting performance standards for carriage service providers, and provides for payment of specified damages to customers where those standards are contravened. The Explanatory Memorandum to the Bill states that the CSG is not intended to address every individual service difficulty that may arise, but is intended to supplement other customer complaint mechanisms. It further states that the CSG is intended to guard against poor service in certain key problem areas and provide a streamlined means for compensating consumers where set standards in those areas are not met. Matters not covered by the CSG are addressed by other more appropriate mechanisms either in statute, licence condition or under the proposed industry code and standard regime in Part 6 of the Bill.[38]

2.83 Under a scale of damages to be developed by the ACA, up to $3000 can be awarded to a consumer for contravention of a performance standard by a carriage service provider. The primary intention of standards however, is not to benefit customers financially, but provide carriage service providers with an incentive to meet performance standards. It is only when a carriage service provider fails to meet such standards that customers can seek compensation. While the CSG must ultimately be enforced by a court, the scheme has been designed to encourage voluntary compliance by the industry and the

38 Explanatory Memorandum, Telecommunications Bill 1996, Vol 1, p 134.

involvement of the Telecommunications Industry Ombudsman (TIO) Scheme. The CSG provides a streamlined means of compensating customers in certain specified circumstances. The CSG does not limit or affect any other rights to action or damages a person may have.[39]

2.84 Clause 224 of the Bill provides for the Minister to direct the ACA to make performance standards for carriage service providers.

2.85 Clause 225 of the Bill provides that if a carriage service provider contravenes a performance standard in relation to a customer, the carriage service provider will be liable to pay specific damages to that particular customer.

2.86 Telstra raised concerns in its submission that the Bill did not make an exception for breaches in relation to performance standards caused by a force majeure, such as a natural disaster and suggested that clause 225 of the Bill be amended to specifically provide for such circumstances.[40]

2.87 In response to Telstra's concerns, the Committee notes that the Explanatory Memorandum to the Bill clarifies that clause 224(4) of the Bill, which provides that a performance standard may be of general application or may be limited as provided for in the standard:

> ...has been included because a standard may need to recognise circumstances where the standard should not apply, for example in circumstances beyond the carriage service provider's control such as when a natural disaster has occurred.[41]

Further, the Committee is of the view that the performance standards developed by the ACA should include appropriate exemptions to deal with situations such as those raised by Telstra. Thus, the Committee agreed that amendment to the Bill was not necessary.

2.88 Clause 228 of the Bill enables the ACA to make, by written instrument, provision for customers of carriage service providers to waive, in whole or in part, their protection and rights under this Part in relation to a particular service supplied, or proposed to be supplied, by the carriage service provider concerned.

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39 Explanatory Memorandum, Telecommunications Bill 1996, Vol 1, p 134.

40 Telstra Corporation Limited, Submission 43, Vol 3, pp 487-488.

41 Explanatory Memorandum, Telecommunications Bill 1996, Vol 1, p 136.

2.89 In relation to this provision, CTN suggested that criteria should be specified for the basis on which a waiver might be granted, for example, in offering customers free trials of new technologies.[42] Given that the ACA would be expected to set out in its determination the circumstances under which a waiver could be made, the Committee agreed that amendment to the Bill was not warranted.

2.90 Clause 232 of the Bill enables the Minister to give the ACA written directions about how it should exercise its powers under this Part. Such a direction could be given, for example, to identify the kinds of carriage services in relation to which performance standards should be imposed, the standard that should be imposed for a specified service, the level of penalty that should be specified in a scale of damages, what provision the ACA should make for waiver or processes the ACA should follow in making a performance standard.

2.91 Clause 233 of the Bill requires a Ministerial direction to be given under clause 232 of the Bill before the ACA makes a performance standard. The Explanatory Memorandum states that this measure will enable the Minister to direct the ACA to where regulatory attention should be focussed.[43] The provision also enables:

- the Minister to revoke or vary a direction, which would in turn require the ACA to vary or revoke and remake the relevant performance standard;
- the ACA to vary a performance standard on its own initiative, within the bounds of compliance with the relevant direction; and
- the ACA to revoke and remake a performance standard consistent with the relevant direction, on its own initiative.

2.92 CTN submitted that any review of performance standards (by the Minister or the ACA) should provide for public participation and consultation.[44] Clause 232(4) of the Bill provides that a Ministerial direction to the ACA to make a performance standard will be a disallowable instrument. The Committee notes that the proposed Legislative Instruments Bill 1996, when passed by the Parliament, will impose new obligations in relation to public participation and consultation regarding such instruments. The

42 Consumers' Telecommunications Network, Submission 49, Vol 3, p 563.

43 Explanatory Memorandum, Telecommunications Bill 1996, Vol 1, p 141.

44 Consumers' Telecommunications Network, Submission 49, Vol 3, p 563.

Committee therefore concluded that no specific amendment to the Bill was required to take account of CTN's suggestion.

2.93 The Committee however notes that Part 9 of the Bill does not currently fully reflect the corresponding provisions of the 1991 Act as inserted by the *Telstra (Dilution of Public Ownership) Act 1996*.[45] Accordingly, the Committee recommends that the Part be amended to be consistent with the 1991 Act.

RECOMMENDATION 2.17

The Committee recommends that Part 9 of the Telecommunications Bill 1996, which relates to the Customer Service Guarantee, be amended to:

a) extend the range of matters about which the Australian Communications Authority can make performance standards to include other matters in relation to which the Authority thinks it appropriate to develop standards (clause 224);
b) increase the proposed statutory cap for damages payable by a carrier for contravention of performance standards from $3,000 to $25,000 (clause 226); and
c) include a provision that prevents the power to issue evidentiary certificates (clause 227) from affecting the right of a customer to complain to the Telecommunications Industry Ombudsman about a breach of a performance standard.

Telecommunications Industry Ombudsman scheme (Part 10)

2.94 Part 10 of the Bill requires carriers and certain carriage service providers to enter into a Telecommunications Industry Ombudsman (TIO) scheme which is a central element of the self-regulatory arrangements for the telecommunications industry provided for by the Bill.

2.95 The TIO scheme was previously dealt with in clause 4 of the Telecommunications (General Telecommunications Licences) Declaration (No.2) of 1991. The TIO scheme is intended to provide customers with an independent complaint handling mechanism after they have taken up their complaints with the respective carrier or carriage service provider and failed to resolve them.

45 Mr Warwick Smith MP, Minister Sport, Territories and Local Government and Minister Assisting the Prime Minister for the Sydney 2000 Games, *House Hansard*, 12 December 1996, p 8361.

2.96 Under the current scheme, the functions of the TIO are to investigate and to facilitate the resolution of:

- complaints as to the provision or supply of (or the failure to provide or supply) telecommunications services by a participant, other than complaints in relation to the general telecommunications policy or commercial practices of a participant;
- complaints from owners or occupiers of land in respect of which a carrier has exercised its statutory powers, other than complaints in relation to the policy or commercial decision of a carrier to exercise its statutory rights in relation to that particular land; and
- such other complaints as may, by agreement with the complainant, be referred to the TIO by a participant.[46]

2.97 Complaints in relation to the provision or supply (or failure to provide or supply) telecommunications services generally include the following:

> basic carriage services; higher level services; eligible services; public mobile telecommunications services and public access cordless telecommunications services; operator services; directory assistance; fault reporting and repair and maintenance services; printed and electronic white pages; billing not in accordance with a tariff; billing for a higher level service for an eligible service not in accordance with the contracted price; failure to supply a service in accordance with a tariff; and interference with the privacy of an individual in terms of non-compliance with the Information Privacy Principles contained in section 14 of the *Privacy Act 1988* or any industry specific privacy standards which may apply from time to time.[47]

2.98 The Explanatory Memorandum to the Bill indicates the Minister's expectation that the TIO scheme will continue to operate along current lines, however the detail of its operation is effectively a matter for the members of the scheme. Clause 113 of the Bill provides that the TIO may accept functions and powers under industry codes and industry standards.

2.99 In submissions and public hearings, the Committee identified one principal issue, initially raised in the submission by the Ombudsman, in relation to the provisions dealing with the TIO scheme.

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46 Telecommunications Industry Ombudsman: 1996 Annual Report, p 40.

47 Telecommunications Industry Ombudsman: 1996 Annual Report, p 40.

2.100 Clause 235 of the Bill defines the classes of carriage service providers or carriage service intermediaries ('eligible carriage service providers') who must enter into a TIO scheme. Currently Internet Access Providers (IAPs) and Internet Service Providers (ISPs) are not classified as eligible carriage service providers.

2.101 The Ombudsman suggested that the definition of 'eligible service providers' should be expanded to specifically include IAPs and ISPs. In light of the strong growth in Internet use and overseas experience, the Ombudsman suggested that coverage of IAP/ISP was appropriate:

> As has been shown by recent experience in the USA, this growth [in the IAP/ISP sector] brings with it disputes concerning billing and quality of service issues such as congestion, or the inability to obtain, or delay in obtaining, access to the Internet. The TIO believes that this experience will quickly be repeated in Australia and notes that this sector of the industry is already demonstrating the reality of convergence with a recent, although limited, offering of voice telephony via the Internet.[48]

2.102 While clause 239 of the Bill provides that the ACA may make a determination that members of a specified class of carriage service providers must enter into the TIO scheme, the Ombudsman suggested that:

> given the high profile of Internet access providers at the present time, [the TIO Council and Board] would rather start out from scratch with jurisdiction, rather than at some future time have to negotiate, effectively, with the ACA as to whether [the Ombudsman] should or should not have jurisdiction over them.[49]

2.103 The Committee is satisfied that, in general, clause 239 of the Bill provides an appropriate mechanism for the ACA to subject additional classes of carriage service providers to the TIO scheme following commencement of the legislation. The Committee accepts, however, that in the case of IAPs and ISPs, current Australian and overseas experience warrants legislating for their inclusion in the TIO scheme, thus enabling the Ombudsman to investigate end-user complaints, for example, about billing, or the manner of charging, for the provision or supply of IAP or ISP services (including potential telephony services).

RECOMMENDATION 2.18

48 Telecommunications Industry Ombudsman, Submission 36, Vol 2, p 322.

49 Mr John Pinnock, Telecommunications Industry Ombudsman, Telecommunications Ombudsman Scheme, *Committee Hansard*, p 131.

The Committee recommends that clause 235 of the Telecommunications Bill 1996 be amended to require Internet Access Providers and Internet Service Providers to enter into the Telecommunications Industry Ombudsman scheme.