Chapter 1

The Telecommunications Universal Service Management Agency Bill 2011; Telecommunications Legislation Amendment (Universal Service Reform) Bill 2011; and Telecommunications (Industry Levy) Bill 2011

Conduct of the inquiry

1.1 On 3 November 2011, on the recommendation of the Selection of Bills Committee, the Senate referred three related bills: the Telecommunications Universal Service Management Agency (TUSMA) Bill 2011; Telecommunications Legislation Amendment (Universal Service Reform) Bill 2011; and Telecommunications (Industry Levy) Bill 2011 (the bills), to the Environment and Communications Legislation Committee for inquiry and report by 27 February 2012.

1.2 The three bills were also referred to the House of Representatives Standing Committee on Infrastructure and Communications on 3 November 2011 for inquiry and report.[1] That Committee decided not to proceed with its inquiry as it 'would unnecessarily duplicate the inquiry process concurrently being undertaken by the Senate committee.'[2]

1.3 In accordance with usual practice, the Committee advertised the inquiry on its website and in *The Australian*. The Committee also wrote to various organisations inviting submissions. The Committee received 5 submissions (listed at Appendix 1) and held a public hearing in Melbourne on 2 February 2012 (see Appendix 2).

Background

Universal Service Obligation

1.4 The Universal Service Obligation (USO) requires the primary universal service provider (currently Telstra) to ensure that standard telephone services (STS) and payphones are reasonably accessible to all people in Australia on an equitable basis, irrespective of where they live or conduct business.[3] The USO is currently funded by the telecommunications industry via the universal service levy, as outlined

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1 House of Representatives Standing Committee on Infrastructure and Communications, *Inquiry into bills referred 3 November 2011*, available: www.aph.gov.au/house/committee/ic/3Nov/index.htm (accessed 9 November 2011).

2 Ms Sharon Bird MP, Chair, House of Representatives Standing Committee on Infrastructure and Communications, *House of Representatives Hansard*, 22 November 2011, p. 13310.

3 Explanatory Memorandum (TUSMA bill), p. 3.

in the *Telecommunications (Consumer Protection and Service Standards) Act 1999*.[4] The levy contribution is calculated on the basis of each participating telecommunications carrier's annual 'eligible revenue'.[5]

1.5 The USO is currently administered by the Australian Communications and Media Authority (ACMA).[6]

National Relay Service

1.6 The *Telecommunications (Consumer Protection and Service Standards) Act 1999* also makes provisions for the National Relay Service (NRS). The NRS:

> ...provides persons who are deaf or who have a hearing and/or speech impairment with access to a standard telephone service on terms, and in circumstances, that are comparable to the access other Australians have to a standard telephone service.[7]

1.7 The NRS is delivered under contract with the Commonwealth Government. Under the current contractual arrangements, the NRS is delivered by Australian Communications Exchange Limited and an outreach service is provided by WestWood Spice.[8]

1.8 The NRS is currently being reviewed as part of the government's review of access to telecommunications by people with disability, older Australians and people experiencing illness.[9]

Emergency call services

1.9 Emergency call services in Australia are covered by the *Telecommunications Act 1997* and the *Telecommunications (Consumer Protection and Service Standards)*

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4 *Telecommunications (Consumer Protection and Service Standards) Act 1999*, s. 8.

5 *Telecommunications (Consumer Protection and Service Standards) Act 1999*, ss 20, 20A and 20H.

6 Australian Communications and Media Authority (ACMA), *Universal Service Obligation*, available: www.acma.gov.au/WEB/STANDARD/pc=PC_2491 (accessed 17 February 2012).

7 *Telecommunications (Consumer Protection and Service Standards) Act 1999*, s. 93.

8 Explanatory Memorandum (TUSMA bill), p. 3.

9 Department of Broadband, Communications and the Digital Economy (DBCDE), *Review of access to telecommunications by people with disability, older Australians and people experiencing illness*, available: www.dbcde.gov.au/consultation_and_submissions/review_of_access_to_telecommunications_by_people_with_disability,_older_australians_and_people_experiencing_illness (accessed 17 February 2012).

Act 1999.[10] Under the Acts, the telecommunications industry must provide access to the emergency call service for standard telephone services free of charge.[11]

1.10 At present, Telstra and the Australian Communications Exchange Ltd are the national providers of the emergency call service.[12]

The National Broadband Network and the structural separation of Telstra[13]

1.11 The USO reforms being considered by the Committee arise in the context of the establishment of the National Broadband Network. On 7 April 2009 the Commonwealth Government announced the establishment of NBN Co to design, build and operate a wholesale-only national high-speed broadband network (the National Broadband Network or NBN) capable of delivering speeds of up to 100 Megabits per second (Mbps). The NBN will connect all premises in Australia to improve service delivery in areas such as health and education and, more broadly, drive productivity growth in Australia.

1.12 The 2009 NBN policy was a microeconomic reform measure designed to improve competition in the Australian telecommunications sector. The government's plan to achieve structural reform and improve competition required separation of the infrastructure provider from retail service providers, to be achieved by the structural separation of Telstra.[14] This is to be effected by the gradual migration of customers from Telstra’s copper network to the NBN fibre network which is the subject of commercial agreements between NBN Co and Telstra which are now being considered by the Australian Competition and Consumer Commission (ACCC).

1.13 As outlined by the Joint Parliamentary Committee on the NBN:

> Subsequently, the Government introduced three pieces of legislation which were passed in 2011 and are the foundation for the Government's NBN policy. These are the: *Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Act 2011 (Cth)*, (*the CCS Act)*, the *National Broadband Network Companies Act 2011 (Cth)*, and

10 Explanatory Memorandum (TUSMA bill), p. 3.

11 Explanatory Memorandum (TUSMA bill), p. 3.

12 Explanatory Memorandum (TUSMA bill), p. 3.

13 The following information is drawn largely from the Joint Parliamentary Committee on the National Broadband Network, *Review of the Rollout of the National Broadband Network: Second Report*, November 2011, available: www.aph.gov.au/house/committee/jcnbn/report2/fullreport.pdf (accessed 9 February 2012).

14 The structural separation of Telstra is defined by the Australian Competition and Consumer Commission (ACCC) as 'the legal separation of Telstra's assets and activities into separate corporate entities with entirely separate owners / shareholders' (see Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2011 Explanatory Memorandum, p. 1).

Telecommunications Legislation Amendment (National Broadband Network Measures- Access Arrangements) Act 2011 (Cth).

The CCS Act contains a "package of legislative reforms aimed at enhancing competitive outcomes in the Australian telecommunications industry and strengthening consumer safeguards". These reforms include:

- "addressing Telstra's vertical and horizontal integration by requiring Telstra to either voluntarily structurally separate or be subject to mandatory functional separation;
- streamlining the access and anti-competitive conduct regimes, and strengthening consumer safeguard measures such as the Universal Service Obligation, the Customer Service Guarantee and priority assistance; and
- measures to improve regulatory enforcement".[15]

1.14 On 20 June 2010, prior to passing of the CCS Act and associated NBN legislation, NBN Co and Telstra entered into a non-binding Financial Heads of Agreement (FHA). Amongst other things, the FHA outlined the high level terms and conditions for the decommissioning of Telstra's copper and Hybrid Fibre Coaxial (HFC) networks to enable the progressive migration of customers' services from Telstra's copper and subscription television cable networks to the NBN.

1.15 At the same time, the government announced a suite of public policy reforms to support the transition to the NBN. These included the establishment of a new entity, USO Co which would assume responsibility for most of Telstra's Universal Service Obligations for the delivery of standard telephone services, payphones and emergency call handling from 1 July 2012. This was to ensure that essential communications services would be protected and assist the structural reform of the industry.

1.16 Together with the public policy reforms, the FHA, if completed, will deliver a post-tax net present value of approximately $11 billion to Telstra[16] and will reduce overall NBN roll-out costs by:

- giving NBN Co access to Telstra's existing infrastructure;
- enabling decommissioning of the copper access network as the fibre is rolled out; and
- allowing for the progressive migration of customer services from Telstra's copper and subscription television cable networks to the NBN.

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15 Joint Committee on the National Broadband Network, *Review of the Rollout of the National Broadband Network: Second Report*, November 2011, p. 35.

16 Telstra, 'Telstra signs Financial Heads of Agreement on NBN', media release, 20 June 2010, available: www.telstra.com.au/abouttelstra/media-centre/announcements/telstra-signs-financial-heads-of-agreement-on-nbn-1.xml (accessed 17 February 2012).

1.17 On 23 June 2011, following further negotiations, NBN Co and Telstra entered into several Binding Definitive Agreements. These agreements are also known as the "Telstra Agreement".

Telstra Agreement

1.18 The Telstra Agreement comprises four documents which form the basis of Telstra's participation in the rollout of the NBN.

1.19 There are three main components of the Telstra Agreement which benefit NBN Co, Telstra and Australian taxpayers by:

- granting NBN Co access to Telstra facilities and infrastructure over a minimum period of 35 years to ensure the NBN can be rolled out efficiently and avoid duplicating infrastructure;
- providing for the progressive migration of Telstra's copper and HFC customers to the NBN resulting in Telstra's gradual structural separation and establishing NBN Co as Telstra's preferred fixed-line network; and
- providing for interim arrangements for immediate access to Telstra infrastructure.

1.20 NBN Co has stated some of the benefits of the Telstra Agreement:

> The outcome, we believe, is good for taxpayers and good for the broader community. We will, in making use of Telstra's facilities, avoid duplicating existing infrastructure. The deal reduces our costs to build the NBN, it reduces the risk of delays and, very importantly, it reduces potential disruption to local communities.[17]

1.21 The Telstra Agreement includes nine "conditions precedent" which must be either satisfied or waived for the Telstra Agreement to be completed. Of relevance to the TUSMA bills, one of the conditions precedent is the TUSMA Agreement, the Information Campaign and Migration Deed being entered into by Telstra and the Commonwealth in a form acceptable to NBN Co.

1.22 On 23 June 2011 the government and Telstra agreed on a package of measures to ensure basic universal telecommunications services standards during and after the NBN rollout. As part of this package of measures, TUSMA will be established to assume responsibilities for administering the USO and other public interest services. The TUSMA bills being considering in this inquiry give effect to and complement the agreement between Telstra and the Commonwealth Government regarding TUSMA.

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17 Mr Mike Quigley, Chief Executive Officer, NBN Co, *Joint Committee on the National Broadband Network Hansard*, 5 July 2011, p. 2.

Overview of the bills

Telecommunications Universal Service Management Agency Bill 2011

1.23 The Telecommunications Universal Service Management Agency Bill 2011 (TUSMA bill) seeks to establish the Telecommunications Universal Service Management Agency as the statutory agency with responsibility for the implementation and administration of service agreements or grants that deliver universal service and other public policy telecommunications outcomes.[18]

1.24 In the government's view, the changes to existing USO regulatory arrangements proposed by the TUSMA bill are necessary because:

> The USO regulatory arrangements were designed for a market where there was a vertically integrated operator of a national telecommunications network. The rollout of the [National Broadband Network] will result in a fundamental change to the structure of the Australian telecommunications market as Telstra's near ubiquitous national copper fixed line network will be progressively decommissioned as NBN Co rolls out its next generation fibre network nationally.
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> The NBN will be operated on a wholesale-only and equivalent basis. In an environment where all retail service providers are able, via the NBN, to offer high quality voice and high-speed broadband services nationally, it is appropriate that the model for delivering universal service and other public policy telecommunications outcomes be reformed to facilitate the competitive supply of universal service and other public policy telecommunications outcomes...In this regard, the service delivery arrangements for the [Universal Service Provider] will transition to a model similar to the current arrangements for the provision of the NRS, in that the Government will contract with service providers for the supply of these important services.
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> ...
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> As part of the reforms, a new statutory agency, TUSMA, will be established to manage the [USO] and other public interest telecommunications contracts and grants. The establishment of a statutory agency dedicated to the implementation and effective administration of telecommunications service agreements and grants will promote high quality and efficient contract and grant managements to maximise the benefit for consumers and manage risks appropriately, within a transparent and accountable legislative framework.[19]

1.25 The TUSMA bill establishes TUSMA and confers the following powers (among others) on the agency:

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18 Explanatory Memorandum (TUSMA bill), p. 2.

19 Explanatory Memorandum (TUSMA bill), pp 3–5.

- the power to do all things necessary or convenient to be done for or in connection with the performance of its functions; and
- the power to enter into contracts on behalf of the Commonwealth Government.[20]

1.26 TUSMA will be required to take all reasonable steps to ensure that the policy objectives of the bill, as follows, are achieved:

(a) that standard telephone services are to:

(i) be reasonably accessible to all people in Australia on an equitable basis, wherever they reside or carry on business; and

(ii) be supplied to people in Australia on request; and

(b) that payphones are to:

(i) be reasonably accessible to all people in Australia on an equitable basis, wherever they reside or carry on business; and

(iii) be supplied, installed and maintained in Australia; and

(c) that end-users of standard telephone services in Australia are to have access, free of charge, to an emergency call service; and

(d) that the National Relay Service is to be reasonably accessible to all persons in Australia who:

(i) are deaf; or

(ii) have a hearing and/or speech impairment;

wherever they reside or carry on business; and

(e) that there are to be such:

(i) customer information programs; and

(ii) customer cabling installation programs; and

(iii) carriage service development programs; and

(iv) other measures (if any) as are specified in the regulations;

as are necessary to support the continuity of supply of carriage services during the transition to the national broadband network;

(f) the objectives (if any) specified in the regulations, where those objectives relate to the supply of carriage services.[21]

1.27 TUSMA will be constituted as a body corporate and have a membership comprising a chair and between four and six other members. Each member of TUSMA will be appointed by the minister and must have substantial experience or knowledge and significant standing in one of the following fields: operation of a sector of the telecommunications industry; economics; business or financial

20 TUSMA Bill 2011, clause 34.

21 TUSMA Bill 2011, clause 11.

management; law; or public administration.[22] The terms and conditions for TUSMA members during their appointment are also outlined in the TUSMA bill.[23]

1.28 The TUSMA bill requires the appointment of a chief executive officer of TUSMA with responsibility for the day-to-day administration of the agency.[24]

1.29 Clause 13 of the TUSMA bill empowers TUSMA to enter into contracts or make a grant of financial assistance on behalf of the Commonwealth.[25]

1.30 An NBN corporation is required, if directed by the minister, to provide information or documents to TUSMA if that corporation has information or a document that is relevant to the performance of TUSMA's functions or the exercise of TUSMA's powers.[26]

1.31 TUSMA will be responsible for the Telecommunications Universal Service Special Account. The account will be funded via an industry levy as well as payments for damages and breaches under clause 13 of the bill and repayment of a grant under clause 13 of the bill.[27] The account will be used to fund the administrative costs of TUSMA and amounts payable by the Commonwealth Government under clause 13 of the bill.[28]

1.32 Clauses 22 through 26 outline the transitional arrangements for the USO, emergency call service, NRS and continuity of supply of carriage services.[29] It is the government's intention that the transitional arrangements will apply in particular to:

- a Telecommunications Universal Service Management Agency Agreement between the Commonwealth and Telstra, announced on 23 June 2011, for the provision of standard telephone services, payphones, an emergency call service, and to support the transition of copper-based services to the NBN Co fibre network (clauses 22, 23, 24 and 26);
- in relation to the provisions of the NRS:
  - a relay service contract with Australian Communication Exchange Limited; and
  - an outreach service contract with WestWood Spice (clause 25); and

22 TUSMA Bill 2011, clauses 37 and 38.

23 TUSMA Bill 2011, clauses 41–48.

24 TUSMA Bill 2011, clauses 58 and 59.

25 TUSMA Bill 2011, clause 13.

26 TUSMA Bill 2011, clause 78.

27 TUSMA Bill 2011, clause 85.

28 TUSMA Bill 2011, clause 86.

29 TUSMA Bill 2011, clauses 22–26 and Explanatory Memorandum (TUSMA bill), p. 7.

- any contracts entered into with any persons before commencement of the Bill relating to the achievement of the police objective that there are to be such customer information, customer cabling installation and carriage service development programs that are necessary to support the continuity of the supply of carriage services during the transition to the NBN (clause 26).[30]

1.33 The TUSMA bill sets out the provisions for the assessment, collection and recovery of an industry levy.[31] The levy will be imposed under the Telecommunications (Industry Levy) Bill 2011 and will replace the existing universal service and NRS levies currently applied to carriers.[32]

Telecommunications (Industry Levy) Bill 2011

1.34 The Telecommunications (Industry Levy) Bill 2011 (Industry Levy bill) imposes a levy to support the provision of public interest telecommunications services.[33] In conjunction with the TUSMA bill, the Industry Levy bill determines who must pay the levy and provides for the administration and enforcement of the levy scheme.[34]

1.35 Those required to pay the levy will be telecommunications carriers, or if so determined by the minister, carriage service providers.[35] The amount of the levy is determined under the TUSMA bill and is related to the payee's annual eligible revenue.[36]

Telecommunications Legislation Amendment (Universal Service Reform) Bill 2011

1.36 The Telecommunications Legislation Amendment (Universal Service Reform) Bill 2011 (Universal Service Reform bill) makes consequential amendments to the *Telecommunications Act 1997*, the *Telecommunications (Consumer Protection and Service Standards) Act 1999* and the *Australian Communications and Media Authority Act 2005*.[37] In particular, the Universal Service Reform bill contains provisions which, if specified pre-conditions are met, enable the progressive removal of the current USO for standard telephone services and payphones.[38] The bill sets out

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30 Explanatory Memorandum (TUSMA bill), p. 45.

31 Explanatory Memorandum (TUSMA bill), p. 61.

32 Explanatory Memorandum (TUSMA bill), p. 61.

33 Telecommunications (Industry Levy) Bill 2011 (Industry Levy bill),

34 Senator the Hon Kate Lundy, *Senate Hansard*, 9 February 2012, p. 33.

35 Senator the Hon Kate Lundy, *Senate Hansard*, 9 February 2012, p. 33.

36 TUSMA bill, clauses 91–93.

37 Explanatory Memorandum (Universal Service Reform bill), p. 2.

38 Explanatory Memorandum (Universal Service Reform bill), p. 2.

the manner in which the progressive shift from a regulatory scheme to a contractual scheme is expected to occur.

1.37 Key elements of the Universal Service Reform bill include:

- amendments to the *Telecommunications (Consumer Protection and Service Standards) Act 1999* to enable the removal of the current regulated obligations on the primary universal service provider and shift to a fully contractual model for the provision of universal service outcomes;
- amendments to the *Telecommunications (Consumer Protection and Service Standards) Act 1999*, the *Telecommunications (Universal Service Levy) Act 1997* and the *NRS Levy Imposition Act 1998* so that the USO and NRS levies, respectively, will cease to apply after 30 June 2012;
- amendments to the *Financial Management and Accountability Act 1997* so that TUSMA will be a prescribed agency; and
- a range of technical amendments to the *Australian Communications and Media Authority Act 2005*, the *Competition and Consumer Act 2010*, the *Criminal Code Act 1995*, the *Sea Installations Act 1987* and the *Telecommunications Act 1997* to:
  - recognise the establishment of TUSMA;
  - allow the ACMA to administer, enforce and report on the new levy provisions; and
  - reflect the shift in responsibility for the delivery of universal service outcomes and other public interest services to TUSMA.[39]

Issues regarding the bills

1.38 Most submitters to the inquiry acknowledged the need for changes to the USO as Australia transitions to the National Broadband Network (NBN).[40] However, submitters also raised a number of issues regarding the bills, such as:

- consultation during the development of the bills;
- the industry levy;
- services for people with a disability; and
- other amendments regarding the operation and responsibilities of TUSMA.

1.39 These issues are discussed in Chapter 2.

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39 Explanatory Memorandum (Universal Service Reform bill), p. 4.

40 See for example Macquarie Telecom, *Submission 1*; Optus, *Submission 2* and Australian Communications Consumer Action Network (ACCAN), *Submission 4*.

Concerns raised by the Senate Scrutiny of Bills Committee

1.40 The Senate Standing Committee for the Scrutiny of Bills raised concerns regarding the Telecommunications Universal Service Management Agency (TUSMA) Bill 2011. The Scrutiny of Bills Committee sought advice from the Minister regarding:

- review mechanisms available to consumers and others who may be aggrieved by an alleged breach of the public interest requirements or a failure by TUSMA to adequately enforce this obligations through contract law; and
- the absence of an explanation of the application of strict liability to the offence of failing to lodge an eligible revenue return in the explanatory memorandum.

1.41 The Minister for Broadband, Communications and the Digital Economy provided the following response:

> The proposed removal of the USO legislated obligations is not intended to diminish the safeguard that the USO has so far provided with respect to public interest telecommunication services for consumers. Instead, moving to a competitive contractual regime is intended to benefit consumers as it promotes more innovative, effective and efficient service delivery arrangements...Under the proposed new arrangements, consumers will continue to have access to existing compensation and dispute resolution schemes, including compensation under the Customer Service Guarantee (CSG).[41]

1.42 And:

> The [Scrutiny of Bills Committee] highlighted the principles of Commonwealth criminal law policy outlined in part 4.5 of the *Guide to the Framing of Commonwealth Offences, Civil Penalties and Enforcement Powers* (the Guide). Part 4.5 provides that application of strict or absolute liability to all physical elements of an offence has generally only been considered appropriate where the following considerations are applicable:
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> - The offence is not punishable by imprisonment and is punishable by a fine of up to 60 penalty units for an individual (300 for a body corporate) in the case of strict liability or 10 penalty units for an individual (50 for a body corporate) in the case of absolute liability. A higher maximum fine has been considered appropriate where the commission of the offence will pose a serious and immediate threat to public health, safety or the environment;
> - The punishment of offences not involving fault is likely to significantly enhance the effectiveness of the enforcement regime in deterring offences; and

41 Senate Standing Committee for the Scrutiny of Bills, *First Report of 2012*, 8 February 2012, p. 42.

- There are legitimate grounds for penalising persons lacking "fault", for example because they will be placed on notice to guard against the possibility of any contravention.

The strict liability offence in clause 120 [of the TUSMA Bill] accords with these principles.[42]

42 Senate Standing Committee for the Scrutiny of Bills, *First Report of 2012*, 8 February 2012, p. 44.