



Telecommunications Legislation Amendment (Future Proofing and Other Measures) Bill 2005

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Telecommunications Legislation Amendment (Future Proofing and Other Measures) Bill 2005

Date Introduced: 7 September 2005

House: House of Representatives

Portfolio: Communications, Information Technology and the Arts

Commencement: Sections 1-3, Schedule 1, Schedule 2 and Schedule 4, item 7 all commence on the day the Act receives Royal Assent. Schedule 3 commences on a single day to be fixed by Proclamation. Schedule 4 or after 6 months which ever is earlier, items 1 – 6 commence on the later of:

The start of the day on which the Act receives Royal Assent; and

Immediately after the commencement of Part 1 of Schedule 1 to the Telstra (Transition to Full Private Ownership) Bill 2005.

If the event in (b) does not occur, then the provisions in schedule 4, items 1-6 do not commence at all.

Purpose

The Bill amends the *Telecommunications Act 1997*, the *Telecommunications (Consumer Protection and Service Standards) Act 1999*, and the *Telstra Corporation Act 1991*.

The Bill establishes the Communications Fund and the Regional Telecommunications Independent Review Committee (the Committee). The Committee is required to conduct reviews of telecommunications services in regional, rural and remote areas. The Communications Fund is intended to fund measures to improve telecommunications services in regional, rural and remote areas in line with the Government's response to recommendations made by the newly created Committee.

The Bill supersedes the *Telecommunications Legislation Amendment (Regular Reviews and Other Measures) Bill 2005* which sought to establish the same Committee. That Bill was passed by the Senate on 24 June 2005 with amendments but those amendments are yet to be considered by the House of Representatives.

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Background¹

In March 2000, the then Minister for Communications, Information Technology and the Arts, Senator Richard Alston, announced the establishment of an independent inquiry to assess the adequacy of telecommunications services in metropolitan, regional, rural and remote areas. The 'Telecommunications Service Inquiry' (also referred to as the 'Besley Inquiry', after its chair Mr Tim Besley, AO), was the Government's means of fulfilling its 1998 election policy to have an independent inquiry into telecommunications services prior to any sale to further privatise Telstra.²

In September 2000 the report from the Telecommunications Service Inquiry was presented to the Minister.³ The market research completed by the Telecommunications Service Inquiry indicated that most Australians had a broadly positive view of the telecommunications sector and its performance. However the Telecommunications Service Inquiry also found that key aspects of services in rural and remote Australia were not adequate and recommended remedial action.

In August 2002, Senator Richard Alston announced the establishment of an independent inquiry to further review telecommunications services in regional, rural and remote Australia (the 'Regional Telecommunications Inquiry' or the 'Estens Inquiry' after its chair, Mr Dick Estens). The conclusions of the Estens Inquiry, which reported in November 2002, were that while consumers concerns were being addressed in response to the Telecommunications Service Inquiry, aspects of services in rural Australia still needed to be improved. The Estens report made 39 recommendations for improvements.

In 2003, when the T3 sale Bill⁴ was introduced, the Prime Minister's priority was to retire debt rather than to apply any Telstra sale proceeds to address the concerns raised in these inquiries. In the 2004 election campaign, however,

...Prime Minister Howard reaffirmed the Government's commitment to sell the rest of Telstra, subject to meeting its rural service obligations and achieving a satisfactory level of service in the bush.⁵

The Bill is one of a package of Bills dealing with the proposed sale of Telstra and disposition of some of the proceeds. Funding allocated to the Communications Fund is separate to that allocated to the proposed \$1.1 billion Connect Australia program. The appropriation for Connect Australia is made in the *Appropriation (Regional Telecommunications Services) Bill 2005*.⁶

The Communications Fund has, in part, resulted from agitation by the National Party. The aim of the National Party in advocating the establishment of such a fund is to ensure adequate telecommunications services are maintained in regional Australia after the full privatisation of Telstra. The Leader of the Nationals, the Hon. Mark Vaile in a press statement noted:

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I proposed this fund to future-proof regional telecommunications in the long term. The proceeds of the fund will roll out new technologies and address areas of market failure.

The proceeds will be allocated on a competitive basis in response to regular reviews of regional telecommunications. The reviews will be a requirement of the Telstra sale legislation.⁷

The Bill follows the Senate Inquiry into the *Telecommunications Legislation Amendment (Regular Reviews and Other Measure) Bill 2005* which reported on 11 May 2005.

That Senate Inquiry made the following key recommendations in relation to the review process and the Regional Telecommunications Independent Review Committee (the Committee):

- to reduce the maximum period of the review cycle from five to three years;
- to provide that the first review be conducted within two years of the Bill obtaining Royal Assent;
- that the membership of the Committee be restricted so that no more than one service provider can be represented on the Committee and that the majority of the members be made up of representatives of organisations with an interest in regional affairs, such as, for example, the National Farmers' Federation, the Australian Local Government Association and the Isolated Children's Parents Association; and
- that Telstra be required to respond to Committee reports within the same time frame as the Government.⁸

In this Bill, the first of these recommendations has been accepted. The second recommendation has been dealt with by the requirement that the first review must start before the end of 2008. The third recommendation has been dealt with by the requirement that membership of the Committee be restricted as detailed in the Main Provisions set out below.

However, the Bill does not make provision for a majority of regional representatives. This recommendation was strongly urged by a number of interest groups.⁹ The Bill also does not specify any requirements for a response from Telstra. In its appearance before the Senate Inquiry Telstra indicated that it is willing to respond to Committee findings.¹⁰

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Comment

The Second Reading Speech described the Bill's provisions as follows:

These arrangements provide a high degree of certainty for regional, rural and remote communities that the review process will result in improved, equitable access to important telecommunications services and that the reviews are independent from the executive government of the day.¹¹

The purpose of the Fund is directed at improving the telecommunications services of regional, rural and remote communities in line with the Government's stated commitment.

The Committee

The composition of the Committee is controlled only by the Minister. The Bill does not specify any formal mechanism for input or recommendations on the appointment process or the nomination of candidates.

There is no specific provision in the Bill requiring that the Committee be constituted as an 'independent' body.

The Bill provides that committee members must have knowledge of, or experience in, matters affecting regional, rural and remote parts of Australia *or* telecommunications. It is therefore possible that no Committee members will have knowledge or experience of regional, rural or remote communities.

Funding of the Committee

The funding of the Committee is not dealt with in the Bill and no explanation is given about how it is to be resourced. Committee members are appointed on a part-time basis. 'Assistance' to the committee is to be given, in kind, by the Australian Communications and Media Authority (ACMA), the ACCC, the Department and other Departments which may include the provision of information and advice and making available resources and facilities (**clause 158ZD**).

There does not appear to be a designated secretariat supporting the work of the Committee. It is likely that the secretariat function will be provided on a piecemeal basis by the agencies nominated above.

The Committee's capacity to undertake comprehensive and detailed reviews may be compromised by the apparently *ad hoc* nature of its funding and staffing. The paucity of information on how the Committee will be funded raises concerns as to how the Committee will be capable of undertaking effective public consultation in those areas the subject of a review. It could also affect the Committee's ability to undertake cost/benefit analyses supporting its recommendations.

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The Reviews

The Committee's objective is to assess the adequacy of telecommunications services. The Bill does not specify the principles or criteria that would inform the assessment process. The Bill does not 'flesh-out' what is meant 'adequate services'.¹²

The Bill has addressed criticism by the Opposition, the National Farmers Federation and the Senate Committee (which inquired into the earlier Bill), that reviews should occur, at most, every 3 years and not every 5 years. This appears consistent with the Estens report. However, the drafting of the provision may impede the timely operation of the review process.

Timing of the Review process

Each review must commence within 3 years of the previous report. However, the Bill does not specify the duration of the review period.

It is conceivable that a review could run for months or years.

A possible hypothetical scenario could be that a review might commence almost 3 years after the previous report and then take eighteen months to conduct. The report, therefore, would come four and a half years (or more) after the previous report.

These issues could seriously delay the Government's ability to implement improvements in the delivery of telecommunications services to regional Australia.

Although the recommendations of the Committee must be tabled, the Government is not bound to accept or act on them.

The Explanatory Memorandum is carefully worded to specify that the objective of the Communications Fund is to implement the 'government's response' to the recommendations of the Committee - not to implement the recommendations themselves.

The Fund

The quantum of money allocated to the fund is not fixed. There is no minimum amount that must be contributed by the Government to the Fund Account, nor is there a minimum amount that must be retained in the Fund Account or in investment of the Fund at any time. The fund may include up to \$2 billion in cash or may, notionally, include shares. There is no mechanism for valuing the shares.

The Ministers have a broad discretion relating to the amount that can be credited to the Fund Account, and the management of the Fund's investments. Investment decisions are not explicitly subject to review or, with few exceptions, any prescribed limitations, and depending on the nature of those investments may fluctuate according to market

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conditions. These factors presumably will affect the amount of funds available to implement review recommendations.

As the Ministers' contribution is capped, the question of whether the income stream will be ongoing or sufficient may be contingent upon the investment strategies adopted.

The 'fund' is no more than a 'special account' which is in effect, an accounting convenience and not a separate pool of assets. A special account is a mechanism used to record amounts in the Consolidated Revenue Fund that are set aside for a particular purpose.

If the fund includes cash, a mechanism will be needed for imputing a return on the cash component of the fund. The Bill does not provide a mechanism for this.

Parliament cannot bind a subsequent Parliament. There is no legal impediment to this, or a subsequent parliament, making amendments to the legislation with the effect of reducing the amount of money available or abolishing the 'fund' altogether. There is nothing to guarantee the Fund's continued existence or that it will operate in perpetuity.

The object of the 'fund' could have been more transparently achieved by regular appropriations of an amount equal to the anticipated annual earnings for the 'fund'. The device chosen (the special account) would appear to have been used to satisfy the demands of the Senator Barnaby Joyce.

ALP policy position

The amendments to the *Telecommunications Legislation Amendment (Regular Reviews and Other Measures) Bill 2005* introduced by Senator Conroy on behalf of the Opposition, and passed by the Senate in late June, addressed the issue as to what the Committee should consider when conducting reviews on the adequacy of the telecommunications services in regional, rural and remote areas. Two of those amendments have not been incorporated into this current Bill. They were that the Committee should:

- have regard to:
 - the extent to which services meet the social, industrial and commercial needs of the Australian people including those in regional, rural and remote parts of Australia; and
 - whether those services are equitable and reasonably available throughout Australia for all people who reasonably require those services...¹³; and
- adopt a broader terms of reference rather than examining only the services in rural and regional Australia because of the general importance of the telecommunications sector to Australia's economy.¹⁴

However, some of the amendments have been incorporated into this Bill, namely that:

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- in order to ensure greater independence, no officers or employees of a carrier or carriage service provider can be a member of the Committee; and
- consistent with the Senate Inquiry, reviews should be held every 3 years rather than every 5 years.

The Opposition has since raised a number of concerns relating to the report provided by the new Telstra management that Telstra has not maintained its infrastructure and other services, and that dividends have been paid from reserves.¹⁵ With reference to the Communications Fund, the Opposition noted that the Bill allows the Government to establish the fund with Telstra shares, the value of which may fluctuate.¹⁶

Position of significant interest groups/press commentary

The National Farmers Federation has expressed its support for the Communications Fund but wants ‘strong legislation’¹⁷ to ensure the delivery of telecommunications services to rural Australia. It remains critical that the first review will not take place sooner:

It is already three years since the last review and who knows when the Telstra sale will be completed, but in the best case scenario rural Australia faces at least a six year gap until the next review.¹⁸

The President of the NSW Farmers’ Association, Mr Jock Laurie, has reportedly criticised the Communications Fund as ‘nowhere near’ what is required.¹⁹

There has been press commentary on the nature of the fund stating that the fund will be entirely made up of Telstra shares and is thus a ‘high-risk but potentially high-return strategy’²⁰

Based on Telstra’s dividends of 40 cents a share for the past financial year, \$2 billion worth of the stock would have earned about \$168 million for the fund.

But against the previous year’s dividend of 26 cents a share, the earnings would have been \$109 million.

If for some reason, the company paid no dividends, there would be no income. It makes it a risky investment strategy that could also erode the base value of the fund.²¹

Concerns have also been raised about the potential for ‘pork-barrelling’ and the consequent need for ‘a national strategy, a national blueprint’ in order to avoid this.²²

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Main Provisions

Communications Fund

Schedule 1 inserts a new Part 9-C Division 2 of the *Telecommunications (Consumer Protection and Service Standards) Act 1999* to establish the Communications Fund which consists of the Fund Account and investments of the Fund (**clause 158ZG(2)**).

Fund Account

The purpose of the Fund Account is to:

- implement the Government's response to recommendations of reports by the Regional Telecommunications Independent Review Committee established under **clause 158R**;
- implement any purposes incidental or ancillary to this primary purpose; and
- make financial grants in relation to the same.

The responsible Ministers, currently the Minister for Finance and the Minister for Communications, Information Technology and the Arts, will determine what amount is credited to the Fund Account but that amount or those amounts must not exceed \$2 billion (**Clause 158ZJ**). Therefore the combined amounts contributed by the Government for so long as the Fund exists can never exceed \$2 billion.

Investments of the Fund

The responsible Ministers may determine that a financial asset, or two or more financial assets, constitutes an investment of the fund (**clause 158ZK(1)**). Such a determination is irrevocable (**clause 158ZK(4)**) though it does not prevent the realisation of the asset (**clause 158ZK(5)**).

Clause 158ZO allows for the Ministers to authorise the investment of Fund money in any financial asset.

Clause 158ZF defines the term 'investment' broadly and so will allow:

...for the notional transfer of some Telstra shares to the Communications Fund, with ownership of the shares remaining with the Commonwealth until they were sold.²³

Income derived, a return of capital or any other financial distribution from that investment is to be credited to the Fund Account (**clause 158ZP(1) and (2)**). The Ministers may also authorise the realisation of an investment of the Fund and the proceeds from the sale of an investment are also to be credited to the Fund Account (**clauses 158ZP (4) and (5)**).

The clear purpose is to distinguish the income from Fund investments. The income is placed in the Fund Account and only it can be used for the above-listed purposes.

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Clause 158ZP(6) provides that the Ministers may authorise the re-investment of the proceeds of an investment of the Fund before it matures. A **Note** to this clause provides that such proceeds

will not become public money when the investment matures because the proceeds will not be received by or on behalf of the Commonwealth.

The *Explanatory Memorandum* explains that this means the proceeds ‘will therefore not be required to be dealt with in accordance with the *Financial Management and Accountability Act 1997*’.²⁴ What constitutes ‘public money’ is not defined in this Bill though in the *Financial Management and Accountability Act 1997*, ‘public money’ is defined as money ‘in the custody or in control of the Commonwealth’ or alternatively ‘money in the custody or under control of any person acting for or on behalf of the Commonwealth in respect of the custody or control of the money.’²⁵ It appears that the purpose is to clearly separate the Communications Fund from consolidated revenue. Although as investments are to be made in the name of the Commonwealth (**clause 158ZO** and **clause 158ZQ3**), on this definition of ‘public money’ there may be some issue as to whether the distinction operates effectively.

Clause 158ZP(8) excludes section 39 of the *Financial Management and Accountability Act 1997* from application to an investment of the Fund. Section 39 sets out the ‘authorised investments’ that may be made by the Finance Minister and the Treasurer with public money. There are no such prescribed authorised investments in this Bill. As noted of **clause 158ZO**, the Ministers may authorise investment ‘in any financial asset’.

Subject to the conditions set out in **clause 158ZQ**, the Ministers may also authorise the purchase of derivatives to protect the value of or returns on Fund investments; thus they may adopt a speculative approach to protecting the Fund’s value.

Clause 158ZP(3) allows for expenses relating to investments to be deducted from the Fund Account.

Clauses 158ZL and **158ZM** set out the process for grants of financial assistance to a State or to persons respectively and such grants must stipulate the ‘terms and conditions’.

Clause 159B is an acknowledgement that the Communications Fund is separate from the Government’s ‘Connect Australia’ package of \$1.1 billion. The Second Reading Speech also notes that the Fund is in addition to the Universal Service Obligation, the Customer Service Guarantee and other initiatives.²⁶

Reviews

Schedule 2 sets out the new Part 9B of the *Telecommunications (Consumer Protection and Service Standards) Act 1999*. This details the nature of the independent review of regional telecommunications which must cover ‘regional, rural and remote parts of

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Australia.’ (**clause 158P(1)**). The focus of the reviews is on achieving ‘equitable access’ to telecommunications services that are significant to those communities and are already available to urban communities (**clause 158(2)**).

Clauses 158P (9) and (10) provide that the reviews will not cover ‘the eligible Territories’ as defined in section 7 of the *Telecommunications Act*, nor the ‘adjacent areas’ of the States or the eligible Territories. The eligible Territories are currently the Territory of Christmas Island and the Territory of Cocos (Keeling) Islands though others may be prescribed as such.²⁷

Clause 158P(5) ensures that public consultation will be a mandatory component of the reviews.

The Committee must also have regard to Government policies as notified to the Committee by the Minister and any other matters the Committee considers relevant (**clause 158P(6)**).

The Committee in its review must provide a costs/benefits assessment of any recommendations (**clause 158Q(4)**).

The first review must start before the end of 2008 though the Minister may determine that a review should begin earlier (**clause 158P(3)**). Subsequent reviews must begin within 3 years after completion of the previous review (**clause 158P(4)**).

A review is completed when received by the Minister (**clause 158P(4) and 158Q**). This reporting mechanism is obligatory (a report must be prepared and given to the Minister, see **clause 158Q**) though there is no set time frame for submitting the review’s report.

Clause 158Q(2) provides that once a report is received by the Minister, a time frame is put in place with the Minister required to table the report in Parliament within 15 sitting days and if the report makes recommendations (it is not a mandatory that it do so) the Minister must prepare a statement of the Government’s response and table this in Parliament within 6 months (**clause 158Q(6)(b)**).

Of this provision, the Explanatory Memorandum notes:

This will ensure that the Commonwealth responds to recommendations contained in a report of the Committee and justifies its approach to regional, rural and remote communities.²⁸

Thus the Minister must respond, although it is a matter for the Government as to whether it acts on the recommendations.

In its response, the Government is entitled to take into account the views of the telecommunications industry and government regulatory bodies such as the ACCC and the

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Telecommunications Industry Ombudsman as well as any other person the Minister considers relevant (**clause 158Q(7)**).

Importantly, the Communications Fund will not be applied until after completion of the first review. In the interim, the Connect Australia program will operate to fund telecommunications initiatives in regional Australia.

Regional Telecommunications Independent Review Committee

Clause 158U provides that the Committee members are to be appointed by the Minister on a part-time basis for a period not exceeding 4 years (**clause 158U**).

Clause 158T(1) and (2) provide that the Committee must consist of a Chair and at least 2 other members all of whom can only be appointed:

if it appears to the Minister that the person has knowledge of, or experience in:

- (a) matters affecting regional, rural and remote parts of Australia; or
- (b) telecommunications.

Therefore, the members may either be expert in matters affecting regional, rural or remote areas or telecommunications but need not have experience of both.

The only provision made with respect to funding is for assistance to the Committee by the Australian Communications and Media Authority ('ACMA'), the ACCC, the Department and other Departments which may include the provision of information and advice and making available resources and facilities (**clause 158ZD**).

The Committee Chair and the majority of members forming the Committee must not be Commonwealth employees (**clause 158T(4)**) or involved in a carriage service provider (**clause 158T(5)**). There is also provision for disclosure of conflict of interests (**clause 158X**) and for the Minister to terminate a member's appointment 'for misbehaviour or physical or mental incapacity' (**clause 158ZB(1)**) or in other situations including when a member becomes bankrupt (**clause 158ZB(2)**).

Costs of development of consumer-related industry codes

Schedule 3 provides for amendments to the *Telecommunications Act 1997* to allow for reimbursement of costs of development of consumer-related industry codes by application to the ACMA.

The ACMA's determination for approval will be based on whether it is satisfied that the proposal is put by a body which meets the criteria set out in **clause 136A(1)(a)**, deals with matters relating to the relationship between carriage service providers and their retail

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customers and the adequate representation of those customers, and is of a 'reasonable' cost (**clause 136B**).

Appropriations

Schedule 4 deals with appropriations as well as payments and the borrowing of money by the Commonwealth in relation to sale-scheme hybrid securities under a Telstra sale scheme.

Endnotes

- 1 For a more detailed outline of the background to the proposed sale of Telstra see John Kain, '[Sale of Telstra](#)', *Parliamentary Library Briefing Book: Key Issues for the 41st Parliament*, Parliamentary Library, 2004, pp.10–11.
- 2 Senator the Hon. Richard Alston, formerly Minister of Communications, Information Technology and the Arts, [Media release](#), 19 March 2000, (accessed 7 September 2005).
- 3 See [Connecting Australia, Report of the Telecommunications Service Inquiry](#), 30 September 2000, (accessed 7 September 2005).
- 4 Telstra (Transition to Full Private Ownership) Bill 2003
- 5 John Kain, op. cit., note 1, p. 10.
- 6 For further information, see: Richard Webb, Appropriation (Regional Telecommunications Services) Bill 2005, [Bills Digest](#) 42, 2005–06.
- 7 The Hon. Mark Vaile MP, Leader of the Nationals, Minister for Trade, The Nationals Deliver on Regional Telecommunications, Media Release, 17 August 2005.
- 8 http://www.aph.gov.au/senate/committee/ecita_ctte/regular_reviews/report/a02.htm, accessed 8 September 2005.
- 9 See submissions by Communications Experts Group Pty Ltd (CEG) *Submission 9*, p. 2, and Mr Ewan Brown, Small Enterprise Telecommunications Centre Limited (SETEL), [Committee Hansard](#), 11 April 2005, p. 35, referred to in the Senate Inquiry report, Chapter 2, Key Issues, p. 6., paras 2.30 and 2.33.
- 10 *ibid.*, p. 7., para 2.44.
- 11 Second Reading Speech, *Telecommunications Legislation Amendment (Future Proofing and Other Measures) Bill 2005*.
- 12 For further discussion, see Jonathan Chowns, Telecommunications Legislation Amendment (Regular Reviews and Other Measures) Bill 2005, [Bills Digest](#), 17 March 2004, pp. 6–7.
- 13 Amendments moved by [Senator Conroy](#) and passed by the Senate 27 June 2005.

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- 14 *Telecommunications Legislation Amendment (Future Proofing and Other Measures) Bill 2005*
- 14 See Senator Conroy, *Telecommunications Legislation Amendment (Regular Reviews and Other Measures) Bill 2005*, In Committee, Senate Hansard 23 June 2005.
- 15 Mr Lindsay Tanner, MP, *Telecommunications Legislation Amendment (Future Proofing and Other Measures) Bill 2005*; *Telecommunications (Carrier Licence Charges) Amendment Bill 2005*; *Appropriation (Regional Telecommunications Services) Bill 2005-2006*, House of Representatives, Hansard, 7 September 2005, p. 73.
- 16 *ibid.*, p. 73
- 17 Fed: Sale plan fails to secure bush telecoms – NFF, *AAP*, 17 August 2005.
- 18 *ibid.*
- 19 David Crowe, ‘Unlikely allies gang up on government plans’, [Australian Financial Review](#), 19 August 2005, p. 32.
- 20 Phillip Hudson, ‘Telstra share plan for bush fund raises spectre of risk’, [Sunday Age](#), 21 August 2005, p. 5.
- 21 *ibid.*
- 22 AM – Analyst says national strategy needed for Govt’s Telstra funds, [ABC Online](#), 18 August 2005, (accessed 8 September 2005).
- 23 *ibid.*, p. 8.
- 24 Explanatory Memorandum, *Telecommunications Legislation Amendment (Future Proofing and Other Measures) Bill 2005*, p. 12.
- 25 s 5.
- 26 *ibid.*
- 27 *Explanatory Memorandum*, *op. cit.*, note 6, p. 14.
- 28 *Explanatory Memorandum*, *op. cit.*, note 6, p. 16.

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