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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

TELECOMMUNICATIONS COMPETITION BILL 2002

EXPLANATORY MEMORANDUM

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

TELECOMMUNICATIONS COMPETITION BILL 2002

OUTLINE

The Telecommunications Competition Bill 2002 (the Bill) makes amendments to Parts XIB and XIC of the *Trade Practices Act 1974* (TPA) and some amendments to the *Telecommunications Act 1997* and the *Telecommunications (Carrier Licence Charges) Act 1997*. Part XIB of the TPA deals with anti-competitive conduct in the telecommunications industry and Part XIC deals with interconnection and access to telecommunications services.

The Bill implements the Government's response to the Productivity Commission's Inquiry Report on Telecommunications Competition Regulation. The measures contained in the Bill aim to increase the level of competition and investment in the telecommunications market to the benefit of consumers and business by:

(a) facilitating timely access to basic telecommunications services:
- Part 1 of Schedule 2 requires the Australian Competition and Consumer Commission (ACCC) to produce model terms and conditions for core telecommunications services; and
- Part 2 of Schedule 2 removes the right to seek merits review of final determinations made by the ACCC in relation to access arbitrations;

(b) facilitating investment in new telecommunications infrastructure:
- Parts 11 and 12 of Schedule 2 extend the existing provisions under Part XIC of the TPA relating to exemptions and undertakings to cover services that are not yet declared or supplied; and
- Part 12 of Schedule 2 encourages the industry-wide benefits of undertakings;

(c) encouraging a more transparent regulatory market:
- Part 16 of Schedule 2 provides a mechanism for the Government to introduce greater transparency in Telstra Corporation Limited's wholesale and retail operations;

(d) enhancing accountability and transparency of decision making under Part XIB:
- Part 9 of Schedule 2 requires the ACCC to publish guidelines on the exercise of its powers under Part XIB;
- Part 16 of Schedule 2 requires the ACCC to consult prior to the issue of a Part A competition notice and enables it to issue an advisory notice whether or not a Part A competition notice has been issued; and

(e) making a number of other changes to the telecommunications regime:
- Schedule 1 contains a number of amendments to the *Telecommunications Act 1997*;
- Schedule 2 contains a number of amendments to the TPA; and
- Schedule 3 contains some minor amendments to the *Telecommunications (Carrier Licence Charges) Act 1997* that are consequential to the proposed amendments in Schedule 1 to the Bill.

Facilitating more timely access to basic telecommunications services

Part 1 of Schedule 2 assists parties to reach commercial agreement on fair terms and conditions of access by requiring the ACCC to publish model terms and conditions of access. The model terms and conditions will relate to the following 'core' services that have already been declared by the ACCC under the telecommunications access regime:

- Domestic Public Switched Telephone Network (Originating and Terminating) Service;
- Unconditioned Local Loop Service; and
- Local Carriage Service.

The ACCC will be required to have regard to the model terms and conditions if it is called upon to arbitrate an access dispute in relation to the service.

Part 2 of Schedule 2 improves the certainty and timeliness of access by removing merits review by the Australian Competition Tribunal (ACT) in relation to final determinations made by the ACCC. The amendments will not affect the ability of a party to seek merits review of decisions of the ACCC under Part XIC in relation to an application for an exemption order or an access undertaking, nor the ability to seek judicial review of a final ACCC determination. The Bill preserves appeal rights where an application for appeal has been lodged, or where parties have a right of appeal at the time of commencement of the Bill.

Parts 11 and 12 of Schedule 2 promote timely decision-making by introducing time limits on the ACCC's and ACT's decision-making process for exemptions and undertakings. The ACCC or the ACT is deemed to have approved an application if it does not make a decision at the end of a 6-month period, subject to provisions that will allow the ACCC or the ACT to extend, or further extend, the 6-month period by notifying the applicant and publishing a statement of reasons explaining the extension. The ACCC will be able to "stop the clock" when requesting further information or when conducting public consultation.

Parts 11 and 12 of Schedule 2 remove scope for the above time limits to be abused by limiting the information and evidence that the ACT may consider on review of decisions of the ACCC in relation to exemptions and undertakings to the information, evidence and documents that were before the ACCC in making the original decision.

Part 12 of Schedule 2 acknowledges the industry-wide benefits of undertakings by allowing the ACCC to defer the consideration of an access dispute, in whole or in part, in order to consider an access undertaking received by the ACCC that relates, in whole or in part, to the matter that is the subject of the access dispute. In addition, proposed section 152CGA will provide that a determination made by the ACCC under Division 8 (ie, a final determination in relation to an access dispute) has no effect to the extent to which it is inconsistent with an access undertaking that is in operation.

The effective the operation of the standard access obligations will be ensured by clarifying that they apply independently of any ACCC determination (Part 7 of Schedule 2) and that 'ordering' and 'provisioning' are aspects of technical and operational quality under the standard access obligations (Part 13 of Schedule 2).

Facilitating investment in new telecommunications infrastructure

There are two mechanisms to facilitate investment in new telecommunications infrastructure. Firstly, Part 11 of Schedule 2 promotes certainty for investors in telecommunications facilities by extending the current exemption mechanism under Part XIC. These provisions allow the ACCC to determine that a class of carriers and/or carriage service providers, or a particular individual, is exempted from the standard access obligations even if that service is not in existence at the time that the exemption is sought. The essential features of these proposed exemptions are that:

- they may contain limitations (for example, by referring to a service that is supplied using a particular facility or particular infrastructure and/or in a certain geographical area);
- when determining whether an exemption will be in the long-term interests of end-users the ACCC will be required to have regard to any matters specified by the Minister; and
- the ACCC will be subject to the 6-month time limit mentioned above in deciding whether to make an order.

Secondly, Part 12 of Schedule 2 further promotes certainty for investors in telecommunications facilities by extending the current provisions in Part XIC relating to access undertakings. These provisions allow the ACCC to accept undertakings from existing and potential access providers of all telecommunications services (including services provided by a particular piece of telecommunications infrastructure), irrespective of whether those services have or will be declared, or are in existence at the time the undertaking is lodged. The essential features of the proposed amendments are that:

- they create two types of access undertakings: ordinary access undertakings (currently known under Part XIC as access undertakings) and special access undertakings. Special access undertakings will cover proposed services and services which may exist to some extent but are not yet declared and may be given by a person who is, or expects to be, a carrier or carriage service provider;
- a special access undertaking may relate to a listed carriage service or a service that facilitates the supply of a listed carriage service that the person expects to supply;
- a special access undertaking must contain an expiry time but it may also contain provisions for the extension, or further extension, of the undertaking with the approval of the ACCC. A special access undertaking may be withdrawn voluntarily, subject to certain notice requirements;
- once a special access undertaking comes into operation, it will operate as though the service supplied by the person who gave the undertaking is an active declared service, even if the service is not the subject of a declaration of general application;
- the ACCC will be subject to the 6-month time limit mentioned above in relation to decisions about ordinary and special access undertakings; and
- when determining whether a special access undertaking is reasonable, the ACCC will be required to have regard to any matters specified by the Minister.

Facilitating a more transparent regulatory market

The Government has previously announced that it will encourage a more transparent regulatory market by requiring accounting separation of Telstra's wholesale and retail operations. Accounting separation will address competition concerns arising from the level of vertical integration of Telstra's wholesale and retail services and improve the provision of costing and price information to access seekers and the public.

The Government's proposed accounting separation framework will ensure:

(a) Telstra prepares current (replacement) cost accounts (as well as existing historic cost accounts) to provide more transparency to the ACCC about Telstra's ongoing and sustainable wholesale and retail costs;
(b) Telstra publishes current cost and historic cost key financial statements in respect of "core" interconnect services but not underlying detailed financial and traffic data which is regarded as commercially sensitive;
(c) the ACCC prepares and publishes an "imputation" analysis (based on Telstra purchasing the 'core' interconnect services at the price that it charges external access seekers) which will demonstrate whether there is any systemic price squeeze behaviour; and
(d) Telstra publishes information comparing its performance in supplying "core" services to itself and to external access seekers in relation to key non-price terms and conditions. (These will include faults / maintenance, ordering, provisioning, availability / performance, billing and notifications).

The amendments in Part 16 of Schedule 2 provide a mechanism for the Government to introduce accounting separation by enabling the Minister to direct the ACCC in relation to the exercise of its existing record-keeping rule powers under Division 6 of Part XIC. The Minister's direction would be a disallowable instrument. The direction power will provide flexibility for the Government to introduce accounting separation of Telstra's wholesale and retail operations in a probative and deliberate manner without the complexity of specifying detailed regulatory accounting rules in Part XIB.

Anti-competitive conduct provisions (Part XIB)

Several amendments are made to enhance accountability and transparency of decision making in Part XIB. Part 9 of Schedule 2 requires the ACCC to issue guidelines to address the circumstances of the ACCC issuing a competition notice as opposed to taking other action under the TPA. The amendments in Part 16 of Schedule 2:

- provide that the ACCC must consult with a carrier or carriage service provider before issuing a Part A competition notice, including providing the carrier or carriage service provider with a written notice that summarises the instance or kind of anti-competitive conduct to be specified in the Part A competition notice; and
- allow the ACCC to issue an advisory notice before, at the same time, or after the issue of a Part A competition notice advising a carrier or carriage service provider of the action that it should take, or consider taking, in order to ensure that it does not engage, or does not continue to engage, in anti-competitive conduct.

Other changes to the telecommunications competition regime

The Bill contains a number of amendments to the *Telecommunications Act 1997*:

- Part 1 of Schedule 1 shifts the responsibility for determining which services should be subject to pre-selection from the Australian Communications Authority to the ACCC;

- Part 2 of Schedule 1 removes the legal requirement for Industry Development Plans in relation to carrier licensing; and

- Part 3 of Schedule 1 aligns the various procedures and obligations on service providers to provide information to enable efficient interconnection between networks contained in Part 4 of Schedule 1 of the Telecommunications Act.

Other amendments to the TPA contained in the Bill will:

- provide that a declaration must sunset after five years from the making of the declaration (Part 3 of Schedule 2);

- allow the ACCC to revoke a declaration of minor importance without holding a public inquiry (Part 4 of Schedule 2);

- provide that the time that a service provider's reasonably anticipated requirements are measured under paragraph 152AR(4)(a) and subsection 152CQ(1) will be the time that an access seeker (or service provider as described in section 152AR) makes a request under section 152AR for access to a declared service (Part 5 of Schedule 2);

- prevent the ACCC from making a determination that would have the effect of requiring a party (other than the access seeker) to bear an unreasonable amount of the costs (rather than some or all of the costs as is currently the case) of extending or enhancing the capability of a facility or maintaining extensions to or enhancements of the facility (Part 6 of Schedule 2);

- clarify the ACCC's power to require a party to an arbitration to pay interest to another party on the whole or part of the money that the party is required to pay the other party under the determination. The ACCC will be required to publish guidelines on the use of this power (Part 8 of Schedule 2); and

- repeal provisions relating to the Telecommunications Access Forum (Part 10 of Schedule 2).

Schedule 3 to the Bill make some minor amendments to the *Telecommunications (Carrier Licence Charges) Act 1997* consequential to the proposed repeal of the legal requirement for Industry Development Plans in carrier licensing (Part 2 of Schedule 1).

FINANCIAL IMPACT STATEMENT

The Bill is not expected to have any financial impact on Commonwealth expenditure or revenue.

REGULATION IMPACT STATEMENT

The Telecommunications Competition Bill 2002 (the Bill) makes amendments to Parts XIB and XIC of the *Trade Practices Act 1974* (TPA) and some amendments to the *Telecommunications Act 1997* and the *Telecommunications (Carrier Licence Charges) Act 1997*. Part XIB of the TPA deals with anti-competitive conduct in the telecommunications industry and Part XIC deals with interconnection and access to telecommunications services. This Regulation Impact Statement (RIS) identifies the key issues the Bill addresses, the options for addressing them and explains why the approach implemented has been adopted.

Background

Part XIB of the TPA supplements the ACCC's general anti-competitive conduct powers by enabling the ACCC to issue competition notices to carriers and carriage service providers with substantial market power engaging in conduct with the purpose or effect of substantially lessening competition. The issue of a competition notice is designed to promptly stop anti-competitive conduct and opens the way for substantial penalties and damages.

Under Part XIB, the ACCC can also require a carrier or carrier service provider to file its charges (public tariffs and access agreements), enabling their scrutiny for anti-competitive purpose or effect. The ACCC can also make record-keeping rules requiring carriers or carriage service providers to keep both financial and non-financial information in a prescribed form and to publish this information.

The object of the telecommunications access regime in Part XIC is to promote the long-term interests of end-users of carriage services or services provided by means of carriage services. In determining whether something promotes the long-term interests of end-users, regard must be had to whether it is likely to result in:

- promoting competition;
- achieving any-to-any connectivity; and
- encouraging the efficient use of, and economically efficient investment in, infrastructure used to supply telecommunications services.

Under Part XIC, the ACCC has the power to "declare" services for the purposes of the telecommunications specific access regime. Carriers and carriage service providers are generally required to provide interconnection with, and access to, services declared by the ACCC, together with various ancillary services. In the first instance, terms and conditions of supply, including price, are commercially negotiated between parties or set out in an undertaking given by the access provider; if negotiations fail, the ACCC may determine terms and conditions.

In 2001 the Parliament passed the *Trade Practices Amendment (Telecommunications) Act 2001* which introduced a series of measures to streamline the operation of Part XIC (the 2001 streamlining amendments)[1].

In June 2000, the Government issued terms of reference for a review by the Productivity Commission (PC) of the telecommunications-specific competition regulations, including a review of Part XIC. On 23 December 2001, the Government released the PC's Inquiry Report on Telecommunications Competition Regulation (Report No. 16 of 2001) (the PC report) for public comment. The PC report broadly recommended the retention of telecommunications-specific provisions for dealing with anti-competitive conduct (Part XIB) (PC 5.1)[2] and for providing access to telecommunications services (Part XIC) (PC 8.1).

After careful consideration of the telecommunications-specific competition regime, including the recommendations of the PC report, on 24 April 2002 the Government announced a range of measures that it would introduce to enhance the operation of the regime. These initiatives were aimed at increasing the level of competition and investment in the telecommunications market to the benefit of consumers and business. In broad terms, the package of measures were to:

(a) provide greater certainty and more timely access for access seekers by requiring the regulator to produce model terms and conditions of access for core telecommunications services such as Public Switched Telephone Network (PSTN) Origination and Termination Service, Local Carriage Service (LCS) and Unconditioned Local Loop Services (ULLS);

(b) facilitate timely access to basic telecommunications services by removing the right to merits review in relation to access arbitrations;

(c) facilitate investment in new telecommunications infrastructure by extending the existing provisions under Part XIC of the TPA relating to exemptions and undertakings to include services that are not yet declared or supplied;

(d) encourage a more transparent regulatory market by requiring accounting separation of Telstra's wholesale and retail operations; and

(e) a number of minor changes to the telecommunications regime including making additional information available to the market; repeal of the requirement for Industry Development Plans; monitoring of access pricing by power utilities; monitoring the timeliness of porting processes and clarification of some minor technical legislative matters.

This RIS assesses the regulatory impact of these measures as they have been incorporated into the Bill.

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[1] The Streamlining amendments incorporated a number of the recommendations from the PC Report on Telecommunications Competition Regulation (No. 16 of 2001). These recommendations were 10.5, 10.6, 10.8, 10.10, 10.11, 11.3, 11.4 and 14.4.

[2] Recommendation 5.1 of the PC report.

Stakeholders

The key stakeholders with an interest in these matters are:

- access providers;
- access seekers;
- carriers and carriage service providers;
- potential investors in telecommunications services; and
- end-users of telecommunications services.

Consultation

A significant degree of stakeholder consultation has informed the Government's decision-making process in relation to the matters addressed in the Bill.

The PC report, a key input to the process, was itself developed following extensive public consultation, including:

- the release of issues papers in June 2000 and early January 2001;
- the release of a draft report in March 2001 for public comment;
- informal discussions with 24 organisations and consideration of over 100 written submissions; and
- public hearings in August 2000 and May 2001 in which 27 organisations took part in total.

The Government released the PC report on 21 December 2001. At that time, the Minister for Communications, Information Technology and the Arts, Senator the Hon. Richard Alston, called for public comments. These were to be provided in writing to the Department of Communications, Information Technology and the Arts by 15 February 2002.

A number of written submissions were received in relation to the Government's response to the PC report. In addition, a general industry forum and one forum that focussed specifically on the concerns of regional ISPs were held on 4 March and 8 March 2002 respectively.

This consultation demonstrated there was broad agreement on the policy objectives of telecommunications competition regulation, including:

- reducing delays and providing greater certainty in resolving the terms and conditions of access to core services that relate to Telstra's fixed line network;
- promoting investment in telecommunications infrastructure;
- improving transparency (and reducing discrimination) between Telstra's wholesale and retail services; and
- the provision of further costing / price information to access seekers and to the market.

Following the Government's announcement on 24 April 2002 of the measures that it would introduce in response to the PC report, further detailed industry consultation occurred on the implementation of these measures.

Implementation and review

The Bill incorporates those PC report recommendations that have been accepted by the Government, which require legislative amendments to be given effect. A small number of the PC report recommendations that have been accepted by the Government can be implemented administratively.

The Government's full response to the PC report is contained in The Government's Response to the Productivity Commission's (PC) Report on Telecommunications Competition Regulation which will be available from the Internet site of the Department of Communications, Information Technology and the Arts at www.dcita.gov.au.

The ACCC will be responsible for implementing the majority of the proposals in the Bill. Where these give rise to specific implementation requirements these are drawn out in the discussion below.

The Government will continue to closely monitor the operation of the telecommunications-specific competition regulations under the TPA and any related provisions in the *Telecommunications Act 1997*. In line with the PC report recommendations 5.9 and 6.1, the Government has decided that there will be a further review of Parts XIB and XIC of the TPA in five years.

1. Providing greater certainty and facilitating more timely access to basic telecommunications services

Problem identification

The underlying philosophy of the telecommunications access regime in Part XIC of the TPA is focussed on the terms and conditions of access being established through commercial agreement, or being set out in access undertakings. This provides flexibility for parties to establish access arrangements that match their commercial needs. Where parties cannot agree on the terms and conditions of access they can take their dispute to the ACCC for binding arbitration (determinations). The Australian Competition Tribunal (ACT) is empowered to review determinations by the ACCC based on the evidence that was provided to the ACCC.

The telecommunications access regime promotes commercial outcomes, however, the development of the industry continues to be frustrated by delays in securing access to core fixed line network services. These delays are caused in part by uncertainties as to the outcomes that will be achieved through arbitration. Delays and further uncertainty also arise from the protracted review process that can follow ACCC arbitrations. Delay in obtaining access can have the result of diminishing competition for services and discouraging access seekers from entering the market.

Objectives

Provide greater certainty and more timely access for access seekers to "core" fixed line network services.

Discussion of options and impacts

(a) Maintain the current position

Option (a) is to leave unchanged the current process for securing access to network services. This process has provided a framework under which numerous access arrangements have been established, however, experience to date has been that achieving access has been at times a protracted and costly process. This can be attributed, in part to the substantial reliance on ACCC arbitration to resolve disputes rather than resolution through commercial negotiation.

As noted above, the underlying philosophy of the access regime is for terms and conditions of access to be established through commercial agreement. This provides flexibility for parties to agree on terms and conditions that reflect their specific circumstances, and to a significant extent it has been successful. The PC report noted that "by far the majority (at least 80%) of terms and conditions for access are commercially negotiated".[3] However, 44 disputes on terms and conditions of access have gone to arbitration and these disputes have tended to involve the core high volume services such as PSTN and LCS. These results suggest that further improvements could be made.

The dispute resolution process has tended to be protracted. Only eight final determinations have been made by the ACCC. Of these, three were made over eighteen months after the dispute had been notified to the ACCC. The ACCC has terminated two disputes, in one jurisdiction was not established and 33 disputes have been withdrawn at the request of the parties. It also should be noted that some of these disputes would have been the subject of commercial negotiation for a considerable period, before being taken to the ACCC.

The 2001 streamlining amendments addressed a number of the procedural aspects of the arbitration process in order to reduce the delays that were occurring. The streamlining amendments introduced into the regime some multilateral mechanisms for the settling of disputes by making provision for multi-party arbitrations. The steamlining amendments also allowed the regulator to make better use of information by allowing it to provide arbitration information from one arbitration to another and requiring it to produce pricing principles that it would have regard to in arbitrations. These amendments were in line with those proposed in PC recommendations 10.8, 10.10 and 10.11. The streamlining amendments also sought to reduce delays by limiting the material that the ACT could consider on review to that which was provided to the ACCC at first instance.

These amendments have reduced the potential for delay from the arbitration process, however, one further area where improvements could be made is to provide incentives for parties to reach commercial agreement so that terms of access can be agreed before needing to go to arbitration.

Under the current processes for securing access to network services there is relative uncertainty prior to arbitration as to what the eventual terms and conditions of access will be. As a result, parties tend not to be willing to compromise in their commercial

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[3] PC report, p224.

agreement because they believe they will get a better outcome from arbitration. If parties were more aware of the proximate outcome from arbitration they may be more likely to agree on terms of access commercially.

(b) Modify the current regime to improve the timeliness and certainty of obtaining access

This option is to adopt further measures to improve the timeliness and certainty of obtaining access to "core" fixed line network services by increasing the incentives for terms and conditions of access to be established through commercial agreement, or to be set out in access undertakings. Central to this option would be a requirement for the ACCC to publish model terms and conditions of access for "core" wholesale telecommunications services. While these model terms and conditions would not be binding they would provide clear guidance about the regulator's views as to what fair terms and conditions for access would be. The model terms and conditions would be based on an assessment of the current market conditions and would be in a form that could easily be incorporated into access agreements or be adopted by an access provide in an access undertaking. If a dispute about terms and conditions then arose between parties, any subsequent ACCC arbitration decision (determinations) would be expected to reflect the model terms and conditions.

The "core" services for which model terms and conditions could be established are the Public Switched Telephone Network Originating and Terminating Service, Unconditioned Local Loop Service (ULLS) and Local Carriage Service (LCS). Each of these services is a bottleneck service vital to the supply of many other telecommunications services. Further services (if any) could be included via regulation, and thus would be subject to consideration by Parliament.

This option overcomes the uncertainty that currently exists prior to regulatory arbitrations as to what the ACCC's likely views may be concerning the eventual terms and conditions of access. Up-front provision of this information is likely to assist the commercial negotiation process by giving parties a view of what the likely outcome of an ACCC determination on the issue would be. This is likely to bring the parties' negotiating position closer together, thus expediting and simplifying the commercial negotiation process. This follows similar reasoning to PC report recommendations 10.11 and 14.4.

This option would benefit access seekers (particularly smaller or niche players) as it would set a starting point for access negotiations, thereby reducing the overall time taken to gain access. It would also result in financial certainty for access seekers by giving a broad indication of likely outcomes. It would also overcome some of the information asymmetry that may disadvantage small rivals compared to the incumbent.

Option (b) also includes a number of procedural changes to further promote certainty and timeliness of access. To promote certainty for competitors in obtaining access via the telecommunications access regime, the right of parties to seek merits review of ACCC determinations would be removed. In addition, to reduce delays in setting terms and conditions of access, time limits would be introduced for the ACCC and ACT consideration of exemptions and undertakings. It should be noted that the right of review to the ACT on ACCC decisions on exemptions and undertakings would remain.

These changes recognise that the time taken to resolve disputes is a matter of concern to many participants in the telecommunications industry. Delay in decision making imposes costs on industry participants and creates uncertainty for investors. The cost of delay is difficult to quantify because it comprises lost benefits from potential new investments in the telecommunications industry. Delay in decision making reduces competition and consequently affects the quality and price of telecommunications services offered to consumers.

As an example of the potential delay resulting from the review process, an appeal in relation to the ACCC's decision on PSTN access was notified to the ACT in October 2000, with initial hearings commencing in November 2000. In March 2002 the parties settled and the dispute was withdrawn, without ever having a substantive hearing on the terms of access. In fact, it is likely that a substantive hearing would not have occurred until 2003.

Removing merits review of ACCC decisions recognises the significant delays that have resulted from the review process in the past and that new entrants seeking access to telecommunications infrastructure have difficulty raising or committing capital during the review process due to the contingent liability of an unfavourable outcome via, for example, a backdated determination or review decision. Removing merits review also promotes certainty by streamlining the decision-making process. It provides for consistency in decision-making and in concert with the publication of model terms and conditions, it will enable industry participants to have a clear understanding of the likely outcome of arbitrations.

The main risk of removing merits review arises from the potential occurrence of regulatory error or breach of due process by the ACCC and the degree to which removing merits review limits the ability to have the correct decision made by the ACT. In relation to due process, ACCC arbitrations involve an exhaustive examination of the issues and are prosecuted by experienced and well-resourced participants. It is unlikely that the parties to these proceedings would not be capable of upholding their rights and ensuring that all relevant information is provided to the decision maker. In relation to regulatory error, the PC report concluded that the range of variables in making a determination meant that the ACCC might be prone to regulatory error. However, there appears to be little reason why the ACT would not be equally subject to the same regulatory error. The ACT does not have the ACCC's technical skills nor its experience in dealing with telecommunications issues. The ACT is also likely to rely on the ACCC for technical advice. Therefore, merits review may do little to reduce the risk of regulatory error. If the ACCC does err on a matter of law or process, parties to an ACCC determination decision retain the capacity to seek review by the Federal Court under the *Administrative Decisions (Judicial Review) Act 1977*, as well as under other appeal mechanisms in the Federal and High Courts.

Introducing time limits on the ACCC and ACT decision-making processes in relation to exemptions and undertakings promotes timely access for access seekers. Binding time limits send a clear message and introduce a degree of discipline on the ACCC and ACT. The ACT currently faces time limits in making decisions in respect to mergers and acquisitions and under the *Gas Pipelines Access (South Australia) Act 1997*. The negative effects of a fixed time limit and the potential for this time limit to

be abused can be mitigated by providing the decision-maker with an ability to "stop the clock" between requesting further information from parties and receiving that information and while conducting public hearings. The negative effect can be further mitigated by allowing the decision-maker to extend the time period for further periods of up to three months, with publication of a statement of reasons.

Any scope for regulatory gaming of these timeframes will be further restricted as this option also proposes limiting the information which the ACT may consider in a review of the ACCC's decision on an undertaking or exemption to that which was considered by the ACCC in making the original decision. This approach is consistent with the measures adopted in the streamlining amendment (in relation to ACT reviews of determinations) and it also recognises the likely shift in regulatory activity from arbitrations to undertakings and exemptions as a result of the removal of merits review of determinations.

(c) Require the regulator to determine and enforce uniform terms and conditions of access for all access seekers over common services

Under option (c), operators with significant market power would be required to publish standard interconnection offers specifying the technical conditions and tariffs applicable for interconnection. In turn the regulator would require those offers to meet cost-based pricing principles. This centralised approach to setting access terms and conditions is adopted in many other countries, including Finland, France and Japan.

This approach could provide greater certainty and more timely access to declared services, particularly for smaller access seekers. It could also benefit the ACCC as it would reduce the number of disputes notified to the ACCC for arbitration.

However, this approach would be inconsistent with the underlying philosophy of the current regulatory regime that is focussed on the terms and conditions of access being established through commercial agreement, or being set out in access undertakings. A centralised approach to setting access arrangements would lead to uniform terms and conditions for access. Access seekers would lose the flexibility to obtain services on terms and conditions that reflect their specific circumstances or that were suitable for their customers. Access providers may be forced to alter their networks or supply services on terms and conditions that were not commercially viable.

A centralised approach to setting access terms and conditions may result in standardised access arrangements that may consequently lead to a dampening of competition and result in a loss of choice for consumers.

In implementing this option it would be difficult for the regulator, or the incumbent, to set inter-connection arrangements which would be flexible and suitable to the unique requirements of all access seekers and ultimately in the long-term interests of end-users. It is likely that the inter-connection arrangement would favour some players over others, thus distorting competition.

Consultation

Consultation revealed that there is considerable concern over the speed at which regulatory decisions are made. A number of the submissions received by the Government focussed on the tension between having a decision-making process that emphasised efficiency and expediency and one that prioritises transparency, accountability and accuracy, by incorporating layers of reviews.

A number of submissions supported a role for the ACCC of producing model terms and conditions. Indeed some proposed that these terms and conditions should encompass not only price but also non-price terms and conditions of access, which they argued are becoming an increasingly important consideration in access negotiations. Some submissions advocated the benefits of uniform terms and conditions, pointing to their application in a number of overseas jurisdictions. The regulator is comfortable with its added role of producing model terms and conditions, as it builds on its existing functions of producing pricing principles and resolving access disputes.

A number of submissions were polarised on the issue of merits review. For example, many stakeholders believed that the advantages of a faster decision would outweigh any disadvantages. Some also argue that review mechanisms can be used as a costly delaying tactic, which disadvantages new or smaller players and diverts resources from areas such as infrastructure investment. Others see merits review as critical to minimising regulatory error and support extending the range of decisions subject to merits review.

Time limits have at times received support from all sections of the industry and neither the ACCC nor the ACT have raised in principle objections to their introduction, provided they contain provisions to “stop the clock” and extend the time limit in appropriate circumstances.

Conclusions and recommended actions

Option (a) has gone some way to improving the timeliness of the access process however it does not provide sufficient incentive for parties to reach commercial agreement. Option (b) reduces the uncertainty as to the outcome from arbitration and thus increases the likelihood that parties will reach commercial agreement on the terms and conditions for access. It also further improves the timeliness of the arbitration process and should benefit investment and competition. Option (c) represents a significant departure from the current regulatory regime and has the potential to stifle competition and choice for consumers. It is recommended that option (b) be adopted.

Implementation

The Bill provides that the ACCC must make a written determination setting out the model terms and conditions relating to each core service. Before making a determination the ACCC must publish a draft of the determination and consider any submissions on that draft and it must also consult with the Australian Communications Authority. The Bill provides that the ACCC must take all

reasonable steps to ensure that a determination relating to each core service is made within six months of commencement of the Bill.

2. Facilitating investment in new telecommunications infrastructure

Problem identification

In recognition of the importance of broadband and other telecommunications services to the future growth of the Australian economy, it is important to ensure that Part XIC promotes investment by access providers in core infrastructure.

Objectives

To promote greater certainty for major new telecommunications infrastructure investment.

Discussion of options and impacts

(a) Maintain the current position

Under the current provisions of Part XIC, a potential investor in a telecommunications service is unable to receive an exemption from the obligation to provide access to a declared service or to lodge an access undertaking until they supply an active declared service, as declaration can only occur for a service that is being supplied. This can provide a disincentive for investment because it means potential access providers cannot obtain regulatory certainty as to whether or not their service will be declared, and if so, on what terms they will be required to provide access. In particular, where "risky investments" are subject to potential declaration, the investment may be rendered uneconomic as a result of this uncertainty.

This concern can, in part, be addressed through existing mechanisms that provide for appropriate access prices that allow the access provider to receive a normal commercial return. However, the regulator's task in distinguishing between an appropriate reward for a risky investment and monopoly rents is difficult. Uncertainty in the minds of the investors about the outcome of this decision can result in marginal investments being delayed or cancelled.

The costs of relying on the declaration criteria and access prices could be significant but are difficult to quantify because they relate to potential lost investments arising from the lack of certainty for investors. This may be in the form of the delayed roll-out of new broadband services, with consequent flow-on effects on the community from delayed access to high-speed communication services.

(b) Extend the existing provisions in Part XIC to enable the ACCC to grant exemptions and approve undertakings for new services

This option would extend the existing provisions in Part XIC to enable the ACCC to grant exemptions and approve undertakings for services that are not yet declared or supplied. This would provide certainty for investors and thus encourage investment by allowing the ACCC to rule on whether a service should be exempt from

declaration or whether the terms of a proposed undertaking are acceptable prior to the investment being made.

These anticipatory exemptions and special undertakings would not be time limited, but would specify the period for which they will apply. Longstanding exemptions may be appropriate in circumstances where a service is "ex-post" contestable, and therefore would not normally be declared, but an investor may wish to obtain a ruling that this is the case beforehand. Exemptions for a limited period could exempt the investment from access requirements for a short period of time, just as in the case of patents, and could provide an incentive to invest and innovate in otherwise uncertain circumstances.

Unlike ordinary undertakings, special undertakings would not have a maximum legislated time limit. This provides further certainty for investors and an additional incentive for the access provider to submit a special undertaking. Special undertakings have the benefit of providing industry-wide access to the service on terms that are agreeable to the access provider and regulator. This would assist access seekers to avoid costly arbitration proceedings by utilising the terms and conditions of access in the special undertaking.

The combination of the binding term and the capacity for the investor and regulator to come to agreement on the conditions of the anticipatory exemption or special undertaking mean that this mechanism would allow the access provider and the regulator to enter into a type of regulatory compact. The adoption of up-front exemptions was recommended by the PC (PC 9.5).

Recognising the potential economy-wide benefits of some investments, the ACCC would be required to consider any views of the Minister for Communications, Information Technology and the Arts in considering whether or not to grant an anticipatory exemption or to approve a special undertaking, in addition to the standard considerations. Such views would be required to be specified in writing and would be subject to the possibility of disallowance by Parliament.

To enhance the potential of these anticipatory exemptions and special undertakings to promote investment certainty, timely decision making would be prompted by providing that the anticipatory exemption or special undertaking would be deemed to be accepted unless the ACCC rejected it within 6 months of receipt of the application. Similar to the provisions noted above, to mitigate the effects of an absolute deadline, the calculation of this period would exclude time:

- between the decision-maker seeking further information and the supply of that information; and
- whilst conducting a public hearing.

Further, the decision-maker would be able to extend (and further extend) the above timeframe by periods of up to 3 months at a time with publication of a statement of reasons.

Option (b) would result in some costs for the ACCC, as it would need to devote resources through its ongoing role in the administration, implementation and

oversight of the reporting regime, but this may be balanced by the savings from less time spent on its declaration and arbitration processes.

The binding nature of anticipatory exemptions and special undertakings also raises some risks for the regulator and access provider in the circumstances where the conditions of the market change over time. However, this would be a matter of judgement for the regulator and the potential investor and would be weighed against the benefits to the community and access seekers.

In recognition of the fact that the ACCC could not revoke a special undertaking and to ensure that access seekers' rights were adequately protected, access providers would be required to give 12 months notice before a "special" access undertaking could be withdrawn. This would provide time for the ACCC to consider whether there was a need to conduct a declaration hearing to determine if the service should be declared prior to the special undertaking being withdrawn.

Ultimately, the use of anticipatory exemptions and special undertakings could see customers benefit from a wider range of services available on new and more diverse infrastructure, and from lower prices resulting from greater investment in new infrastructure. This may lead to economy-wide benefits as businesses take-up new services at lower prices.

(c) Allow case by case legislative exemptions for major projects

Another approach for quarantining an investment from declaration prior to the investment being made is to provide for case by case legislative exemptions and undertakings for major projects. This approach would involve legislation specifically designed to apply to a particular project being passed by Parliament which would override or alter the existing provisions in Part XIC.

This option offers the potential to mirror many of the benefits of anticipatory exemptions and special undertakings as the legislative exemption could be developed to accommodate the particular needs of each project. A legislative process may in fact be particularly suited to infrastructure projects of national significance by providing additional flexibility and by allowing the Parliament to take into account a wide range of factors when assessing the merits of a proposed exemption or undertaking.

However, establishing a separate process for legislative exemptions and undertakings would be more administratively complex and costly for the Government and also potentially costly for the access seeker. This complexity may not provide a timely response, particularly as normal legislative drafting and Parliamentary processes would need to be taken into account.

This option could also be considered with more scepticism by access seekers as it would not be bound by the same procedural steps and ordered deliberations as the current assessment process undertaken by the ACCC. It would also have the potential to be less open and transparent.

Consultation

There has been considerable concern over the ACCC's inability to exempt services provided by a prospective investment from declaration. A number of submissions advanced proposals similar to that outlined in option (b). Others argued that undertakings already allowed investors to achieve up-front certainty and that there is no evidence that the current Part XIC objects and statutory criteria are a barrier to investment.

Conclusions and recommended action

Option (a) does not allow potential investors to obtain certainty and thus has the potential to deter investment in new infrastructure that may otherwise have benefited consumers. Option (b) provides flexibility and certainty by extending existing exemption and undertaking provisions to services that have not yet been supplied or declared. Option (c) would provide similar benefits to option (b), however, it would be more administratively complex, prolonged and less transparent. It is recommended that option (b) be adopted.

3. Facilitating a more transparent regulatory market

Problem identification

The vertical integration between Telstra's wholesale and retail divisions has raised concerns about the lack of transparency between Telstra's wholesale and retail services, with the consequent concern that Telstra's wholesale services are possibly not being provided to competitors on a non-discriminatory basis.

Objectives

Address competition concerns arising from the level of vertical integration between Telstra's wholesale and retail services and improve the provision of costing and price information to access seekers and the market.

Discussion of options and impacts

(a) Existing regulatory accounting framework

This option is to continue to rely on the ACCC to implement accounting transparency under its existing regulatory accounting framework.

The ACCC has wide powers to make record-keeping rules (RKRs). These rules were enhanced in 1999 by providing the ACCC with explicit powers to publish the information it collected under the RKRs. The intention at the time was for the ACCC to use the powers of disclosure to assist it in determining whether conduct was anti-competitive by enabling market participants, with their knowledge of telecommunications, to provide advice or comments to the ACCC, and to benefit negotiations under the access regime by providing all parties to those negotiations with a common information base.

In November 2000, the ACCC released for comment the draft Telecommunications Industry Regulatory Accounting Framework (RAF) setting out record-keeping rules. In August 2002, the ACCC issued a draft report seeking comment on the public disclosure of information collected via the RAF. The development of the RAF has been a detailed and deliberative process involving close consultation with industry and addressing a multitude of complex issues. However, the ACCC is yet to publish information collected under the RAF.

Delay in implementing accounting transparency is likely to benefit the incumbent as it is subject to less industry scrutiny and its competitors are at more of a disadvantage in access negotiations.

(b) Ministerial Direction

This option is to provide the Minister for Communications, Information Technology and the Arts with a power to direct the ACCC in the use of its existing powers to make RKRs. This would allow the Government to mandate the implementation of accounting separation for Telstra in a more probative and deliberate manner. Accounting separation would build upon the work that has been commenced by the ACCC in developing the RAF and require relevant accounts to be disclosed to the public. The PC report noted that accounting separation had the potential to "reduce the scope for discriminatory pricing between Telstra's downstream arms and other access seekers" (PC report page 360).

The key benefits of this option would be that:

- the ACCC would have better costing information to identify possible discriminatory and anti-competitive behaviour;
- Telstra's competitors would have access to transparent price and non-price information in relation to the core services that are subject to Telstra's monopoly control, thereby assisting them in identifying possible cases of discrimination and in negotiating commercial agreements for access; and
- release of transparent cost information is likely to deter anti-competitive conduct.

The disclosure of information to the regulator and the market could potentially have some negative impacts on Telstra. In view of the need to mitigate these impacts to sustain a competitive market, this option would not:

- require Telstra to re-configure its business units thereby imposing additional costs and reducing efficiencies;
- give the ACCC any new discretionary powers;
- reduce Telstra's capacity to realise its bona fide economies of scale and scope; or
- involve any structural separation of Telstra's wholesale or retail divisions.

Telstra has already developed accounting systems to report against the RAF. To the extent that accounting separation requires Telstra to undertake further work, there are likely to be some additional costs to Telstra.

Consultation

This issue has been the subject of significant public debate and has similarly been the focus of a considerable number of the submissions to the Government and in the Government's discussions with industry. A number of submissions to the Government expressed concerns over the apparent lack of information available to the market on the pricing of Telstra's wholesale services. A number of submissions argued that the Government should adopt more interventionist arrangements than accounting separation in order to address Telstra's vertical integration and the information asymmetry inherent in its provision of wholesale services to its competitors.

In developing the accounting separation framework the Government has had regard to the views of the key stakeholders and to accounting separation approaches in overseas jurisdictions (including the accounting separation regime administered by Oftel in the United Kingdom). The proposed framework is generally regarded as being acceptable by Telstra, with it holding reservations in some areas. Conversely, its competitors would prefer to see the arrangements taken further, while recognising it will represent a significant improvement in the level of information available to the market.

Conclusions and recommended action

Accounting separation of Telstra's wholesale and retail arrangements is consistent with the PC report recommendations and has the potential to promote competition and to deliver improved services to the public. However, under option (a), continued reliance on the ACCC's implementation of the RAF may not place enough information in the public domain in a timely manner. Option (b) makes effective use of the ACCC's existing RKRs and does not impose unreasonable costs on Telstra. It is recommended that option (b) be adopted.

Implementation

The Bill provides that the Minister for Communications, Information Technology and the Arts may give a written direction to the ACCC in relation to the exercise of its RKR powers. The Bill does not expand the ACCC's existing powers. The direction provides a means of implementing accounting separation in a timely manner without duplication of existing regulatory powers and without the complexity and rigidity of specifying the detailed accounts in legislation. The direction is a disallowable instrument and the costs and benefits of its provisions would be the subject of examination in a further regulation impact statement.

To ensure that implementation of the accounting separation framework is not subject to the delays that have impacted upon the RAF, the proposed framework would aim to provide for publication of accounts relating to the 2002-03 financial year by the end of 2003.

Further information on the accounting separation framework will
be announced by the Government when the Bill is introduced in Parliament to ensure that stakeholders have relative certainty regarding this initiative.

4. Anti-competitive conduct provisions (Part XIB)

Problem identification

Part XIB provides an important regulatory tool for the ACCC to use where it deals with instances of anti-competitive conduct. The issue for consideration is whether the current provisions in Part XIB strike the right balance between providing an effective and timely deterrent against anti-competitive conduct and affording industry participants adequate procedural fairness and certainty.

Objectives

To enhance certainty and procedural fairness in the use of Part XIB without detracting from the effectiveness of the anti-competitive conduct provisions.

Discussion of options and impacts

(a) Maintain current provisions

Part XIB provides industry-specific prohibition against anti-competitive conduct in the telecommunications industry by supplementing the ACCC's general anti-competitive powers in Part IV. The two main differences between Part XIB and Part IV are: Part XIB makes use of an effect or likely effects test, whereas Part IV uses a purpose test; Part XIB, but not Part IV, allows the ACCC to issue competition notices to firms which are allegedly engaging in anti-competitive behaviour.

The Part XIB provisions recognise that the telecommunications industry is an extremely complex, horizontally and vertically-integrated industry where competition is not fully established in some telecommunications markets. The retention of these provisions was recommended by the PC report (PC 5.1).

Competition notices reverse the onus of proof and are designed to promptly stop anti-competitive conduct and open the way for substantial penalties and damages. To the extent they represent an effective deterrent against anti-competitive conduct, they promote competition and ultimately benefit consumers. However, at the same time, the receipt of a competition notice has the potential to have a significant impact on a firm both in terms of monetary damages and damage to its reputation. Therefore, the issue of a competition notice must follow an appropriate process and should be carefully considered.

The current provisions in Part XIB do not place an obligation on the ACCC to consult with the potential recipient of a competition notice prior to the issue of that notice. While the ACCC has made it its practice to enter into such consultation this may not provide sufficient certainty for firms. Such consultation may have the benefit of assisting the ACCC to better identify instances of anti-competitive conduct and to prevent this conduct at an early stage.

The current provisions in Part XIB also do not provide guidance as to when the ACCC should utilise the Part XIB provisions as against other remedies. This has led to some concerns that the success of competition notices may be leading the ACCC to

utilise these provisions in circumstances where a remedy under Part XIC may be a more appropriate action (see PC report p.197).

These issues may result in the anti-competitive conduct provisions overreaching their appropriate boundaries and deterring acceptable pro-competitive conduct.

(b) PC report recommendations

The PC report recommended a number of amendments to improve certainty and procedural fairness in the use of Part XIB. Option (b) is to adopt several of these recommendations. The PC report recommended:

i. the ACCC be required to develop and publish, after public consultation, guidelines for deciding which regulatory mechanism is most appropriate in particular cases (PC 5.5);
ii. Part XIB be amended so that a competition notice no longer constitutes prima facie evidence of the matters set out in the notice (PC 5.3);
iii. that a party be allowed to appeal against the merits of a competition notice, even after its withdrawal (PC 5.2); and
iv. the ACCC be required to issue a public report for all allegations of anti-competitive conduct which proceeded to formal investigations of a telecommunications provider's conduct (PC 5.4).

In general, the PC report recommendations involve procedural changes to establish a more regimented decision-making process for the ACCC. While these changes may improve transparency, the cost of these changes is that they would introduce new scope for firms to frustrate actions against anti-competitive conduct. As noted above, timeliness of action is very important in the telecommunications industry, therefore, restricting the ACCC’s ability to act quickly in response to anti-competitive conduct could have significant costs.

The publication of non-binding guidelines establishing which regulatory mechanism is most appropriate may provide valuable information to the market. This would be weighed against the impact on the ACCC’s resources and any restrictions that the guidelines may impose on the regulator’s flexibility.

In most, if not all cases, where the regulator is investigating alleged anti-competitive conduct there will be significant information asymmetry between it and the firm being investigated. The reversal of the onus of proof in the competition notice addresses this imbalance. Removing this function would be likely to delay the ACCC’s investigation of anti-competitive conduct and frustrate its ability to prosecute breaches of Part XIB.

Introducing appeals against the merits of a competition notice may be inconsistent with measures to ensure timely action to curtail anti-competitive behaviour. It may also increase the potential for regulatory gaming and increase delay.

Publication of a report for all allegations of anti-competitive conduct would improve transparency but it would also be another drain on the ACCC’s resources. The

publication of all allegations, especially if not proven, may also have the potential to damage the reputation of industry participants.

(c) Alternative procedural enhancements

Option (c) is to adopt alternative measures that address the issues of procedural fairness and certainty in the operation of the anti-competitive conduct provisions in Part XIB without imposing a more regimented decision making process on the ACCC.

Firstly, option (c) would place an obligation on the ACCC to formally consult with the potential recipient of a Part A competition notice before it issued a notice. This would ensure that the potential recipient of a Part A competition notice is informed of the potential issue of that notice, including the instances of anti-competitive conduct that are proposed to be specified in the notice and is invited to respond to those allegations. This option would provide certainty for the potential recipient of a competition notice and, because it accords with existing ACCC practices, it should not give rise to delay.

Secondly, option (c) would provide the ACCC with the ability to issue a notice to a person advising that person of the action it should take, or consider taking, in order to ensure that it does not engage, or continue to engage, in anti-competitive conduct. This provision would add to the ACCC's existing ability to issue an advisory notice to the recipient of a Part A competition notice under section 151AQB of Part XIB but it provides the additional benefit of issuing the notice before the Part A competition notice is in force. This option would enable the potential recipient of a competition notice to obtain greater certainty about the regulator's response. The issue of the competition notice would be at the discretion of the ACCC, therefore it would not further add to the regulator's procedural obligations.

Consultation

Some industry participants argued that the market remains dominated by the incumbent and that there is a continuing need for strong telecommunications-specific competition provisions. Others have argued that the current provisions do not provide sufficient certainty and scope for guidance on how and when the telecommunications-specific competition provisions will be exercised. The ACCC has expressed concern that any amendments should not result in a more complicated decision-making process.

Conclusions and recommendation

Indications are that there may be some need to improve the process for dealing with anti-competitive conduct. Therefore, option (a) is not preferred. However, any improvement to procedural fairness and transparency should not be made at the cost of rigorous prevention of anti-competitive conduct. For this reason Items (ii), (iii) and (iv) in option (b) are rejected, as they would introduce a more regimented decision making process for the ACCC, distract resources from enforcement activities and give rise to delay. Option (c) addresses concerns about certainty and procedural fairness without impacting on the ACCC's regulatory obligations. It is recommended that Item (i) of option (b) and option (c) be adopted.

5. Minor changes to the telecommunications competition regime

Problem identification

Experience with the current competition regime, detailed consultation with industry and the recommendations of the PC report have highlighted a number of areas where improvements could be made to the current regime through a series of minor amendments.

Objectives

To implement more robust regulatory arrangements by clarifying and improving the certainty of the current law where necessary, reducing administrative burden where possible, removing anomalies or inconsistencies where identified, improving equity amongst parties where possible and providing for more timely decision making where appropriate.

Discussion of options and impacts

(a) Make appropriate amendments to the regulatory framework

This option would involve making minor amendments to the regulatory framework to make improvements and to rectify identified shortcomings and inefficiencies. While the amendments could be approached in a number of ways, the amendments would generally do the following:

- remove uncertainty in relation to determinations made by the ACCC by clarifying that the relevant time for assessing "reasonably anticipated requirements" under subsection 152CQ(1) is the time that a request for access to a declared service is made (PC 10.14);
- remove inequities that place all financial responsibilities on access seekers by amending paragraph 152CQ(1)(f) to restrict the power of the ACCC to make an access determination where it would require someone other than the access seeker to bear an unreasonable amount of the costs (rather than some or all of the costs as is currently the case) (PC 10.15);
- amend paragraph 152EF(1)(b) to clarify that the obligation to comply with the standard access obligations exists independently of an ACCC determination (PC 10.16);
- facilitate access to declared services by clarifying that ordering and provisioning are taken to be aspects of technical and operational quality for the purposes of the standard access obligations;
- remove uncertainty by clarifying the ACCC's powers to require a party to a determination to pay interest on sums and to require the ACCC to publish guidelines on the exercise of this power (PC 10.17(a));
- repeal the provisions relating to the Telecommunications Access Forum (PC 10.4) and repeal requirements for industry development plans contained in Part 2 of Schedule 1 of the *Telecommunications Act 1997* (PC 12.1);
- facilitate quicker resolution of interconnection arrangements by aligning the different procedures and obligations on service providers to provide information to enable efficient interconnection between networks contained in Part 4 of Schedule 1 of the *Telecommunications Act 1997* (PC 12.4);

- ensure that pre-selection is considered within the context of a wider range of regulatory options by transferring the responsibility for determining which services should be subject to pre-selection from the Australian Communications Authority to the ACCC (PC 15.1);
- ensure that the provisions in Part XIB that deal with the powers and functions of the ACT on a review of a decision of the ACCC under Part XIB or under Part XIC are consistent and clarify the powers of the ACT where it reviews a decision o the ACCC to refuse to do something;
- reduce administrative costs by providing a mechanism for the ACCC to revoke declarations of minor importance without the need to conduct a public inquiry (PC 9.9); and
- improve the regulatory scrutiny of declared services by providing for declarations to "sunset" after five years, unless the ACCC extends the period of the declaration, after conducting a public review (PC 9.8).

Amendments that address these issues would generally benefit all stakeholders. Those amendments that clarify or remove uncertainty should benefit access seekers and providers by removing scope for unnecessary confusion and thus costly delay. A number of amendments will reduce administrative costs for the ACCC and thus reduce the burden on the industry when these costs are recovered through carrier licence fees.

(b) Retain the status quo

Maintaining the current arrangements without change will mean that a number of the inefficiencies and uncertainties that have been identified will not be addressed. These arrangements could be continued on the basis that, while imperfect, they have not frustrated the objectives of the regime. Doing nothing may also save some administrative costs associated with instituting changes. The status quo may also benefit service providers to the extent that it hampers the development of competition and thus helps to maintain their market position.

Consultation

The PC report and consultations with industry and the ACCC are the main means by which the Government has become aware of these issues with the current legislative regime. There is general support for the amendments in option (a) by stakeholders and the regulator.

Conclusion and recommended action

It is fairly clear that option (a) is the only realistic option, given the issues that have been identified. The package of proposed measures is consistent with the direction of existing regulation, deals with current concerns within the industry and implements numerous recommendations of the PC report. It is recommended that option (a) be adopted.

ABBREVIATIONS

The following abbreviations are used in this explanatory memorandum:

ACA:	Australian Communications Authority
ACCC:	Australian Competition and Consumer Commission
ACT:	Australian Competition Tribunal
Bill:	Telecommunications Competition Bill 2002
Carrier Licence Charges Act:	*Telecommunications (Carrier Licence Charges) Act 1997*
Minister:	Minister for Communications, Information Technology and the Arts
PC Report:	Productivity Commission report "Telecommunications Competition Regulation", Report No. 16, 21 September 2001
Telecommunications Act:	*Telecommunications Act 1997*
TPA:	*Trade Practices Act 1974*

NOTES ON CLAUSES

Clause 1 – Short title

Clause 1 provides that the Bill, when enacted, may be cited as the Telecommunications Competition Act 2002.

Clause 2 – Commencement

Clause 2 provides that the Bill, when enacted, will commence on the day on which it receives the Royal Assent.

Clause 3 – Schedule(s)

Clause 3 provides that each Act that is specified in a Schedule to the Bill is amended or repealed as set out in that Schedule and any other Item in a Schedule has effect according to its terms. There are three Schedules to the Bill. Schedule 1 to the Bill amends the *Telecommunications Act 1997*. Schedule 2 to the Bill amends the *Trade Practices Act 1974*. Schedule 3 to the Bill amends the *Telecommunications (Carrier Licence Charges) Act 1997*.

Schedule 1 – Amendment of the Telecommunications Act 1997

Part 1 – Pre-selection in favour of carriage service providers

Part 1 of Schedule 1 to the Bill contains amendments to Part 17 of the Telecommunications Act. Under Part 17 of the Telecommunications Act, the ACA may require certain carriers and carriage service providers to provide pre-selection in favour of carriage service providers. Pre-selection allows customers directly connected to the network of one carriage service provider to have access automatically to another carriage service provider's services when they pick up the phone to make certain types of calls. Pre-selection provided by carriers and carriage service providers must include over-ride dial codes for selecting alternative carriage service providers on a call-by-call basis (section 353).

The PC Report recommended that the responsibility for determining which services should be subject to pre-selection requirements should be shifted from the ACA to the ACCC, with the ACCC being required to consult the ACA on technical matters. The purpose of the PC Report recommendation is to ensure that pre-selection is but one of a wider range of regulatory options that may facilitate competition in charges for telecommunications services. Currently, the ACA cannot consider other options due to its limited powers under the Telecommunications Act in relation to competition issues.

The amendments in Part 1 of Schedule 1 to the Bill:

- reverse the current roles of the ACA and the ACCC under Part 17;
- include a new proposed section regarding review of decisions by the ACCC to refuse to make a declaration exempting a carrier or carriage service provider from pre-selection requirements; and

- contain transitional measures to provide for the continued effect of determinations, declarations and opinions made by the ACA under Part 17 prior to the commencement of the amendments.

Item 1 – Section 5

Section 5 of the Telecommunications Act contains a simplified outline of the Telecommunications Act. The outline currently states that the ACA may require certain carriers and carriage service providers to provide pre-selection in favour of carriage service providers.

Item 1 amends the outline in section 5 to provide that the ACCC may require certain carriers and carriage service providers to provide pre-selection in favour of carriage service providers. The proposed amendment is consequential to the proposed shift in responsibility for determining pre-selection requirements from the ACA and to the ACCC under Part 17 of the Telecommunications Act.

Item 2 – Section 348

Section 348 of the Telecommunications Act contains a simplified outline of Part 17 of the Act. The simplified outline currently states that the ACA may require certain carriers and carriage service providers to provide pre-selection in favour of carriage service providers and that pre-selection must include over-ride dial codes for selecting alternative carriage service providers on a call-by-call basis.

Item 2 amends section 348 to change the reference to the ACA with a reference to the ACCC. The proposed amendment is consequential to the proposed shift in responsibility for determining pre-selection requirements from the ACA and to the ACCC under Part 17 of the Telecommunications Act.

Item 3 – Section 349

Section 349 deals with the requirement to provide pre-selection. Subsection 349(1) requires the ACA to make a determination requiring each carrier or carriage service provider who supplies a standard telephone service to provide pre-selection in favour of a specified carriage service provider in relation to calls made using a standard telephone service. Subsection 349(2) provides that the ACA may make a written determination requiring each carrier or carriage service provider who supplies a specified carriage service to provide pre-selection in favour of a specified carriage service provider in relation to calls made using the carriage service.

In making a determination under section 349, the ACA:

- must have regard to the technical feasibility as well as the costs and benefits of complying with the requirement;
- may adopt or incorporate matters contained in codes or standards; and
- must consult the ACCC before making the determination.

Item 3 amends section 349 by changing references to the ACA to references to the ACCC. The purpose of the proposed amendment is to transfer the responsibility for

determining pre-selection requirements from the ACA to the ACCC to ensure that pre-selection is considered within the context of a wider range of regulatory options.

Item 4 – Subsection 349(6)

Subsection 349(6) provides that the ACA must consult the ACCC before making a determination under section 349 about pre-selection requirements. Item 4 amends subsection 349(6) by changing the reference to the ACCC to the ACA. The purpose of the proposed amendment is to transfer the responsibility for determining pre-selection requirements from the ACA to the ACCC to ensure that pre-selection is considered within the context of a wider range of regulatory options.

Item 5 – Section 352

Section 352 allows the ACA, by notice in the Gazette, to declare that a specified carrier or carriage service provider is exempt from a pre-selection requirement under section 349. In deciding whether to exempt a carrier or carriage service provider from a pre-selection requirement the ACA must have regard to whether it would be technically feasible for the carrier or carriage service provider to comply with the requirement and whether compliance with the requirement would impose unreasonable financial hardship on the carrier or carriage service provider (subsection 352(2)). The ACA may also have regard to other matters (subsection 352(3)).

Item 5 amends section 352 by changing the references to the ACA to references to the ACCC. The purpose of the proposed amendment is to transfer the responsibility for determining pre-selection requirements from the ACA to the ACCC to ensure that pre-selection is considered within the context of a wider range of regulatory options.

Item 6 – At the end of section 352

Item 6 inserts a new subsection at the end of section 352. Proposed subsection 352(4) provides that the ACCC must consult the ACA before making a declaration exempting a carrier or carriage service provider from a pre-selection requirement under section 349. This provision ensures that the ACCC will consult the ACA on any relevant matters. This may include, for example, technical matters related to pre-selection.

Item 6 also inserts a note at the end of section 352. The note draws attention to proposed section 352A which deals with the review of a decision of the ACCC to refuse to make a declaration under section 352. It is proposed to add section 352A in Part 17 of the Telecommunications Act to provide that decisions of the ACCC under section 352 will be reviewable by the ACT. Proposed section 352A is required because a decision made under section 352 will be removed from the list of reviewable decisions of the ACA in clause 1 of Schedule 4 to the Telecommunications Act as a consequence of responsibility for the determination of pre-selection requirements being shifted from the ACA to the ACCC. The purpose of note is therefore to draw attention to the new provision in the Telecommunications Act that will allow decisions made under section 352 to be reviewed.

Item 7 – After section 352

Item 7 inserts a proposed new section after section 352. Proposed section 352A provides that certain decisions of the ACCC under section 352 will be reviewable by the ACT. This is consequential to the transfer of the responsibility for determining pre-selection requirements from the ACA to the ACCC to ensure that pre-selection is considered within the context of a range of regulatory options. Currently, a decision by the ACA to refuse to make a declaration under section 352 (ie, not to exempt a carrier or carriage service provider from a pre-selection requirement) is included in the list of reviewable decisions of the ACA in clause 1 of Schedule 4 to the Telecommunications Act. Decisions listed in clause 1 of Schedule 4 may be reconsidered by the ACA and reviewed by the Administrative Appeals Tribunal. A decision to refuse to make a declaration under section 352 will be removed from the list in clause 1 of Schedule 4 as a consequence of the shifting of responsibility for pre-selection requirements from the ACA to the ACCC.

The purpose of the amendment in Item 7 is therefore to provide for merits review of a decision by the ACCC to refuse to make a declaration under section 352. The ACT has been substituted for the Administrative Appeals Tribunal to maintain consistency with the review body adopted for other decisions of the ACCC. This substitution will not substantively alter the rights of those persons whose interests are affected by a decision under section 352, as reviews by both the Administrative Appeals Tribunal and the ACT are on the merits. Decisions made by the ACCC will not be required to be reconsidered by the ACCC before they can be appealed to the ACT. This is consistent with the processes for review of other decisions made by the ACCC under the TPA.

Proposed subsections 352A(2), (3) and (4) set out how a person whose interests are affected by a decision by the ACCC under section 352 may apply for review of the decision by the ACT. Proposed subsections 352A(5), (6), (7), (8) and (9) set out the functions and powers of the ACT in reviewing the decision.

Item 8 – Subsection 353(2)

Section 353 deals with the use of over-ride dial codes and applies to a carriage service provider if that carriage service provider supplies a carriage service that involves the use of a controlled network or a controlled facility of a carrier, of itself or another carriage service provider and the network or facility is required to provide over-ride dial codes for the selection of alternative carriage service providers on a call-by-call basis (subsection 353(1)). If section 353 applies to a carriage service provider, that carriage service provider must take all necessary steps to ensure that each end-user of the carriage service is able to make use of the codes for selecting alternative carriage service providers, unless, in the ACA's opinion, it would not be technically feasible or it would impose unreasonable financial hardship (subsection 353(2)).

Item 8 amends subsection 353(2) to change the reference to the ACA to the ACCC so that the obligation to take all necessary steps to ensure that each end-user of the carriage service is able to make use of the codes for selecting alternative carriage service providers would apply, unless, in the ACCC's opinion, it would not be technically feasible or it would impose unreasonable financial hardship. The purpose

of the proposed amendment is to transfer the responsibility for determining pre-selection requirements from the ACA to the ACCC to ensure that pre-selection is considered within the context of a wider range of regulatory options.

Item 9 – Paragraph 1(n) of Schedule 4

Item 9 repeals paragraph 1(n) of Schedule 4 to the Telecommunications Act. The proposed amendment will remove from the list of decisions of the ACA that may be reconsidered by the ACA and reviewed by the Administrative Appeals Tribunal in clause 1 of Schedule 4 a decision of the ACA made under section 352 to refuse to make a declaration. The proposed amendment is consequential to the responsibility for making decisions under section 352 being shifted from the ACA to the ACCC. The function of having the original decision-maker review its own decision before providing for appeal to an external body will not be replicated in the TPA. This is consistent with the processes for review of other decisions made by the ACCC under the TPA.

Item 10 – Transitional – section 349 of the *Telecommunications Act 1997*

Item10 is a transitional provision that applies to a determination that was made under section 349 (ie a determination in relation to pre-selection requirements) and that was in force before the commencement of Item 10. The proposed amendment provides that such a determination will continue in effect after the commencement of Item 10 as if the determination had been made by the ACCC and any requirement imposed by section 349 in relation to the making of the determination had been satisfied (for example, the requirement to have regard to the matters in subsection 349(3) and consultation with the ACA (subsection 349(6)).

Item 11 – Transitional – section 352 of the *Telecommunications Act 1997*

Item 11 is a transitional provision that applies to a declaration that was made under section 352 (ie a declaration that a carrier or carriage service provider is exempt from a pre-selection requirement imposed under section 349) and that was made before the commencement of Item 11. The proposed amendment provides that such a declaration will continue in effect after the commencement of Item 11 as if the declaration had been made by the ACCC and any requirement imposed by section 352 in relation to the making of the declaration had been satisfied (for example, the requirement to have regard to the matters in subsection 352(2)).

Item 12 – Transitional – reconsideration and review of certain decisions under section 352 of the *Telecommunications Act 1997*

Item 12 is a transitional provision that applies to a decision of the ACA to refuse to make a declaration under section 352 (to exempt a carrier or carriage service provider from a pre-selection requirement) where the decision was made before the commencement of Item 12. The proposed amendment provides that Part 29 (Review of Decisions) and Schedule 4 (Reviewable Decisions of the ACA) to the Telecommunications Act will continue to apply to decisions to which Item 12 applies and those decisions will continue in effect after the commencement of Item 12 as if they had been made by the ACCC. The ACCC will be substituted for the ACA as a

party to any proceedings in the Administrative Appeals Tribunal that were pending immediately before the commencement of Item 12 and are related to a decision to which Item 12 applies.

Item 13 – Transitional – section 353 of the *Telecommunications Act 1997*

Item 13 is a transitional provision that applies to an opinion that was formed by the ACA under subsection 353(2) (ie that provision of over-ride dial codes would not be technically feasible or it would impose unreasonable financial hardship on a carriage service provider) and that was in existence immediately before the commencement of Item 13. The proposed amendment provides that such an opinion will continue in effect after the commencement of Item 13 as if the opinion had been formed by the ACCC under subsection 353(2). The proposed amendment is not intended to prevent the ACCC from revoking or varying the relevant opinion at a later time.

Part 2 – Industry development plans

Under the Telecommunications Act, the ACA cannot grant a carrier licence to a person unless that person has given an industry development plan (IDP) to the Industry Minister and the Industry Minister has approved the IDP (subclause 4(1) of Schedule 1). A carrier is required to have a current IDP plan at all times (subclause 4(2)). Subclause 4(3) of Schedule 1 provides that for the purposes of subclause 4(2), a carrier has a current IDP if the carrier has given the plan to the Industry Minister and the Industry Minister has approved the plan. For the purposes of Part 2 of Schedule 1 to the Act, "Industry Minister" is defined in clause 3 to mean either the Minister for Communications, Information Technology and the Arts or the Minister for the Arts and Sport (because of the *Acts Interpretation (Substituted References – Section 19B) Amendment Order 2001* made by the Governor-General on 20 December 2001 changed the reference in clause 3 of Schedule 1 to the "Minister for the Arts and Centenary of Federation" is read as the "Minister for the Arts and Sport").

Carriers are required to make a summary of their IDPs publicly available and must report annually on their IDP achievements to the Industry Minister. The Industry Minister must table annual reports in Parliament on IDP achievements. The aim in requiring carriers to prepare and publish IDPs was to assist the development of the Australian telecommunications industry by encouraging carriers to undertake activities that contributed to the growth of the industry.

IDPs deal with a carrier's strategic commercial relationships, research and development activities, export development and employment and training. All commitments, other than those in respect of research and development, are, in a formal sense, voluntary.

The PC Report recommended that the legal requirement for IDPs be repealed, concluding that there is no compelling argument for continuing with the operation of IDPs because:

- established carriers have had individual plans in place for many years and therefore any possible market failures would have been substantially overcome;

- IDPs of a limited number of new carriers that are essentially resellers or serving a regional or limited telecommunications market are likely to have very little impact on the local equipment industry overall;
- there are some costs to carriers of preparing, obtaining approval and reporting annually on the progress of IDPs. There is also a small administrative cost to government; and
- with the exception of commitments in relation to research and development, other commitments made by carriers in IDPs are in a formal sense voluntary.

As IDPs have little impact on industry practice and represent a cost burden to carriers in their preparation, it is proposed to remove the requirement for IDPs in relation to carrier licensing. The amendments in Part 2:

- repeal the legislative basis for IDPs; and
- provide a transitional provision to require carriers to provide a final report on the implementation of their IDPs for the period before the commencement of the amendments and for the Industry Minister to table an annual report in Parliament for that period in relation to the progress made by carriers in respect of their IDPs.

Item 14 – Part 2 of Schedule 1

Item 14 repeals Part 2 of Schedule 1 to the Telecommunications Act. The purpose of the proposed amendment is to remove the legal requirement for IDPs in relation to carrier licensing.

Item 15 – Transitional – clauses 14 and 15 of Schedule 1 to the *Telecommunications Act 1997*

Item 15 is a transitional provision that relates to the requirements of clauses 14 and 15 of Part 2 of Schedule 1 to the Telecommunications Act. Clause 14 requires carriers with current industry development plans (IDPs) to give the Industry Minister, within 90 days of the end of each financial year, a report setting out the carrier's progress in implementing its IDP for the year and to make a summary of this report available to the public. Clause 15 requires the Industry Minister, within 6 months of the end of each financial year, to prepare, and table in both Houses of Parliament, a report relating to the progress made by carriers in implementing current IDPs during the financial year.

Item 15 provides that clauses 14 and 15 of Schedule 1 will continue to apply as if each reference to a financial year in those clauses is a reference to "pre-commencement reporting period" and the amendment in Item 14 had not been made. "Pre-commencement reporting period" is a financial year that began on or after 1 July 1997 and ended before the commencement of Item 15 or, if Item 15 does not commence on a 1 July, the period at the start of the financial year in which Item 15 commenced and ending immediately before Item 15 commenced. This will effectively require carriers and the Industry Minister to prepare a final report on the implementation of IDPs in respect of the period that has not been the subject of reports by carriers and the Industry Minister but had ended with the commencement of Item 14.

Part 3 – Access to network information

Under Part 4 of Schedule 1 to the Telecommunications Act, carriers must provide other carriers with access to certain information to ensure efficient inter-connection between networks. This includes information:

- from the carrier's operations support systems;
- about traffic flow;
- that is contained in a database that relates to the manner in which that carrier's telecommunications networks treats calls of a certain kind;
- about network planning (including volume or characteristics of traffic being offered and telecommunications performance standards);
- about likely changes to facilities on a telecommunications network of a first carrier that will affect the completion success rates of calls offered by a second carrier; and
- about quality of service.

The access obligations under Part 4 differ slightly depending on the type of information involved. However, as no particular type of information under Part 4 has greater importance or status than other types of information dealt with by Part 4, the PC Report recommended that the obligations under Part 4 be aligned.

The amendments in Part 3 of Schedule 1 to the Bill align the various procedures and obligations on service providers to provide information to enable efficient inter-connection between networks. These amendments will result in uniform obligations in relation to access to information as follows:

- the obligation will be to provide timely and detailed information; and
- the obligation will not apply unless a purpose of the access is to enable a carrier to undertake planning, maintenance or reconfiguration of its telecommunications network; and
- a service provider will not be obliged to comply with a request for information unless it is reasonable.

Item 16 – Paragraph 21(2)(a) of Schedule 1

Clause 21 of Schedule 1 applies to a carrier (the first carrier) if the first carrier supplies carriage services to another carrier (the second carrier). Paragraph 21(2)(a) requires the first carrier, where requested to do so by the second carrier, to provide the second carrier with reasonable access to information about the first carrier's operations support systems.

Item 16 amends paragraph 21(2)(a) by adding the requirement that the first carrier must provide timely and detailed information about its operations systems to the second carrier. This will make the obligation to provide information in paragraph 21(2)(a) consistent with the similar obligations in subclauses 23(2), 24(2) and 25(2). The purpose of the proposed amendment is to implement the PC Report recommendation that the obligations to provide network information in Part 4 of Schedule be aligned.

Item 17 – Paragraph 21(2)(b) of Schedule 1

Clause 21 of Schedule 1 applies to a carrier (the first carrier) if the first carrier supplies carriage services to another carrier (the second carrier). Paragraph 21(2)(b) requires the first carrier, where requested to do so by the second carrier, to provide the second carrier with reasonable access to traffic flow information.

Item 17 amends paragraph 21(2)(b) by adding the requirement that the first carrier must provide timely and detailed traffic flow information to the second carrier. This will make the obligation to provide information in paragraph 21(2)(b) consistent with the similar obligations in subclauses 23(2), 24(2) and 25(2). The purpose of the proposed amendment is to implement the PC Report recommendation that the obligations to provide network information in Part 4 of Schedule be aligned.

Item 18 – Subclause 21(3) of Schedule 1

Clause 21 of Schedule 1 applies to a carrier (the first carrier) if the first carrier supplies carriage services to another carrier (the second carrier). Subclause 21(2) requires the first carrier, where requested to do so by the second carrier, to provide the second carrier with reasonable access to information about the first carrier's operations support systems and traffic flow. Subclause 21(3) provides that the first carrier is not required to comply with a request from the second carrier unless the sole purpose of the access is to enable the second carrier to undertake planning, maintenance or reconfiguration of the second carrier's telecommunications network.

Item 18 repeals subclause 21(3) and replaces it with new proposed subclause 21(3). The effect of the proposed amendment will be that the first carrier will not be required to comply with a request for information by a second carrier under subclause 21(2) unless a purpose of the access is to enable the second carrier to undertake planning, maintenance or reconfiguration of the second carrier's telecommunications network and the request is reasonable. The purpose of the proposed amendment is to implement the PC Report recommendation that the obligations to provide network information in Part 4 be aligned.

Item 19 – Subclause 22(2) of Schedule 1

Clause 22 of Schedule 1 applies to a carrier (the first carrier) if the first carrier supplies carriage services to another carrier (the second carrier). Subclause 22(2) requires the first carrier, where requested to do so by the second carrier, to provide the second carrier with reasonable access to information contained in the first carrier's databases that relates to the manner in which the first carrier's telecommunications network treats calls of a particular kind.

Item 19 amends subclause 22(2) by adding the requirement that the first carrier must provide timely and detailed information to the second carrier. This will make the obligation to provide information in subclause 22(2) consistent with the similar obligations in subclauses 23(2), 24(2) and 25(2) and the proposed amendments in Items 16 and 17. The purpose of the proposed amendment is to implement the PC Report recommendation that the obligations to provide network information in Part 4 of Schedule be aligned.

Item 20 – Subclause 22(3) of Schedule 1

Clause 22 of Schedule 1 applies to a carrier (the first carrier) if the first carrier supplies carriage services to another carrier (the second carrier). Subclause 22(2) requires the first carrier, where requested to do so by the second carrier, to provide the second carrier with reasonable access to information contained in the first carrier's databases that relates to the manner in which the first carrier's telecommunications network treats calls of a particular kind. Subclause 22(3) provides that the first carrier is not required to comply with a request from the second carrier unless the sole purpose of the access is to enable the second carrier to undertake planning, maintenance or reconfiguration of the second carrier's telecommunications network.

Item 20 repeals subclause 22(3) and inserts new proposed subclause 22(3). The effect of the proposed amendment will be that the first carrier will not be required to comply with a request for information by a second carrier under subclause 22(2) unless a purpose of the access is to enable the second carrier to undertake planning, maintenance or reconfiguration of the second carrier's telecommunications network and the request is reasonable. The purpose of the proposed amendment is to implement the PC Report recommendation that the obligations to provide network information in Part 4 be aligned.

Item 21 – Subclause 23(2) of Schedule 1

Clause 23 of Schedule 1 applies to a carrier (the first carrier) if the first carrier supplies carriage services to another carrier (the second carrier). Subclause 23(2) requires the first carrier, where requested to do so by the second carrier, to provide the second carrier with timely and detailed telecommunications network planning information that is sufficient to enable the second carrier to undertake planning for the second carrier's telecommunications network.

Item 21 amends subclause 23(2) so that the first carrier's obligation will be to provide timely and detailed telecommunications network planning information. This will mean that the obligation to provide information will be consistent with similar obligations in subclauses 21(2), 22(2), 24(2) and 25(2) as amended. The purpose of the proposed amendment is to implement the PC Report recommendation that the obligations under Part 4 be aligned.

Item 22 – Subclause 23(4) of Schedule 1

Clause 23 of Schedule 1 applies to a carrier (the first carrier) if the first carrier supplies carriage services to another carrier (the second carrier). Subclause 23(2) requires the first carrier, where requested to do so by the second carrier, to provide the second carrier with timely and detailed telecommunications network planning information that is sufficient to enable the second carrier to undertake planning for the second carrier's telecommunications network. Subclause 23(4) provides that the first carrier is not required to comply with subclause 23(2) unless the second carrier's request is reasonable.

Item 22 amends subclause 23(4) to include an additional pre-condition to the first carrier's obligation to provide requested information. The first carrier will not be

required to comply with the request unless a purpose of the provision of the information is to enable the second carrier to undertake planning for its own telecommunications network and the request is reasonable. Proposed subclauses 21(3), 22(3) and 24(3) have a similar requirement (see Items 18, 20 and 23). The purpose of the amendment is to implement the PC Report recommendation that the obligations in Part 4 be aligned.

Item 23 – Subclause 24(3) of Schedule 1

Clause 24 of Schedule 1 applies to a carrier (the first carrier) if the first carrier supplies carriage services to another carrier (the second carrier). Subclause 24(2) requires the first carrier, where requested to do so by the second carrier, to provide the second carrier with timely and detailed information about quality of service and other information. Subclause 24(3) provides that the first carrier is not required to comply with a request for information unless the second carrier's request is reasonable.

Item 23 amends subclause 24(3) to include an additional pre-condition to the first carrier's obligation to provide requested information. The first carrier will not be required to comply with the request unless a purpose of the provision of the information is to enable the second carrier to undertake planning for its own telecommunications network and the request is reasonable. Proposed subclauses 21(3), 22(3) and 23(4) have a similar requirement (see Items 18, 20 and 22). The purpose of the proposed amendment is to implement the PC Report recommendation that the obligations in Part 4 be aligned.

Item 24 – Transitional – clauses 21, 22 and 23 of Schedule 1 to the *Telecommunications Act 1997*

Item 24 is a transitional provision that applies to a request that was made under subclause 21(2), 22(2) or 23(2) of Schedule 1 and that was in force before the commencement of Item 24. Item 24 provides that such a request has effect after the commencement of 24 as if it had been made under, and in the terms required by, proposed subclauses 21(2), 22(2) or 23(2).

Schedule 2 – Amendment of the Trade Practices Act 1974

Part 1 – Model terms and conditions relating to access to core services etc.

Part 1 contains amendments to require the ACCC to publish non-binding model terms and conditions of access for each of the following "core services":

- the Domestic Public Switched Telephone Network (PSTN) Originating Access Service;
- the Domestic Public Switched Telephone Network (PSTN) Terminating Access Service;
- the Unconditioned Local Loop Service;
- the Local Carriage Service; and
- a declared service specified in the regulations.

The ACCC will be required to take all reasonable steps to ensure that it publishes model terms and conditions (by way of a written determination) of access for these core services within 6 months of commencement of the Bill and, in the case of a declared service specified as a core service in the regulations, within 6 months after the relevant regulation takes effect.

The aim of releasing model terms and conditions is to assist parties to reach commercial agreement on terms and conditions for access, or to submit access undertakings, thus providing more timely access for access seekers to "core" fixed line network services. This is in line with the underlying philosophy of the telecommunications access regime in Part XIC that is focussed on the terms and conditions of access being established through commercial agreement or being set out in access undertakings.

While these model terms and conditions will not be binding, they will provide clear guidance about the regulator's views as to what fair terms and conditions for access would be, including price. The model terms and conditions would be based on an assessment of the current market conditions and would be in a form that could be easily incorporated into an access undertaking. If a dispute about terms and conditions then arose between parties, any subsequent ACCC arbitration decision (determination) would be expected to reflect the model terms and conditions.

The availability of model terms and conditions is designed to overcome the uncertainty that currently exists prior to regulatory arbitrations as to what the regulator's likely views may be concerning the eventual terms and conditions of access. Up-front provision of this information is likely to assist the commercial negotiation process by giving parties a view of what the likely outcome of an ACCC determination on the issue would be. This is intended to bring the parties' negotiating position closer together, thus expediting and simplifying the commercial negotiation process.

Item 1 – After subsection 152AQA(7)

Section 152AQA requires the ACCC to determine pricing principles relating to the price of access to a declared service. Subsection 152AQA(6) provides that the ACCC must have regard to the determination if it is required to arbitrate an access dispute under Division 8 of Part XIC in relation to the declared service. Subsection 152AQA(7) provides that a determination has no effect to the extent that it is inconsistent with any Ministerial pricing determination which is made under Division 6 of Part XIC (section 152CH).

Item 1 inserts a new proposed subsection at the end of section 152AQA. The proposed amendment makes it clear that neither section 152AQA nor any pricing determination made under that section limits the ACCC's powers under Division 4 (Telecommunications Access Code) or Division 5 (Access Undertakings). The purpose of the amendment is to ensure that the existence of a pricing determination does not prevent the ACCC from considering and/or accepting a telecommunications access code (under Division 4) or an access undertaking (under Division 5) the terms of which are inconsistent with a pricing determination made under section 152AQA.

The proposed amendment will ensure that section 152AQA is consistent with proposed section 152AQB (Item 2).

Item 2 – After section 152AQA

Item 2 inserts a new proposed section after section 152AQA. Proposed section 152AQB will require the ACCC to make a written determination of model terms and conditions relating to access to each core service.

Core services are those service specified in the Bill to be core services and those services specified by regulation to be core services. The services specified in proposed section 152AQB as a core service are:

- the Domestic Public Switched Telephone Network (PSTN) Originating Access Service;
- the Domestic Public Switched Telephone Network (PSTN) Terminating Access Service;
- the Unconditioned Local Loop Service; and
- the Local Carriage Service.

Each of these services has been previously declared under section 152AL.

The services have been specified in the proposed amendment by reference to the description of the particular service in the relevant declaration. This will ensure that changes in the description of the service in the relevant declaration will not affect the application of proposed section 152AQB and that the deemed declaration of the Domestic Public Switched Telephone Network (PSTN) Originating Access Service and the Domestic Public Switched Telephone Network (PSTN) Terminating Access Service (by virtue of section 39 of the *Telecommunications (Transitional Provisions and Consequential Amendments) Act 1997*) is accommodated. A variation of a deemed declaration will also be covered by the reference to the description of the service.

The ACCC must take all reasonable steps to ensure that a determination relating to the Domestic PSTN Originating Service, the Domestic PSTN Terminating Service, the Unconditioned Local Loop Service and the Local Carriage Service is made within 6 months after the commencement of Item 2. In the case where a declared service is specified in the regulations to be a core service, the ACCC will be required to make a determination relating to that core service within 6 months of the making of the relevant regulations. It is intended that the model terms and conditions will not need to be comprehensive; the ACCC will be able to publish any or all of the model terms and conditions relating to a core service.

The proposed amendment sets out the procedure for making a determination. Before making a determination relating to a core service, the ACCC will be required to undertake public consultation on the determination (by publishing a draft determination, inviting submissions from the public on the draft determination and considering those submissions) and to consult with the ACA about the determination.

A determination in relation to a particular core service will cease to be in force 5 years after the day on which it is made (unless revoked earlier) or at the end of any longer period specified by regulation. The ACCC will be required to publish a determination in a manner that it considers appropriate (including in electronic form).

If the ACCC is required to arbitrate an access dispute in relation to a core service covered by a determination, the ACCC will be required to have regard to that determination in arbitrating the dispute (proposed subsection 152AQB(9)). This is a similar requirement to that that exists in relation to the pricing principles (section 152AQA). However, proposed subsection 152AQB(9) is not intended to preclude the ACCC from considering the model terms and conditions in other contexts unrelated to core services.

A determination made under proposed 152AQB will have no effect to the extent that it is inconsistent with any Ministerial pricing determination or a determination made under section 152AQA (pricing principles). The proposed amendment makes it clear that neither proposed section 152AQB nor any determination made under it will limit the ACCC's powers under Division 4 (Telecommunications Access Code) or Division 5 (Access Undertakings). This is to ensure that the existence of a determination relating to core services will not prevent the ACCC from considering and/or accepting a telecommunications access code (under Division 4) or an access undertaking (under Division 5) the terms of which are inconsistent with the determination. Proposed section 152AQB will not preclude the ACCC from dealing with price-related terms and conditions under the proposed section as well as under section 152AQA (pricing principles).

Item 3 – Subsection 152CH(1) (before note 2)

Item 3 inserts two new notes before note 2 to subsection 152CH(1). Proposed note 1A draws attention to subsection 152AQA(7) which provides that a determination under section 152AQA (pricing principles) has no effect to the extent that it is inconsistent with any Ministerial pricing determination. Proposed note 1B draws attention to proposed subsection 152AQB(9) (see Item 2) which provides that a determination under proposed 152AQB (model terms and conditions) will have no effect to the extent that it is inconsistent with a Ministerial pricing determination or a determination under section 152AQA. The proposed amendment is consequential to the proposed amendment in Item 2.

Item 4 – Section 152CLA (note)

Section 152CLA provides that the ACCC must, in exercising its powers under Division 8 of Part XIC (which deals with the resolution of disputes about access), have regard to the desirability of access disputes being resolved in a timely manner. The note to section 152CLA draws attention to the requirement for the ACCC to have regard to the relevant pricing determination made under section 152AQA in exercising its powers under Division 8.

Item 4 amends this note by adding to it the requirements for the ACCC to have regard to the matters set out in 152CR and, in the case of core services, to any relevant

determination made under section 152AQB, in exercising its powers. The proposed amendment is consequential to the proposed amendment in Item 2.

Part 2 – Merits review of final determinations

Section 152DO in Part XIC of the TPA enables a party to a final determination made by the ACCC in relation to an access dispute to make a written application for a review of the final determination by the ACT. A review by the ACT is a re-arbitration of the access dispute (subsection 152DO(3)) and is based on the information and evidence given, and the documents produced, to the ACCC in connection with the making of the final determination (and any other information referred to in the ACCC's reasons for the making of the determination) (section 152DOA).

Part 2 of Schedule 2 to the Bill contains amendments to remove the right of a party to seek merits review by the ACT in relation to final determinations made by the ACCC. The amendments will not affect the ability of a party to seek merits review of decisions of the ACCC under Part XIC to accept or reject an application for an exemption order under section 152AT or an access undertaking under section 152BU, nor the ability to seek judicial review of a final determination.

Removing merits review of ACCC determinations recognises the significant delays that have resulted from the review process in the past and that new entrants seeking access to telecommunications infrastructure have difficulty raising or committing capital during the review process due to the contingent liability of an unfavourable outcome via, for example, a backdated determination or review decision. Removing merits review is also intended to promote certainty for access seekers by streamlining the decision-making process. It will provide for consistency in decision-making and, in combination with the publication of model terms and conditions under proposed section 152AQB, it will further promote the likelihood that parties will reach commercial agreement on the terms and conditions for access.

Item 5 – Subsections 152DN(2) to (8)

Item 5 repeals subsections 152DN(2) to (8). Subsections 152DN(2) to (8) allow the operation and implementation of a final determination to be stayed upon orders of the ACT (under subsection 152DN(2)) in order to ensure that a review of the ACT is effective. Subsection 152DN(3) allows the ACT to make an order to vary or revoke an order made under subsection 152DN(2). Subsection 152DN(4) provides that an order made under subsection (2), including an order varied under subsection (3), is subject to any conditions specified in the order and has effect until the end of the period specified in the order or the finalisation of the ACT's review. Subsection 152DN(5) provides that if a final determination is stayed, and there was an interim determination in force immediately before the final determination took effect, the interim determination remains in force until the end of any period specified in the order, the finalisation of the review or the revocation of the interim determination. Subsection 152DN(6) provides that the ACCC may make an interim determination while a final determination is stayed. Subsections 152DN(7) and (8) relate to the making of interim determinations by the ACCC.

The proposed repeal of subsections 152DN(2) to (8) is consequential to the removal of the right of a party to seek review by the ACT of a final determination made by the ACCC in relation to an access dispute because these subsections deal with the interim arrangements that apply whilst the ACT is finalising a review of a final determination.

Item 6 – Subsection 152DNA(3)

Subsection 152DNA(1) allows some or all of the provisions of a final determination to be backdated, so that specified provisions can be expressed to have taken effect earlier than the date on which the determination took effect. Subsection 152DNA(3) provides that for the purposes of subsection 152CPA(9) and 152DN(5) and (6), in determining the time when a final determination takes effect, a provision in a determination covered by subsection 152DNA(1) is to be disregarded. This means that the backdating of some or all of the provisions in a final determination will not affect the operation of interim determinations whilst a review is being finalised.

Item 6 amends subsection 152DNA(3) to remove reference to subsections 152DN(5) and (6). The proposed amendment is consequential to the proposed repeal of subsections 152DN(5) and (6) (see Item 5).

Item 7 – Subsection 152DNA(5)

Subsection 152DNA(1) allows some or all of the provisions of a final determination to be backdated, so that specified provisions can be expressed to have taken effect earlier than the date on which the determination took effect. Subsection 152DNA(5) provides that section 152DNA has effect despite anything in subsection 152DN(1). Subsection 152DN(1) provides that a final determination has effect 21 days after it is made.

Item 7 amends subsection 152DNA(5) by omitting the reference to subsection 152DN(1) and replacing it with a reference to section 152DN. The proposed amendment is consequential to the proposed repeal of subsections 152DN(2) to (8) (see Item 5).

Item 8 – Subdivision F of Division 8 of Part XIC

Subdivision F of Part XIC deals with the review of final determinations by the ACT. The matters dealt with by Subdivision F include the right to seek review of a final determination by the ACT, the matters that the ACT may have regard to for the purposes of a review, appeals to the Federal Court from determinations of the ACT on questions of law and the operation and implementation of a determination of the ACT that is the subject of an appeal.

Item 8 repeals Subdivision F. The effect of the proposed amendment will be to remove the right of a party to an access dispute to seek review of a final determination made by the ACCC by the ACT.

Item 9 – Transitional – review of determinations

Item 9 is a transitional provision that applies if a final determination was made by the ACCC under subsection 152DO(1) before the commencement of Item 9. Despite the proposed amendments in Part 2, the TPA will apply to such a final determination as if the amendments in Part 2 had never been made. This means that it will be possible to seek review by the ACT of a final determination made by the ACCC before the commencement of Item 9 (where an application is made within the time provided by subsection 152DO(2)). The TPA will apply to such a review as if the amendments removing the right to seek review had never been made.

The effect of this provision is to preserve the right of appeal of parties to any final determinations made by the ACCC before the date of commencement of the Bill where an application for appeal has been lodged or where parties have a right of appeal at the time of commencement of the Bill.

Part 3 – Duration of declarations

Section 152AL allows the ACCC to declare that a specified eligible service is a "declared service" if the Telecommunications Access Forum (TAF) has made a recommendation that the ACCC do so (subsection 152AL(2)) or if the ACCC has held a public inquiry about a proposal to make the declaration (subsection 152AL(3)). "Eligible service" is defined as a listed carriage service (within the meaning of the Telecommunications Act) or a service that facilitates the supply of a listed carriage service where the service is supplied, or capable of being supplied, by a carrier or carriage service provider.

In making a declaration under section 152AL, the ACCC is currently not required to specify an expiry date for the declaration. If the ACCC declares an eligible service to be a declared service, the declaration can only be revoked or varied following the holding of a public inquiry (section 152AO), except where a variation is minor in nature, in which case the variation can be made without a public inquiry.

The amendments in Part 3 will require the ACCC to specify an expiry date for declarations made under section 152AL which may be up to 5 years after the making of the declaration. The ACCC will be able to extend (and further extend) the expiry date of a declaration for a period of up to 5 years, provided that the ACCC has held a public inquiry about a proposal to extend (or further extend) the expiry date of a declaration. A transitional provision in Part 3 will apply to declarations made by the ACCC before the commencement of the proposed amendments. The ACCC will be required to determine an expiry date for existing declarations and the proposed amendments will apply to each such declaration as if that expiry date had been specified in the declaration. The expiry date specified in the determination must occur within the 5-year period beginning on the commencement of the amendments. The ACCC will be required to make such a determination for all declarations that were in force immediately before the commencement of the amendments within 6 months of the commencement of the amendments.

The purpose of the amendments in Part 3 is to implement the PC Report recommendations that Part XIC should include a provision for the sunsetting of

declarations and that the maximum duration of a declaration should not exceed 5 years, unless a further inquiry recommends its extension. If a public inquiry is not held, or the public inquiry does not recommend extension, the declaration will automatically lapse. The purpose of the proposed amendments is to ensure that there is no redundant persistence of access regimes and reflects the possibility that the underlying motives for declaring a particular service may vanish over time with technological change, the declaration of substitute services or maturing competition in facilities.

Item 10 – After section 152AL

Item 10 inserts a new proposed section after section 152AL. Proposed section 152ALA provides that a declaration must specify an expiry date (proposed subsection 152ALA(1)). The expiry date must occur within 5 years from the making of the declaration (proposed subsection 152ALA(2)). A declaration will cease to be in force on the expiry date specified, unless it is revoked prior to that date or it is extended, or further extended, by the ACCC following a public inquiry held in accordance with the provisions in Part 25 of the Telecommunications Act. An extension, or further extension, cannot be for a period more than 5 years after the expiry date of the relevant declaration. A declaration will be able to be further extended more than once. If a declaration does cease to be in force, the ACCC will not be prevented from subsequently making another declaration in similar terms to the expired declaration (proposed subsection 152ALA(6)).

The purpose of the proposed amendment is to implement the PC Report recommendations that Part XIC should include a provision for the sunsetting of declarations and that the maximum duration of a declaration should not exceed 5 years, unless a further inquiry recommends its extension.

Item 11 – At the end of subsection 152AM(1)

Section 152AM deals with public inquiries by the ACCC about proposals to declare services. Section 152AM:

- allows the ACCC to hold a public inquiry on its own initiative or if requested in writing to do so by a person;
- provides that, where the ACCC decides not to hold a public inquiry as requested by a person, the ACCC must notify the person of this decision and give reasons for it; and
- requires the ACCC to give a copy of a report prepared in relation to the public inquiry to the ACA and the Telecommunications Access Forum, and to the person who requested the inquiry, if the inquiry was requested by a person.

Subsection 152AM(1) provides that section 152AM applies to a public inquiry of a kind mentioned in paragraph 152AL(3)(a) (which requires the ACCC to hold a public inquiry about a proposal to declare an eligible service to be a declared service). Item 11 adds a reference to paragraph 152ALA(4)(b) at the end of subsection 152AM(1). This will mean that the provisions in section 152AM relating to public inquiries held by the ACCC will apply to a public inquiry held about a proposal to extend, or further extend, the expiry date of a declaration that declares an eligible service to be a

declared service (as will be required by the proposed amendment in Item 10). The proposed amendment is consequential to the proposed amendment in Item 10.

Item 12 – At the end of subsection 152AN(1)

Subsection 152AN(1) allows the ACCC to combine two or more public inquiries of a kind mentioned in paragraph 152AL(3)(a) (which requires the ACCC to hold a public inquiry about a proposal to declare an eligible service to be a declared service). If the ACCC decides to do so, it may publish a single notice informing the public of the combined inquiry, prepare a single discussion paper and hold hearings relating to the combined inquiry and ensure that each report is covered by a report under section 505 of the Telecommunications Act.

Item 12 adds a reference to paragraph 152ALA(4)(b) at the end of subsection 152AN(1). This will mean that the provisions in section 152AN relating to combined public inquiries will be able to apply to public inquiries held about a proposal to extend, or further extend, the expiry date of declarations that declare an eligible service to be a declared service (as will be required by the proposed amendment in Item 10). The proposed amendment is consequential to the proposed amendment in Item 10.

Item 13 – Paragraph 152AQ(2)(c)

Under section 152AQ, the ACCC must keep a Register in relation to declarations under section 152AL. Paragraph 152AQ(2)(c) provides that one of the things to be included in the Register are copies of reports prepared in accordance with section 505 of the Telecommunications Act in relation to inquiries mentioned in paragraph 152AL(3)(a) or subsection 152AO(2) of the TPA.

Item 13 amends paragraph 152AQ(2)(c) by inserting a reference to proposed paragraph 152ALA(4)(b), which will require a public inquiry to be held about a proposal to extend, or further extend, the expiry date of a specified declaration. The purpose of the proposed amendment is to ensure that copies of reports prepared in accordance with proposed paragraph 152ALA(4)(b) will be included in the Register.

Item 14 – After section 152DNB

Item 14 inserts a new section after section 152DNB. Proposed section 152DNC will apply if a declaration made under section 152AL expires and a final determination was in force in relation to the declared service concerned immediately before the expiry of the declaration and that determination does not have an indefinite duration. In such a situation, the declaration will continue to have effect (despite having expired) for the purposes of ascertaining whether the determination remains in force, ascertaining whether a party to the determination has any obligations under section 152AR (ie in relation to the standard access obligations) to any other party to the determination while it remains in force and the exercising of the ACCC's power to vary the determination under section 152DT.

The proposed amendment is designed to ensure that determinations that do not have an indefinite duration (for example, a determination might specify an expiry date or

the duration of the determination may be connected to the duration of a commercial agreement) will continue to have effect until such time as the determination ceases to be in force. However, a party to the determination will not be able to notify an access dispute in relation to the declared service (proposed subsection 152DNC(3)). Determinations that are of indefinite duration will cease to be of effect when the declaration relating to the declared service concerned expires.

Item 15 – Transitional – section 152ALA of the *Trade Practices Act 1974*

Item 15 is a transitional provision that will apply to a declaration under section 152AL of the TPA and was in force immediately before the commencement of Item 15. Item 15 provides that proposed section 152ALA will not apply to such a declaration until the ACCC determines both that an expiry date for the declaration and that section 152ALA will apply to the declaration as if the expiry date had been specified in the declaration. This determination must be published in the Gazette and the expiry date determined by the ACCC must occur within the 5-year period beginning on the commencement of Item 15. The ACCC will be required to take all reasonable steps to ensure that each declaration to which the transitional provision applies is covered by a determination within 6 months of the commencement of Item 15. The purpose of this transitional provision is to allow the ACCC to stagger its review of existing declarations rather than to consider all extensions at the same time.

Part 4 – Revocation of declarations of minor importance

Currently, the TPA provides that existing declarations (made under section 152AL) cannot be revoked unless the ACCC has held a public inquiry (section 152AO). However, the ACCC is allowed to make minor variations to existing declarations without conducting a public inquiry (subsection 152AO(3)).

The PC Report noted that this has resulted in some declarations outliving their useful lives. For example, although the analogue mobile service has been discontinued, the ACCC cannot revoke the declaration of those services without a public inquiry. This procedural requirement uses resources that must be diverted from other tasks. As a result, the declared AMPS services have remained declared despite there being no AMPS service in operation. The PC Report recommended that the ACCC should be able to revoke a declaration without a full public inquiry where the ACCC is satisfied that the particular telecommunications service is a minor one.

Part 4 of Schedule 2 to the Bill contains amendments to implement the PC Report recommendation.

Item 16 – After subsection 152AO(1)

Section 152AO contains provisions about the revocation and variation of declarations made by the ACCC under section 152AL. Subsection 33(3) of the *Acts Interpretation Act 1901* applies to the power conferred on the ACCC under section 152AL but with the changes provided in section 152AO. These changes are that the ACCC cannot vary or revoke a declaration unless it has held a public inquiry about the proposal to revoke or vary the declaration. This rule does not apply to a variation that is minor in nature.

Item 16 inserts a new proposed subsection after subsection 152AO(1). Proposed subsection 152AO(1A) will allow the ACCC to revoke a declaration without holding a public inquiry under Part 25 of the Telecommunications Act if, in the ACCC's opinion, the particular service to which the declaration relates is minor in nature. The purpose of this amendment is to allow the ACCC to revoke a declaration without a full public inquiry where the ACCC is satisfied that the particular telecommunications service is of minor importance.

Part 5 – Service provider's reasonably anticipated requirements

Carriers and carriage service providers (access providers) who provide active declared services are required to comply with standard access obligations (SAOs) in relation to those services (section 152AR). If requested to do so by a service provider, an access provider is required to:

- supply an active declared service to the service provider (so the service provider can provide carriage and/or content services);
- take all reasonable steps to ensure that the technical and operational quality of the service supplied to the service provider is equivalent to that to which the access provider provides to itself; and
- take all reasonable steps to ensure that the service provider receives, in relation to the service, fault detection, handling and rectification of a technical or operational quality and timing that the access provider provides to itself.

However, the access provider is not required to comply with an obligation to the extent that the obligation would prevent a service provider who already has access to the declared service, or the access provider, from obtaining a sufficient amount of the service to be able to meet its reasonably anticipated requirements, at the time that the request is made by a service provider (paragraphs 152AR(4)(a) and (b)). These limitations on standard access obligations are relevant to the scope of the determinations made by the ACCC when arbitrating an access dispute. Section 152CQ provides that the ACCC must not make a determination that would prevent a service provider who already has access to the declared service from obtaining a sufficient amount of the service to be able to meet its reasonably anticipated requirements or the carrier or provider from obtaining a sufficient amount of the service to be able to meet the carrier or provider's reasonably anticipated requirements, at the time when the dispute was notified (paragraphs 152CQ(1)(a) and (b)). Subsection 152AR(4) provides that reasonably anticipated requirements are to be measured at the time when the access request was made, whereas paragraphs 152CQ(1)(a) and (b) specify that the relevant time is when the dispute was notified.

The PC Report noted that this inconsistency has created legal uncertainty as to the applicable date and provides an incentive for early notification of an access dispute to avoid a situation in which the access provider might seek to "manufacture" other uses for whatever spare capacity remains. The PC Report recommended that setting the date at the time that the access request was made would solve these problems.

Part 5 contains amendments to provide that the relevant time for assessing "reasonably anticipated requirements" under subsection 152CQ(1) is the time that a request for access to a declared service is made.

Item 17 – Paragraph 152CQ(1)(a)

Section 152CQ provides that the ACCC must not make a determination that would prevent a service provider who already has access to the declared service from obtaining a sufficient amount of the service to be able to meet its reasonably anticipated requirements or the carrier or provider from obtaining a sufficient amount of the service to be able to meet the carrier or provider's reasonably anticipated requirements, measured at the time when the dispute was notified (paragraphs 152CQ(1)(a) and (b)).

Item 17 amends paragraph 152CQ(1)(a) to provide that the relevant time that the service provider's reasonably anticipated requirements will be measured at the time when the access seeker made a request in relation to the service under section 152AR. The proposed amendment ensures that the time that a service provider's reasonably anticipated requirements are measured under paragraph 152AR(4)(a) and paragraph 152CQ(1)(a) will both be the time that an access seeker (or service provider as described in section 152AR) makes a request under section 152AR for access to a declared service.

Item 18 – Paragraph 152CQ(1)(b)

Section 152CQ provides that the ACCC must not make a determination that would prevent a service provider who already has access to the declared service from obtaining a sufficient amount of the service to be able to meet its reasonably anticipated requirements or the carrier or provider from obtaining a sufficient amount of the service to be able to meet the carrier or provider's reasonably anticipated requirements, measured at the time when the dispute was notified (paragraphs 152CQ(1)(a) and (b)).

Item 18 amends paragraph 152CQ(1)(b) to provide that the relevant time that the service provider's reasonably anticipated requirements will measured will be the time when the access seeker made a request in relation to the service under section 152AR. The proposed amendment provides that the time that a service provider's reasonably anticipated requirements are measured under paragraph 152AR(4)(a) and paragraph 152CQ(1)(b) will both be the time that an access seeker (or service provider as described in section 152AR) makes a request under section 152AR for access to a declared service.

Item 19 – Transitional – section 152CQ of the *Trade Practices Act 1974*

Item 19 is a transitional provision to make it clear that the proposed amendments to section 152CQ (Items 17 and 18) do not affect the validity of a determination on access made by the ACCC (under section 152CP) before the commencement of Item 19.

Part 6 – Costs of extending or enhancing the capability of a facility etc.

Section 152CQ sets out restrictions on the ACCC's ability to make determinations on access in relation to the arbitration of an access dispute. Paragraph 152CQ(1)(f) prevents the ACCC from making a determination that that would have the effect of

requiring a party (other than the access seeker) to bear some or all of the costs of extending or enhancing the capability of a facility or maintaining extensions to or enhancements of the capability of the facility.

The PC Report noted that one interpretation of the provision is that in circumstances where an access provider is required to bear any facility costs as a result of the ACCC's determination, no matter how small, a determination would be set aside. The PC Report further noted that this interpretation may have some unintended impacts such as the first access seeker bearing the costs of extending or enhancing the capability of a facility, which would benefit subsequent access seekers, and the calculation of the cost could be problematic, particularly where an access seeker only wants access for a particular period but would be required to finance the full enhancement of the facility. The PC Report recommended that the words "some or all of the costs" in paragraph 152CQ(1)(f) be amended to refer to "an unreasonable amount of the costs".

The amendments in Part 6 implement this recommendation.

Item 20 – Paragraph 152CQ(1)(f)

Paragraph 152CQ(1)(f) prevents the ACCC from making a determination that would have the effect of requiring a party (other than the access seeker) to bear some or all of the costs of extending or enhancing the capability of a facility or maintaining extensions to or enhancements of the facility.

Item 20 amends paragraph 152CQ(1)(f) so that the ACCC will be prevented from making a determination that would have the effect of requiring a party (other than the access seeker) to bear an unreasonable amount of the costs of extending or enhancing the capability of a facility or maintaining extensions to or enhancements of the facility. This will mean that the blanket prohibition on the ACCC making a determination that would have the effect of requiring a party (other than the access seeker) to bear some or all of the costs of extending or enhancing the capability of a facility will become more flexible.

Item 21 – Transitional – section 152CQ of the *Trade Practices Act 1974*

Item 21 is a transitional provision to make it clear that the proposed amendment of section 152CQ in Item 20 does not affect the validity of a determination on access made by the ACCC (under section 152CP) before the commencement of Item 21.

Part 7 – Hindering the fulfilment of a standard access obligation etc.

Subsection 152EF(1) prohibits certain persons from engaging in conduct for the purpose of preventing or hindering access by a service provider to a declared service if that access is in accordance with any of the standard access obligations (SAOs) (subparagraph 152EF(1)(b)(i)) or that access is in accordance with a determination (subparagraph 152EF(1)(b)(ii)). The subsection applies to:

- a carrier or carriage service provider who supplies a declared service;

- a service provider to whom a declared service is being supplied by a carrier or carriage service provider; or
- a body corporate that is related to the carrier, carriage service provider or service provider.

Subsection 152AY(2) specifies that a carrier or carriage service provider must comply with the SAOs if there is a commercial relationship agreed by the parties, an undertaking or a determination by the ACCC. The PC Report appears to agree with the view that subsection 152AY(2) implies that if an access seeker had no commercial agreement with the access provider (through an undertaking or otherwise) then the carrier would not be bound to comply with the SAOs until the ACCC had made a determination. Consequently, the prohibition on hindering the fulfilment of a SAO would be delayed and would preclude access until that time. The PC Report recommended that paragraph 152EF(1)(b) be repealed.

However, the obligation to comply with the SAOs clearly exists independently of any ACCC determination. The SAOs may be enforced upon application to the Federal Court (see section 152BB). In any event, simply repealing paragraph 152EF(1)(b) as recommended would have no effect on this issue which turns on the relationship between section 152AR and 152AY. That provision is there because an ACCC determination is capable of imposing obligations on an access provider in addition to those imposed by the SAOs. Because of the apparent misunderstanding that has arisen, subsection 152EF(1) has been redrafted to make its intended effect clearer.

Item 22 – Section 152AA

Section 152AA contains a simplified outline of Part XIC of the TPA. The outline states that "a carrier, carriage service provider or related body must not prevent or hinder access to a declared service".

Item 22 amends section 152AA so that the outline will state that a carrier, carriage service provider or related body must not prevent or hinder the fulfilment of a standard access obligation. The proposed amendment is consequential to the proposed amendment contained in Item 24.

Item 23 – Division 10 of Part XIC (heading)

The heading to Division 10 of Part XIC is "Hindering Access to Declared Services". Item 23 amends the heading so that it will be "Hindering the fulfilment of a standard access obligation etc". The proposed amendment is consequential to the proposed amendment contained in Item 24.

Item 24 – Subsection 152EF(1)

Subsection 152EF(1) prohibits certain persons from engaging in conduct for the purpose of preventing or hindering access by a service provider to a declared service if that access is in accordance with any of the standard access obligations (subparagraph 152EF(1)(b)(i)) or that access is in accordance with a determination (subparagraph 152EF(1)(b)(ii)). The subsection applies to:

- a carrier or carriage service provider who supplies a declared service;
- a service provider to whom a declared service is being supplied by a carrier or carriage service provider; or
- a body corporate that is related to the carrier, carriage service provider or service provider.

Item 24 repeals subsection 152EF(1) and replaces it with new proposed subsection 152EF(1). As stated above, this amendment does not effect any substantive change but is merely intended to make clear the scope of the provision. The proposed amendment will prohibit a person from engaging in conduct for the purpose of preventing or hindering the fulfilment of a standard access obligation or an obligation imposed by a determination made by the ACCC under Division 8. The prohibition will apply to a carrier or carriage service provider who supplies a declared service, a service provider to whom a declared service is being supplied by a carrier, carriage service provider or a body corporate that is related to a carrier, carriage service provider or a service provider.

The proposed amendment also makes some consequential changes to the headings to sections 152EF and 152EG.

Part 8 – Backdating of final determinations

Section 152DNA allows the ACCC to backdate any or all of the provisions of a final determination, that is, any or all of the provisions in a final determination may be expressed to have taken effect on a specified date that is earlier than the date on which the determination took effect.

The power is intended to act as an incentive for parties to reach commercial settlement of a dispute. Backdating can account for any difference between the terms and conditions of access, including price, between the final determination and those which have prevailed in the post-dispute notification period.

The ACCC is not subject to guidelines in the exercise of this power, although the backdating of some or all of the provisions of a final determination can have a significant financial impact on the outcome of an arbitration of an access dispute. The ACCC is also not subject to any requirements to incorporate interest payments to compensate parties for losses incurred as a result of over-payment.

By amending the TPA to require the ACCC to publish guidelines on the use of the backdating power, including to clarify its powers to require a party to a determination to pay interest, industry will have greater certainty in the power's application and a greater capacity to settle disputes commercially. It is proposed that the guidelines will also include a method that the ACCC will use for calculating interest under the express power provided by the proposed amendments. The proposed amendments are in accordance with PC Report recommendation 10.17.

Part 8 contains amendments to require the ACCC to publish guidelines regarding the exercise of its powers under section 152DNA and to clarify that the ACCC has the power to require a party to a determination to pay interest on any sums to be paid under a determination. The amendments will require the guidelines to be published

under section 152DNA to include a method that the ACCC will use in calculating interest to be paid in respect of sums to be paid under a determination.

Item 25 – At the end of section 152DNA

Item 25 inserts at the end of section 152DNA new proposed subsections 152DNA(6), (7), (8), (9) and (10).

Proposed subsection 152DNA(6) will allow the ACCC to require a party to an arbitration to pay interest to another party on the whole or part of the money that the party is required to pay the other party under the determination, where the money to be paid is specified in a backdated provision of a determination. The ACCC will be able to require interest to be paid on a sum to be paid under a provision of a determination for the whole or part of a period beginning on the date that the parties began negotiations with a view to agreeing on the terms and conditions for compliance with the standard access obligations (paragraph 152AY(2)(a)) and ending on the date on which the determination would have taken effect had no provision of the determination been backdated (ie, 21 days after the determination is made) (subsection 152DN(1)).

Proposed subsection 152DNA(7) will require the ACCC, in exercising its powers to backdate any or all of the provisions of a determination (subsection (1)) or in requiring a party to pay interest in respect of a sum that it is required to pay to another party under the determination (proposed subsection (6)), to have regard to any guidelines in force (under proposed subsection (8)) and such other matters as the ACCC considers relevant.

Proposed subsection 152DNA(8) will require the ACCC to formulate written guidelines for the purposes of the proposed subsection (7). The ACCC will be required to take all reasonable steps to ensure that those guidelines are made within 6 months of the commencement of Item 25 and must make the guidelines available on the Internet (proposed subsections (9) and (10)).

Part 9 – Guidelines about the ACCC's powers to regulate anti-competitive conduct

Under Part XIB, the ACCC has powers to issue Part A and Part B competition notices. A Part A competition notice may be issued where the ACCC has reason to believe that a carrier or carriage service provider has engaged, or is engaging in, a specified instance of anti-competitive conduct (section 151AKA). A Part A competition notice is not required to specify any particular instance of anti-competitive conduct. The issue of a Part A competition notice by the ACCC is a pre-condition to the ACCC, or a person who has suffered loss or damage, instituting proceedings against the carrier or carriage service provider.

A Part B competition notice may be issued where the ACCC has reason to believe that a carrier or carriage service provider has contravened, or is contravening, the competition rule and the notice must set out the particulars of the contravention (section 151AL). A Part B competition notice constitutes prima facie evidence of the

matters specified in the notice and therefore facilitates legal proceedings relating to the alleged contravention of the competition rule.

The ACCC may institute a proceeding in the Federal Court for the recovery, on the behalf of the Commonwealth, a pecuniary penalty (section 151BY) where it has issued a Part A competition notice. The pecuniary penalty may be imposed by the Court if the Court is satisfied that a carrier or carriage service provider has contravened, or has attempted to contravene, the competition rule (section 151BX). In addition, the carrier or carriage service provider may be ordered to disclose information or publish advertisements (section 151CB) and may be liable for damages to other persons who suffered loss or damage due to the anti-competitive conduct (section 151CC). Other orders to compensate a party or prevent or reduce loss or damage may also be made (section 151CE).

The ACCC has already issued guidelines in relation to the use of its powers to issue a competition notice (as required under s.151AP). However, the guidelines provide little practical analysis of circumstances where the ACCC will rely on its anti-competitive conduct powers rather than others in Part XIB or XIC. The PC Report recommended that the ACCC be required to develop and publish, after public consultation, guidelines for deciding which regulatory mechanism is most appropriate in particular cases. The creation of more detailed guidelines would be a useful clarification for industry and would facilitate a consistent approach from the ACCC with respect to the use of its powers to issue a competition notice.

Part 9 contains amendments to implement the PC Report's recommendation. The proposed amendments require the ACCC to develop and publish guidelines on the use of its powers to regulate anti-competitive conduct under Part XIB. The guidelines will not be binding on the ACCC.

Item 26 – Subsection 151AP(3)

Section 151AP relates to guidelines. Section 151AP requires the ACCC to formulate guidelines about the decision of whether to issue a competition notice. The section also requires the ACCC to have regard to the guidelines and any other matters it considers relevant when deciding whether to issue a competition notice. Subsection 151AP(3) required the ACCC to take all reasonable steps to ensure that the guidelines were in place by 1 July 1997.

Item 26 repeals subsection 151AP(3) and replaces it with proposed new subsection (3). The proposed amendment will require the guidelines to address the appropriateness of the ACCC issuing a competition notice as opposed to the ACCC taking other action under the TPA. The ACCC will be required to take all reasonable steps to ensure that the guidelines address this matter within 12 months of the commencement of Item 26. The purpose of the proposed amendment is to implement the PC Report recommendation that the ACCC be required to develop and publish guidelines in relation to the use of its powers under Parts XIB and XIC of the TPA.

Part 10 – Telecommunications access codes

The Telecommunications Access Forum (TAF) is an industry body declared by the ACCC to be the TAF under section 152AI. TAF membership is open to all carriers and carriage service providers and the TAF is capable of generating recommendations relating to the declaration of services under section 152AL and developing access codes. It had been envisaged that there would be fewer regulatory hurdles for implementing a TAF access code or a declaration recommended by the TAF. However, the TAF has not recommended any services for declaration and the usefulness of the access code that it generated has been questioned by some participants in the telecommunications industry. The PC Report concluded that the TAF has a marginal role in practice (due to the procedural requirements of unanimity in decision-making and the incompatibility of the goals of members of the TAF) and has not been an effective decision-making body to date. The PC Report therefore recommended that the TAF be abolished.

The amendments contained in Part 10 repeal the provisions in Part XIC relating to the TAF.

Item 27 – Section 152AC (definition of *ACCC telecommunications access code*)

Section 152AC contains definitions of terms used in Part XIC of the TPA. Section 152AC defines "ACCC telecommunications access code" to mean an ACCC telecommunications access code under Division 4.

Item 27 repeals this definition. The proposed amendment is consequential to the proposed repeal of provisions in Part XIC relating to the TAF which will result in the ACCC being the body that may make a telecommunications access code. As a result of the repeal of provisions in Part XIC relating to the TAF, the term "approved TAF telecommunications access code" will be repealed and the term "telecommunications access code" will replace the term "ACCC telecommunications code".

Item 28 – Section 152AC (definition of *approved TAF telecommunications access code*)

Section 152AC contains definitions of terms used in Part XIC of the TPA. Section 152AC defines "approved TAF telecommunications access code" to mean the approved TAF telecommunications access code under Division 4.

Item 28 repeals this definition. The proposed amendment is consequential to the proposed repeal of provisions in Part XIC relating to the TAF which will result in the ACCC being the body that may make a telecommunications access code. The term "approved TAF telecommunications access code" will therefore be redundant.

Item 29– Section 152AC (definition of *draft TAF telecommunications access code*)

Section 152AC contains definitions of terms used in Part XIC of the TPA. Section 152AC defines "draft TAF telecommunications access code" to mean a draft TAF telecommunications access code under Division 4.

Item 29 repeals this definition. The proposed amendment is consequential to the proposed repeal of provisions in Part XIC relating to the TAF which will result in the ACCC being the body that may make a telecommunications access code. As a result of the repeal of provisions in Part XIC relating to the TAF, the term "draft TAF telecommunications access code" will be redundant.

Item 30 – section 152AC (definition of *TAF*)

Section 152AC contains definitions of terms used in Part XIC of the TPA. Section 152AC defines "TAF" to have the meaning given by section 152AI.

Item 30 repeals this definition. The proposed amendment is consequential to the proposed repeal of provisions in Part XIC relating to the TAF which will result in the ACCC being the body that may make a telecommunications access code. As a result of the repeal of provisions in Part XIC relating to the TAF, the term "TAF" will be redundant.

Item 31 – Section 152AC

Section 152AC contains definitions of terms used in Part XIC of the TPA. Item 31 inserts a new definition in section 152AC of the term "telecommunications access code". A telecommunications access code will be a code made under section 152BJ. Section 152BJ allows the ACCC to make an ACCC telecommunications access code. As a result of the proposed repeal of provisions in Part XIC relating to the TAF, there will no longer be a need to distinguish between an approved TAF telecommunications access code and an ACCC telecommunications access code since only the ACCC will be able to make a telecommunications access code. The proposed amendment is consequential to the proposed repeal of provisions in Part XIC relating to the TAF.

Item 32 – Section 152AI

Section 152AI allows the ACCC to declare that a specified body (the membership of which is open to all carriers and carriage service providers) is to be the Telecommunications Access Forum for the purposes of Part XIC. Item 32 repeals section 152AI. The purpose of the proposed amendment is to implement the PC Report's recommendation by repealing the provisions in Part XIC relating to the TAF.

Item 33 – Subsection 152AL(2)

Subsection 152AL(2) provides for the ACCC to declare an eligible service to be a declared service upon the recommendation of the TAF. Item 33 repeals subsection 152AL(2). The proposed amendment is consequential to the proposed repeal of provisions in Part XIC relating to the TAF.

Item 34 – Subsection 152AM(4)

Section 152AM relates to inquiries about proposals to declare services. Subsection 152AM(4) provides that the ACCC must give the ACA and the TAF a copy of the report about an inquiry prepared in accordance with section 505 of the Telecommunications Act.

Item 34 amends subsection 152AM(4) to omit reference to the TAF. The proposed amendment is consequential to the proposed repeal of provisions in Part XIC relating to the TAF.

Item 35 – Subsection 152AO(2)

Subsection 152AO(2) provides that the ACCC must not revoke or vary a declaration under subsection 152AL(2) (ie a declaration based on a recommendation of the TAF that an eligible service be declared) unless the ACCC has held a public inquiry under Part 25 of the Telecommunications Act about the proposed revocation or variation. However, this rule does not apply to variations that are minor in nature.

Item 35 repeals subsection 152AO(2). The proposed amendment is consequential to the repeal of subsection 152AL(2) (see Item 33) which in turn is consequential to the proposed repeal of provisions in Part XIC relating to the TAF.

Item 36 – Section 152AP

Section 152AP applies to a public inquiry of a kind mentioned in subsection 152AO(2). Subsection 152AO(2) provides that the ACCC must not revoke or vary a declaration under subsection 152AL(2) (ie a declaration based on a recommendation of the TAF that an eligible service be declared) unless the ACCC has held a public inquiry under Part 25 of the Telecommunications Act about the proposed revocation or variation. However, this rule does not apply to variations that are minor in nature.

Item 36 repeals section 152AP. The proposed amendment is consequential to the repeal of subsection 152AO(2) (see Item 35). Both proposed amendments are consequential to the proposed repeal of provisions in Part XIC relating to the TAF.

Item 37 – Paragraph 152AQ(2)(c)

Section 152AQ requires the ACCC to keep a Register of declared services in relation to declarations under section 152AL. Subsection 152AQ(2) specifies what is to be included in the Register. Paragraph 152AQ(2)(a) provides that copies of reports in relation to inquiries mentioned in paragraph 152AL(3)(a) or subsection 152AO(2) must be kept in the Register.

Item 37 amends paragraph 152AQ(2)(a) to omit reference to subsection 152AO(2). The proposed amendment is consequential to the proposed repeal of subsection 152AO(2) in Item 35. The proposed amendment in Item 35 is consequential to the proposed repeal of provisions in Part XIC relating to the TAF.

Item 38 – Subdivision A of Division 4 of Part XIC

Division 4 of Part XIC relates to the Telecommunications Access Code. Subdivision A of Division 4 relates to the TAF telecommunications access code. Subdivision A allows the TAF to give the ACCC a draft TAF telecommunications access code that sets out model terms and conditions relating to compliance with standard access obligations and that are capable of being adopted in undertakings. The Subdivision allows the ACCC to approve a draft TAF telecommunications access code and sets

out the conditions to be met before the ACCC can approve a draft TAF telecommunications access code.

Item 38 repeals Subdivision A. The proposed amendment is a consequential to the proposed repeal of provisions in Part XIC relating to the TAF.

Item 39 – Subdivision B of Division 4 of Part XIC (heading)

The heading to Subdivision B of Division 4 is "ACCC Telecommunications Access Code". Item 39 repeals this heading as a consequence of the proposed repeal of Subdivision A of Division 4 (Item 38).

Item 40 – Section 152BJ

Section 152BJ allows the ACCC to make an ACCC telecommunications access code, where there is no approved TAF telecommunications access code in force, or to revoke an approved TAF telecommunications access code and make an ACCC telecommunications access code where the ACCC is satisfied that, if the TAF were to give the ACCC a draft TAF telecommunications access code in the same terms as the approved TAF telecommunications access code, it would refuse to approve the draft code.

Item 40 repeals section 152BJ and replaces it with new proposed section 152BJ. Proposed section 152BJ provides that the ACCC may make, in writing, a telecommunications access code. A telecommunications access code will be a disallowable instrument for the purposes of section 46A of the *Acts Interpretation Act 1901*. It is proposed that only one telecommunications access code will be able to be in force at a particular time (proposed subsection 152BJ(3)).

The ACCC will be able to revoke or vary a telecommunications access code made under proposed section 152BJ (subsection 33(3) of the *Acts Interpretation Act 1901*).

The proposed amendment is consequential to the proposed repeal of provisions in Part XIC relating to the TAF. This will have the effect that there will no longer be a concept of a TAF telecommunications access code.

Item 41 – Subsection 152BK(1)

Section 152BK deals with the content of an ACCC telecommunications access code. Subsection 152BK(1) provides that an ACCC telecommunications access code must set out model terms and conditions relating to compliance with the standard access obligations and that are capable of being adopted by access undertakings.

Item 41 amends subsection 152BK(1) to change the reference to an ACCC telecommunications access code to a telecommunications access code. The proposed amendment is consequential to the proposed repeal of provisions in Part XIC relating to the TAF.

Item 42 – Subsection 152BK(3)

Section 152BK deals with the content of an ACCC telecommunications access code. Subsection 152BK(1) provides that an ACCC telecommunications access code must set out model terms and conditions relating to compliance with the standard access obligations and that are capable of being adopted by access undertakings. Subsection 152BK(2) provides an ACCC telecommunications access code may contain different sets of model terms and conditions for different kinds of obligations or the same kind of obligations in so far as it applies to different kinds declared services.

Item 42 amends subsection 152BK(2) to change the reference to an ACCC telecommunications access code to a telecommunications access code. The proposed amendment is consequential to the proposed repeal of provisions in Part XIC relating to the TAF.

Item 43 – Section 152BL

Section 152BL provides that the ACCC must not make an ACCC telecommunications access code unless the ACCC has published the code and invited submissions on the code, and has considered any submissions on the code.

Item 43 amends section 152BL to change the reference to an ACCC telecommunications access code to a telecommunications access code. The proposed amendment is consequential to the proposed repeal of provisions in Part XIC relating to the TAF.

Item 44 – Section 152BM

Section 152BM requires the ACCC to consult the ACA before making an ACCC telecommunications code.

Item 44 amends section 152BM to change the reference to an ACCC telecommunications access code to a telecommunications access code. The proposed amendment is consequential to the proposed repeal of provisions in Part XIC relating to the TAF.

Item 45 – Section 152BN

Section 152BN requires the ACCC to give a copy of an ACCC telecommunications access code to the ACA and the TAF.

Item 45 amends section 152BN to change the reference to an ACCC telecommunications access code to a telecommunications access code. The proposed amendment is consequential to the proposed repeal of provisions in Part XIC relating to the TAF.

Item 46 – Section 152BN

Section 152BN requires the ACCC to give a copy of an ACCC telecommunications access code to the ACA and the TAF.

Item 46 amends section 152BN to remove reference to the TAF in section 152BN. The proposed amendment is consequential to the proposed repeal of provisions in Part XIC relating to the TAF.

Item 47 – Section 152BO

Section 152BO deals with the effect of an ACCC telecommunications access code. Section 152BO provides that if an ACCC telecommunications access code is made at a particular time, Part XIC (apart from sections 152BD to 152BI) has effect as if it were an approved TAF telecommunications access code that had been approved at that time.

Item 47 repeals section 152BO. The proposed amendment is consequential to the proposed repeal of provisions in Part XIC relating to the TAF.

Item 48 – Subdivision C of Division 4 of Part XIC

Subdivision C of Division 4 of Part XIC deals with the duration, variation and revocation of telecommunications access codes (ie approved TAF telecommunications access codes).

Item 48 repeals Subdivision C. The proposed amendment is consequential to the proposed repeal of provisions in Part XIC relating to the TAF, which will mean that TAF telecommunications codes will no longer be able to be made.

Item 49 – Subdivision D of Division 4 of Part XIC (heading)

The heading of Subdivision D of Division 4 of Part XIC is “Register of Telecommunications Access Codes”.

Item 49 repeals the heading. The proposed amendment is consequential to the proposed repeal of provisions relating to the TAF. As a result of the proposed repeal of provisions in Part XIC relating to the TAF, Subdivisions A and C of Division 4 will be repealed.

Item 50 – Subsection 152BR(1)

Subsection 152BR(1) requires the ACCC to maintain a Register that includes all approved TAF telecommunications access codes and all approved variations of approved TAF telecommunications access codes.

Item 50 amends subsection 152BR(1) to change references to approved TAF telecommunications access code to telecommunications access code. The proposed amendment is consequential to the proposed repeal of provisions in Part XIC relating to the TAF.

Item 51 – Paragraph 152BR(1)(b)

Paragraph 152BR(1)(b) requires the ACCC to maintain a Register that all approved variations of approved TAF telecommunications access codes.

Item 51 amends subsection 152BR(1) to change the reference to “approved variations” to “variations”. The proposed amendment is consequential to the proposed repeal of provisions in Part XIC relating to the TAF.

Item 52 – Subsection 152BS(4)

Section 152BS defines an access undertaking for the purposes of Part XIC. Subsection 152BS(4) provides that the terms and conditions specified in an access undertaking may be specified by adopting a model set of terms and conditions set out in an approved TAF telecommunications access code.

Item 52 amends subsection 152BS(4) to change references to approved TAF telecommunications access code to telecommunications access code. The proposed amendment is consequential to the proposed repeal of provisions in Part XIC relating to the TAF.

Item 53 – Paragraph 152BV(1)(b)

Section 152BV deals with acceptance of access undertakings by the ACCC where model terms and conditions are not adopted in the undertaking. Paragraph 152BV(1)(b) provides that section 152BV applies where an undertaking does not adopt a set of model terms and conditions set out in the approved TAF telecommunications access code.

Item 53 amends paragraph 152BV(1)(b) to change references to approved TAF telecommunications access code to telecommunications access code. The proposed amendment is consequential to the proposed repeal of provisions in Part XIC relating to the TAF.

Item 54 – Paragraph 152BW(1)(b)

Section 152BW deals with acceptance of access undertakings by the ACCC where model terms and conditions are adopted in the undertaking. Paragraph 152BW(1)(b) provides that section 152BW applies where an undertaking adopts a set of model terms and conditions set out in the approved TAF telecommunications access code.

Item 54 amends paragraph 152BW(1)(b) to change references to approved TAF telecommunications access code to telecommunications access code. The proposed amendment is consequential to the proposed repeal of provisions in Part XIC relating to the TAF.

Item 55 – Subparagraph 152BX(2)(b)(ii)

Section 152BX deals with the duration of an access undertaking. Subparagraph 152BX(2)(b)(ii) provides that, where the ACCC accepts the undertaking and the undertaking adopts a set of model terms and conditions set out in the approved TAF telecommunications access code, the undertaking continues in operation until the approved TAF telecommunications access code is revoked or varied so as to omit the relevant set of model terms and conditions.

Item 55 amends subparagraph 152BX(2)(b)(ii) to change references to approved TAF telecommunications access code to telecommunications access code. The proposed amendment is consequential to the proposed repeal of provisions in Part XIC relating to the TAF.

Item 56 – Subsection 152CH(1) (note 1)

Section 152CH deals with Ministerial pricing determinations. Subsection 152CH(1) allows the Minister to make a written determination setting out principles dealing with price-related terms and conditions relating to standard access obligations. These determinations are known as Ministerial pricing determinations. Note 1 to subsection 152CH(1) draws attention to section 152BF which provides that the ACCC must not approve a TAF telecommunications access code dealing with a price or method of ascertaining a price unless the code is consistent with any Ministerial pricing determination.

Item 56 repeals this note. The proposed amendment is consequential to the proposed repeal of section 152BF (Item 38).

Item 57 – Subsection 152CH(1) (note 2)

Section 152CH deals with Ministerial pricing determinations. Subsection 152CH(1) allows the Minister to make a written determination setting out principles dealing with price-related terms and conditions relating to standard access obligations. These determinations are known as Ministerial pricing determinations. Note 2 to subsection 152CH draws attention to subsection 152BK(3) which provides that the ACCC must not make an ACCC telecommunications access code unless the code is consistent with any Ministerial pricing determination.

Item 57 amends this note to change the reference to an ACCC telecommunications access code to a telecommunications access code. The proposed amendment is consequential to the proposed repeal of provisions in Part XIC relating to the TAF.

Item 58 – Subsection 152CH(1) (note 5)

Section 152CH deals with Ministerial pricing determinations. Subsection 152CH(1) allows the Minister to make a written determination setting out principles dealing with price-related terms and conditions relating to standard access obligations. These determinations are known as Ministerial pricing determinations. Note 5 to subsection 152CH(1) draws attention to subsection 152CI(2) which provides that a provision of the approved TAF telecommunications access code has no effect to the extent that the provision is inconsistent with any Ministerial pricing determination.

Item 58 amends this note to change references to approved TAF telecommunications access code to telecommunications access code. The proposed amendment is consequential to the proposed repeal of provisions in Part XIC relating to the TAF.

Item 59 – Subsection 152CI(2)

Section 152CI deals with undertakings and codes that are inconsistent with Ministerial pricing determinations. Subsection 152CI(2) provides that a provision of the approved TAF telecommunications access code has no effect to the extent that the provision is inconsistent with any Ministerial pricing determination.

Item 59 amends subsection 152CI(2) to change reference to approved TAF telecommunications access code to telecommunications access code. The proposed amendment is consequential to the proposed repeal of provisions in Part XIC relating to the TAF (and therefore approved TAF telecommunications codes).

Part 11 – Exemptions from standard access obligations

If a carrier or carriage service provider supplies declared services to itself or other persons, the declared services are active declared services (paragraph 152AR(2)(b)). If a carrier or carriage service supplies an active declared service to a service provider, the standard access obligations in section 152AR apply to the supply of that active declared service unless the carrier or carriage service provider is exempt from any or all of the standard access obligations under section 152AS (which allows the ACCC to exempt members of a specified class of carrier) or under section 152AT (which allows the ACCC to exempt an individual carrier or carriage service provider). Exemptions may be subject to such conditions or limitations as specified by the ACCC in its exemption determination.

Currently, it is not possible for the ACCC to exempt a specified class of carrier or an individual carrier or carriage service provider in relation to a service that is not an active declared service (ie, a declared service that is being supplied to itself or other people). This means that potential investors in telecommunications services are unable to apply for exemption from the standard access obligations until they supply an active declared service. This provides a disincentive for investment as it means that potential access providers cannot obtain regulatory certainty as to whether or not their service would be declared. In particular, where “risky investments” were subject to potential declaration, the investment may be rendered uneconomic as a result of this uncertainty.

The amendments in Part 11 of Schedule 2 will extend the current exemption mechanism under Part XIC by allowing the ACCC to determine that a class of carriers and/or carriage service providers, or a particular individual, are exempted from current and possible future standard access obligations in relation to a particular proposed service even if that service is not in existence at the time that the exemption is sought.

The purpose of the proposed amendments is to provide certainty for potential investors in telecommunications infrastructure and services in relation to access to that infrastructure or service in the future by allowing the ACCC to exempt a specified class of carrier or carriage service provider or an individual carrier or carriage service provider from the standard access obligations before the service becomes an active declared service.

These anticipatory exemptions need to specify an expiry time but are not subject to a maximum expiry time. Longstanding exemptions may be appropriate in circumstances where a service is “ex-post” contestable, and normally would not be declared, but an investor may wish to obtain a ruling to this effect beforehand. Exemptions for a limited period could exempt the investment from access requirements for a short period of time, just as in the case of patents, and could provide an incentive to invest and innovate in otherwise uncertain circumstances.

Item 60 – After section 152AS

Item 60 inserts a new proposed section after section 152AS. Proposed section 152ASA allows anticipatory class exemptions from standard access obligations to be made by the ACCC. The ACCC will be able to make a written determination that, in the event that a specified service or a proposed service becomes an active declared service (ie, the service is declared and is being supplied), members of a specified class of carrier or carriage service provider are exempt from any or all of the standard access obligations, to the extent that those obligations relate to the active declared service. A determination will be a disallowable instrument for the purposes of section 46A of the *Acts Interpretation Act 1901*.

The terms “specified service” and “proposed service” allows for exemptions to apply to services not yet in existence or not yet being supplied. A determination made by the ACCC under proposed section 151ASA may be unconditional or subject to conditions specified in the order (proposed subsection 152ASA(2)). For example, a determination may contain a limitation that the exemption applies to a service that is supplied using a particular facility, or particular infrastructure and/or in a certain geographical area. This also provides flexibility for the ACCC to grant an exemption in relation to any combination of standard access obligations.

Before making such a determination, the ACCC will need to be satisfied that the exemption will be in the long-term interests of end-users of carriage services or services supplied by means of carriage services. Recognising the potential economy-wide benefits of some investments, the ACCC will be required to have regard to any matters specified by the Minister (in a written instrument for that purpose), as well as the matters specified in subsection 152AB(2), in applying this requirement. The written instrument will be a disallowable instrument for the purposes of section 46A of the *Acts Interpretation Act 1901*. Subsection 152AB(2) specifies the matters to be considered in determining whether a particular thing promotes the long-term interests of end-users of carriage services or services supplied by means of carriage services. Since it is intended that the matters in subsection 152AB(2) will not be the only matters to which the ACCC will have regard, the proposed section excludes the operation of subsection 152AB(3) for the purposes of the proposed section. Subsection 152AB(3) limits the ACCC’s consideration of the promotion of long-term interests of end-users to the matters in subsection 152AB(3).

The ACCC will be required to specify an expiry time of the exemption, however, if a determination expires, the ACCC will not be prevented from making a fresh determination in the same terms as the expired determination, or a determination under section 152AS where the service has become an active declared service.

The proposed section contains a requirement for public consultation on a draft determination.

Item 61 – Subsection 152AT(10)

Under section 152AT, a carrier or carriage service provider may apply to the ACCC for a written order exempting the carrier or carriage service provider from any or all of the standard access obligations under section 152AR. The ACCC must either make a written order or refuse the application (subsection 152AT(3)). Subsection 152AT(10) provides that if the ACCC makes a decision refusing an application for an exemption order, the ACCC must give the applicant a written statement of reasons for the refusal.

Item 61 repeals subsection 152AT(10) and replaces it with new proposed subsection 1512AT(10) and several additional new subsections. The effect of the proposed subsections will be to impose a 6-month time limit on the ACCC's consideration, and decision, on applications for exemption under section 152AT.

The introduction of time limits is intended to encourage timely decision-making in order to promote certainty for investors and the development of further competition.

Proposed subsection 152AT(10) requires the ACCC to make a decision on an application within 6 months after receiving the application. The proposed subsection does this by deeming the ACCC to have made an order in accordance with the terms of the application if the ACCC has not made a decision at the end of the 6-month period.

The effects of the absolute limit and any potential for the time limit to be subject to regulatory gaming are mitigated by allowing the ACCC to "stop the clock" in certain circumstances. In calculating the 6-month period, the days in the period beginning on the date that an application is published under subsection 152AT(9) and ending on the time limit specified by the ACCC when it publishes the application are to be disregarded. Similarly, the days during which a request by the ACCC for further information remains unfulfilled are to be disregarded in calculating the 6-month period. The ACCC will be able to withdraw a request for further information in whole in or in part (proposed subsection 152AU(4) (see Item 64)). For example, if the ACCC makes a request for further information (which would effectively "stop the clock" on the 6-month time limit) and receives some of the information requested, if the ACCC were satisfied that the remaining information could not be provided, did not exist or was no longer required, the ACCC could withdraw that part of the request. This in turn would mean that the "clock" would start again on the 6-month time limit (subject to any other suspension by virtue of the public consultation on an application).

The effects of the absolute time limit are further mitigated by the ACCC being able to extend, or further extend, the 6-month time period for a period of not more than 3 months by giving a written notice to the applicant that includes a statement explaining why the ACCC has been unable to make a decision within the 6-month period, or the previously extended 6-month period. After giving such a notice to the applicant, the ACCC must make a copy of the notice available on the Internet.

Proposed subsection 152AT(14) requires the ACCC, where it refuses to accept an application, to provide the applicant with a statement that sets out the reasons for the refusal. This will ensure that the requirements under section 152AT are consistent with the requirements under proposed section 152ATA (anticipatory exemption orders) (see Item 62).

Item 62 – After section 152AT

Item 62 inserts a new proposed section after section 152AT. Proposed section 152ATA will allow a person who is, or expects to be a carrier or carriage service provider to apply to the ACCC to make an order exempting the person from any or all of the standard access obligations in the event that a specified service or a proposed service becomes an active declared service.

The terms "specified service" and "proposed service" allows for exemptions to apply to services not yet in existence or not yet being supplied. An order made by the ACCC under proposed section 152ATA may be unconditional or subject to conditions or limitations specified in the order (proposed subsection 152ATA(4)). For example, an order may contain a limitation that the exemption applies to a service that is supplied using a particular facility, or particular infrastructure and/or in a certain geographical area. This also provides flexibility for the ACCC to grant an exemption in relation to any combination of standard access obligations.

The ACCC will be required to make the exemption order or refuse the application for exemption. Before making an order, the ACCC will need to be satisfied that the exemption will be in the long-term interests of end-users of carriage services or services supplied by means of carriage services. Recognising the potential economy-wide benefits of some investments, the ACCC will be required to have regard to any matters specified by the Minister (in a written instrument for that purpose), as well as the matters specified in subsection 152AB(2), in applying this requirement. The written instrument will be a disallowable instrument for the purposes of section 46A of the *Acts Interpretation Act 1901*. Subsection 152AB(2) specifies the matters to be considered in determining whether a particular thing promotes the long-term interests of end-users of carriage services or services supplied by means of carriage services. Since it is intended that the matters in subsection 152AB(2) will not be the only matters to which the ACCC will have regard, the proposed section excludes the operation of subsection 152AB(3) for the purposes of the proposed section. Subsection 152AB(3) limits the ACCC's consideration of the promotion of long-term interests of end-users to the matters in subsection 152AB(3).

The ACCC will be required to specify an expiry time of the order, however, if an order expires, the ACCC will not be prevented from making a fresh order in the same terms as the expired order, or an order under section 152AT where the service has become an active declared service.

The proposed section contains a requirement for public consultation on an application for exemption if, in the ACCC's opinion, the making of an order is likely to have a material effect on the interests of a person (proposed subsection 152ATA(11)).

To encourage timely decision-making in order to promote certainty for investors, proposed subsection 152ATA(12) requires the ACCC to make a decision on an application within 6 months after receiving the application. The proposed subsection does this by deeming the ACCC to have made an order in accordance with the terms of the application if the ACCC has not made a decision at the end of the 6-month period.

The effects of the absolute time limit and any potential for the time limit to be subject to regulatory gaming are mitigated by allowing the ACCC to “stop the clock” in certain circumstances. In calculating the 6-month period, the days in the period beginning on the date that an application is published under proposed subsection 152ATA(11) and ending on the time limit specified by the ACCC when it publishes the application are to be disregarded. Similarly, the days during which a request by the ACCC for further information remains unfulfilled are to be disregarded in calculating the 6-month period. The ACCC will be able to withdraw a request for further information in whole in or in part (proposed subsection 152AU(4) (see Item 64)). For example, if the ACCC makes a request for further information (which would effectively “stop the clock” on the 6-month time limit) and receives some of the information requested, if the ACCC were satisfied that the remaining information could not be provided, did not exist or was no longer required, the ACCC could withdraw that part of the request. This in turn would mean that the “clock” would start again on the 6-month time limit (subject to any other suspension by virtue of the public consultation on an application).

To further mitigate the effect of the time limit, the ACCC will be able to extend, or further extend, the 6-month time period for a period of not more than 3 months by giving a written notice to the applicant that includes a statement explaining why the ACCC has been unable to make a decision within the 6-month period, or the previously extended 6-month period. After giving such a notice to the applicant, the ACCC must make a copy of the notice available on the Internet.

If the ACCC refuses an application, a notice must be provided to the applicant setting out the reasons for the refusal.

Item 63 – At the end of subsection 152AU(1)

Section 152AU applies to applications for exemption from any or all of the standard access obligations by an individual carrier or carriage service provider (subsection 152AU(1)) and allows the ACCC to request the applicant to give it further information about the application. Subsection 152AU(3) provides that the ACCC may refuse to consider the application until the applicant gives the ACCC the information.

Item 63 amends subsection 152AU(1) so that section 152AU will apply to applications under section 152AT and applications under proposed section 152ATA. The proposed amendment is consequential to the proposed amendment in Item 62, which will allow the ACCC to make an order exempting a carrier or carriage service provider from any or all of the standard access obligations in the event that a specified service or proposed service becomes an active declared service. Under proposed section 152ATA, the ACCC will have 6 months from the date of receiving an

application, or from the date that the ACCC receives further information pursuant to a request under section 152AU, in which to make a decision regarding the application.

Item 64 – At the end of section 152AU

Section 152AU allows the ACCC to request an applicant for further information about an application under sections 152AT and proposed section 152ATA (see Item 63). The ACCC may refuse to consider an application until the requested information is given to the ACCC.

Item 64 inserts a new proposed subsection at the end of section 152AU. Proposed subsection 152AU(4) will allow the ACCC to withdraw a request in whole or in part. The proposed amendment is consequential to the proposed amendments in Part 11 which will impose 6-month time limits on the making of a decision in relation to applications for exemption orders and anticipatory exemption orders, subject to provisions to "stop the clock" where the ACCC has requested further information (see Items 61 and 62).

Item 65 – Subsection 152AV(1)

Section 152AV provides that a person whose interests are affected by a decision of the ACCC under section 152AT may apply to the ACT for a review of the decision.

Item 65 amends subsection 152AV(1) by inserting a reference to proposed section 152ATA. The proposed amendment will mean that a person whose interests are affected by a decision of the ACCC under proposed subsection 152ATA(1) (ie a decision in relation to an application for exemption in the event that a specified or proposed service becomes an active declared service) will be able to seek review of the decision by the ACT. The proposed amendment is consequential to the proposed amendment in Item 62.

Item 66 – Section 152AW

Section 152AW deals with the functions and powers of the ACT. Subsection 152AW(1) provides that on a review of a decision of the ACCC under section 152AT, the ACT may make a decision affirming, setting aside or varying a decision of the ACCC and, for the purposes of the review, may perform all the functions and exercise all of the powers of the ACCC.

Item 66 repeals section 152AW and inserts new proposed section 152AW. The substantive amendments to section 152AW are to limit the information and evidence that the ACT may consider on a review to the information and evidence that was before the ACCC in making the original decision and to specify a 6-month period in which the ACT is to make a decision on review. If the ACT has not made a decision at the end of the 6-month period, it will be deemed to have made a decision in accordance with the terms of the application for review.

The opportunity has also been taken to clarify the power of the ACT on review of a decision of the ACCC to refuse to do something. Proposed section 152AW provides that in such circumstances, the ACT has the power to set aside the decision of the

ACCC and to make a decision in substitution for the decision of the ACCC. Proposed subsection 152AW(1) has been redrafted to clarify the type of decision that the ACT may make on review according to the nature of the decision being reviewed (ie, whether it is positive in nature or whether it is a refusal to do a certain thing). It has therefore been necessary to include in proposed subsection 152AW(1) a decision of the ACCC to vary (or to refuse to vary) or to revoke (or to refuse to revoke) an exemption order made under section 152AT or proposed section 152ATA. The ability of the ACCC to do this arises from the operation of subsection 33(3) of the *Acts Interpretation Act 1901*. However, this provision requires the ACCC to exercise the power to vary (or to refuse to vary) or revoke (or to refuse to revoke) an exemption order in the same manner and subject to the same conditions as apply to the exercise of the power to make an exemption order under section 152AT or proposed section 152ATA. Therefore, the ACCC would need to receive an application for the variation or revocation of an exemption order made under section 152AT or proposed section 152ATA and would need comply with the requirements of the relevant section in exercising the power conferred by subsection 33(3) of the *Acts Interpretation Act 1901*.

Proposed subsection 152AW(4) limits the information to which the ACT may have regard on review to the information given, documents produced or evidence given to the ACCC in connection with the decision to which the review relates and any other information referred to in the ACCC's reasons for making the decision. This will mean that an applicant will not be able to put information, documents or evidence to the ACT for consideration in reviewing the decision of the ACT that was not first put before the ACCC, however, any information given to the ACCC by a person in relation to the original decision by the ACCC will be before the ACT on review.

Proposed subsection 152AW(5) will apply where a person has applied for ACT review of a decision of the ACCC under section 152AT or 152ATA and where the ACT has not made a decision within 6 months after receiving the application for review. If this occurs, the ACT will be taken to have made, at the end of the 6-month period a decision in accordance with the terms of the application for review. For example, where an application for review seeks to have a decision of the ACCC refusing an application for an order under section 152AT or proposed section 152ATA set aside and an order made on certain terms, if the ACT has not made a decision in relation to the application after 6 months (subject to any extension of this time limit by the ACT), the ACT will be taken to have made the decision sought in the application. The time limit will also apply to decisions of the ACCC in relation to applications for the variation or revocation of an exemption order which may be made as a result of the operation of subsection 33(3) of the *Acts Interpretation Act 1901* on section 152AT and proposed section 152ATA.

The ACT will be able to extend, and further extend, the 6-month period for a period of not more than 3 months by giving a written notice to the applicant that includes a statement explaining why the ACT has been unable to make a decision on the review within the 6-month period, or the previously extended 6-month period. The ACT must make a copy of that notice available on the Internet.

Item 67 – At the end of section 152AX

Section 152AX provides that Division 1 of Part IX of the TPA does not apply to a review of by the ACT of a decision made by the ACCC under section 152AT. Division 1 of Part IX of the TPA deals with applications for review by the ACT of determinations of the ACCC in relation to an application for authorisation, or a minor variation of an authorisation, and the functions and powers of the ACT on review.

Item 67 amends section 152AX to insert a reference to proposed section 152ATA. The proposed amendment is consequential to the proposed amendment of Item 62.

Item 68 – After section 152AX

Item 68 inserts a new proposed section after section 152AX. Proposed section 152AXA provides that if the ACCC makes a decision under section 152AT or proposed section 152ATA and gives a person a written statement of reasons for the decision, the statement must specify the documents that the ACCC examined in course of making the decision. The purpose of this amendment is to ensure that documents that are examined by the relevant ACCC members who are performing the functions of the ACCC in considering an application are specified in any statement of reasons for the decision made in relation to the application, even if the ACCC members decided that they did not need to rely on a particular document in making their findings in relation to the application. The ACT will be able to consider documents specified in a statement of reasons on a review of a decision made by the ACCC under section 152AT or proposed section 152ATA.

Item 69 – Application – section 152AW of the *Trade Practices Act 1974*

Item 69 provides that subsections 152AW(1), (2) and (3) as amended by Part 11 will apply to applications for review that are made before and after the commencement of Item 69 so long as the ACT had not made a decision on review under subsection 152AW(1) before the commencement of Item 69. Despite the repeal of subsection 152AW(4) by Part 11, that subsection will continue to apply to applications made before the commencement of Item 69 as if it had not been repealed. Proposed subsections 152AW(1), (2) and (3) clarify the ACT's powers on review and are not substantive changes to section 152AW. Therefore, it is appropriate that these proposed amendments apply immediately upon commencement of Item 69, except in the case of applications where a decision on review has been made.

Subsections 152AW(4) to (7) as amended by Part 11 will apply to applications for review made after the commencement of Item 69. This means that the restriction on the evidence that the ACT may consider and the 6-month time limit of the making of review decisions by the ACT will only apply to applications for review made after the commencement of Item 69. This will ensure that the substantive changes to section 152AW will not have a retrospective effect on applications for review made before the commencement of these proposed amendments.

Part 12 – Access undertakings

Under Division 5 of Part XIC of the TPA, carriers or carriage service providers who are subject to standard access obligations (ie are supplying an active declared service) may give the ACCC a written undertaking under which the carrier or carriage service provider undertakes to comply with the terms and conditions specified in the undertaking in relation to the applicable standard access obligations.

The ACCC is required to accept or reject an undertaking given to it. Subsection 152BV(2) prohibits the ACCC from accepting an undertaking unless the ACCC:

- has published the undertaking and invited people to make submissions to the ACCC on the undertaking;
- is satisfied that the undertaking is consistent with the standard access obligations that apply to the carrier or carriage service provider;
- if the undertaking deals with price or a method for ascertaining price, is satisfied that the undertaking is consistent with any Ministerial pricing determination;
- is satisfied that the terms and conditions specified in the undertaking are reasonable; and
- the expiry time of the undertaking occurs within 3 years of the date that the undertaking comes into operation.

Section 152AH sets out the matters to be taken into account when determining whether terms and conditions in an undertaking are reasonable.

Currently, potential investors in telecommunications services or infrastructure are unable to gain the certainty of an undertaking until the service that is proposed to be supplied becomes an active declared service. When the service becomes an active declared service, the standard access obligations apply to that service. This provides a disincentive for investment as it means potential access providers cannot obtain regulatory certainty as to the terms and conditions they would be required to provide access should the service be declared. In particular, where “risky investments” are subject to potential declaration, the investment may be rendered uneconomic as a result of this uncertainty.

The amendments in Part 12 of Schedule 2 will extend the current provisions relating to access undertakings under Part XIC by allowing the ACCC to accept undertakings from existing and potential access providers of all telecommunications services (including services provided by a particular piece of telecommunications infrastructure), irrespective of whether those services have or will be declared or are in existence. The proposed amendments will create two types of undertakings: ordinary access undertakings (which will be dealt with by Subdivision A of Division 5) and special access undertakings (which will be dealt with by Subdivision B of Division 5). Special access undertakings will cover proposed services and services which may exist to some extent but are not yet declared.

The purpose of the proposed amendments is to provide certainty for potential investors in telecommunications infrastructure and services in relation to access to that infrastructure or service in the future by allowing the ACCC to rule on whether the terms of a proposed undertaking are acceptable prior to the investment being made.

Unlike ordinary access undertakings, special access undertakings do not have a maximum time limit. This is intended to provide further certainty for investors and an additional incentive for access providers to submit a special undertaking as special undertakings have the benefit of providing industry-wide access to the service on terms that are agreeable to the access provider and regulator. This would benefit access seekers to avoid costly arbitration proceedings by utilising the terms and conditions of access in the special undertaking. The combination of the binding term and the capacity for the investor and regulator to come to agreement on the terms and conditions of the special undertaking mean that this mechanism would allow the access provider and the regulator to enter into a type of regulatory compact.

Item 70 – Section 152AA

Section 152AA contains a simplified outline to Part XIC of the TPA. The simplified outline states that "an access undertaking may adopt the terms and conditions set out in a telecommunications access code". Item 70 amends section 152AA to make it clear that a special access undertaking may not adopt the terms and conditions set out in a telecommunications access code. The reason for this is that a code would not be made for a non-declared service. The proposed amendment is consequential to the proposed amendments in Item 95 that will allow special access undertakings to be given to the ACCC.

Item 71 – Section 152AC (definition of *access undertaking*)

Section 152AC contains definitions of terms used in Part XIC, including a definition of "access undertaking", which is defined to mean an undertaking under Division 5. Item 71 amends this definition to provide that an access undertaking means an "ordinary access undertaking" (which will be defined in Item 72 to mean an undertaking under proposed Subdivision A of Division 5) or a "special access undertaking" (which will be defined in Item 73 to mean an undertaking under proposed Subdivision B of Division 5). The proposed amendment is consequential to the proposed amendments in Item 95 which expand the current provisions under Division 5 relating to access undertakings to allow undertakings to be accepted that relate to services that are not active declared services.

Item 72 – Section 152AC

Section 152AC contains definitions of terms used in Part XIC. Item 72 inserts a new proposed definition of "ordinary access undertaking" into section 152AC. An ordinary access undertaking will mean an undertaking under Subdivision A of Division 5. The concept of an ordinary access undertaking is the same as the current concept of an access undertaking (ie an access undertaking in relation to an active declared service). The proposed amendment is consequential to the proposed creation of Subdivisions A and B of Division 5 as a result of the extension of the current provisions relating to access undertakings to allow access undertakings to be given in relation to services that are not active declared services.

Item 73 – Section 152AC

Section 152AC contains definitions of terms used in Part XIC. Item 73 inserts a new proposed definition of "special access undertaking" into section 152AC. A special access undertaking will mean an access undertaking under Subdivision B of Division 5 (ie an access undertaking in relation to a service or a proposed service that is not an active declared service). The proposed amendment is consequential to the proposed creation of Subdivisions A and B of Division 5 as a result of the extension of the current provisions relating to access undertakings to allow access undertakings to be given in relation to services that are not active declared services.

Item 74 – At the end of section 152AL

Section 152AL provides for the declaration of eligible services as declared services by the ACCC. The standard access obligations apply to a declared service (section 152AR). Item 74 inserts a new proposed subsection at the end of section 152AL. Proposed subsection 152AL(7) will effectively deem a service or proposed service that is the subject of a special access undertaking to be a declared service vis-à-vis the person that is supplying the service, where the person supplies the service or the proposed service to itself or other persons. The purpose of this amendment is to apply the standard access obligations and associated machinery of Part XIC to the undertaking where the service has come into existence. Proposed subsection 152AL(8) makes it clear that proposed subsection 152AL(7) will not prevent the ACCC from declaring (in the ordinary way under subsection 152AL(3)) a service that is covered by a special access undertaking. The ACCC may need to declare the service under subsection 152AL(3) even if the person who gave the special access undertaking is the only supplier of the service where that person has given notice of its intention to withdraw the special access undertaking (see new section 152CBI, Item 95).

Item 75 – Paragraph 152BK(1)(b)

Section 152BK relates to the content of an ACCC telecommunications access code. Paragraph 152BK(1)(b) provides that an ACCC telecommunications access code must set out model terms and conditions that are capable of being adopted by access undertakings.

Item 75 amends paragraph 152BK(1)(b) to change the reference to "access undertaking" to "ordinary access undertaking". The proposed amendment is consequential to the proposed extension of the current provisions relating to access undertakings by distinguishing between ordinary access undertakings (the same as access undertakings under the current provisions) and special access undertakings (which may be given to the ACCC in relation to a service or proposed service that is not an active declared service (ie a service that is not declared or not being supplied)).

Item 76 – Before section 152BS

Item 76 creates a new proposed Subdivision A of Division 5 by inserting a heading before section 152BS. Proposed Subdivision A will deal with ordinary access undertakings and will contain all of the current provisions relating to access

undertakings (which will be amended to refer to ordinary access undertakings). The proposed amendment is consequential to the proposed extension of the current provisions relating to access undertakings by distinguishing between ordinary access undertakings (the same as access undertakings under the current provisions) and special access undertakings (which may be given to the ACCC in relation to a service or proposed service that is not an active declared service (ie a service that is not declared or not being supplied)).

Item 77 – Subsection 152BS(1)

Section 152BS specifies what an access undertaking is for the purposes of Part XIC. Subsection 152BS(1) provides that, for the purposes of Part XIC, an access undertaking is a written undertaking given by a carrier or a carriage service provider to the ACCC in which the carrier or carriage service provider undertakes to comply with the terms and conditions specified in the undertaking in relation to the standard access obligations.

Item 77 amends subsection 152BS(1) to change the reference to “access undertaking” to “ordinary access undertaking”. Item 77 also amends the heading to section 152BS to refer to ordinary access undertakings. The proposed amendment is consequential to the proposed extension of the current provisions relating to access undertakings by distinguishing between ordinary access undertakings (the same as access undertakings under the current provisions) and special access undertakings (which may be given to the ACCC in relation to a service or proposed service that is not an active declared service (ie a service that is not declared or not being supplied)).

Item 78 – At the end of subsection 152BS(1)

Section 152BS defines what an access undertaking is for the purposes of Part XIC. Item 78 inserts a note at the end of 152BS(1) to highlight that an undertaking need not specify all terms and conditions. This note makes it clear that an access undertaking (which will be an ordinary access undertaking – see Item 77) given by a carrier or carriage service provider to the ACCC under which the carrier or carriage service provider undertakes to comply with the terms and conditions specified in the undertaking in relation to the applicable standard access obligations need not cover all possible matters. This proposition is implicit from subparagraph 152AY(2)(b)(ii) which provides that if an undertaking does not specify terms and conditions about a particular matter, terms and conditions on that matter may be specified by the ACCC on arbitration of an access dispute.

Item 79 – After subsection 152BS(6)

Section 152BS specifies what an access undertaking is for the purposes of Part XIC. Subsection 152BS(6) provides that an access undertaking must be in the form approved by the ACCC.

Item 79 inserts a new proposed subsection in section 152BS. Proposed subsection 152BS(6A) will make it clear that an undertaking may be made without limitations or may be subject to such limitations as are specified in the undertaking. This makes it

clear that an undertaking may be given only in relation to, for example, a relevant service supplied in a specified area or by means of a particular facility.

Item 80 – After subsection 152BS(9)

Item 80 inserts a new proposed subsection after subsection 152BS(9). Proposed subsection 152BS(9A) makes it clear that the expiration of an undertaking will not prevent a carrier or carriage service provider from giving a fresh undertaking in the same terms as the expired undertaking. However, once an undertaking has expired, it will not be possible to seek an extension of the term of the undertaking.

Item 81 – Subsection 152BT(1)

Section 152BT allows the ACCC to request a carrier or a carriage service provider to give the ACCC further information about an undertaking. Item 81 changes the reference to “access undertaking” in subsection 152BT(1) to “ordinary access undertaking”. The proposed amendment is consequential to the proposed extension of the current provisions relating to access undertakings by distinguishing between ordinary access undertakings (the same as access undertakings under the current provisions) and special access undertakings (which may be given to the ACCC in relation to a service or proposed service that is not an active declared service (ie a service that is not declared or not being supplied).

Item 82 – At the end of section 152BT

Item 152BT allows the ACCC to request an applicant for further information about an undertaking. The ACCC may refuse to consider an undertaking until the requested information is given to the ACCC.

Item 82 inserts a new proposed subsection at the end of section 152BT. Proposed subsection 152BT(4) will allow the ACCC to withdraw a request in whole or in part. The proposed amendment is consistent with the proposed amendments to section 152AU and 152BT (in Parts 11 and 12 of Schedule 2 respectively) and the proposed amendment in Item 95.

Item 83 – Subsection 152BU(1)

Section 152BU provides that the ACCC may accept or reject an access undertaking. Item 83 amends subsection 152BU(1) to change the reference to “access undertaking” in subsection 152BU(1) to “ordinary access undertaking”. The proposed amendment is consequential to the proposed extension of the current provisions relating to access undertakings by distinguishing between ordinary access undertakings (the same as access undertakings under the current provisions) and special access undertakings (which may be given to the ACCC in relation to a service or proposed service that is not an active declared service (ie a service that is not declared or not being supplied)).

Item 84 – Subsections 152BU(3) and (4)

Section 152BU provides that the ACCC may accept or reject an access undertaking. Subsection 152BU(3) provides that if the ACCC accepts the access undertaking, the

ACCC must notify the applicant in writing. Subsection 152BU(4) provides that if the ACCC rejects the access undertaking, the ACCC must notify the applicant in writing and set out the reasons for the rejection.

Item 84 amends subsections 152BU(3) and (4) to change the references to "access undertaking" to "undertaking". The proposed amendment is consequential to the proposed amendment in Item 83. Amended subsection 152BU(1) will refer to an ordinary access undertaking. Thereafter, it is only necessary to refer to an undertaking.

Item 85 – At the end of section 152BU

Item 85 inserts several new subsections at the end of section 152BU. The proposed subsections will impose a 6-month time limit in which the ACCC must make a decision in relation to an undertaking. At the end of this period, if the ACCC has not made a decision, it will be taken to have made a decision accepting the undertaking.

To encourage timely decision making in order to promote certainty for investors, proposed subsection 152BU(5) requires the ACCC to make a decision on an undertaking within 6 months after receiving the undertaking. The proposed subsection does this by deeming the ACCC to have accepted the undertaking if the ACCC has not made a decision at the end of the 6-month period.

The effects of the absolute time limit and any potential for the time limit to be subject to regulatory gaming are mitigated by allowing the ACCC to "stop the clock" in certain circumstances. In calculating the 6-month period, the days in the period beginning on the date that an undertaking is published under subparagraph 152BV(2)(a)(i) and ending on the time limit specified by the ACCC when it publishes the undertaking are to be disregarded. Similarly, the days during which a request by the ACCC for further information remains unfulfilled are to be disregarded in calculating the 6-month period. The ACCC will be able to withdraw a request for further information in whole in or in part (proposed subsection 152BT(4) (see Item 82)). For example, if the ACCC makes a request for further information (which would effectively "stop the clock" on the 6-month time limit) and receives some of the information requested, if the ACCC were satisfied that the remaining information could not be provided, did not exist or was no longer required, the ACCC could withdraw that part of the request. This in turn would mean that the "clock" would start again on the 6-month time limit (subject to any other suspension by virtue of the public consultation on an application).

To further mitigate the effect of the time limit, the ACCC will be able to extend, or further extend, the 6-month time period for a period of not more than 3 months by giving a written notice to the applicant that includes a statement explaining why the ACCC has been unable to make a decision within the 6-month period, or the previously extended 6-month period. After giving such a notice to the applicant, the ACCC must make a copy of the notice available on the Internet.

Item 86 – Paragraph 152BV(1)(a)

Section 152BV deals with the acceptance of an access undertaking where the undertaking does not adopt the model terms and conditions in the approved TAF telecommunications access code. Paragraph 152BV(1)(a) provides that section 152BV applies if an access undertaking is given to the ACCC by a carrier or carriage service provider. Paragraph 152BV(1)(b) is amended by Item 53 in Part 10 of Schedule 2 to the Bill to remove the reference to the TAF (as a result of the proposed abolition of the TAF).

Item 86 amends paragraph 152BV(1)(a) to change the reference to “access undertaking” in paragraph 152BV(1)(a) to “ordinary access undertaking”. The proposed amendment is consequential to the proposed extension of the current provisions relating to access undertakings by distinguishing between ordinary access undertakings (the same as access undertakings under the current provisions) and special access undertakings (which may be given to the ACCC in relation to a service or proposed service that is not an active declared service (ie a service that is not declared or not being supplied)).

Item 87 – Paragraph 152BW(1)(a)

Section 152BW deals with the acceptance of an access undertaking where the undertaking adopts the model terms and conditions in the approved TAF telecommunications access code. Paragraph 152BW(1)(a) provides that section 152BW applies if an access undertaking is given to the ACCC by a carrier or carriage service provider. Paragraph 152BW(1)(b) is amended by Item 54 in Part 10 of Schedule 2 to the Bill to remove the reference to the TAF (as a result of the proposed abolition of the TAF).

Item 87 amends paragraph 152BW(1)(a) to change the reference to “access undertaking” in paragraph 152BW(1)(a) to “ordinary access undertaking”. The proposed amendment is consequential to the proposed extension of the current provisions relating to access undertakings by distinguishing between ordinary access undertakings (the same as access undertakings under the current provisions) and special access undertakings (which may be given to the ACCC in relation to a service or proposed service that is not an active declared service (ie a service that is not declared or not being supplied)).

Item 88 – Subsection 152BX(1)

Section 152BX deals with the duration of access undertakings. Subsection 152BX(1) provides that section 152BX applies if an access undertaking is given to the ACCC.

Item 88 amends subsection 152BX(1) to change the reference to “access undertaking” in subsection 152BX(1) to “ordinary access undertaking”. The proposed amendment is consequential to the proposed extension of the current provisions relating to access undertakings by distinguishing between ordinary access undertakings (the same as access undertakings under the current provisions) and special access undertakings (which may be given to the ACCC in relation to a service or proposed service that is not an active declared service (ie a service that is not declared or not being supplied)).

Item 89 – Subsection 152BY(1)

Section 152BY deals with the variation of access undertakings. Subsection 152BY(1) provides that section 152BY applies if an access undertaking given by a carrier or carriage service provider is in operation.

Item 89 amends subsection 152BY(1) to change the reference to "access undertaking" in subsection 152BY(1) to "ordinary access undertaking". The proposed amendment is consequential to the proposed extension of the current provisions relating to access undertakings by distinguishing between ordinary access undertakings (the same as access undertakings under the current provisions) and special access undertakings (which may be given to the ACCC in relation to a service or proposed service that is not an active declared service (ie a service that is not declared or not being supplied)).

Item 90 – At the end of section 152BY

Item 90 inserts several new proposed subsections at the end of section 152BY. Section 152BY deals with the variation of access undertakings. As a result of the proposed amendment in Item 89, section 152BY will deal with the variation of ordinary access undertakings.

The proposed amendments in Item 90 will impose a 6-month time limit in which the ACCC must make a decision in relation to a variation of an ordinary access undertaking. At the end of this period, if the ACCC has not made a decision, it will be taken to have made a decision accepting the variation of the undertaking.

Proposed subsection 152BY(7) requires the ACCC to make a decision on a variation of an undertaking within 6 months after receiving the variation of the undertaking. The proposed subsection does this by deeming the ACCC to have accepted the variation of the undertaking if the ACCC has not made a decision at the end of the 6-month period. The proposed amendment is designed to ensure that the 6-month limit that will apply to decisions of the ACCC about access undertakings is consistently applied to variations of undertakings. As in the case of decisions on access undertakings, the 6-month time limit will provide certainty for investors.

The effects of the absolute time limit and any potential for the time limit to be subject to regulatory gaming are mitigated by allowing the ACCC to "stop the clock" in certain circumstances. In calculating the 6-month period, the days in the period beginning on the date that a variation of an undertaking is published under section 152BV and ending on the time limit specified by the ACCC when it publishes the variation of the undertaking are to be disregarded. Similarly, the days during which a request by the ACCC for further information remains unfulfilled are to be disregarded in calculating the 6-month period. The ACCC will be able to withdraw a request for further information in whole in or in part (proposed subsection 152BZ(4) (see Item 92)). For example, if the ACCC makes a request for further information about the variation (which would effectively "stop the clock" on the 6-month time limit) and receives some of the information requested, if the ACCC were satisfied that the remaining information could not be provided, did not exist or was no longer required, the ACCC could withdraw that part of the request. This in turn would mean that the

"clock" would start again on the 6-month time limit (subject to any other suspension by virtue of the public consultation on a variation).

To further mitigate the effect of the time limit, the ACCC will be able to extend, or further extend, the 6-month time period for a period of not more than 3 months by giving a written notice to the applicant that includes a statement explaining why the ACCC has been unable to make a decision within the 6-month period, or the previously extended 6-month period. After giving such a notice to the applicant, the ACCC must make a copy of the notice available on the Internet.

Item 91 – Subsection 152BZ(1)

Section 152BZ allows the ACCC to request further information from a carrier or carriage service provider in relation to a variation of an access undertaking given to the ACCC. Subsection 152BZ(1) provides that section 152BZ applies if the carrier or carriage service provider gives the ACCC a variation of an access undertaking.

Item 91 amends subsection 152BZ(1) to change the reference to "access undertaking" in subsection 152BZ(1) to "ordinary access undertaking". The proposed amendment is consequential to the proposed extension of the current provisions relating to access undertakings by distinguishing between ordinary access undertakings (the same as access undertakings under the current provisions) and special access undertakings (which may be given to the ACCC in relation to a service or proposed service that is not an active declared service (ie a service that is not declared or not being supplied)).

Item 92 – At the end of section 152BZ

Section 152BZ allows the ACCC to request an applicant to provide further information about a variation of an access undertaking. The ACCC may refuse to consider a variation until the requested information is given to the ACCC.

Item 92 inserts a new proposed subsection at the end of section 152BZ. Proposed subsection 152BZ(4) will allow the ACCC to withdraw a request in whole or in part. The proposed amendment will ensure that section 152BZ is consistent with sections 152AU and 152BT (which will be similarly amended in Parts 11 and 12 of Schedule 2 to the Bill respectively) and the proposed amendment in Item 95.

Item 93 – Subsection 152CA(1)

Section 152CA allows a carrier or carriage service provider to voluntarily withdraw an access undertaking by written notice to the ACCC. Subsection 152AC(1) provides that section 152AC applies if an access undertaking given by the carrier or carriage service provider is in operation.

Item 93 amends subsection 152CA(1) to change the reference to "access undertaking" in subsection 152CA(1) to "ordinary access undertaking". The proposed amendment is consequential to the proposed extension of the current provisions relating to access undertakings by distinguishing between ordinary access undertakings (the same as access undertakings under the current provisions) and special access undertakings

(which may be given to the ACCC in relation to a service or proposed service that is not an active declared service (ie a service that is not declared or not being supplied)).

Item 94 – Subsections 152CB(1) and (2)

Section 152CB allows a carrier or carriage service provider to give the ACCC an access undertaking that is expressed to replace a current access undertaking (see subsection 152CB(2)). Subsection 152CB(1) provides that section 152CB applies if an access undertaking given by a carrier or carriage service provider is in operation.

Item 94 amends subsections 152CB(1) and (2) to change the references to "access undertaking" in subsection 152BU(1) to "ordinary access undertaking". The proposed amendments are consequential to the proposed extension of the current provisions relating to access undertakings by distinguishing between ordinary access undertakings (the same as access undertakings under the current provisions) and special access undertakings (which may be given to the ACCC in relation to a service or proposed service that is not an active declared service (ie a service that is not declared or not being supplied)).

Item 95 – After section 152CB

Item 95 inserts a new proposed Subdivision after section 152CB. Proposed Subdivision B of Division 4 will deal with special access undertakings and contains provisions that define what special access undertakings are (proposed section 152CBA), the process and criteria for acceptance or rejection of a special access undertaking by the ACCC (proposed sections 152CBB, 152CBC and 152CBD) and the extension, variation and withdrawal of accepted special access undertakings (proposed sections 152CBE, 152CBF, 152CBG, 152CBH and 152CBI).

As noted above, currently, potential investors in telecommunications services or infrastructure are unable to gain the certainty of an undertaking until the service that is proposed to be supplied becomes an active declared service. When the service becomes an active declared service, the standard access obligations apply to that service. This provides a disincentive for investment as it means potential access providers cannot obtain regulatory certainty as to the terms and conditions under which they would be required to provide access should the service be declared. In particular, where "risky investments" are subject to potential declaration, the investment may be rendered uneconomic as a result of this uncertainty.

Special access undertakings allow the ACCC to accept undertakings from potential access providers of proposed services and services which may exist to some extent but are not yet declared. The purpose of the proposed amendment is to encourage investment in telecommunications infrastructure and services by providing certainty for potential investors in relation to access obligations that will apply to the services provided by proposed infrastructure or a particular service.

A special access undertaking will be able to be given to the ACCC by a carrier or carriage service provider, or a person who expects to be a carrier or carriage service provider.

A special access undertaking may relate to a listed carriage service or a service that facilitates the supply of a listed carriage service that the person expects to supply so long as the service is not an active declared service. A special access undertaking may be subject to limitations specified in the undertaking or have no limitations. The term “service that facilitates the supply of a listed carriage service” is intended to provide considerable flexibility for the person who submits the special access undertaking to describe the scope of the service to which the undertaking applies. In particular, this will allow a service to be specified by reference to a particular piece of telecommunications infrastructure over which the particular or proposed service will be provided. For example, this could apply to the supply of various telecommunications and telecommunications-related services over a segment of digitised hybrid fibre coaxial cable described by geographic location.

A service includes a proposed service (see definition of service in proposed section 152CBJ). Undertakings relating to active declared services will continue to be dealt with under subdivision A (which will contain the current provisions relating to access undertakings) and will be known as ordinary access undertakings.

A special access undertaking will be required to state that in the event that the applicant supplies the service (whether to itself or to other persons) the applicant agrees to be bound by the standard access obligations to the extent that those obligations would apply to the applicant if the service were a declared service and undertakes to comply with the terms and conditions specified in the undertaking in relation to the standard access obligations. However, a special access undertaking will not need to specify all possible terms and conditions in order for it to be a valid special access undertaking (see proposed note to subsection 152CBA(3)). This is implicit from subparagraph 152AY(2)(b)(ii) (which will apply both to ordinary and special access undertakings) because that subparagraph provides that if an undertaking does not specify terms and conditions about a particular matter, terms and conditions may be specified by the ACCC on arbitration of an access dispute. This subparagraph continues to apply to matters not covered by a special access undertaking.

An expiry time must be specified in a special access undertaking. This expiry time may be described by reference to when the service commences to be supplied or when the undertaking comes into operation. An undertaking may also contain provisions for the extension, or further extension of the duration of the undertaking, subject to the approval by the ACCC of such extensions and further extensions. For example, an undertaking may provide that it operates for five years from the date the service is supplied, but will continue for a further five years if the ACCC is satisfied that certain criteria specified in the undertaking have been met.

Once a special access undertaking comes into operation, it will operate as though the service supplied by the person who gave the undertaking is a declared service, even if the service is not be the subject of a declaration of general application. Special access undertakings will cover services that are not declared and declared services that are not active and will continue in operation until it expires or until it is withdrawn, even if the service is subsequently declared under subsection 152AL(3).

When the ACCC receives a special access undertaking, the ACCC may request the applicant to provide further information about the undertaking (proposed section 152CBB). The ACCC may refuse to consider the undertaking until the information is provided and it may withdraw the request in whole or in part.

To facilitate timely decision-making in order to promote certainty for investors, the ACCC will be subject to a 6-month time limit for making a decision to refuse or to accept a special access undertaking. Proposed subsection 152CBC(5) requires the ACCC to make a decision on a special access undertaking within 6 months after receiving the undertaking. The proposed subsection does this by deeming the ACCC to have accepted the special access undertaking if the ACCC has not made a decision at the end of the 6-month period.

To mitigate the effects of the time limit and any potential for the time limit to be abused, in calculating the 6-month period, the days in the period beginning on the date that an undertaking is published under proposed subparagraph 152CBD(2)(d)(i) and ending on the time limit specified by the ACCC when it publishes the undertaking are to be disregarded. Similarly, the days during which a request by the ACCC for further information remains unfulfilled are to be disregarded in calculating the 6-month period. The ACCC will be able to withdraw a request for further information in whole in or in part (proposed subsection 152CBB(4)). For example, if the ACCC makes a request for further information (which would effectively “stop the clock” on the 6-month time limit) and receives some of the information requested, if the ACCC were satisfied that the remaining information could not be provided, did not exist or was no longer required, the ACCC could withdraw that part of the request. This in turn would mean that the “clock” would start again on the 6-month time limit (subject to any other suspension by virtue of the public consultation on an undertaking).

To further mitigate the effect of the time limit, the ACCC will be able to extend, or further extend, the 6-month time period for a period of not more than 3 months by giving a written notice to the applicant that includes a statement explaining why the ACCC has been unable to make a decision within the 6-month period, or the previously extended 6-month period. After giving such a notice to the applicant, the ACCC must make a copy of the notice available on the Internet.

The criteria for the ACCC’s decision to refuse or accept a special access undertaking are contained in proposed section 152CBD. A special access undertaking cannot be accepted by the ACCC unless:

- the ACCC is satisfied that the terms and conditions in the undertaking would be consistent with the standard access obligations;
- the ACCC is satisfied that those terms and conditions are reasonable (section 152AH specifies matters that are relevant to the determination of whether terms and conditions are reasonable);
- the ACCC is satisfied that the terms and conditions are consistent with any Ministerial pricing determination; and
- the ACCC has published the undertaking, invited submissions from the public on the undertaking and considered those submissions.

In determining whether terms and conditions are reasonable, the ACCC must have regard to the matters specified in section 152AH (which is not an exhaustive list) and any matters specified in a written instrument made by the Minister for this purpose. This instrument will be a disallowable instrument for the purposes of section 46A of the *Acts Interpretation Act 1901*.

Where a special access undertaking is in operation and it contains provisions that allow for the extension of the expiry time of the undertaking with the approval of the ACCC, the person must make an application to the ACCC in the last twelve months of the period of the undertaking for approval of an extension. This provides that the decision to extend the expiry time is considered commensurate with the market conditions at or near the time of the expiry. The criteria for the ACCC's decision to refuse to approve or approve a special access undertaking would be those specified in the special access undertaking. A person will be able to apply for approval of further extensions of an access undertaking under proposed section 152CBE.

A special access undertaking may be varied by giving the ACCC a variation of the undertaking which the ACCC must reject or accept (proposed section 152CBG). The same criteria for the ACCC's decision to reject or accept an undertaking will apply to the ACCC's decision to reject or accept a variation of the undertaking. However, if the variation is minor in nature, the ACCC will not be required to publish the variation and seek submissions from the public on the undertaking. Whether or not a variation is of a minor nature will be in the ACCC's discretion. The ACCC will be able to request further information about a variation and may refuse to consider the variation until the information is provided.

Proposed section 152CBG will impose a 6-month time limit in which the ACCC must make a decision in relation to a variation of an ordinary access undertaking. At the end of this period, if the ACCC has not made a decision, it will be taken to have made a decision accepting the variation of the undertaking. This will ensure that the 6-month limit that will apply to decisions of the ACCC about special access undertakings will also apply to variations of special access undertakings. As is the case in relation to decisions in relation to special access undertakings, the ACCC will be able to "stop the clock" in certain circumstances. In calculating the 6-month period, the days in the period beginning on the date that a variation of an undertaking is published under proposed section 152CBD and ending on the time limit specified by the ACCC when it publishes the variation of the undertaking are to be disregarded. Similarly, the days during which a request by the ACCC for further information about a variation (see proposed section 152CBH) remains unfulfilled are to be disregarded in calculating the 6-month period. The ACCC will be able to withdraw a request for further information in whole in or in part (proposed subsection 152CBH(4)). For example, if the ACCC makes a request for further information about the variation (which would effectively "stop the clock" on the 6-month time limit) and receives some of the information requested, if the ACCC were satisfied that the remaining information could not be provided, did not exist or was no longer required, the ACCC could withdraw that part of the request. This in turn would mean that the "clock" would start again on the 6-month time limit (subject to any other suspension by virtue of the public consultation on a variation).

The ACCC will be able to extend, or further extend, the 6-month time period for a period of not more than 3 months by giving a written notice to the applicant that includes a statement explaining why the ACCC has been unable to make a decision within the 6-month period, or the previously extended 6-month period. After giving such a notice to the applicant, the ACCC must make a copy of the notice available on the Internet.

A person may voluntarily withdraw a special undertaking that is in operation by giving written notice to the ACCC. The method for doing so will depend on whether the service to which the undertaking relates is declared at the time that the person gives the ACCC the notice. If the service is declared (in the ordinary declaration way under subsection 152AL(3) as opposed to a deemed declared that arises as a result of proposed subsection 152AL(7)) when the notice of withdrawal is given, only the notice of withdrawal is required. However, at least twelve months' notice of an intention to withdraw the undertaking will need to be given where the service to which the undertaking relates is not a declared service. This pre-condition is to give the ACCC 12 months notice in order for it to determine if it should hold an inquiry to declare the service in the ordinary way.

Item 96 – Subsection 152CD(1)

Section 152CD relates to the enforcement of access undertakings. Subsection 152CD(1) provides that section 152CD applies if an access undertaking given by a carrier or carriage service provider is in operation. Item 96 amends subsection 152CD(1) to change the reference to "carrier or carriage service provider" to "person (the first person)". The proposed amendment is consequential to the proposed amendments to create a new category of access undertakings called special access undertakings. A person who expects to be a carrier or a carriage service provider will be able to give the ACCC a special access undertaking. The proposed amendment to subsection 152CD(1) therefore reflects the fact that a person other than a carrier or carriage service provider may give an access undertaking to the ACCC which may be enforced under section 152CD.

Item 97 – Paragraph 152CD(2)(b)

Section 152CD relates to the enforcement of access undertakings. Subsection 152CD(1) provides that section 152CD applies if an access undertaking given by a carrier or carriage service provider is in operation. Subsection 152CD(2) provides that if the ACCC, or any person whose interests are affected by the undertaking, thinks that the carrier or carriage service provider has breached the access undertaking, the ACCC or the person may apply to the Federal Court for an order under subsection (3).

Item 97 amends paragraph 152CD(2)(b) to insert "(the affected person)" after the reference to "person". The proposed amendment is consequential to the proposed amendments in Items 96 and 98 and is required to differentiate between the person who has given an undertaking (the first person) and the person whose interests are affected by an undertaking (the affected person).

Item 98 – Subsection 152CD(2)

Section 152CD relates to the enforcement of access undertakings. Subsection 152CD(2) allows the ACCC or a person whose interests are affected by the undertaking to apply to the Federal Court for an order under subsection (3) if the ACCC, or the affected person, thinks that the carrier or carriage service provider has breached the access undertaking. Under subsection (3), the Federal Court, if it is satisfied that the carrier or carriage service provider has breached the undertaking, can make orders directing the carrier or carriage service provider to comply with the undertaking or to pay compensation to another person who has suffered loss or damage as a result of the breach, or any order the Court thinks appropriate.

Item 98 amends subsection 152CD(2) to change the references to "carrier or carriage service provider" to "person (the first person)". The proposed amendment is consequential to the proposed amendments to create a new category of access undertakings called special access undertakings. A person who expects to be a carrier or a carriage service provider will be able to give the ACCC a special access undertaking. The proposed amendment to subsection 152CD(2) therefore reflects that a person other than a carrier or carriage service provider may give an access undertaking to the ACCC which may be enforced under section 152CD.

Item 99 – Subsection 152CD(2)

Section 152CD relates to the enforcement of access undertakings. Subsection 152CD(1) provides that section 152CD applies if an access undertaking given by a carrier or carriage service provider is in operation. Subsection 152CD(2) provides that if the ACCC, or any person whose interests are affected by the undertaking, thinks that the carrier or carriage service provider has breached the access undertaking, the ACCC or the person may apply to the Federal Court for an order under subsection (3).

Item 99 amends paragraph 152CD(2) to insert "(the affected person)" after the reference to "person". The proposed amendment is consequential to the proposed amendments in Items 96 and 98 and is required to differentiate between the person who has given an undertaking (the first person) and the person whose interests are affected by an undertaking (the affected person).

Item 100 – Subsection 152CD(3)

Section 152CD relates to the enforcement of access undertakings. Subsection 152CD(2) allows the ACCC to apply to the Federal Court for an order under subsection (3) if the ACCC, or a person whose interests are affected by the undertaking, thinks that the carrier or carriage service provider has breached the access undertaking. Under subsection (3), the Federal Court, if it is satisfied that the carrier or carriage service provider has breached the undertaking, can make orders directing the carrier or carriage service provider to comply with the undertaking or to pay compensation to another person who has suffered loss or damage as a result of the breach, or any order the Court thinks appropriate.

Item 100 amends subsection 152CD(3) to change the references to "carrier or carriage service provider" to "person (the first person)" throughout that subsection. The proposed amendment is consequential to the proposed amendments to create a new category of access undertakings called special access undertakings. A person who expects to be a carrier or a carriage service provider will be able to give the ACCC a special access undertaking. The proposed amendment to subsection 152CD(3) therefore reflects the fact that a person other than a carrier or carriage service provider may give an access undertaking to the ACCC which may be enforced under section 152CD.

Item 101 – Subsection 152CE(1)

Subsection 152CE(1) allows a person whose interests are affected by a decision of the ACCC under subsection 152BU(2) (ie to accept or reject an access undertaking) or under subsection 152BY(3) (ie to accept or reject a variation to an access undertaking) to apply for review by the ACT.

Item 101 amends subsection 152CE(1) to also allow a person whose interests are affected by a decision of the ACCC under proposed subsections 152CBC(2) (to reject or accept a special access undertaking) and 152CBG(3) (to accept or reject a variation of a special access undertaking) to apply for review. The proposed amendment is consequential to the proposed amendment to create the new category of access undertakings of special access undertakings (see Item 95).

Item 102 – Section 152CF

Section 152CF deals with the functions and powers of the ACT on review of certain decisions of the ACCC in relation to access undertakings. Subsection 152CF(1) provides that on a review of a decision of the ACCC under subsection 152BU(2) (ie to accept or reject an access undertaking) or under subsection 152BY(3) (ie to accept or reject a variation to an access undertaking), the ACT may make a decision affirming, setting aside or varying the decision of the ACCC and, for the purposes of the review, may perform all of the functions and exercise all of the powers of the ACCC.

Item 102 repeals section 152CF and inserts new proposed section 152CF. The substantive amendments to section 152CF are to limit the information and evidence that the ACT may consider on a review to the information and evidence that was before the ACCC in making the original decision and to specify a 6-month period in which the ACT is to make a decision on review. If the ACT has not made a decision at the end of the 6-month period, it will be deemed to have made a decision in accordance with the terms of the application for review.

Proposed subsection 152CF(4) limits the information to which the ACT may have regard on review to the information given, documents produced or evidence given to the ACCC in connection with the decision to which the review relates and any other information referred to in the ACCC's reasons for making the decision. The proposed amendment ensures that the time limits under proposed subsection 152CF(5) are not subject to abuse by dumping of evidence on the ACT.

Proposed subsection 152CF(5) will apply where a person has applied for ACT review of a decision of the ACCC under subsections 152BU(2) or 152BY(3) (ie, decisions to accept or reject an ordinary access undertaking or a variation of an ordinary access undertaking) or proposed subsections 152CBC(2) or 152CBG(3) (ie, decisions to accept or reject a special access undertaking or a variation of a special access undertaking) and where the ACT has not made a decision within 6 months after receiving the application for review. If this occurs, the ACT will be taken to have made, at the end of the 6-month period a particular decision depending on the nature of the decision that is being reviewed. For example, where the application for review relates to a decision of the ACCC to reject an access undertaking, if the ACT has not made a decision in relation to the application after 6 months (subject to any extension of this time limit by the ACT), the ACT will be taken to have made the decision to set aside the ACCC's decision and to accept the access undertaking.

The ACT will be able to extend, and further extend, the 6-month period for a period of not more than 3 months by giving a written notice to the applicant that includes a statement explaining why the ACT has been unable to make a decision on the review within the 6-month period, or the previously extended 6-month period. The ACT must make a copy of that notice available on the Internet.

The opportunity has also been taken to clarify the power of the ACT on review of a decision of the ACCC to refuse to do something to set aside the ACCC's decision and to make a decision in substitution for the decision of the ACT. Proposed section 152CF provides that in such circumstances, the ACT has the power to set aside the decision of the ACCC and to make a decision in substitution for the decision of the ACCC. Proposed subsection 152CF(1) has been redrafted to clarify the type of decision that the ACT may make on review according to the nature of the decision being reviewed (ie, whether it is positive in nature or whether it is a refusal to do a certain thing). The reference to the ability of the ACT to vary a decision of the ACCC has also been removed because it is inappropriate that a review body have greater powers than an original decision-maker on review. In the case of access undertakings, the ACCC is only able to accept or reject the undertaking. The ACCC is not able to vary the access undertaking so it is therefore appropriate that the ACT similarly not be able to vary an access undertaking on review.

Item 103 – Section 152CG

Section 152CG provides that Division 1 of Part IX of the TPA does not apply in relation to a review by the ACT of a decision of the ACCC made under subsection 152BU(2) (to accept or reject an access undertaking) or under subsection 152BY(3) (to accept or reject a variation to an access undertaking).

Item 103 amends section 152CG to extend the provision to review of decisions of the ACCC under proposed subsections 152CBC(2) (to reject or accept a special access undertaking) and 152CBG(3) (to accept or reject a variation of a special access undertaking). The proposed amendment is consequential to the proposed amendment to create a new category of access undertakings, special access undertakings.

Item 104 – After section 152CG

Item 104 inserts two new proposed sections after section 152CG.

Proposed section 152CGA provides that if the ACCC makes a decision referred to in section 152CE (as amended – see Item 101) and gives a person a written statement of reasons for the decision, the statement must specify the documents that the ACCC examined in course of making the decision. The purpose of this amendment is to ensure that documents that are examined by the relevant ACCC members who are performing the functions of the ACCC in considering an ordinary access undertaking or a special access undertaking (or a variation of an undertaking) are specified in any statement of reasons for the decision made in relation to the undertaking, even if the ACCC members decided that they did not need to rely on a particular document in making their findings in relation to the undertaking. The ACT will be able to consider documents specified in a statement of reasons on a review of a decision made by the ACCC referred to in section 152CE.

Proposed section 152CGB provides that a determination made by the ACCC under Division 8 (ie, a final determination in relation to an access dispute) has no effect to the extent to which it is inconsistent with an access undertaking that is in operation. This amendment makes it clear that an undertaking prevails over a determination, from the date on which the undertaking is in operation, to the extent that it deals with the same matters (see also subsection 152CP(3), subparagraph 152AY(2)(b)(i) and subsection 152CQ(5)).

Item 105 – Subsection 152CH(1) (note 3)

Section 152CH allows the Minister to make a written determination setting out principles dealing with price-related terms and conditions relating to the standard access obligations. Note 3 to section 152CH draws attention to subsection 152BV(2) which provides that the ACCC must not accept an access undertaking dealing with price or a method of ascertaining price unless the undertaking is consistent with any Ministerial pricing determination.

Item 105 amends note 3 to subsection 153CH(1) to change the reference to “access undertaking” in subsection 152BU(1) to “ordinary access undertaking”. The proposed amendment is consequential to the proposed extension of the current provisions relating to access undertakings by distinguishing between ordinary access undertakings (the same as access undertakings under the current provisions) and special access undertakings (which may be given to the ACCC in relation to a service or proposed service that is not an active declared service (ie a service that is not declared or not being supplied)).

Item 106 – Subsection 152CH(1) (after note 3)

Item 106 inserts a new proposed note after note 3 to subsection 152CH(1). Proposed note 3A draws attention to proposed subsection 152CBD(2) which will provide that the ACCC must not accept a special access undertaking unless the undertaking is consistent with any Ministerial pricing determination.

The proposed amendment is consequential to the proposed amendment in Item 95.

Item 107 – At the end of section 152CK

Section 152CK deals with relationships between Part XIC and Part IIIA. Subsection 152CK(1) provides that notification of an access dispute must not be given under section 44S if the dispute relates to one or more aspects of a declared service (within the meaning of Part XIC). Subsection 152CK(2) provides that the ACCC must not accept an undertaking under section 44ZZA that relates to a declared service if the terms and conditions relate to the provision of access to one or more services providers within the meaning of Part XIC.

Proposed subsection 152AL(7) (see Item 74) will have the effect of a service to which a special access undertaking relates being deemed to be declared under section 152AL with respect to the supply of that service by the person who gave the special access undertaking to the ACCC. Item 107 inserts a new proposed subsection at the end of section 152CK. Proposed subsection 152CK(4) will ensure that a deemed declaration of a service under proposed subsection 152AL(7) will not be considered a declared service for the purposes of section 152CK and makes it clear that the reference to a declared service in section 152CK are references to declarations made in the ordinary way under section 152AL.

Item 108 – At the end of section 152CLA (after the note)

Section 152CLA deals with the resolution of access disputes and requires the ACCC, in exercising its powers in relation to resolution of access disputes, to have regard to the desirability of access disputes being resolved in a timely manner.

Item 108 adds several new proposed subsections after section 152CLA. Proposed subsection 152CLA(2) allows the ACCC to defer the consideration of an access dispute, in whole or in part, in order to consider an access undertaking received by the ACCC that relates, in whole or in part, to the matter that is the subject of the access dispute.

In exercising its power to defer consideration of an access dispute, the ACCC must have regard to:

- the fact that the undertaking will, if accepted, apply generally to access seekers, whereas a determination in relation to the access dispute will only apply to the parties to the determination;
- the guidelines in force in relation to the exercise of the power; and
- any other matters that the ACCC considers relevant.

The ACCC must take all reasonable steps to make within 6 months of the commencement of Item 108.

The criteria in paragraph 152CLA(4)(a) recognise that the ACCC should generally give priority to the consideration of undertakings in preference to arbitrations. The remaining criteria in subsection 152CLA(4) recognise that there may be

circumstances where it is appropriate for the ACCC to complete arbitration of an access dispute.

Item 109 – Subsection 155AB(3) (definition of *protected Part XIB or XIC information*)

Section 155AB relates to protection of Part XIB or Part XIC information. Subsection 155AB(3) defines "protected Part XIB or Part XIC information" as information that was obtained by the ACCC under section 151AU, 152AU, 152BT, 152BZ, or 155 or rules in force under section 151BU.

Item 109 amends the definition of "protected Part XIB or Part XIC information" to include information obtained by the ACCC under proposed section 152CBB or 152CBH. The proposed amendment is consequential to the proposed amendment in Item 95.

Item 110 – Transitional – subsection 152BS(6A) of the *Trade Practices Act 1974*

Item 110 is a transitional provision that ensures that if the ACCC accepts an access undertaking before the commencement of proposed subsection 152BS(6A) (which enables an undertaking to be with or without limitations (see Item 79)), the undertaking will be as valid as it would have been had the proposed subsection been in force. The proposed amendment will ensure the validity of access undertakings accepted before the commencement of irrespective of whether or not the access undertaking is subject to limitations.

Item 111 – Application – section 152CF of the *Trade Practices Act 1974*

Item 111 provides that subsections 152CF(1), (2) and (3) as amended by Part 11 will apply to applications for review under section 152CE that are made both before and after the commencement of Item 111 so long as the ACT had not made a decision on review under subsection 152CF(1) before the commencement of Item 111. Despite the repeal of subsection 152CF(4) by Part 12, that subsection will continue to apply to applications made before the commencement of Item 111 as if it had not been repealed. Proposed subsections 152CF(1), (2) and (3) clarify the ACT's powers on review and are not substantive changes to section 152CF. Therefore, it is appropriate that these proposed amendments apply immediately upon commencement of those amendments, except in the case of applications where a decision on review has been made.

Subsections 152CF(4) to (7) as amended by Part 12 will apply to applications for review made after the commencement of Item 111. This means that the restriction on the evidence that the ACT may consider and the 6-month time limit of the making of review decisions by the ACT will only apply to applications for review made after the commencement of Item 111. This will ensure that the substantive changes to section 152CF will not have a retrospective effect on applications for review made before the commencement of these proposed amendments.

Part 13 – Ordering and provisioning

Section 152AR sets out the standard access obligations. Carriers and carriage service providers must comply with the standard access obligations if the carrier or carriage service provider (known as the access provider) supplies active declared services either to itself or a third party, unless a class exemption under section 152AS or an individual exemption under 152AT applies. Subsection 152AR(3) provides that an access provider must, if requested to do so by a service provider:

- supply an active declared service to the service provider so that the service provider can provide carriage services and/or content services;
- take all reasonable steps to ensure that the technical and operational quality of the active declared service supplied to the service provider is equivalent to that which the access provider supplies to itself; and
- take all reasonable steps to ensure that the service provider receives, in relation to the active declared service supplied to the service provider, fault detection, handling and rectification of a technical and operational quality and timing that is equivalent to that which the access provider supplies to itself.

Subsection 152AR(3) does not make it clear as to whether it covers the ordering or provisioning of the active declared service because these matters are not specifically addressed in that subsection. However, there is a requirement to provide equivalence to the extent that ordering and provisioning relates to technical and operational quality of a service (paragraph 152AR(3)(b)).

The ordering and provisioning of a service are essential components of receiving access to an active declared service, in that a new service could not be provided to an end-user without the order for that service being placed and acted upon and that service being provisioned, or activated. To facilitate access to declared services, Part 13 contains an amendment to make it clear that ordering and provisioning are taken to be aspects of technical and operational quality in paragraph 152AR(3)(b). This recognises that if ordering and provisioning are not provided to an access seeker on equivalent terms to that to which the access provider provides the service to itself, it can disadvantage a service provider and thus reduce effective competition.

Item 112 – After subsection 152AR(4)

Item 112 inserts three new proposed subsections after subsection 152AR(3).

Proposed subsection 152AR(4A) provides that, to avoid doubt, ordering and provisioning are taken to be aspects of technical and operational quality referred to in paragraph 152AR(3)(b).

Proposed subsection 152AR(4B) provides that the regulations may provide that, for the purposes of subsection (4A), a specified act or thing is taken to be ordering.

Proposed subsection 152AR(4C) provides that the regulations may provide that, for the purposes of subsection (4A), a specified act or thing is taken to be provisioning.

The insertion of these subsections should not be taken to alter the interpretation of the remaining subsections in 152AR.

Item 113 – Transitional – paragraph 152AR(3)(b) of the *Trade Practices Act 1974*

Item 113 is a transitional provision that provides that the proposed amendment in Item 112 is to be disregarded in determining the meaning that paragraph 152AR(3)(b) had before the commencement of Item 113.

Note however that the amendments in Item 113 are inserted for the avoidance of doubt. This is not intended to imply that ordering and provisioning were not part of the standard access obligations before this amendment.

Part 14 – Review of competition decisions

Part 14 of Schedule 2 to the Bill contains amendments to ensure that the provisions in Part XIB that deal with the powers and functions of the ACT on a review of a decision of the ACCC under Part XIB or under Part XIC are consistent. In particular, section 151CJ is amended to clarify that where the ACCC makes a decision to refuse to do something, the ACT is able to set that decision aside and make a decision in substitution for that decision. The proposed amendments in Part 14 are similar in nature to proposed subsections 152AW(1), (2) and (3) in Item 66 of Part 11 and proposed subsection 152CF(1), (2) and (3) in Item 102 of Part 12 of Schedule 2 to the Bill. As noted in Parts 11 and 12 above, these are technical amendments and do not contain substantive changes to the current provisions in the TPA.

Item 114 – Subsections 151CJ(1) and (2)

Section 151CJ deals with the functions and powers of the ACT on a review of the kind mentioned in section 151CI. Section 151CI allows for a person to apply for review of the following decisions of the ACCC:

- a decision under section 151BA to refuse to make an exemption order;
- a decision under section 151BG to revoke an exemption order;
- a decision under section 151BQ to make information obtained from a person available for inspection and purchase;
- a decision under section 151BUA to make a report obtained from a person (or an extract from that report) available for inspection and purchase; or
- a decision under section 151BUB or 151BUC to give a person a written direction to make a report or extract available for inspection and purchase.

Subsection 151CJ(1) provides that on a review of a decision mentioned in section 151CI, the ACT may make a decision affirming, setting aside or varying the decision of the ACCC and for the purposes of the review, may perform all of the functions and exercise all of the powers of the ACCC. Subsection 151CJ(2) provides that a decision of the ACT affirming, setting aside or varying a decision of the ACCC will be taken to be a decision of the ACCC for the purposes of the TPA (other than for Division 9 of Part XIB, which is the Division in which section 151CJ is contained).

Item 114 repeals subsections 151CJ(1) and (2) and replaces them with new proposed subsections (1) and (2). The proposed amendments clarify the power of the ACT (on review of a decision of the ACCC not to do something) to set aside the decision and to make a decision in substitution for the decision of the ACT.

Item 115 – Transitional – section 151CJ of the *Trade Practices Act 1974*

Item 115 is a transitional provision that provides that the proposed amendments in Item 114 will apply to application for review under section 151CI made after the commencement of Item 115 and to applications made before the commencement of Item 115, so long as the ACT has not made a decision on review before the commencement of the Item. Where the ACT has made a decision before the commencement of the Item, the amendments will not apply.

Part 15 – Competition notices and advisory notices etc.

Under section 151AKA of Division 3 of Part XIB of the TPA, the ACCC may issue a Part A competition notice that states that a specified carrier or carriage service provider has engaged, or is engaging, in a specified instance of anti-competitive conduct. This provides an important regulatory tool for the ACCC to use where it deals with instances of anti-competitive conduct and recognises that the telecommunications industry is an extremely complex, horizontally and vertically integrated industry where competition is not fully established in some telecommunications markets.

Division 3 does not specifically require the ACCC to provide a carrier or carriage service provider to whom it is considering issuing a Part A competition notice any warning of that action prior to the issue of the notice. While the ACCC has made it its practice to enter into such consultation and the principles of administrative law require the ACCC to accord procedural fairness to a carrier or carriage service provider who will be affected by the issue a Part A competition notice, this may not provide sufficient certainty for the affected carrier or carriage service provider.

Part 15 contains amendments to expressly provide an obligation on the ACCC to consult a potential recipient of a Part A competition notice.

Part 15 also contains amendments to allow the ACCC to issue an advisory notice under section 151AQB irrespective of whether it has issued a Part A competition notice. An advisory notice is a written notice that advises a carrier or carriage service provider of the action it should take, or should consider taking, in order to ensure that it does not engage, or continue to engage, in the kind of conduct specified in a Part A competition notice. Currently, the ACCC may only issue an advisory notice under section 151AQB at the same time that it issues a Part A competition notice, or after it issues such a notice. The amendments contained in Part 15 will allow the ACCC to issue an advisory notice prior to issuing a Part A competition and will not require there to be a suspicion that a carrier or carriage service provider is engaging, or is continuing to engage in, anti-competitive conduct. This will mean that the ACCC will be able to issue an advisory notice as a pre-emptive measure or respond to a submission put to it by a carrier or carriage service provider as to how the carrier or carriage service provider may alter its conduct in order to ensure that it does not

engage in anti-competitive conduct. However, the issue of an advisory notice will be in the ACCC's discretion and will not prevent the ACCC from issuing a Part A competition notice without having issued an advisory notice.

Item 116 – After subsection 151AKA(8) (before the note)

Under section 151AKA of Division 3 of Part XIB of the TPA, the ACCC may issue a Part A competition notice that states that a specified carrier or carriage service provider has engaged, or is engaging, in a specified instance of anti-competitive conduct (subsection 151AKA(1)) or at least one instance of anti-competitive conduct of a kind described in the notice (subsection 151AKA(2)). There is no explicit requirement under section 151AKA for the ACCC to provide a carrier or carriage service provider to whom it is considering issuing a Part A competition notice any warning of that action prior to the issue of the notice.

Item 116 inserts two new subsections in section 151AKA. Proposed subsection 151AKA(9) explicitly provides that the ACCC must consult with a carrier or carriage service provider before issuing a Part A competition notice to the carrier or carriage service provider under subsection 151AKA(1). Proposed subsection 151AKA(10) explicitly provides that the ACCC must consult with a carrier or carriage service provider before issuing a Part A competition notice to the carrier or carriage service provider under subsection 151AKA(2). Under both proposed subsections 151AKA(9) and (10), the ACCC will need to give the carrier or carriage service provider a written notice that states that the ACCC proposes to issue a Part A competition notice, describes, in summary form, the instance, or the kind in the case of subsection (10), of anti-competitive conduct that is proposed to be specified in the Part A competition notice and invites the carrier or carriage service provider to make a submission to the ACCC on the proposal within a specified time limit. The ACCC must consider any submission before issuing a Part A competition notice. It is not intended that the notice will need to contain full particulars of the instance or kind of anti-competitive conduct that is proposed to be specified in the notice, although this may be appropriate in some circumstances. The notice will be required to contain the substance of the anti-competitive conduct that will be specified in the notice. This reflects the intention that the proposed amendment will make explicit the obligation to consult with the recipient of a Part A competition notice that was previously reflected in ACCC practice and the ACCC's administrative law obligation to accord procedural fairness to the recipient of a Part A competition notice. It is not intended that the proposed amendment will increase or decrease those existing obligations.

Item 117 – Subsection 151AQB(1)

Section 151AQB allows the ACCC to issue an advisory notice to a carrier or carriage service provider at the same time that it issues a Part A competition notice to the carrier or carriage service provider, or after it has issued the Part A competition notice (subsection 151AQB(1)). An advisory notice is an instrument of an advisory character in which the ACCC advises the carrier or carriage service provider of the action it should take, or consider taking, in order to ensure that it does not engage, or continue to engage, in the kind of conduct dealt with by the Part A competition notice.

Item 117 repeals subsection 151AQB(1) and replaces it with proposed subsections 151AQB(1) and (2). Proposed subsection 151AQB(1) will allow the ACCC to give a carrier or carriage service provider an advisory notice advising the carrier or carriage service provider of the action that it should take, or should consider taking, in order to ensure that it does not engage, or does not continue to engage, in anti-competitive conduct. The proposed amendment will allow the ACCC to issue an advisory notice before, at the same time, or after the issue of a Part A competition notice. The issue of an advisory notice will be at the discretion of the ACCC and will not be a pre-condition to the issue of a Part A competition notice under either subsection 151AKA(1) or 151AKA(2) (proposed subsection 151AQB(2)). The issue of an advisory notice will not require there to be a suspicion that a carrier or carriage service provider is engaging, or is continuing to engage in, anti-competitive conduct.

Item 118 – Subsection 151AQB(4)

Subsection 151AQB(4) provides that an advisory notice that relates to a Part A competition notice ceases to be in force if the Part A competition notice ceases to be in force.

Item 118 repeals subsection 151AQB(4). The proposed amendment is consequential to the proposed amendment in Item 116 which will allow the ACCC to issue an advisory notice before it issues a Part A competition notice. Consequently, it will no longer be appropriate for the effect of an advisory notice to be linked to the effect of a Part A competition notice.

Item 119 – At the end of section 151AQB

Item 119 inserts a new subsection at the end of section 151AQB. Section 151AQB allows the ACCC to issue advisory notices to carriers and carriage service providers.

The proposed amendment in Item 117 will allow the ACCC to issue an advisory notice prior, at the same time as, or after the issue of a Part A competition notice. Currently, there is no explicit provision establishing the process for the publication of advisory notices under section 151QB. With the proposed amendment in Item 117 introducing a pre-emptive character to advisory notices there is more likely to be circumstances where the publication of information which the ACCC has provided to a carrier or carriage service provider would be of public benefit. Proposed subsection 151AQB allows the ACCC to publish an advisory notice if the ACCC is satisfied that the publication of the advisory notice would result, or would be likely to result in a benefit to the public and where that benefit would outweigh any substantial prejudice to the commercial interests of a person that would result, or would be likely to result, if the advisory notice were published. The decision to publish an advisory notice will be in the ACCC's discretion and the ACCC may publish the notice in such a manner as it thinks fit. Where, for example, a carrier or carriage service provider may have sought an advisory notice in order to test a new service delivery model in relation to a service which is not yet supplied, rather than actual anti-competitive conduct, usually there would be strong grounds for keeping commercial purposes confidential.

Item 120 – At the end of section 151AU

Item 120 inserts a new proposed subsection at the end of section 151AU. Section 151AU allows the ACCC to request further information about an application for an exemption order. The ACCC may refuse to consider the application until the information is received.

Proposed subsection 151AU(3) will allow the ACCC to withdraw a request in whole or in part. The proposed amendment is designed to ensure that section 151AU is consistent with other similar provisions in Parts XIB and XIC of the TPA that allow the ACCC to request further information and that will be amended to allow the ACCC to withdraw a request for information in whole or in part.

Part 16 – Record-keeping rules and disclosure directions

The Government has previously announced that it will encourage a more transparent regulatory market by requiring accounting separation of Telstra's wholesale and retail operations. Accounting separation will address competition concerns arising from the level of vertical integration of Telstra's wholesale and retail services and improve the provision of costing and price information to access seekers and the public.

Accounting separation will assist in identifying whether Telstra is discriminating between itself and its competitors in relation to price or non-price terms and conditions of supply, particularly in relation to the core interconnection services over which Telstra has effective monopoly control. It will also give Telstra both an incentive and an opportunity to demonstrate that their price and non-price arrangements promote efficient competitive outcomes and do not involve unfair discrimination or price squeeze behaviour.

The ACCC is already empowered to make record-keeping rules under Division 6 of Part XIB of the TPA with which specified carriers and carriage service providers, or classes of carrier and carriage service providers, are required to comply. These record-keeping rules already create the appropriate framework to implement accounting separation. It is intended to introduce accounting separation by building on the existing work that the ACCC has done with these record-keeping rules, without needing to add to the ACCC's existing powers.

To provide for the implementation of accounting separation for Telstra in a probative and deliberate manner, Part 16 provides that the Minister may direct the ACCC in the exercise of its record-keeping rule functions under sections 151BU, 151BUDA, 151BUDB or 151BUDC and the ACCC must comply with a direction under these sections.

The Government's proposed accounting separation framework will ensure:

(a) Telstra prepares current (replacement) cost accounts (as well as existing historic cost accounts) to provide more transparency to the ACCC about Telstra's ongoing and sustainable wholesale and retail costs;

(b) Telstra publishes current cost and historic cost key financial statements in respect of "core" interconnect services but not underlying detailed financial and traffic data which is regarded as commercially sensitive;
(c) the ACCC prepares and publishes an "imputation" analysis (based on Telstra purchasing the 'core' interconnect services at the price that it charges external access seekers) which will demonstrate whether there is any systemic price squeeze behaviour; and
(d) Telstra publishes information comparing its performance in supplying "core"services to itself and to external access seekers in relation to key non-price terms and conditions. (These will include faults / maintenance, ordering, provisioning, availability / performance, billing and notifications).

The introduction of accounting separation under this Part would:

- build on work already done by the ACCC and the industry with RAF, rather than 'reinvent the wheel';
- recognise genuine economies of scale and scope in the supply of retail services; and
- avoid undue regulatory burdens on industry.

Item 121 – Section 151AA

Section 151AA contains a simplified outline of Part XIB of the TPA. The simplified outline states that the ACCC may make record-keeping rules that apply to carriers and carriage service providers and that the ACCC may direct carriers and carriage service providers (by a disclosure direction) to make certain reports available for inspection and purchase.

Item 121 amends section 151AA to omit the reference to "inspection and purchase". The proposed amendment is consequential to the proposed substantive amendments in Part 16 of Schedule 2 to the Bill that will enable the Minister to give a direction to the ACCC in relation to the exercise of its powers under the record-keeping rules and will create a new category of report that may be required to be prepared under the record-keeping rules. A "Ministerially-directed report" will be a report prepared under a record-keeping rule where that rule was made as a result of a Ministerial direction. The ACCC will be able to give disclosure directions in relation to Ministerially-directed reports (and periodic reports) to make reports, or extracts of reports, available in a manner specified in the direction. Currently, the ACCC may give disclosure directions to a carrier or carriage service provider in relation to reports prepared in accordance with the record-keeping rules to make a report, or an extract of a report, available for inspection or purchase. The purpose of the proposed amendment is to update the simplified outline.

Item 122 – Section 151AB (definition of *disclosure direction*)

Section 151AB defines terms referred to in Part XIB and defines "disclosure direction" to mean a direction under subsection 151BUB(2) or 151BUC(2).

Item 122 amends the definition of "disclosure direction" to include a direction under proposed subsections 151BUDB(2) or 151BUDC(2). The proposed amendment is

consequential to the proposed amendments in Item 124 which will insert proposed subsections 151BUDB(2) and 151BUDC(2) in Part XIB of the TPA.

Item 123 – Section 151AB

Section 151AB defines terms referred to in Part XIB. Item 123 inserts a definition of "Ministerially-directed report" and defines this term to have the meaning given in proposed section 151BUAA (see Item 124). The proposed amendment is consequential to the proposed amendment in Items 124.

Item 124 – After section 151BU

Item 124 inserts two new sections after section 151BU.

Proposed section 151BUAA allows the Minister to give a written direction to the ACCC in relation to the exercise of its powers under section 151BU or proposed sections 151BUDA, 151BUDB or 151BUDC. Under section 151BU, the ACCC may make record-keeping rules for and in relation to requiring one or more specified carriers or carriage service providers to keep and retain records. Such rules may also require the preparation of reports consisting of information contained in the records kept in accordance with the record-keeping rules. Subsection 151BU(4) provides that the ACCC must not exercise its powers under section 151BU so as to require the keeping or retention or records unless the records contain, or will contain, information that is relevant to:

- ascertaining whether the competition rule has been, or is being, complied with;
- ascertaining whether tariff filing directions have been, or are being, complied with;
- the operation of Part XIB (other than Division 6);
- the operation of Part XIC (which deals with access);
- the operation of Division 3 of Part 20 of the Telecommunications Act (which deals with Rules of Conduct relating to dealings with international telecommunications operators); or
- the operation of Part 9 of the *Telecommunications (Consumer Protection and Service Standards) Act 1999* (which deals with regulation of Telstra's charges).

A direction given to the ACCC by the Minister in relation to the exercise of its powers under section 151BU and proposed sections 151BUDA, 151BUDB or 151BUDC will be a disallowable instrument for the purposes of section 46A of *the Acts Interpretation Act 1901*.

Such a direction will provide the means of implementing the Government's intention of introducing accounting separation. The direction would most likely be in two parts. Firstly, it would require the ACCC to exercise its power under section 151BU to require Telstra to keep and retain records. Secondly, it would require the ACCC to exercise its power under proposed sections 151BUDA, 151BUDB or 151BUDC to disclose appropriate information contained in those records.

Where the ACCC makes a record-keeping rule as a result of a Ministerial direction under proposed subsection 151BUAA(1), and the rule requires the preparation of a

report, the rule must state that it is a rule made as a result of a Ministerial direction and a report made under the rule will be known as a Ministerially-directed report (proposed subsection 151BUAA(3)). The purpose of proposed subsection 151BUAA(3) is to distinguish between rules, and reports required to be prepared by those rules, made by the ACCC under existing provisions in Division 6 of Part XIB, and rules, and reports required to be prepared by those rules, made by the ACCC at the direction of the Minister (as a result of the proposed amendments contained in this Item). This distinction is important because different obligations attach to reports that are required to be prepared by rules that are made by the ACCC at the direction of the Minister.

Proposed section 151BUAB provides that a person may request the ACCC to exercise its powers under sections 151BUA or 151BUB to disclose, or to require the disclosure, of reports, or under section 151BUC to require the disclosure of periodic reports. The ACCC must consider the request but it will not need to consider requests that it considers to be frivolous, vexatious or not made in good faith. The purpose of the proposed section is to make it explicit that a decision by the ACCC to exercise its discretionary powers may be prompted by a request from a person that it do so.

Item 125 – After section 151BUD

Item 125 inserts several new sections after section 151BUD that deal with the giving access to Ministerially-directed reports and Ministerially-directed periodic reports to the public and the giving of limited access to specified persons.

ACCC gives access to Ministerially-directed reports

Proposed section 151BUDA applies to particular Ministerially-directed reports given to the ACCC by a carrier or carriage service provider in accordance with the record-keeping rules (subsection 151BUDA(1)) and deals with the disclosure of reports, or extracts from reports, to the public or to specified persons as directed by the Minister. Proposed section 151BUDA is not intended to limit the current provisions in section 151BUA that apply to the disclosure of reports (other than Ministerially-directed reports) by the ACCC.

Where required to do so by a Ministerial direction made under proposed section 151BUAA, the ACCC may make copies of a Ministerially-directed report or copies of extracts from the report (and other relevant material) available to the public. The ACCC may also, where required to do so by a Ministerial direction under proposed section 151BUAA, give a written direction to the carrier or carriage service provider requiring it to take such action specified in the direction to inform the public (or such persons as specified in the direction) that the report is, or extracts from it, are available (paragraph 151BUDA(2)(b)). A person who intentionally or recklessly contravenes a direction under paragraph 151BUDA(2)(b) is guilty of an offence punishable on conviction by a fine not exceeding 20 penalty units (proposed subsection 151BUDA(6)).

The ACCC can make copies of the report, or extracts of the report, available to particular persons and on such terms and conditions (if any) that the ACCC determines (proposed subsection 151BUDA(3)). The ACCC must take reasonable

steps to inform those persons of the terms and conditions and a person must comply with the terms and conditions.

Proposed subsection 151BUDA(5) requires a person to comply with the terms and conditions specified in a determination under proposed subsection 151BUDA(3). A person who intentionally or recklessly contravenes the terms and conditions specified in a notice is guilty of an offence punishable on conviction by a fine not exceeding 100 penalty units (proposed subsection 151BUDA(7))). The penalty for non-compliance is greater here because of the likelihood that the information available to persons specified in the direction under proposed paragraph 151BUDA(2)(b) will be commercially sensitive and therefore the consequences of non-compliance with specified terms and conditions potentially more serious than a contravention of proposed subsection 151BUDA(6).

Carrier or carriage service provider gives access to Ministerially-directed reports

Proposed section 151BUDB applies to particular Ministerially-directed reports given to the ACCC by a carrier or carriage service provider in accordance with the record-keeping rules (subsection 151BUDB(1)) and deals with the disclosure of reports, or extracts from reports, to the public or to specified persons as directed by the Minister. Proposed section 151BUDB is not intended to limit the current provisions in section 151BUB that apply to the disclosure of reports (other than Ministerially-directed reports) by a carrier or carriage service provider at the direction of the ACCC.

Where required to do so by a Ministerial direction made under proposed section 151BUAA, the ACCC may give a carrier or carriage service provider a written direction requiring it to make copies of a Ministerially-directed report or copies of extracts from the report (and any other relevant material) available to the public in the manner specified in the direction and as soon as practicable after the end of the period specified in the direction. The ACCC may also, where required to do so by a Ministerial direction under proposed section 151BUAA, give a written direction to the carrier or carriage service provider requiring it to make copies of a Ministerially-directed report or copies of extracts from the report (and any other relevant material) available to the public in the manner specified in the direction, on such terms and conditions as are specified in the direction and as soon as practicable after the end of the period specified in the direction (paragraph 151BUDB(2)(b)). The carrier or carriage service provider must take reasonable steps to inform those persons of the terms and conditions (if any) specified in a direction and a person must comply with the terms and conditions.

If the ACCC gives a direction to a carrier or carriage service provider under proposed paragraph 151BUDB(2)(a), the ACCC may also give it a direction to take such action as is specified in the direction to inform the public that the report, or extracts, are available and the way in which the report, or extracts, may be accessed. If the ACCC gives a direction to a carrier or carriage service provider under proposed paragraph 151BUBD(2)(b), the ACCC may also give it a direction to take such action as is specified in the direction to inform the persons specified in the direction that the report, or extracts, are available and the way in which the report, or extracts, may be accessed.

A person who intentionally or recklessly contravenes a direction under subsections 151BUDB(4) or (5) is guilty of an offence punishable on conviction by a fine not exceeding 20 penalty units (proposed subsection 151BUDB(7)).

A person who intentionally or recklessly contravenes the terms and conditions on which a report or extract is available is guilty of an offence punishable on conviction by a fine not exceeding 100 penalty units (subsection 151BUDA(8))). The penalty for non-compliance is greater here because of the likelihood that the information available to persons specified in the direction under proposed paragraph 151BUDB(2)(b) will be commercially sensitive and therefore the consequences of non-compliance with specified terms and conditions potentially more serious than a contravention of subsection (7).

Carrier or carriage service provider gives access to Ministerially-directed periodic reports

Proposed section 151BUDC applies to particular Ministerially-directed periodic reports given to the ACCC by a carrier or carriage service provider in accordance with the record-keeping rules (subsection 151BUDC(1)) and deals with the disclosure of periodic reports, or extracts from periodic reports, to the public or to specified persons as directed by the Minister. Proposed section 151BUDC is not intended to limit the current provisions in section 151BUC that apply to the disclosure of periodic reports (other than Ministerially-directed periodic reports) by a carrier or carriage service provider at the direction of the ACCC.

Where required to do so by a Ministerial direction made under proposed section 151BUAA, the ACCC may give a carrier or carriage service provider a written direction requiring it to make copies of a Ministerially-directed periodic report or copies of extracts from the report (and any other relevant material) available to the public in the manner specified in the direction and by such times as are ascertained in accordance with the direction. The ACCC may also, where required to do so by a Ministerial direction under proposed section 151BUAA, give a written direction to the carrier or carriage service provider requiring it to make copies of a Ministerially-directed periodic report or copies of extracts from the report (and any other relevant material) available to persons specified in the direction, in the manner specified in the direction, on such terms and conditions as are specified in the direction and by such times as are ascertained in accordance with the direction (paragraph 151BUDC(2)(b)). The carrier or carriage service provider must take reasonable steps to inform those persons of the terms and conditions (if any) specified in a direction and a person must comply with the terms and conditions.

If the ACCC gives a direction to a carrier or carriage service provider under proposed paragraph 151BUDC(2)(a), the ACCC may also give it a direction to take such action as is specified in the direction to inform the public that the periodic report, or extracts, are available and the way in which the report, or extracts, may be accessed. If the ACCC gives a direction to a carrier or carriage service provider under proposed paragraph 151BUDC(2)(b), the ACCC may also give it a direction to take such action as is specified in the direction to inform the persons specified in the direction that the periodic report, or extracts, are available and the way in which the report, or extracts, may be accessed.

A person who intentionally or recklessly contravenes a direction under subsection 151BUDC(4) or (5) is guilty of an offence punishable on conviction by a fine not exceeding 20 penalty units (proposed subsection 151BUDC(7)).

A person who intentionally or recklessly contravenes the terms and conditions on which a periodic report or extract is available is guilty of an offence punishable on conviction by a fine not exceeding 100 penalty units (proposed subsection 151BUDC (8)). The penalty for non-compliance is greater here because of the likelihood that the information available to persons specified in the direction under proposed paragraph 151BUDC(2)(b) will be commercially sensitive and therefore the consequences of non-compliance with specified terms and conditions potentially more serious than a contravention of proposed subsection 151BUDC(7).

Schedule 3 – Amendment of the Telecommunications (Carrier Licence Charges) Act 1997

Item 1 – Paragraph 15(1)(d)

Item 1 amends paragraph 15(1)(d) by replacing the semi-colon at the end of the paragraph with a full stop. The proposed amendment is consequential to the proposed repeal of paragraph 15(1)(e) (see Item 2).

Item 2 – Paragraph 15(1)(e)

Section 15 specifies the limit on the total charges that may be imposed on carrier licences in force at the beginning of the financial year. Paragraph 15(1)(e) relates to the proportion of the Commonwealth's costs for the immediately preceding financial year that is attributable to the administration of Part 2 of Schedule 1 to the Telecommunications Act. These costs are determined by the Industry Minister by written instrument and form a component of the sum that the charges imposed on carrier licences must not exceed under section 15.

Item 2 repeals paragraph 15(1)(e). The proposed amendment is consequential to the proposed repeal of Part 2 of Schedule 1 to the *Telecommunications Act 1997* (see Item 14 of Part 2 of Schedule 1 to the Bill).

Item 3 – Subsection 15(4) (definition of *Industry Minister*)

Subsection 15(4) contains definitions of terms used in section 15. "Industry Minister" is defined to mean the Minister for Communications, Information Technology and the Arts or the Minister for the Arts and Sport (the effect of the *Acts Interpretation (Substituted References – Section 19B) Amendment Order 2001* made by the Governor-General on 20 December 2001 is that the reference in clause 3 of Schedule 1 to the "Minister for the Arts and Centenary of Federation" is read as the "Minister for the Arts and Sport").

Item 3 repeals the definition of "Industry Minister". The proposed amendment is consequential to the proposed repeal of paragraph 15(1)(e) (Item 2). No other reference to "Industry Minister" is made in the Act.

Item 4 - Application of amendments

Item 4 deals with the application of the proposed amendments in Schedule 3. The amendments will apply in relation to charges imposed on carrier licences in force at the beginning of the first financial year where the financial year ends after the commencement of Item 4 and the immediately preceding year is a zero-cost year, or, a financial year that is later than that first financial year. SubItem 4(1) defines a zero-cost financial year as a financial year in which the Commonwealth did not incur any costs that were attributable to the administration of Part 2 of Schedule 1 to the *Telecommunications Act 1997*.

The effect of Item 4 will be that paragraph 15(1)(e) will continue to apply (allowing the cost of the administration of Part 2 of Schedule 1 of the Telecommunications Act to be included in the ACA's assessment of the charges on carrier licences) until the end of a zero-cost financial year (ie until a financial year has passed in which the Commonwealth did not incur any costs attributable to the administration of the Part 2 of Schedule 1 to the Telecommunications Act).