

1996

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

TRADE PRACTICES AMENDMENT (TELECOMMUNICATIONS) BILL 1996

EXPLANATORY MEMORANDUM

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

79305 Cat. No. 96 5321 X ISBN 0644 482974

TRADE PRACTICES AMENDMENT (TELECOMMUNICATIONS) BILL 1996

OUTLINE

The Trade Practices Amendment (Telecommunications) Bill 1996 ('the Bill') is part of a package of legislation intended to create a new regulatory scheme to govern telecommunications from 1 July 1997. The Bill will amend the *Trade Practices Act 1974* to provide special rules to control anti-competitive conduct by telecommunications carriers and carriage service providers and to deal with access to telecommunications services.

Proposed Part XIB of the Trade Practices Act, inserted by item 6 of Schedule 1 to the Bill, sets up a special regime for regulating anti-competitive conduct in the telecommunications industry. This regime will apply in addition to Part IV of that Act, which regulates restrictive trade practices in general.

Under proposed Part XIB, as well as being able to seek injunctions to stop anti-competitive conduct by a carrier or carriage service provider, the ACCC will be able to issue a competition notice stating that a carrier or carriage service provider has engaged in such conduct. The ACCC will be able to seek pecuniary penalties and a third party will be able to seek damages where anti-competitive conduct is engaged in after the ACCC has issued a competition notice and while the notice is in force. The ACCC will be able to make an order exempting specified conduct from the scope of the definition of anti-competitive conduct.

The ACCC will be able to direct carriers and carriage service providers to file tariff information with the ACCC. In addition, the ACCC will be empowered to make record-keeping rules with which specified carriers and carriage service providers will be required to comply.

Proposed Part XIC, also inserted by item 6 of Schedule 1, sets out an access regime for the telecommunications industry. The regime provides for the declaration of carriage services and related services by the ACCC either following a recommendation of the Telecommunications Access Forum or after a public inquiry. Once declared, standard access obligations apply to carriers or carriage service providers supplying those services (access providers), unless those persons are otherwise exempted. Standard access obligations require the supply of declared services and specified associated services in order that service providers can supply their own carriage services and/or content services.

The terms and conditions of access on which access providers comply with the standard access obligations are subject to commercial agreement, may be set out in an access undertaking or, failing agreement or the existence of a relevant access undertaking, determined by the ACCC in an arbitration.

An access undertaking may incorporate or adopt the model terms and conditions set out in a telecommunications access code prepared by the Telecommunications Access Forum or determined by the ACCC.

Access agreements reached commercially may be registered with the ACCC and enforced as though they are a determination made by the ACCC.

A carrier, carriage service provider or related body must not prevent or hinder access to a declared service.

FINANCIAL IMPACT

The Bill is not expected to have a significant financial impact on Commonwealth expenditure or revenue. The Bill will, however, involve the transfer of competition and access functions for telecommunications from AUSTEL to the ACCC. Accordingly, further resources will be required for the ACCC, estimated to be in the order of \$1m in the 1996-97 financial year.

The Bill can be expected to have financial impact on carriers and carriage service providers. Carriers and carriage service providers supplying declared services will be subject to the access regime in Part XIC, which may impose costs on their activities. However, they will also obtain the benefits of rights of access to declared services supplied by other carriage service providers. It is not possible to quantify the costs and benefits to individual participants in the industry, as much will depend on the nature of the commercial activities in which they are engaged.

New Part XIB can also be expected to have a financial impact on participants in the telecommunications industry, although the precise impact will depend on whether the participant has substantial market power and engages in anti-competitive conduct.

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:	Trade Practices Amendment (Telecommunications) Bill 1996
TPA:	<i>Trade Practices Act 1974</i>

NOTES ON CLAUSES

Clause 1 – Short title

Clause 1 provides for the citation of the *Trade Practices Amendment (Telecommunications) Act 1996*.

Clause 2 – Commencement

Clause 2 provides for the Bill to commence on the day it receives the Royal Assent.

This will enable the ACCC, during the lead up to 1 July 1997, to undertake a range of activities related to its role from 1 July 1997 in regulating certain aspects of telecommunications. These include:

- (a) developing relevant guidelines, including guidelines to assist the ACCC in deciding whether to issue a competition notice (proposed s. 151AP of the TPA) or a procedural direction under proposed s. 152CT directing a party to engage in negotiations in good faith; and
- (b) engaging in market inquiries for the purposes of satisfying itself prior to 1 July 1997 as to the prerequisite for a tariff filing direction ie that a carrier or carriage service provider has a substantial degree of power in a telecommunications market – any tariff filing direction given by the ACCC before 1 July 1997 will not, however, come into force until that date (see proposed s. 151BK(10) of the TPA); and
- (c) making record-keeping rules under proposed Division 5 of Part XIB – any such rules made before 1 July 1997 will not, however, come into force until that date (see proposed s. 151BU(5) of the TPA).

Clause 3 – Schedule(s)

Clause 3 provides that the TPA is amended in accordance with the applicable items in a Schedule to the Bill, and that the other items in the Schedule have effect according to their terms.

Schedule 1—Amendments

Item 1 – Amendment of subsection 2B(1)

Subsection 2B(1) of the TPA provides that Part IV of that Act, which deals with restrictive trade practices generally, and the other provisions of the TPA so far as they relate to Part IV, bind the Crown in right of each of the States, of the Northern Territory and of the Australian Capital Territory, so far as the Crown carries on a business, either directly or by an authority of the State or Territory.

Item 1 extends the operation of s. 2B(1). In addition to Part IV of the TPA and the other provisions of the TPA so far as they relate to Part IV, the following provisions of the TPA will bind the Crown in right of each of the States, of the Northern

Territory and of the Australian Capital Territory, so far as the Crown carries on a business, either directly or by an authority of the State or Territory:

- (a) proposed Part XIB of the TPA, inserted by item 6 of the Bill, which sets up a special regime for regulating anti-competitive conduct in the telecommunications industry; and
- (c) the other provisions of the TPA so far as they relate to Part XIB.

Item 2 – Amendment of paragraph 6(2)(h)

The TPA is founded on the corporations power under s. 51(xx) of the Constitution and the provisions of the TPA use this power as a base by incorporating references to ‘corporations’. Section 6 of the TPA provides for an extended application of certain Parts of the TPA by relying on other heads of Constitutional power. Paragraph 6(2)(h) of the TPA extends the operation of certain Parts of the Act as if a references in those Parts, with certain exceptions, included references to a person not being a corporation.

By contrast, proposed Part XIB of the TPA is drafted primarily in reliance on the posts and telegraphs power under s. 51(v) of the Constitution and applies to carriers and carriage service providers regardless of whether or not they are corporations.

Item 2 excludes the following provisions from the operation of paragraph 6(2)(h):

- (a) proposed s. 151AE of the TPA – this provision, in part, in reliance on the corporations power under s. 51(xx) of the Constitution, gives Part XIB an effect as if any references to carriers or carriage service providers in that Part were confined to corporations; and
- (b) proposed s. 151AJ – proposed ss. 151AJ(4) and (5) apply the anti-competitive conduct test in proposed s. 151AJ(3) to a carrier, or a carriage service provider, that is not a corporation or partnership.

Item 3 – Amendment of subsection 25(1)

Subsection 25(1) of the TPA provides that the ACCC may resolve to delegate to an ACCC member, either generally or otherwise as provided by the instrument of delegation, any of its powers under the TPA, other than this power of delegation and its powers to grant, revoke or vary an authorisation.

Item 3 amends this provision to enable the ACCC to delegate to an ACCC member any of its powers under the proposed *Telecommunications Act 1996* or under Rules of Conduct about dealings with international telecommunications operators under Part 20 of that Act.

Item 4 – Amendment of paragraph 29(1A)(a)

Subsection 29(1) of the TPA provides that the relevant Minister may give the ACCC directions connected with the performance of its functions or the exercise of its

powers under the TPA. Subsection 29(1A) provides, however, that the Minister is not permitted to give directions under subsection (1) relating to:

- (a) Part IIIA, IV or VII (administered under the Treasury portfolio); or
- (b) ss. 65J, 65K, 65M or 65N (administered under the Industry, Science and Tourism portfolio) in relation to individual cases.

Item 4 adds to the restrictions contained in s. 29(1A) by providing that the Minister may not give directions under s. 29(1) relating to:

- (a) proposed Part XIB of the TPA (which will set up a special regime for regulating anti-competitive conduct in the telecommunications industry); and
- (b) proposed Part XIC of the TPA (which will set up a telecommunications access regime).

This will safeguard the independence of the ACCC in relation to the performance of its functions or the exercise of its powers under Parts XIB and XIC.

Item 5 – Amendment of subsection 76(1)

Subsection 76(1) of the TPA provides that if the Court is satisfied that a person has contravened a provision of Part IV or has been involved in such a contravention, it may order the person to pay the Commonwealth an appropriate pecuniary penalty. The Court, in determining the appropriate level of penalty, is required to have regard, among other things, to whether the person has previously been found by the Court, in proceedings under Part VI (dealing, among other things, with the enforcement of Part IV), to have engaged in any similar conduct.

The effect of item 5 is that in proceedings under Part VI of the TPA the Court will also be required to have regard to whether the person has previously been found by the Court, in proceedings under Part VI or under proposed Part XIB (which will set up a special regime for regulating anti-competitive conduct in the telecommunications industry) to have engaged in any similar conduct.

Item 6 – Insertion of Parts XIB and XIC

PART XIB – THE TELECOMMUNICATIONS INDUSTRY: ANTI-COMPETITIVE CONDUCT AND RECORD-KEEPING RULES

Proposed Part XIB of the TPA sets up a special regime for regulating anti-competitive conduct in the telecommunications industry. This regime will apply in addition to Part IV of that Act, which regulates restrictive trade practices in general.

Proposed Part XIB aims to facilitate vigorous competition in the telecommunications industry. It is also concerned to prevent members of the industry with a substantial degree of power in a telecommunications market from engaging in anti-competitive conduct. Carriers and carriage service providers with substantial market power should not be able to take advantage of that market power to stifle competition.

The intention is that all members of the telecommunications carriage services industry should be fully subject to Part IV of the TPA. In particular, the exemption from Part IV given to carriers under the *Telecommunications Act 1991* for the supply of basic carriage services has not been continued (see ss. 237 and 238 of that Act).

Telecommunications is an extremely complex, horizontally and vertically integrated industry and competition is not fully established in some telecommunications markets. There is considerable scope for incumbents to engage in anti-competitive conduct because competitors in downstream markets depend on access to networks or facilities controlled by the incumbents. Furthermore, the possibility of anti-competitive cross-subsidies by incumbents from non-competitive markets to markets in which competition exists or is emerging is a particular threat to the establishment of a competitive environment.

Total reliance on Part IV of the TPA to constrain such anti-competitive conduct might, in some cases, prove ineffective because of the state of competition in the telecommunications industry and the fast pace of change in this industry. There may be difficulty, for example, in obtaining evidence of predatory behaviour supported by inappropriate internal cost allocation by horizontally or vertically integrated firms. Anti-competitive behaviour in telecommunications could cause particularly rapid damage to competition because of the volatile state of the industry during the early stages of competition. Against this background, Part IV alone may prove insufficient to deal with anti-competitive behaviour in telecommunications at this time.

Therefore, as well as Part IV of the TPA applying fully to telecommunications, the amendments made by proposed Part XIB supplement Part IV by increasing the ability of the ACCC to respond where there is evidence of anti-competitive conduct, particularly (though not limited to) predatory pricing behaviour. As well as being able to seek injunctions to stop anti-competitive conduct, as defined by proposed s. 151AJ of the TPA, the ACCC will be able to issue a competition notice stating that a carrier or carriage service provider has engaged in anti-competitive conduct (see proposed

s. 151AL of the TPA). The ACCC will be able to seek pecuniary penalties and a third party will be able to seek damages where anti-competitive conduct is engaged in after the ACCC has issued a competition notice and while the notice is in force. The competition notice is taken to be prima facie evidence of its contents but it does not conclusively establish that a carrier or carriage service provider has engaged in anti-competitive conduct – that is a matter to be determined by the Court.

It is intended that competition rules for telecommunications will eventually be aligned, to the fullest extent practicable, with general trade practices law. Part XIB will apply for the period from 1 July 1997 until some future review determines that competition is sufficiently established that the Part or some provisions of the Part are no longer needed. Under proposed s. 151CN of the TPA the Minister will be required to arrange for a review of the operation of Part XIB before 1 July 2000. In conducting this review, consideration will have to be given to the question whether any or all of the provisions of Part XIB should be repealed or amended. A report of the review will be required to be tabled in both Houses of Parliament.

Division 1—Introduction

Proposed section 151AA – Simplified outline

Proposed s. 151AA of the TPA gives a simplified outline of Part XIB.

Proposed section 151AB – Definitions

Proposed section 151AB sets out the definitions of key terms used in Part XIB.

Proposed section 151AC – Extension to external Territories

Part XIB, and any other provisions of the TPA so far as they relate to Part XIB, will extend to each eligible Territory within the meaning of the proposed *Telecommunications Act 1996* (proposed s. 151AC). ‘Eligible Territory’ is defined in cl. 7 of the Telecommunications Bill 1996 to mean the Indian Ocean Territories (ie, the Territory of Christmas Island and the Territory of Cocos (Keeling) Islands) and any other external Territory that is prescribed by the Regulations for the purposes of cl. 10 of that Bill (which extends the operation of that Bill in a similar way to proposed s. 151AC).

Proposed section 151AD – Continuity of partnerships

Under cl. 52 of the Telecommunications Bill 1996, an ‘eligible partnership’, being a partnership where each partner is a constitutional corporation, may apply for a carrier licence. Clause 86 of that Bill defines those persons who are taken to be carriage service providers. ‘Person’ is defined in cl. 7 of that Bill to include a partnership.

For the purposes of Part XIB, in its application to carriers and carriage service providers, a change in the composition of a partnership does not affect the continuity of the partnership.

Proposed section 151AE – Additional operation of Part

Part XIB is drafted primarily in reliance on the posts and telegraphs power under s. 51(v) of the Constitution. Without prejudice to the effect that Part XIB would otherwise have, proposed s. 151AE provides for Part XIB to have a more limited operation that rests on other Commonwealth powers if necessary (proposed s. 151AE(1)). The relevant powers include the trade and commerce power in s. 51(i) of the Constitution, the corporations power in s. 51(xx) of the Constitution and the Territories' power in s. 122 of the Constitution.

Part XIB will have, by force of proposed s. 151AE(2), the effect it would have if any references to a carrier or a carriage service provider were, by express provision, confined to a carrier or a carriage service provider that is a corporation.

In addition to the effect that Part XIB will have as provided by proposed s. 151AE(2), it will have, by force of proposed s. 151AE(3), the effect it would have if proposed ss. 151AJ(2) and (3) (which set out the circumstances in which a carrier or a carriage service provider will be taken to engage in anti-competitive conduct) were, by express provision, confined in their operation to engaging in conduct to the extent to which the conduct takes place in the course of or in relation to:

- (a) overseas and interstate trade or commerce; or
- (b) trade or commerce within a Territory, between a State and a Territory or between 2 Territories; or
- (c) the supply of goods or services to the Commonwealth or an authority or instrumentality of the Commonwealth.

Proposed section 151AF – Telecommunications market

'Telecommunications market' is defined in proposed s. 151AF. It will be a market, within the meaning of s. 4E of the TPA, in which carriage services, ancillary goods or services or access to facilities are supplied or acquired.

Markets have 4 dimensions – product, geography, function and time. To determine the boundaries of each dimension, the guiding principle is substitutability or being otherwise competitive (s. 4E of the TPA). For instance, in considering the product boundaries, one starts with the product supplied or acquired by the firms in question (ie, product A) and then asks what products are substitutable with product A, or, given a small but significant non-transitory price increase, what are the products to which consumers would turn or to which producers would switch their production?

Part XIB is concerned with regulating anti-competitive conduct in the telecommunications industry. Accordingly, the Part will only apply in relation to markets in which:

- carriage services; or
- goods or services for use in connection with a carriage service; or

- access to facilities;

is supplied or acquired.

The reference to goods for use in connection with a carriage service is intended to include printed telephone directories and customer equipment such as telephone handsets, facsimile machines and set top boxes used for receiving pay-television services. The references to services for use in connection with a carriage service is intended to include billing services and directory assistance services. Access to facilities is included specifically because facilities may not necessarily be characterised as goods, for example a telecommunications tower which is part of the infrastructure of a telecommunications network. Access to a carriage service does not require specific mention as it would be encompassed within the concept of supply or acquisition of a carriage service.

Proposed section 151AG – When a body corporate is related to a partnership

Proposed s. 151AG is relevant to proposed s. 151AH, which sets out various circumstances in which a carrier or carriage service provider will be taken to have a substantial degree of power in a telecommunications market because a body corporate is related to it.

For the purposes of Part XIB, if:

- (a) a carrier or a carriage service provider is a partnership; and
- (b) a body corporate is related to a partner in the partnership – because, for example, the body corporate is the holding company or subsidiary of another body corporate that is a partner in the partnership (see TPA s. 4A(5));

the body corporate will be taken to be related to the carrier or carriage service provider, as the case requires.

Proposed section 151AH – Degree of power in a telecommunications market

Proposed s. 151AH sets out certain circumstances in which the market power of related bodies corporate (see TPA s. 4A(5) and proposed s. 151AG) may be aggregated for the purposes of determining the market power of a carrier or a carriage service provider. Proposed ss. 151AH(1)–(5) are modelled on ss. 46(2)–(4) of the TPA.

Proposed s. 151AH does not limit the matters to which regard may be had in determining the degree of power that a person has in a telecommunications market for the purposes of Part XIB (proposed s. 151AH(6)). For example, contracts, arrangements or understandings between parties may be relevant in determining market power.

Proposed section 151AI – Interpretation of Part IV or VII not affected by this Part

Since many of the provisions in Part XIB are intended to add telecommunications specific concepts to the corresponding provisions in Part IV of the TPA, they are to be ignored when interpreting Part IV. They are also to be ignored when interpreting Part VII, dealing with authorisations and notifications in respect of restrictive trade practices (proposed s. 151AI). This will ensure, for example, that the criteria for making exemption orders in proposed s. 151BC are not taken into account by the ACCC when considering granting an authorisation under s. 88 of the TPA. The reverse is not the case. Many of the provisions in Part XIB are based on provisions in Part IV, and so the interpretation of words used in those provisions is relevant to the interpretation of Part XIB.

Division 2—Anti-competitive conduct

Proposed section 151AJ – Anti-competitive conduct

Proposed s. 151AJ sets out the two circumstances in which a carrier or a carriage service provider will be said to engage in anti-competitive conduct for the purposes of Part XIB (proposed s. 151AJ(1)).

The first circumstance is set out in proposed s. 151AJ(2) and is an effects-based test which does not require any examination of the purpose for which the conduct was engaged in. According to this test, a carrier or carriage service provider will be taken to engage in anti-competitive conduct for the purposes of Part XIB if the carrier or carriage service provider has a substantial degree of power in a telecommunications market and takes advantage of that power with the effect, or likely effect, of substantially lessening competition in that or any other telecommunications market.

An effects test has been included to address the danger that competition in the telecommunications industry will, or will be likely to, be damaged by aberrant behaviour that has a demonstrable, negative effect on competition regardless of the purpose motivating that behaviour. Proof of purpose is a subjective matter that requires a reason or motive for certain conduct to be established. Proof of purpose may not assist in distinguishing predatory conduct. Reliance on a ‘purpose test’ alone risks a focus on the perceived morality of conduct rather than its economic effect.

Provisions for aggregating market power are included in proposed s. 151AH to address collusive behaviour by groups of persons who do not have substantial market power individually but are able to exercise substantial market power when acting together.

The concept of taking advantage of substantial market power is not intended to involve anything more than the use of that power. The term is not intended to introduce any notion of hostile or predatory intent. The core question is whether the defendant would have been unlikely to act in the same way if it were operating in a competitive market subject to the constraining influence of market forces including the likely reactions of competitors with a comparable degree of market power: *Queensland Wire Industries Pty Limited v BHP* (1989) 167 CLR 177.

The second circumstance in which a carrier or a carriage service provider will be said to engage in anti-competitive conduct for the purposes of Part XIB is set out in

proposed s. 151AJ(3). Under this test, a carrier or carriage service provider will be taken to engage in anti-competitive conduct if the carrier or carriage service provider engages in conduct relating to a telecommunications market in contravention of:

- s. 45, dealing with contracts, arrangements or understandings that restrict dealings or affect competition – this will require an examination of purpose, effect or likely effect;
- s. 45B, dealing with covenants annexed to or running with an estate or interest in land that affect competition – this will require an examination of purpose, effect or likely effect;
- s. 46, dealing with misuse of market power – this will require an examination of purpose but not effect or likely effect;
- s. 47, dealing with exclusive dealing – this will require an examination of purpose, effect or likely effect; or
- s. 48, which imposes a ban on resale price maintenance regardless of its effect on competition – see also s. 96, which sets out acts constituting resale price maintenance.

It should be noted that as a result of s. 4(2) of the TPA, the concept of engaging in conduct will include doing or refusing to do any act, including the making of, or the giving effect to a provision of, a contract or arrangement or the arriving at, or the giving effect to a provision of, an understanding.

Because anti-competitive conduct as defined in proposed s. 151AJ is in wider terms than under Part IV, there are no legislative prohibitions on engaging in that conduct. Enforcement action will be able to be taken in the Federal Court in relation to a breach of a competition rule. This is discussed below in the commentary on Division 6 of Part XIB.

Without in any way limiting the kinds of conduct that may be anti-competitive under proposed s. 151AJ, examples of anti-competitive conduct within proposed s. 151AJ may include:

- predatory pricing ie making reductions, or threatened reductions, in price, often below cost, with the intention of deterring new entrants to a market (whether through uniform or differential prices);
- collusion to rig a market (ie entering into fictitious or artificial transactions or devices to maintain, inflate, depress or cause fluctuations in, the price for goods or services) or collusion to deny supplies to a competitor;
- price fixing, controlling or maintaining that would contravene s. 45 of the TPA;
- exclusive dealing that would contravene s. 47 of the TPA; and

- hoarding of inputs ie, the accumulation of scarce facilities or resources required by a competitor for the operation of a business, with the object of withholding the facilities or resources from a market.

Proposed s. 151AJ(4) modifies the operation of proposed s. 151AJ(3) for the purposes of its application to a carrier or a carriage service provider that is not a corporation. Proposed s. 151AJ(5) modifies the operation of proposed s. 151AJ(3) for the purposes of its application to a carrier or a carriage service provider that is not a corporation or a partnership.

Whether or not the exercise of an existing legal or equitable right can amount to taking advantage of market power is an issue which has not been finally settled. In *Warman International v Envirotech Australia Pty Ltd* (1986) 11 FCR 478 Wilcox J expressed the view that the exercise in good faith of an extraneous legal right takes advantage of that right rather than any market power, even if the effect is to lessen or even eliminate competition. The purpose of proposed s. 151AJ(6) is to overcome the uncertainty created by this decision without by implication affecting the interpretation of TPA Part IV. It provides that a person may be treated as having engaged in anti-competitive conduct (and by implication to have taken advantage of its market power for an anti-competitive purpose or effect) even if the conduct involves the exercise, or proposed exercise, of an existing legal or equitable right, whether under a contract or otherwise.

A carrier or carriage service provider will not be taken to engage in anti-competitive conduct if that conduct does not constitute a contravention of s. 45, 45B, 46, 47 or 48 because an authorisation granted by the ACCC is in force under Division 1 of Part VII of the TPA or has been granted by the ACT on a review of a determination of the ACCC or because of the operation of TPA s. 93, dealing with notifications of exclusive dealing (proposed s. 151AJ(7)).

The anti-competitive conduct tests in proposed s. 151AJ will not apply to conduct that occurred before 1 July 1997 (proposed s. 151AJ(8)).

Proposed section 151AK – The competition rule

Proposed s. 151AK sets out a rule for the purposes of Part XIB, known as the competition rule. This rule is that a carrier or carriage service provider must not engage in anti-competitive conduct (as defined by proposed s. 151AJ).

Enforcement of the competition rule is discussed below in the commentary on Division 6 of Part XIB.

Division 3—Competition notices and exemption orders

Subdivision A—Competition notices

Proposed section 151AL – Competition notices

The ACCC will be empowered to issue a written notice, known as a competition notice, stating that a specified carrier or carriage service provider has contravened, or is contravening, the competition rule and setting out particulars of that contravention.

It is expected that if particular conduct was in accordance with the terms and conditions of an access undertaking under Division 5 of Part XIC, the ACCC would not issue a competition notice with respect to that conduct. This reflects the substantial public consultation processes engaged in before acceptance of undertakings.

Proposed section 151AM – Competition notice to be given to carrier or carriage service provider

Proposed s. 151AM is intended to be a directory provision which requires the ACCC, as soon as possible after issuing a competition notice, to give a copy of a competition notice to the carrier or carriage service provider concerned.

Proposed section 151AN – Evidentiary effect of competition notice

A competition notice issued by the ACCC under proposed s. 151AL will be prima facie evidence of the matters in the notice in any proceedings under Part XIB and in proceedings arising out of Part XIB, such as applications for judicial review of an ACCC decision under the *Administrative Decisions (Judicial Review) Act 1977* (proposed s. 151AN(1)). It will be a matter for the carrier or carriage service provider to whom the notice relates to lead evidence to rebut this prima facie evidence.

A document purporting to be a competition notice will be taken, unless the contrary is established, to be a competition notice and to have been properly issued by the ACCC (proposed s. 151AN(2)).

To facilitate the provision of a copy of the competition notice to the Federal Court, a document certified by the ACCC to be a copy of a competition notice will be treated as if it were the original (proposed ss. 151AN(3) and (4)).

Proposed section 151AO – Duration of competition notice

The maximum life of a competition notice issued by the ACCC will be 12 months. It will come into force when it is issued or at such later time as the notice specifies (proposed s. 151AO(1)). As a result of s. 33(3) of the *Acts Interpretation Act 1901*, the ACCC will be able to revoke or vary a competition notice while it is in operation.

If a competition notice expires, the ACCC will be able to issue a new competition notice under proposed s. 151AL that relates to the same matter as the expired notice (proposed s. 151AL(2)).

Proposed section 151AP – Guidelines

To encourage greater certainty for the telecommunications industry, proposed s. 151AP requires the ACCC to take all reasonable steps to formulate written guidelines before 1 July 1997 to be considered by the ACCC in deciding whether to issue a

competition notice. In deciding whether to issue a competition notice, the ACCC will also be required to have regard to such other matters as the ACCC considers relevant

Proposed section 151AQ – Commission to act expeditiously

If the ACCC has reason to suspect that a carrier or carriage service provider has contravened, or is contravening, the competition rule in proposed s. 151AK, it will be required to act expeditiously in deciding whether to issue a competition notice in relation to that contravention. Failure to comply with this requirement will not, however, affect the validity of the competition notice.

Proposed section 151AR – Register of competition notices

The ACCC will be required to keep a Register of competition notices which will include particulars of all competition notices, including those that have expired (proposed ss. 151AR(1) and (2)).

The Register will be able to be maintained by electronic means (proposed s. 151AR(3)). On payment of the fee (if any) specified in the regulations, a person will be able to inspect the Register and make a copy of, or take extracts from, the Register (proposed s. 151AR(4)).

If the Register is maintained by electronic means, a person will be taken to have made a copy of, or to have taken an extract from, the Register if the ACCC gives the person a printout of, or of the relevant parts of, the Register (proposed s. 151AR(5)).

If a person requests that a copy of the Register be provided in an electronic form, the ACCC will be able to provide the relevant information on a data processing device such as a floppy disk or by way of an electronic transmission (proposed s. 151AR(6)).

Subdivision B—Exemption orders

To further increase certainty, a carrier or carriage service provider proposing to engage in a course of conduct will be able to seek an order from the ACCC under proposed s. 151AS to exempt the conduct from the scope of the definitions of anti-competitive conduct in proposed s. 151AJ.

In order to allow proposed s. 151AJ(7) to operate effectively, the ACCC will be able to put an application for an exemption order on hold while it considers an authorisation application or a notification of exclusive dealing in relation to the same conduct (proposed ss. 151AX and 151AY).

The ACCC will be able to make an exemption order in relation to particular conduct if it is satisfied that the conduct will result in a net benefit to the public or that the conduct is not anti-competitive conduct (proposed s. 151BC(1)). As the order exempts specified conduct from the scope of proposed s. 151AJ, the ACCC will not be able to issue a competition notice in relation to that conduct. Rights of action under Parts IV and VI will not, however, be affected.

In considering what public benefits might result from an exemption order, the ACCC may have regard to matters such as the need to satisfy any applicable universal service obligation. An indicative list of the kinds of matters the ACCC may have regard to is at proposed s. 151BC(2). This list does not limit the matters to which the ACCC may have regard.

Proposed section 151AS – Exemption orders

A person may apply to the ACCC for the grant under proposed s. 151BA of an exemption order. Such an order, if given, exempts specified conduct (including proposed conduct) of the person from the scope of the definition of anti-competitive conduct in proposed s. 151AJ (proposed ss. 151AS(1) and 151BJ). Subsection (2) prevents an exemption order being invalidated because it deals with conduct which is outside the scope of proposed s. 151AJ.

Proposed section 151AT – Form of application

An application for an exemption order will be required to be in writing and in a form (whether standard or otherwise) approved in writing by the ACCC. It will also be required to be accompanied by the fee prescribed by the Regulations (proposed s. 151AT).

Proposed section 151AU – Further information

The ACCC will be able to request an applicant for an exemption order to give the ACCC further information about the application (proposed s. 151AU(1)). The ACCC need not proceed with consideration of the application until that information is provided (proposed s. 151AU(2)). It will be an offence intentionally or recklessly to supply false or materially misleading information (including the intentional or reckless omission of any matter or thing without which the information is materially misleading) in connection with an application for an exemption order, including in purported compliance with a request under proposed s. 151AU (proposed s. 151BI).

Proposed section 151AV – Withdrawal of application

An applicant for an exemption order will be able to withdraw the application at any time (proposed s. 151AV).

Proposed section 151AW – Commission must publicise receipt of applications

The ACCC will be required to publicise the receipt of any applications for an exemption order in such manner as it thinks fit (proposed s. 151AW).

Proposed section 151AX – Commission may refuse to consider application if it relates to the same conduct as an authorisation application

In order to allow proposed s. 151AJ(7) to operate effectively, the ACCC will be able to put an application for an exemption order on hold while it considers an authorisation application in relation to the same conduct (proposed s. 151AX).

In particular, the ACCC will be able to refuse to:

- (a) consider the application for the exemption order; or
 - (b) convene a conference to discuss the application for the exemption order;
- until:
- (c) the ACCC has made a determination in relation to the application for the authorisation; or
 - (d) if the ACCC makes such a determination – the end of the time allowed for a person to apply to the ACT for a review of the determination; or
 - (e) if a person applies to the ACT for a review of the determination – the review (including any court appeals arising out of the ACT’s review) is finalised.

Proposed section 151AY – Commission may refuse to consider application if it relates to the same conduct as a section 93 notification

In order to allow proposed s. 151AJ(7) to operate effectively, the ACCC will be able to put an application for an exemption order on hold while it considers a notification of exclusive dealing under s. 93 of the TPA in relation to the same conduct (proposed s. 151AY).

In particular, the ACCC will be able to refuse to:

- (a) consider the application for the exemption order; or
- (b) convene a conference to discuss the application for the exemption order;

until:

- (c) the ACCC decides whether or not to give a notice under 93(3) or (3A) of the TPA to the effect that conduct of a kind described in s. 47, prohibiting exclusive dealing, would or would be likely to substantially lessen competition and that the relevant conduct or proposed conduct has not resulted, or would not be likely to result, in a benefit to the public or any public benefit would not outweigh the detriment to the public constituted by any lessening of competition that has resulted or is likely to result from the conduct or proposed conduct;
- (d) if the ACCC gives such a notice – the end of the time allowed for a person to apply to the ACT for a review of the ACCC’s decision to give the notice; or
- (e) if a person applies to the ACT for a review of the ACCC’s decision to give the notice – the review (including any court appeals arising out of the ACT’s review) is finalised.

Proposed section 151AZ – Commission may convene conference to discuss application

The ACCC may, but need not, convene a conference to discuss an application for an exemption order (proposed s. 151AZ(1)). If the ACCC does decide to convene a conference, it will be required to give the applicant, or the applicant’s representative, and any other persons whom the ACCC considers interested, a reasonable opportunity to attend and take part in the conference (proposed s. 151AZ(2)). A conference under proposed s. 151AZ will be able to be combined with a conference under s. 90A of the TPA in connection with an application for authorisation or with a conference under s. 93A of the TPA in connection with a notification of exclusive dealing if the combined conference relates to the same conduct (proposed s. 151AZ(3)).

Proposed section 151BA – Commission must grant or reject application

If the ACCC receives an application for an exemption order, it will be required either to make the order or to refuse to make the order (proposed s. 151BA). If the ACCC

refuses to make an exemption order in relation to the conduct of a person, that person will be able to apply to the ACT for a review of the ACCC's decision (proposed s. 151CI(1)).

Proposed section 151BB – Commission to give opportunity for submissions

Before making an exemption order, the ACCC will be required to give the applicant and any other person whom the ACCC considers interested a reasonable opportunity to make submissions to the ACCC about the order (proposed s. 151BB).

Proposed section 151BC – Criteria for making exemption order

The ACCC will not be able to make an exemption order in relation to particular conduct or particular proposed conduct of a person unless it is satisfied that:

- (a) both:
 - (i) the conduct will result, or will be likely to result, in a benefit to the public; and
 - (ii) that benefit outweighs, or will outweigh, the detriment to the public constituted by any lessening of competition that will result, or will be likely to result, from engaging in the conduct (this is a net benefit test based on s. 90(6) of the TPA); or
- (b) the conduct or the proposed conduct is not anti-competitive conduct, as defined by proposed s. 151AJ (proposed ss. 151BC(1) and 158BJ).

In determining whether the ACCC is satisfied about the net benefit to the public referred to in proposed s. 151BC(1)(a), it may have regard to the following matters:

- (a) the extent to which the conduct relates to the supply of goods or services on favourable terms and conditions:
 - (i) to any individual who is disadvantaged on financial or health grounds;
 - (ii) to a non-profit community organisation, a non-profit charitable organisation, an educational institution or a health facility;
 - (iii) for community, charitable or educational purposes, or for the promotion of health or safety

(cf. Telecommunications (Service Providers Class Licence) Direction No. 1 of 1995, Schedule 1, proposed s. 3(3));
- (b) the need to satisfy any applicable universal service obligation, such as the obligations set out in cl. 144 of the Telecommunications Bill 1996 to ensure that standard telephone services, payphones and prescribed carriage services are reasonably accessible to all people in Australia on an equitable basis, wherever they reside or carry on business;

- (c) the extent to which the conduct prevents or reduces, or is likely to prevent or reduce, pollution or other forms of degradation of environmental amenity – the reference to ‘environment’ will include all aspects of the surroundings of human beings, whether affecting human beings as individuals or in social groupings (based on the definition of ‘environment’ in s. 3 of the *Environment Protection (Impact of Proposals) Act 1974*);
- (d) the extent to which the conduct contributes, or is likely to contribute, to technical innovation, or the development of new goods or services, by Australian industry

(proposed ss. 151BC(2) and (6)).

In considering the net public benefit test in proposed s. 151BC(1)(a), the ACCC is not, however, limited to the matters set out in proposed s. 151BC(2) (proposed s. 151BC(3)).

The ACCC will not be able to make an exemption order in connection with conduct that would be within s. 46 of the TPA and not be able to be authorised under Part VII of the TPA. In this regard, it should be noted that s. 46(6) allows conduct to be engaged in which might otherwise contravene s. 46 where there is an authorisation in force or s. 93 operates (proposed s. 151BC(4)).

For the purposes of proposed s. 151BC(4), proposed ss. 151AJ(4) and (5) will apply in a corresponding way to the way in which they apply for the purposes of proposed s. 151AJ(3). (Proposed s. 151AJ(3) provides, among other things, that a carrier or carriage service provider will be taken to engage in anti-competitive conduct if the carrier or carriage service provider engages in conduct relating to a telecommunications market in contravention of s. 46 of the TPA. Proposed s. 151AJ(4) modifies the operation of proposed s. 151AJ(3) for the purposes of its application to a carrier or a carriage service provider that is not a corporation. Proposed s. 151AJ(5) modifies the operation of proposed s. 151AJ(3) for the purposes of its application to a carrier or a carriage service provider that is not a corporation or a partnership.)

Proposed section 151BD – Notification of decision

If the ACCC makes an exemption order, it will be required to give the applicant for the order a written notice setting out the order and the reasons for it (proposed s. 151BD(1)). If the ACCC refuses to make an exemption order, it will be required to give the applicant a written notice stating that the order has been refused and setting out the reasons for the refusal (proposed s. 151BD(2)).

If the ACCC refuses to make an exemption order relating to conduct of a person, the person will be able to apply to the ACT for a review of the ACCC’s decision (proposed s. 151CI(1)).

Proposed section 151BE – Duration of exemption order may be limited

The ACCC may specify a period for which an exemption order is in effect. Otherwise, the order is of indefinite duration (proposed s. 151BE – cf. s. 91(1) of the TPA).

Proposed section 151BF – Conditions of exemption order

An exemption order will be able to be expressed to be subject to such conditions as are specified in the order (proposed s. 151BF – cf. s. 91(3) of the TPA).

Proposed section 151BG – Revocation of exemption order

The ACCC will be able to revoke an exemption order only if it is satisfied that:

- (a) the order was made on the basis of false or materially misleading information; or
- (b) a condition to which the order is subject has been contravened; or
- (c) there has been a material change of circumstances since the order was made

(proposed s. 151BG(1), cf. s. 91(4) of the TPA).

For the purposes of proposed s. 151BG(1), the ACCC will have to be satisfied on reasonable grounds: see *Green v Daniels* (1977) 51 ALJR 463 at 467–468 per Stephen J.

An exemption order will not be able to be revoked merely because the ACCC has changed its mind.

The ACCC will not be able to revoke an exemption order unless it has first published a draft notice of revocation, has invited public submissions on it and has considered any submissions that were received (proposed s. 151BG(2)).

The ACCC will be able to make a further exemption order under proposed s. 151BA in substitution for the revoked order (proposed s. 151BG(3)).

If the ACCC revokes an exemption order relating to a person, the ACCC will be required to give the person a written notice stating that the order has been revoked and setting out the reasons for the revocation (proposed s. 151BG(4)).

A revocation of an exemption order will take effect at the time when the notice of the revocation is given or at such later time as is specified in the notice (proposed s. 151BG(5)).

If the ACCC makes a decision under proposed s. 151BG to revoke an exemption order, the person will be able to apply to the ACT for a review of that decision (proposed s. 151CI(2)).

Proposed section 151BH – Register of exemption orders

The ACCC will be required to keep a Register in relation to exemption orders (proposed s. 151BH(1)).

Subject to proposed s. 151BH(3), the Register will be required to include the following:

- (a) particulars of all exemption orders (including orders that have expired) – this will include particulars of an exemption order substituted for one previously in force as well as the particulars of any conditions attached to an exemption order;
- (b) applications for exemption orders received by the ACCC (including applications that have been withdrawn);
- (c) particulars of ACCC decisions refusing to make exemption orders;
- (d) particulars of ACCC decisions revoking, or refusing to revoke, exemption orders; and
- (e) particulars of the ACCC's reasons for making exemption orders (proposed s. 151BH(2)).

The Register will not be required to set out information covered by proposed s. 151BH(2) if the disclosure of these matters could reasonably be expected to prejudice substantially the commercial interests of the person, or any of the persons, to whom the matters relate (proposed s. 151BH(3)).

The Register will be able to be maintained by electronic means (proposed s. 151BH(4)). On payment of the fee (if any) specified in the regulations, a person will be able to inspect the Register and make a copy of, or take extracts from, the Register (proposed s. 151BH(5)).

If the Register is maintained by electronic means, a person will be taken to have made a copy of, or to have taken an extract from, the Register if the ACCC gives the person a printout of, or of the relevant parts of the Register (proposed s. 151BH(6)).

If a person requests that a copy of the Register be provided in an electronic form, the ACCC will be able to provide the relevant information on a data processing device such as a floppy disk or by way of an electronic transmission (proposed s. 151BH(7)).

Proposed section 151BI – False or misleading information supplied in connection with application for an exemption order

Under proposed s. 151AS, a person may apply to the ACCC for an order exempting specified conduct of the person from the scope of proposed s. 151AJ (which deals with anti-competitive conduct). Under proposed s. 151AU, the ACCC will be able to request an applicant for an exemption order to give the ACCC further information about the application.

As a result of proposed s. 151BI, a person who, in the person's application for an exemption order or in purported compliance with a request under proposed s. 151AU or otherwise in connection with an application for an exemption order, intentionally or recklessly gives the ACCC false or materially misleading information, or who omits any matter or thing without which the information is materially misleading, will be guilty of an offence punishable on conviction by imprisonment for a term of up to 6 months or by a pecuniary penalty of up to 30 penalty units, or both or, in the case of a body corporate, by a pecuniary penalty of up to 150 penalty units (proposed s. 151BI and ss. 4B(2) and (3) of the *Crimes Act 1914*).

Subdivision C—Miscellaneous

Proposed section 151BJ – *Conduct* includes proposed conduct

A reference in Division 3 to conduct will include a reference to proposed conduct (see, for example, proposed s. 151AS). This will not limit the meaning of 'conduct', including that meaning as affected by s. 4(2) of the TPA.

Division 4—Tariff filing

The ACCC will have extensive information-gathering powers equivalent to those currently possessed by AUSTEL in relation to competition regulation. In particular, the ACCC will be able to require the provision of information that is relevant to the performance of its functions or the exercise of its powers under proposed Part XIB or under proposed Part XIC, which provides for the telecommunications access regime (s. 155 of the TPA as proposed to be amended by items 7 to 9 of Schedule 1 to the Bill).

The ACCC will be able to direct carriers and carriage service providers to file tariff information with the ACCC if satisfied that they have a substantial degree of power in a telecommunications market (proposed s. 151BK). This mechanism will allow the ACCC to examine carrier and carriage service provider conduct in telecommunications markets, including where the ACCC has concerns about potential anti-competitive conduct but an insufficient basis on which to issue a competition notice under proposed s. 151AL.

Tariff information will only be made publicly available if the ACCC is satisfied that this would result in a net public benefit (proposed s. 151BQ). In such a case, exposure of the information to public scrutiny, especially by other members of the telecommunications industry, will provide an opportunity for other parties with knowledge of industry cost structures and pricing practices to object to particular conduct on the grounds that it is anti-competitive and offer reasons to the ACCC as to why a competition notice should be issued.

Providing false tariff information will be an offence (proposed s. 151BS).

In addition, the ACCC will be empowered to make record-keeping rules under Division 5 of Part XIB with which specified carriers and carriage service providers will be required to comply. The information contained in these records will assist the ACCC in the exercise of its powers to give competition notices, to arbitrate access

disputes, to administer the operation of Rules of Conduct about dealings with international telecommunications operators and to regulate Telstra's charges under Part 6 of the *Telstra Corporation Act 1991*, as proposed to be amended.

Proposed section 151BK – Tariff filing directions

The tariff filing directions provisions in proposed s. 151BK will apply to a person who is a carrier or carriage service provider if the ACCC is satisfied that the person has a substantial degree of power in a telecommunications market as defined in proposed s. 151AF – the ACCC will have to be satisfied of this fact on reasonable grounds: see *Green v Daniels* (1977) 51 ALJR 463 at 467–468 per Stephen J (proposed s. 151BK(1)).

If the requirements of proposed s. 151BK(1) are satisfied, the ACCC will be able to give a carrier or carriage service provider a tariff filing direction requiring information about charges for specified carriage services or classes of carriage services and ancillary goods and services or classes of such goods or services (ie goods or services for use in connection with a carriage service) (proposed ss. 151BK(2) and (11) of the TPA and s. 46(2) of the *Acts Interpretation Act 1901*).

Any tariff filing direction which the ACCC gives before 1 July 1997 will not come into force until that date (proposed s. 151BK(10)).

A tariff filing direction may contain one or more of the following requirements:

- (a) a requirement that if, at the time the direction is given, the carrier or carriage service provider has charges for goods or services within the scope of the direction, the carrier or provider must give the ACCC, within a specified period and in a specified form, a written statement setting out such information about those charges as is specified in the direction (proposed s. 151BK(3));
- (b) a requirement that the carrier or carriage service provider must, at least 7 days (or such shorter period as the ACCC agrees) before:
 - (i) imposing a new charge for goods or services within the scope of the direction at any time when the direction is in force; or
 - (ii) varying a charge for such goods or services; or
 - (iii) ceasing to impose a charge for such goods or services;
 give the ACCC, in a specified form, a written statement setting out specified information about the carrier's or provider's intentions (proposed ss. 151BK(4) and (6));
- (c) a requirement that in the event that the carrier or carriage service provider:
 - (i) imposes a new charge for goods or services within the scope of the direction at any time when the direction is in force; or

- (ii) varies a charge for such goods or services; or
- (iii) ceases to impose a charge for such goods or services;

the carrier or provider must give the ACCC a written statement setting out specified information within a specified period after the imposition, variation or cessation, as the case may be (proposed s. 151BK(5)).

The ACCC's ability to make a tariff filing direction under proposed s. 151BK will be supplementary to the ACCC's information-gathering powers under s. 155 of the TPA and is not in any way to be regarded as limiting the ACCC's ability to gather information under s. 155. It will also not limit the ACCC's ability to accept undertakings under s. 87B of the TPA (proposed s. 151BK(7)).

Two or more tariff filing directions will be able to be given to the same carrier or carriage service provider at the same time (proposed s. 151BK(8)).

A tariff filing direction will be able to request information not only about charges for goods or services but also about the terms and conditions of their supply or proposed supply (proposed s. 151BK(9) and see the inclusive definition of 'terms and conditions' at proposed s. 151BT).

Division 6 sets out various remedies available to the ACCC when there is a contravention of a tariff filing direction.

Proposed section 151BL – Specification of goods and services

Goods or services will be able to be specified in a tariff filing direction by reference to any or all of the following:

- (a) the nature of the goods or services eg, domestic long-distance telephony services;
- (b) the customers or class of customers to whom the goods or services are, or are proposed to be, supplied eg, specified large users;
- (c) the kinds of terms and conditions on which the goods or services are, or are proposed to be, supplied eg, any goods and services bundled with local call services (proposed s. 151BL(1) and see the inclusive definition of 'terms and conditions' at proposed s. 151BT).

The ACCC will also be able to use other ways to specify the goods or services about which it requires tariff information to be filed (proposed s. 151BL(2)).

Proposed section 151BM – Notification of reasons

If the ACCC gives a tariff filing direction to a carrier or carriage service provider, it will be required to give the carrier or provider a written notice setting out the reasons for the direction (proposed s. 151BM).

Proposed section 151BN – Duration of direction may be limited

A tariff filing direction may specify a period for which the direction is to be in force (proposed s. 151BN). If no time limits are set, the direction will be of indefinite duration (subject, of course, to any amendment or repeal of Part XIB as a result of a review of the Part under proposed s. 151CN). A time specified in accordance with the direction will be able to be the time a specified event occurs or the time when a specified condition is satisfied.

Proposed section 151BO – Revocation of direction

The ACCC will be able to revoke a tariff filing direction at any time (proposed s. 151BO(1)). If the ACCC revokes a tariff filing direction, it will be required to notify the carrier or carriage service provider to whom the direction relates that the direction has been revoked (proposed s. 151BO(2)).

A revocation of a tariff filing direction will take effect at the time when the notice of revocation is given or at such later time as is specified in the notice of revocation (proposed s. 151BO(3)).

Proposed section 151BP – Variation of direction

The ACCC will be able to vary a tariff filing direction at any time (proposed s. 151BP(1)). If the ACCC varies a tariff filing direction, it will be required to notify the carrier or carriage service provider to whom the direction relates about the terms of the variation and the reasons for the variation (proposed s. 151BP(2)).

A variation of a tariff filing direction will take effect at the time when the notice of variation is given or at such later time as is specified in the notice of revocation (proposed s. 151BP(3)).

Proposed section 151BQ – Public access to tariff information

Before the ACCC can make a particular item of information given to it in accordance with a tariff filing direction available for inspection and purchase by the public, it will be required to be satisfied of the following net public benefit test:

- (a) the disclosure of the information would result, or be likely to result, in a benefit to the public; and
- (b) that benefit would outweigh both:
 - (i) the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if the information were disclosed (cf. s. 90(6) of the TPA); and

- (ii) any substantial prejudice to the commercial interests of a person that would result, or be likely to result, if the information were disclosed.

The ACCC will have to be satisfied of the above elements on reasonable grounds: see *Green v Daniels* (1977) 51 ALJR 463 at 467–468 per Stephen J. If the ACCC is so satisfied, it will be required to notify the relevant carrier or carriage service provider that it intends to make copies of the information, together with copies of the tariff filing direction to which it relates, available for inspection and purchase by the public (proposed s. 151BQ(2)). This will give an affected carrier or carriage service provider an opportunity to apply to the ACT under proposed s. 151CI(3) for a review of the ACCC's decision to make the information public.

If the ACCC notifies the relevant carrier or carriage service provider under proposed s. 151BQ(2), it will be required to make copies of the tariff information, together with copies of the tariff filing direction to which it relates, available for inspection and purchase by the public:

- (a) as soon as practicable after the end of the 7-day period that began when the ACCC gave the proposed s.151BQ(2) notice to the carrier or carriage service provider; or
- (b) if the ACCC decides that the information and tariff filing direction should not be made available during a further period of up to 14 days, after the end of that further period – this will allow the ACCC, for example, to delay the release of information about a carrier's or carriage service provider's future intentions for up to 21 days if it decides that the release may have a chilling effect on competition, with the possibility of competitors engaging in attempts to match the carrier's or provider's proposed charges without having to make public their intentions.

Proposed section 151BR – Register of tariff filing directions

The ACCC will be required to keep a Register in relation to tariff filing directions (proposed s. 151BR(1)).

The Register will be required to include particulars of all tariff filing directions (including directions that have expired) as well as particulars of all revocations and variations of such directions (proposed s. 151BR(2)).

The Register will be able to be maintained by electronic means (proposed s. 151BR(3)). On payment of the fee (if any) specified in the regulations, a person will be able to inspect the Register and make a copy of, or take extracts from, the Register (proposed s. 151BR(4)).

If the Register is maintained by electronic means, a person will be taken to have made a copy of, or to have taken an extract from, the Register if the ACCC gives the person a printout of, or of the relevant parts of, the Register (proposed s. 151BR(5)).

If a person requests that a copy of the Register be provided in an electronic form, the ACCC will be able to provide the relevant information on a data processing device such as a floppy disk or by way of an electronic transmission (proposed s. 151BR(6)).

Proposed section 151BS – False or misleading tariff information

It will be an offence for a carrier or carriage service provider intentionally or recklessly to give the ACCC false or materially misleading tariff information (including information that is materially misleading because of the intentional or reckless omission of any matter or thing) in purported compliance with a tariff filing direction. In the case of an individual, the offence will be punishable on conviction by imprisonment for up to 6 months, or by a pecuniary penalty of up to 30 penalty units, or both. In the case of a body corporate, the offence will be punishable on conviction by a pecuniary penalty of up to 150 penalty units (proposed s. 151BS and ss. 4B(2) and (3) of the *Crimes Act 1914*).

Proposed section 151BT – Meaning of *terms and conditions*

Proposed section 151BT sets out certain things that are included in the definition of ‘terms and conditions’ for the purposes of Division 4 (see eg, proposed ss. 151BK and 151BL). This definition is based on the definitions of ‘terms and conditions’ in ss. 5, 185(4) and 200(2) of the *Telecommunications Act 1991* but also includes any commissions or similar benefits payable or given in relation to the supply of the goods or services.

Division 5—Record-keeping rules

Proposed section 151BU – Commission may make record-keeping rules

The ACCC will be empowered to make record-keeping rules under Division 5 of Part XIB with which specified carriers and carriage service providers, or classes of carriers and carriage service providers, will be required to comply. These rules will require one or more specified carriers or carriage service providers to keep and retain records (proposed s. 151BU(1)).

The record-keeping rules may specify the manner and form in which the records are to be kept (proposed s. 151BU(2)). If the rules apply to a particular carrier or carriage service provider, the ACCC will be required to give the carrier or provider a copy of the rules (proposed s. 151BU(3)).

The ACCC will not be able to impose the record-keeping requirements under proposed s. 151BU on a carrier or carriage service provider unless the records contain, or will contain, information that will be relevant to:

- the ACCC ascertaining whether the competition rule has been, or is being complied with;
- the ACCC ascertaining whether tariff filing directions have been, or are being, complied with;
- the performance or exercise of the ACCC's functions and powers to give competition notices, to arbitrate access disputes, to administer the operation of Rules of Conduct about dealings with international telecommunications operators and to regulate Telstra's charges under Part 6 of the *Telstra Corporation Act 1991* (proposed s. 151BU(4)).

The enforcement of the record-keeping rules in dealt with by Division 6 of Part XIB, discussed below.

The ACCC will be able to use its information-gathering powers under s. 155 of the TPA to require a carrier or carriage service provider to produce a record kept in accordance with the record-keeping rules.

A carrier that is bound by a chart of accounts or cost allocation manual provided for under Division 5 of Part 5 of the *Telecommunications Act 1991* will continue to be bound by them until the ACCC makes record-keeping rules under proposed s. 151BU (see proposed s. 58 of the Telecommunications (Transitional Provisions and Consequential Amendments) Bill 1996).

Proposed section 151BV – Incorrect records

A carrier or carriage service provider who intentionally or recklessly keeps incorrect records in purported compliance with a requirement of the record-keeping rules will be guilty of an offence punishable on conviction, in the case of an individual, by imprisonment for a term of up to 6 months or by a pecuniary penalty of up to 30 penalty units, or both or, in the case of a body corporate, by a pecuniary penalty of up to 150 penalty units (proposed s. 151BV and s. 4B(2) of the *Crimes Act 1914*).

Division 6—Enforcement of the competition rule, tariff filing directions and record-keeping rules

Division 6 of Part XIB deals with the enforcement in the Federal Court of the competition rule, tariff filing directions and record-keeping rules. Existing s. 87B of the TPA, dealing with the acceptance and enforcement of undertakings, will also apply for the purposes of Part XIB.

The ACCC will be able to bring proceedings before the Federal Court at any time for an injunction to stop anti-competitive conduct. The ACCC will be able to bring proceedings before the Federal Court for a pecuniary penalty in relation to conduct of a kind dealt with in a competition notice that was in force at the time the conduct occurred. Substantial penalties will apply with a maximum for each contravention of \$10 million plus \$1 million for each day that the contravention continued.

Proposed section 151BW – Person involved in a contravention of the competition rule, a tariff filing direction or a record-keeping rule

Proposed section 151BW sets out the circumstances in which a person will be taken to be involved in a contravention of the competition rule, a tariff filing direction or a record-keeping rule. Proposed s. 151BW is relevant to proposed ss. 151BX, 151CB, 151CC, 151CD and 151CE.

Proposed section 151BX – Pecuniary penalties for breach of the competition rule, a tariff filing direction or a record-keeping rule

The ACCC will be able to bring proceedings before the Federal Court for the recovery on behalf of the Commonwealth of a pecuniary penalty in connection with a breach of the competition rule, a tariff filing direction or a record-keeping rule (proposed s. 151BY).

If the Federal Court is satisfied that a person:

- (a) has contravened or attempted to contravene the competition rule in proposed s. 151AK, a tariff filing direction or a record-keeping rule; or
- (b) has been involved in a contravention of the competition rule, a tariff filing direction or a record-keeping rule (see proposed s. 151BW);

the Court will be able to order the person to pay to the Commonwealth such pecuniary penalty, in respect of each contravention, as the Court determines to be appropriate (proposed s. 151BX(1)).

In determining a pecuniary penalty, the Federal Court will be required to have regard to all relevant matters including the nature and extent of the contravention and of any loss or damage suffered as a result of the contravention, the circumstances in which the contravention took place and whether the person has previously been found by the Court in proceedings under the TPA to have engaged in any similar conduct (proposed s. 151BX(2)).

The maximum pecuniary penalty payable by a body corporate for contravening the competition rule will be, for each contravention, the sum of \$10 million and \$1 million for each day that the contravention continued. The maximum penalty payable by an individual, partnership or other non-body corporate for contravening the competition rule will be \$500,000 for each contravention (proposed ss. 151BX(3)(a) and 151BX(4)(b)). This penalty will apply only in relation to conduct occurring on or after the date of the relevant competition notice and not from the date that the competition rule is contravened (see proposed s. 151BY(3)).

The maximum pecuniary penalty payable by a body corporate for contravening a tariff filing direction will be \$10 million for each contravention. The maximum penalty payable by an individual, partnership or other non-body corporate for contravening a tariff filing direction will be \$500,000 for each contravention (proposed ss. 151BX(3)(b) and 151BX(4)(b)).

The maximum pecuniary penalty payable by a body corporate for contravening a record-keeping rule will be \$250,000 for each contravention. The maximum penalty payable by an individual, partnership or other non-body corporate for contravening a record-keeping rule will be \$50,000 for each contravention (proposed ss. 151BX(3)(c) and 151BX(4)(a)).

If conduct constitutes a contravention of 2 or more tariff filing directions or 2 or more record-keeping rules, proceedings will be able to be instituted under the TPA against a person in relation to the contravention of any one or more of the tariff filing directions or record-keeping rules. A person will not, however, be liable to more than one pecuniary penalty under proposed s. 151BX in respect of the same conduct (proposed s. 151BX(5)).

If a person's conduct gives rise to a liability to pay a pecuniary penalty under Part XIB and Part VI of the TPA, proceedings relating to the conduct will be able to be instituted against the person under Part XIB or under Part VI. The person will not, however, be liable to more than one pecuniary penalty in respect of the same conduct (proposed s. 151BX(6)).

Proposed section 151BY – Civil action for recovery of pecuniary penalties

The ACCC will be able to bring proceedings before the Federal Court for the recovery on behalf of the Commonwealth of a pecuniary penalty within 6 years after a contravention of the competition rule, a tariff filing direction or a record-keeping rule (proposed ss. 151BY(1) and (2)).

The ACCC will not, however, be able to bring proceedings against a person who has contravened, attempted to contravene, or been involved in the contravention, of the competition rule unless the alleged conduct is of a kind dealt with in a competition notice that was in force at the time when the alleged conduct occurred or is related to conduct of a kind dealt with in such a competition notice (proposed s. 151BY(3)).

Proposed section 151BZ – Criminal proceedings not to be brought for contraventions of the competition rule, tariff filing directions or record-keeping rules

Criminal proceedings will not lie against a person for the sole reason that the person has contravened, attempted to contravene, or has been involved in a contravention, of the competition rule, a tariff filing direction or a record-keeping rule (proposed s. 151BZ(1)).

Criminal proceedings will still, however, be able to be brought under proposed s. 151BS in connection with giving false or materially misleading tariff information to the ACCC (proposed s. 151BZ(2)).

Proposed section 151CA – Injunctions

The ACCC will be able to apply to the Federal Court at any time for an injunction to restrain or otherwise deal with contraventions, attempted contraventions or

involvement in contraventions of the competition rule, a tariff filing direction or a record-keeping rule and the Court will be able to grant an injunction in such terms as the Court determines to be appropriate. Other persons will be able to apply to the Federal Court for an injunction in connection with these matters in relation to the competition rule only with respect to alleged conduct of a kind dealt with in a competition notice in force when the alleged conduct occurred or with respect to alleged conduct that is related to conduct of a kind dealt with in such a competition notice (proposed ss. 151CA(1) and (8)).

If an application for an injunction under proposed s. 151CA(1) has been made and the Court determines it appropriate to do so, it will be able to grant an injunction by consent of all the parties to the proceedings, whether or not the Court is satisfied that a person has engaged, or is proposing to engage, in contraventions, attempted contraventions or involvement in contraventions of the competition rule, a tariff filing direction or a record-keeping rule (proposed s. 151CA(2)).

The Federal Court will be able to grant an interim injunction pending determination of an application for an injunction under proposed s. 151CA(1) (proposed s. 151CA(3)). If the ACCC applies to the Federal Court for the grant of an injunction under proposed s. 151CA, the Court will not be able to require the ACCC or any other person, as a condition of granting an interim injunction, to give any undertakings as to damages (proposed s. 151CA(7)).

The Federal Court will be able to rescind or vary an injunction or an interim injunction granted under proposed s. 151CA(1) or (3) (proposed s. 151CA(4)).

The power of the Federal Court to grant an injunction restraining a person from engaging in conduct or requiring a person to do an act or thing will be able to be exercised whether or not:

- it appears to the Court that the person intends:
 - to engage again, or continue to engage, in conduct of that kind; or
 - to refuse or fail again, or to continue to refuse or fail, to do that act or thing;
- the person has previously engaged in conduct of that kind or has previously refused or failed to do that act or thing; and
- there is an imminent danger of substantial damage to any person if the first-mentioned person engages in conduct of that kind or refuses or fails to do that act or thing (proposed ss. 151CA(5) and (6)).

Proposed section 151CB – Orders to disclose information or publish an advertisement – breach of the competition rule

If, on the application of the ACCC, the Federal Court is satisfied that a carrier or carriage service provider has engaged in conduct constituting a contravention of the competition rule, being conduct of a kind dealt with in a competition notice that was

in force at the time the conduct occurred, it will be able to make orders requiring the disclosure of information, and/or the publication of advertisements (proposed ss. 151CB(1) and (3) – cf. s. 80A of the TPA).

The Federal Court’s ability, when granting an injunction under proposed s. 151CA, to require a person to do something, will not be affected (proposed s. 151CB(2)).

Proposed section 151CC – Actions for damages—breach of the competition rule

A person who suffers loss or damage as a result of conduct in contravention of the competition rule, being conduct of a kind dealt with in a competition notice that was in force at the time the conduct occurred, will be able to recover the amount of the loss or damage by taking action against the person who engaged in the conduct or any person involved in the contravention (proposed ss. 151CC(1) and (3)).

An action for damages under proposed s. 151CC will be able to be commenced at any time within 3 years after the date on which the cause of action accrued (proposed s. 151CC(2)).

Proposed section 151CD – Finding of fact in proceedings to be evidence

Findings of fact made by the Federal Court (or by another court by reason of the operation of the *Jurisdiction of Courts (Cross-Vesting) Act 1987*) in proceedings for:

- recovery of pecuniary penalties under proposed s. 151BY;
- an injunction under proposed s. 151CA; or
- public disclosure orders under proposed s. 151CB;

in which a person has been found to have contravened, or to have been involved in the contravention of, the competition rule or a tariff filing direction will be prima facie evidence of that fact and will be able to be proved by production of a document under the seal of the court from which the finding appears in:

- an action for damages against the person under proposed s. 151CC; or
- an application under proposed s. 151CE(1) for an order against the person to pay compensation or to prevent or reduce any loss or damage resulting from a breach of the competition rule

(proposed s. 151CD).

Proposed section 151CE – Other orders—compensation for breach of the competition rule

If, in a proceeding instituted under proposed Division 6 of Part XIB, the Federal Court finds that a party to the proceedings has suffered, or is likely to suffer, loss or damage by conduct of another person that was engaged in in contravention of the competition rule, the Court will be able to make such orders as it thinks appropriate against:

- the person who engaged in the conduct; or
- a person who was involved in the contravention (see proposed s. 151BW);

if the Court considers that the orders concerned will compensate the party, in whole or in part, for the loss or damage or prevent or reduce the loss or damage (proposed s. 151CE(1)).

An application under proposed s. 151CE(1) will not be able to be made in relation to a contravention of the competition rule in proposed s. 151AK unless the alleged conduct is of a kind dealt with in a competition notice that was in force at the time when the alleged conduct occurred (proposed s. 151CE(5)).

The Federal Court will be able to make an order under proposed s. 151CE(1) whether or not it grants an injunction, or makes an order relating to the recovery of pecuniary penalties, the disclosure of information or damages (proposed s. 151CE(2)).

The Federal Court's ability, when granting an injunction under proposed s. 151CA, to require a person to do something, will not be affected (proposed s. 151CE(3)).

Examples of the types of orders that the Federal Court may make are set out in proposed s. 151CE(4). These orders are broadly comparable to the orders that the Court may make under s. 87(2) of the TPA in relation to contraventions of Part IV. These include orders voiding or modifying the operation of relevant contracts or ordering a refund or other compensatory arrangements. The powers conferred by proposed s. 151CE in relation to a contract do not affect any powers that any other court may have in relation to the contract in proceedings instituted in that other court in respect of the conduct (proposed s. 151CE(6)).

Proposed section 151CF – Conduct of directors, employees or agents

Part 32 of the proposed *Telecommunications Act 1996* will apply in relation to enforcement proceedings under Division 6 of Part XIB (proposed s. 151CF). Part 32 deals with the proof of matters that involve directors of corporations, employees and agents in connection with civil and criminal proceedings under the Act. It may be compared with s. 84 of the TPA.

If a corporation has contravened the competition rule or any tariff filing direction or record-keeping rules that are applicable to the carrier and it is necessary in proceedings to establish the state of mind of the corporation, it is sufficient to show that:

- a director, employee or agent of the corporation, acting within the scope of his or her authority, engaged in that contravention; and
- the director, employee or agent had that state of mind.

Division 7—Disclosure of documents by Commission

Proposed section 151CG – Disclosure of documents by Commission

Proposed s. 151CG is based on s. 157 of the TPA. It applies where:

- a person makes an application to the ACCC for an exemption order under proposed s. 151AS; or
- under proposed s. 151BG, the ACCC gives the person an opportunity to make a submission to it about a proposal to revoke an exemption order; or
- the ACCC institutes a proceeding against the person under Division 6 of Part XIB (proposed s. 151CG(1)).

The ACCC will be required, at the request of the person and on payment of any fee specified in the regulations, to give the person a copy of any document in the ACCC's possession in connection with a matter set out in proposed s. 151CG(1) that tends to establish the person's case (proposed s. 151CG(2)). If the ACCC does not comply with such a request, the person will be able to apply to the Federal Court for an order directing the ACCC to comply with the request. The Federal Court must make the order unless it would be inappropriate to do so because the disclosure of the contents of a document or part of a document would prejudice any person, or for any reason (proposed ss. 151CG(3) and (4)). Before the Federal Court makes its decision, it may require any documents to be produced to it for inspection (proposed s. 151CG(5)). The Federal Court's order may be made subject to conditions (proposed s. 151CG(6)).

Division 8—Treatment of partnerships

Proposed section 151CH – Treatment of partnerships

Proposed section 151CH is relevant to carriers or carriage service providers that are partnerships.

Part XIB applies to a partnership as if the partnership were a person, subject to the following changes:

- obligations are imposed on each partner but may be discharged by any partner; and
- any offence against Part XIB is taken to have been committed by each partner who was involved in the contravention (proposed s. 151CH).

Division 9—Review of decisions

Proposed section 151CI – Review by Tribunal

Under proposed s. 151CI, certain decisions of the ACCC will be reviewable on the merits by the ACT. Reviewable decisions are:

- a decision to refuse to make an exemption order

- a decision to revoke an exemption order
- a decision to make tariff information available for inspection and purchase (proposed ss. 151CI(1)–(3)).

As an information gathering mechanism, the giving of tariff filing directions will not be subject to merits review by the ACT (although, as noted, a decision to publicly release information collected will be reviewable).

Applications to the ACT will be required to be in writing. An application for review of an ACCC decision to refuse to make an exemption order or to revoke such an order will be required to be made within 21 days after the ACCC made its decision. An application for review of an ACCC decision to make tariff information available for inspection or purchase will be required to be made within 7 days after the ACCC made its decision so as not to delay the release of that information in an appropriate case (proposed s. 151CI(4)).

The ACT will be required to review any ACCC decision in relation to which it receives an application under proposed s. 151CI (proposed s. 151CI(5)).

Appeal rights to the Federal Court will be available under section 163A, as proposed to be amended by items 12 and 13 of Schedule 1 to the Bill. This will enable a person to seek a declaration in relation to the validity of any act or thing done, proposed to be done or purporting to have been done by the ACCC or ACT under Part XIB or under any other Part of the Act. Further appeal rights will be available under the *Administrative Decisions (Judicial Review) Act 1977*.

Proposed section 151CJ – Functions and powers of Tribunal

In conducting its review, the ACT will stand in the ACCC's shoes and be able to affirm or vary the ACCC's decision or set it aside (proposed s. 151CJ(1)). The ACT's decision to affirm, set aside or vary an ACCC decision will be taken for the purposes of the Bill, other than Division 9, to be an ACCC decision (proposed s. 151CJ(2)).

The presiding member of the ACT will be able to require the ACCC to give such information, make such reports and provide such other assistance to the ACT as the member specifies (proposed s. 151CJ(3)).

For the purposes of the review, the ACT will be able to have regard to any information given, documents produced or evidence given to the ACCC in connection with the making of its decision (proposed s. 151CJ(4)).

Division 2 of Part IX of the TPA, which deals with procedural and evidentiary matters, will apply to proceedings before the ACT for the purposes of a review under Division 9 of Part XIB.

Proposed section 151CK – Provisions that do not apply in relation to a Tribunal review

Division 1 of Part IX of the TPA, dealing with applications to the ACT, will not apply in relation to an ACT review of an ACCC decision of a kind mentioned in proposed s. 151CI (proposed s. 151CK). Without this provision, some of the provisions in s. 102 of the TPA which are of general application would otherwise apply.

**Division 10—Reviews of competitive safeguards
within the telecommunications industry**

Proposed section 151CL – Reviews of competitive safeguards within the telecommunications industry

Proposed s. 151CL is based on ss. 40 and 399(1), (4) and (5) of the *Telecommunications Act 1991*, which require AUSTEL to review, and report to the Minister on, competitive safeguards within the telecommunications industry. As a result of the proposed transfer on 1 July 1997 of competition policy functions from AUSTEL to the ACCC, the ACCC will be required to prepare the competitive safeguards report with respect to the 1997/98 and following financial years.

The ACCC will be required to review, and report each financial year to the Minister on competitive safeguards within the telecommunications industry, including:

- matters relating to the operation of proposed Part XIB of the TPA;
- matters relating to the operation of proposed Part XIC of the TPA (which sets out a telecommunications access regime); and
- such other matters relating to competition in the telecommunications industry as the ACCC thinks appropriate (proposed s. 151CL(1)).

As soon as practicable after 1 July 1998 and each subsequent 1 July, the ACCC will be required to give the report to the Minister (proposed ss. 151CL(2) and (6)). (With respect to the 1996/97 financial year, proposed s. 65 of the Telecommunications (Transitional Provisions and Consequential Amendments) Bill 1996 will confer on the ACCC AUSTEL's obligations to report to the Minister under ss. 399(1) and (4) of the *Telecommunications Act 1991* as soon as practicable after 1 July 1997.)

In addition, the ACCC will be required, if so directed by the Minister, to review and report to the Minister within the period specified in the direction on specified matters relating to competitive safeguards within the telecommunications industry (proposed ss. 151CL(3) and (4)).

The Minister will be required to arrange for a copy of a competitive safeguards report to be laid before each House of Parliament within 15 sitting days of that House after receiving the report (proposed s. 151CL(5)).

Division 11—Monitoring of telecommunications charges paid by consumers

Proposed section 151CM – Monitoring of telecommunications charges paid by consumers

In addition to its obligation to review and report to the Minister on competitive safeguards within the telecommunications industry under Division 10 of Part XIB, as soon as practicable after 1 July 1998 and each subsequent 1 July, the ACCC will be required to monitor, and report to the Minister on, charges paid by consumers for listed carriage services, ancillary goods and ancillary services (proposed ss. 151CM(1), (2) and (4), cf. *Telecommunications Act 1991*, paragraph 38(2)(e)).

‘Listed carriage service’ will have the same meaning as in proposed s. 16(1) of the *Telecommunications Act 1996*, ie,

- a carriage service between a point in Australia and one or more other points in Australia;
- a carriage service between a point in Australia and one or more other points, at least one of which is outside Australia; or
- a carriage service between a point outside Australia and one or more other points, at least one of which is in Australia (proposed s. 151CM(5)).

The Minister will be required to arrange for a copy of the report to be laid before each House of the Parliament within 15 sitting days of that House after receiving the report (proposed s. 151CM(3)).

Division 12—Review of operation of this Part

Proposed section 151CN – Review of operation of this Part

It is intended that competition rules for telecommunications will eventually be aligned, to the fullest extent practicable, with general trade practices law. Part XIB operate until some future review determines that competition is sufficiently established so that the Part, or some provisions of the Part, are no longer needed. Under proposed s. 151CN, the Minister will be required to arrange for a review of the operation of Part XIB before 1 July 2000. In conducting this review, consideration will have to be given to the question whether any or all of the provisions of Part XIB should be repealed or amended. A report of the review will be required to be tabled in each House of Parliament within 15 sitting days of that House after the completion of the preparation of the report.

Part XIC—Telecommunications access regime

Part XIC establishes an industry-specific regime for regulated access to carriage services.

The industry-specific nature of this regime reflects the particular policy interests in :

- promoting any-to-any connectivity;
- promoting diversity and competition in the supply of carriage services, content services and other services supplied by means of carriage services; and
- ensuring access to carriage services is established on reasonable terms and conditions and includes necessary ancillary services such as physical interconnection, billing information and access to conditional access customer equipment (such as set top boxes used in the supply of pay television).

The regime is illustrated in Figure 1 below.

The Part enables carriage services and services which facilitate the supply of carriage services to be declared by the ACCC. Transitional arrangements contained in the Telecommunications (Transitional Provisions and Consequential Amendments) Bill 1996 will provide for an initial list of declared services drawn primarily from access agreements made under Part 8 of the *Telecommunications Act 1991*. On an ongoing basis, declarations may take place on the recommendation of an industry body (the Telecommunications Access Forum) or after a public inquiry by the ACCC.

The consequence of declaration is that carriers and carriage service providers supplying declared services are, unless otherwise exempt, under an obligation to supply the declared services and specified ancillary services to requesting service providers.

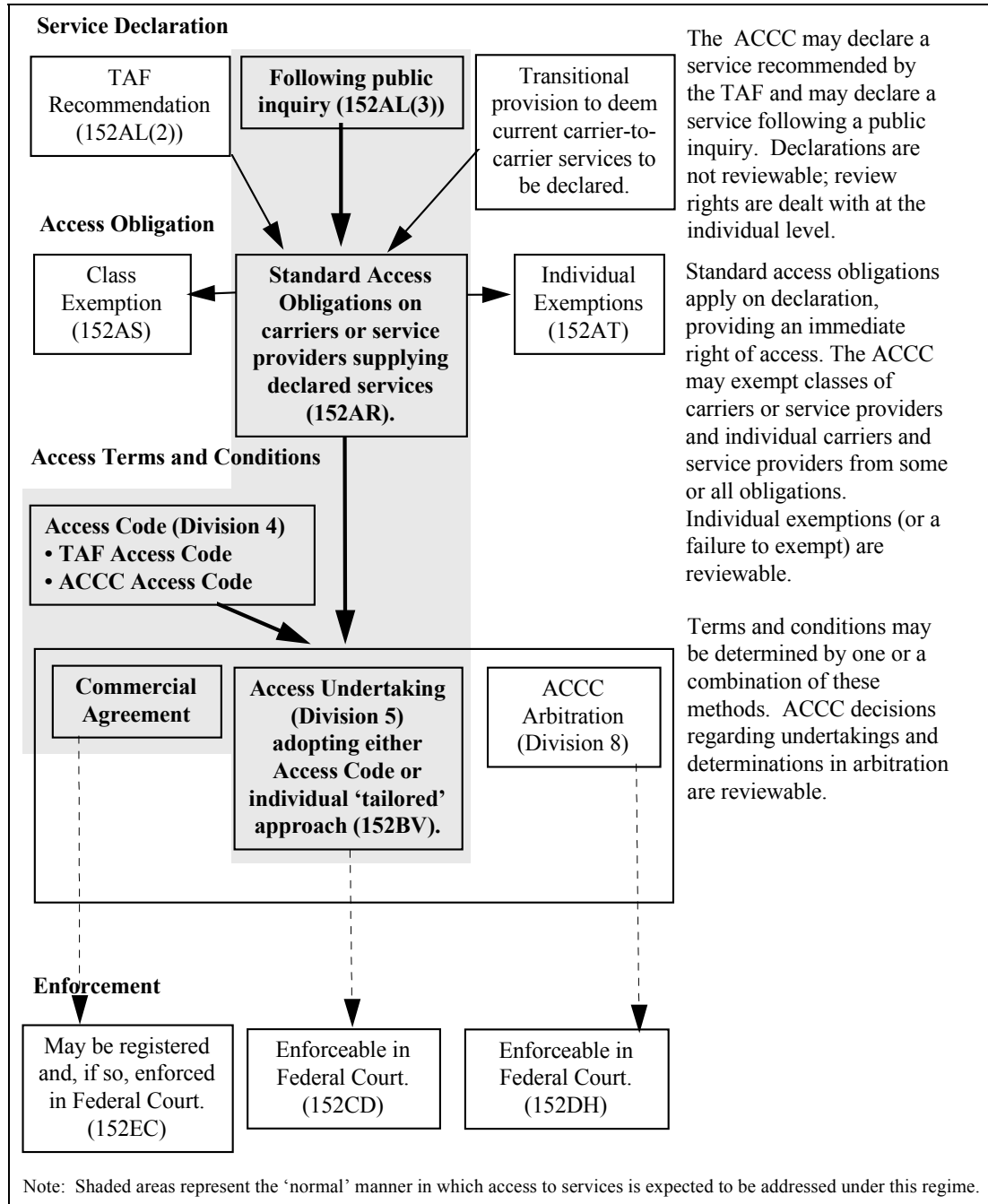
The Part enables the terms and conditions of access to be determined by any one, or a combination of, three methods – commercial negotiation, an undertaking submitted by individual carriers or carriage service providers who are under an access obligation and which has been accepted by the ACCC, or under arbitration by the ACCC.

The telecommunications industry is a complex, technically detailed network industry. It is likely that in many areas industry-wide efficiency gains can be achieved by the industry itself negotiating on a multilateral basis standard terms and conditions on which access is provided to declared services. The Part establishes a mechanism by which the industry may develop and submit for approval an access code containing model terms and conditions for access to particular declared services. Those model terms and conditions may be adopted in an undertaking by individual carriers or carriage service providers who are, or will be, under an access obligation.

The regime does not prevent the industry from developing voluntary, parallel mechanisms to deal with access issues, such as alternative dispute resolution procedures or even alternative arbitration mechanisms. In the event, however, that

mechanisms such as these are developed, the right to seek arbitration by notifying a dispute with the ACCC under this Part will not be affected by those mechanisms.

Figure 1: Telecommunications Access Regime



Division 1 – Introduction

Proposed section 152AA – Simplified outline

Proposed s. 152AA provides a simplified outline of the telecommunications access regime.

Proposed section 152AB – Object of this Part

Proposed s. 152AB provides that the object of this Part is to promote the long-term interests of end-users of:

- carriage services, which is defined in the same terms as in the Telecommunications Bill 1996 and includes proposed carriage services; and
- services supplied by means of carriage services, which includes both content services and other services supplied by means of telecommunications networks (such as banking or retail shopping).

The object of the Part is given practical effect through references to the object ('promoting the long-term interest of end-users of carriage services and services supplied by means of carriage services') in criteria throughout the Part.

In determining whether a particular thing promotes the long-term interests of end-users, this section provides that regard must be had to the extent to which that thing is likely to result in the achievement of three objectives. First, promoting competition in markets for carriage services or services provided by means of carriage services (paragraph (2)(c)). It is not intended that the access regime embodied in this Part impose regulated access where existing market conditions already provide for the competitive supply of services. In considering whether a thing will promote competition, consideration will need to be given to the existing levels of competition in the markets to which the thing relates.

Further, in considering this objective, proposed s. 152AB(4) requires that regard must be had (but not be limited to) the extent to which the thing will remove obstacles to end-users of carriage services or services provided by means of carriage services gaining access to those services. In this regard, it is intended that particular regard be had to the extent to which the particular thing would enable end-users to gain access to an increased range or choice of services.

The second objective is achieving any-to-any connectivity in relation to carriage services that involve communication between end-users (paragraph (2)(d)). Any-to-any connectivity is defined in proposed s. 152AB(8) as being achieved when end-users of a service that involves communications between end-users are able to communicate, by means of that service, with each other end-user who is supplied with the same service or a similar service, whether or not the end-users are connected to the same telecommunications network. Reference to similar services is intended to enable consideration of the need for any-to-any connectivity between end-users of services which have similar, but not identical, functional characteristics, such as end-

users of a fixed voice telephony service and end-users of a mobile voice telephony service, or end-users of internet services which may have differing characteristics.

Note that the any-to-any connectivity objective will only be relevant when considering whether a particular service promotes the long-term interests of end-users of a carriage service that involves communications between end-users. When considering other types of services (such as carriage services which are inputs to an end-to-end service or distributive services such as the carriage of pay television), this criterion will be given little, if any, weight compared to the other two criterion.

The third objective is that of encouraging the economically efficient use of, and economically efficient investment in, the infrastructure by which carriage services and services provided by means of carriage services are supplied (paragraph (2)(e)). In considering this objective regard must be had (but is not limited to):

- the technical feasibility of supplying and charging for particular services;
- the legitimate commercial interests of the supplier or suppliers of the services, including their ability to exploit economies of scale and scope; and
- the impact on investment incentives in telecommunications infrastructure.

The term ‘end-users’ recognises that telecommunications networks and services are used both by customers with a direct contractual relationship with a carrier or service provider and other end-users of carriage or content services (such as the members of a customer’s household).

Proposed section 152AC – Definitions

Proposed s. 152AC defines relevant terms used in new Part XIC.

The definition of conditional access customer equipment is intended to capture equipment such as set top boxes (for example, used in the provision of pay-television services) which enables service providers to determine the particular services a customer is able to receive. It should not, however, encompass equipment used by an end-user to select particular services, such as ‘V-chips’.

Conditional-access systems restrict access to services to authorised customers and may include an encryption system to prevent unauthorised access. Pay TV conditional access systems restrict access to services to those a customer is authorised to receive and deny access to other services.

A definition of “terms and conditions” was included in the exposure draft of this Part released in September 1996, to avoid doubt that “terms and conditions” includes price or methods of ascertaining price. That definition is not included in this Bill on the basis that the definition is unnecessary because the ordinary meaning of “terms and conditions” encompasses these matters.

Proposed section 152AD – This Part binds the Crown

Proposed s. 152AD provides that the Crown in right of the Commonwealth, each of the States, the Australian Capital Territory and the Northern Territory are bound by

Part XIC and other provisions of the Trade Practices Act so far as they relate to new Part XIC.

Proposed section 152AE – Extension to external Territories

Proposed s. 152AE provides that new Part XIC and other provisions of the Trade Practices Act, so far as they relate to new Part XIC, extend to Christmas Island, Cocos (Keeling) Islands and such other Territories as are prescribed under cl. 10 of the Telecommunications Bill 1996.

Proposed section 152AF – Access

Proposed s. 152AF defines the term “access” in relation to a declared service. This Part is intended to enable carriage and content service providers to gain access to declared services for the purposes of supplying their own carriage or content services. “Access” therefore refers to access by a service provider in order that the service provider can provide their own carriage services and/or content services.

Proposed s. 152AF(2) provides that for the purposes of this Part, anything done by a carrier or carriage service provider in fulfilment of a standard access obligation is taken to be an aspect of access to declared service. Proposed s. 152CM(2) enables notification of access disputes where there is disagreement about one or more aspects of access to a declared service. This proposed section makes it clear that “aspects of access” incorporates (although is not limited to) things done in fulfilment of a standard access obligation.

Proposed section 152AG – Access seeker

Proposed s. 152AG defines “access seeker” in relation to a declared service for the purposes of the telecommunications access regime. There are two limbs to the definition of “access seeker”. A service provider is an access seeker in relation to a declared service:

- if the service provider makes, or proposes to make, a request in relation to that declared service under the standard access obligations (proposed s. 152AR);
- if the service provider wants access to the service or either the service provider or the supplier of the service wants to change some aspect of the provider’s existing access to the service.

A service provider is an “access seeker” whether or not a request for access is being complied with.

Proposed section 152AH - Reasonableness - terms and conditions

Proposed s. 152AH sets out the matters relevant to the “reasonableness” of terms and conditions of access. This section provides guidance to the ACCC in determining whether terms and conditions are reasonable in considering whether to approve a draft access code (proposed s. 152BF), in determining an access code (proposed s. 152BK) and in considering whether to accept a draft access undertaking (proposed s. 152BV).

In determining whether particular terms and conditions are reasonable, regard must be had to:

- the promotion of the long-term interests of end-users of carriage services and services supplied by means of carriage services (proposed s. 152AB);
- the legitimate business interests of the carrier or carriage service provider concerned and the carrier's or carriage service provider's investment in facilities used to supply the declared service concerned;
- the interests of persons who have a right to use the declared service concerned;
- the direct costs of providing access to the declared service concerned;
- the operational and technical requirements necessary for the safe and reliable operation of a carriage service, a telecommunications network or a facility;
- the economically efficient operation of a carriage service, a telecommunications network or a facility.

Reference to whether the terms and conditions would promote the long-term interests of end-users of carriage services and services supplied by means of carriage services is not intended to provide grounds for reconsideration of the decision by the ACCC to declare the service to which the terms and conditions referred to in this provision relate. Rather the ACCC is to have regard to the matters listed in the proposed objects section (proposed s. 152AB) in determining whether the terms and conditions are reasonable.

Consistent with Part IIIA of the TPA, the references here to the 'legitimate' business interests of the carrier or carriage service provider and to the 'direct' costs of providing access are intended to preclude arguments that the provider should be reimbursed by the third party seeking access for consequential costs which the provider may incur as a result of increased competition in an upstream or downstream market.

These matters reflect closely similar considerations the ACCC must consider in making a determination under Division 8 of this Part (proposed s. 152CR).

Proposed s. 152AH(2) ensures that the list of relevant matters does not, by implication, limit the matters to which regard may be had.

Proposed section 152AI – The Telecommunications Access Forum

Proposed s. 152AI defines the Telecommunications Access Forum. The TAF is to be an industry based organisation. The ACCC may declare a specified body or association to be the TAF if the body or association provides: for open membership to all carriers and carriage service providers; is capable of generating recommendations regarding the declaration of services and a draft access code; and has a written constitution.

It is expected that the ACCC will have regard to the nature of the processes detailed in its constitution by which the body will come to agreement on the recommendation of services for declaration or submission of a draft code in determining whether to declare a body or association to be the TAF.

An instrument declaring a body or association to be the TAF falls within the terms of section 33(3) of the *Acts Interpretation Act 1901*, which provides that a power to make an instrument includes a power, exercisable in like manner and subject to like conditions, to vary or revoke the instrument. The ACCC may, therefore, revoke a declaration that a body or association is the TAF for the purposes of this Part.

Proposed section 152AJ – Interpretation of Part IIIA not affected by this Part

Proposed s. 152AJ ensures that expressions used in new Part XIC, with the exception of proposed s. 152CK, should not be used to interpret the meaning of provisions of Part IIIA. Part XIC uses many different concepts to Part IIIA, reflecting specific telecommunications industry access requirements, including the need for many carriage services to have any-to-any connectivity. The different concepts also recognise the detailed access and interconnection arrangements which have applied under Part 8 of the *Telecommunications Act 1991* and relevant licence conditions under that Act.

A number of provisions however, most particularly those establishing the ACCC's powers to arbitrate disputes over access (Division 8), enabling the registration of agreements for access (Division 9) and prohibiting conduct with the purpose of hindering access to declared services (Division 10), are based on parallel provisions in Part IIIA. The interpretation of these provisions may draw upon the meaning of similar expressions used in Part IIIA.

Proposed section 152AK – Operation of Parts IV and VII not affected by this Part

Proposed s. 152AK clarifies that nothing in this Part is intended to exempt conduct from the operation of Part IV or the ability of persons to seek authorisations or notify conduct under Part VII.

Division 2 – Declared services

Proposed section 152AL – Declared services

Proposed s. 152AL provides a mechanism for the declaration of services by the ACCC. A standard access obligation (proposed s. 152AR) applies to any carrier or carriage service provider supplying a declared service (unless otherwise exempted from the obligation).

Carriage services supplied between two or more points, at least one of which is in Australia, or a service that facilitates the supply of such a carriage service, may be declared for the purposes of the telecommunications access regime.

Enabling services which facilitate the supply of carriage services to be declared will perform two functions. First, it should avoid disputes over whether a particular service proposed to be declared is properly characterised as a carriage service.

Secondly, it will facilitate the unbundling of services where that is justified - replacing the mechanism in Division 3 of Part 9 of the *Telecommunications Act 1991*. It is intended to allow the ACCC to attach access obligations to blocks of functionality, or other inputs, which, while not carriage services themselves, may be used to produce a carriage service. Accordingly, the concept of an eligible service is defined in broad terms. As an initial threshold test, it merely establishes the range of services which can be declared under the routes detailed in proposed ss. 152AL(2) and (3).

A carriage service may be declared by the ACCC by either of two separate routes.

It may do so following receipt of a recommendation by the TAF that the service should be declared (proposed s. 152AL(2)), where the ACCC is satisfied representatives of likely access seekers in relation to the service and representatives of consumers have been given a reasonable opportunity to comment on the proposal. As the TAF represents the interests of the industry generally, the ACCC has the flexibility to accept that recommendation without itself undertaking an inquiry into the service's declaration. However, if the ACCC:

- has concerns regarding the process by which the TAF decided to recommend the service be declared, including, for example, concerns that the interests of those persons who would become bound by standard access obligations as a result of the declaration were not fully considered; or
- otherwise unconvinced by the TAF recommendation that declaration would promote the long-term interests of end-users;

the ACCC may choose to undertake its own public inquiry into the declaration of the service (see proposed s. 152AL(3)) or reject the TAF recommendation.

The second route for declaration requires a public inquiry to be held by the ACCC under Part 25 of the Telecommunications Bill 1996 (proposed s. 152AL(3)). Where the ACCC is satisfied as a result of the inquiry that the making of the declaration will promote the long-term interests of end-users of carriage services or of services provided by means of carriage services, it may declare the service. The ACCC will be required to make a declaration within 180 days of publication of the report of the public inquiry.

Proposed s. 152AL(6) ensures that the ACCC cannot include the use of intellectual property in a declaration of a service which facilitates the supply of a carriage service, except to the extent that the use of intellectual property in the service is an integral but subsidiary part of the declared service. This safeguard provision reflects a similar provision in section 44B of Part IIIA the Trade Practices Act and is intended to ensure that the declaration of a service which facilitates the supply of a carriage service will not provide direct access to intellectual property, although it may enable access to services produced, carried or delivered with the aid of intellectual property.

In making a declaration of an eligible service, the ACCC will have a high level of flexibility to describe the service, whether it be in functional or any other terms. This will enable, where appropriate, the ACCC to target the access obligations (which are triggered by a declaration) to specific areas of bottleneck market power by describing

the service in some detail, or to more broadly describe a service which is generally important (such as services necessary for any-to-any connectivity).

Proposed section 152AM – Inquiries about proposals to declare services

Proposed s. 152AM places certain requirements on the ACCC in undertaking an inquiry about the declaration of a service.

The ACCC may hold a public inquiry either on its own initiative or following the request of a person. If a person requests that an inquiry be held, the ACCC may decline to hold an inquiry but must provide the person with a written notification and reasons for refusing the request.

Where a public inquiry is held, the ACCC must give the ACA, the TAF and – if a person requested that the ACCC undertake the inquiry - that person, a copy of the report of the inquiry prepared in accordance with cl. 489 of the Telecommunications Bill 1996.

Proposed section 152AN – Combined inquiries about proposals to declare services

Proposed s. 152AN provides that the ACCC may decide to combine two or more public inquiries under proposed s. 152AL(3). Where a combined public inquiry is held, the ACCC may follow the procedures for the holding of public inquiries set out in Part 25 of the Telecommunications Bill 1996 as though it were a single inquiry. A single report must be produced.

Proposed section 152AO – Variation or revocation of declaration

Proposed s. 152AO applies, with some modifications, s. 33(3) of the *Acts Interpretation Act 1901* to the variation or revocation of a declaration made by the ACCC under proposed s. 152AL. The variation or revocation of a declaration of a service under proposed s. 152AL is generally to take the same procedural route as the declaration itself, however:

- where the ACCC proposes to vary or revoke a declaration made following a recommendation of the TAF under proposed s. 152AL(2), the ACCC must hold a public inquiry under Part 25 of the Telecommunications Bill 1996; and
- the ACCC is not required to hold a public inquiry for a minor variation of a declaration.

Proposed section 152AP – Inquiries about revocation of declared services

Proposed s. 152AP provides that where the ACCC holds a public inquiry mentioned in proposed s. 152AO(2) into a proposed variation or revocation of an existing declaration, the ACCC must give the ACA and the TAF a copy of the report about the inquiry prepared in accordance with cl. 489 of the Telecommunications Bill 1996.

Proposed section 152AQ – Register of declared services

Proposed s. 152AQ requires the ACCC to keep a Register of declarations made under proposed s. 152AL. The Register must include:

- particulars of all declarations;
- particulars of all variations and revocations of declarations;
- copies of reports prepared under cl. 489 of the Telecommunications Bill in relation to inquires mentioned in proposed s. 152AL(3)(a) or 152AO(2).

The Register may be maintained by electronic means and may be inspected by any person upon the payment of any fee specified in the Regulations. Any person may take an electronic copy, including the provision of information on computer disk.

Division 3 – Standard access obligations

Proposed section 152AR – Standard access obligations

Proposed s. 152AR sets out the standard access obligations. Subject to proposed ss. 152AS and 152AT, all carriers and carriage service providers must comply with the standard access obligations in regard to declared services that they supply either to themselves or a third party (“active declared services”). Those carriers and carriage service providers are known as “access providers”.

Reference to the supply of a service by a carrier or carriage service provider to itself is intended to ensure that where a carrier or carriage service provider supplies declared services to itself in order to supply of another service to an end customer (for example, supplying to itself a service for carrying communications from an end user’s customer equipment to an exchange, the carriage of that communication between exchanges, and the carriage of the communication from the last exchange to the end user to whom the call is being made, in order to supply an end-to-end telephony service to final customers), it is under an access obligation in relation to those declared services.

Proposed s. 152AR(3) requires access providers to supply active declared services to a requesting service provider, and to take all reasonable steps to ensure that the service is supplied at a technical and operational quality equivalent to that which the access provider provides to itself and with fault detection, handling and rectification of a technical and operational quality and timing equivalent to that which the access provider provides to itself.

The requirements regarding the technical and operational quality of the declared service and fault detection, handling and rectification arrangements are based on equivalent obligations imposed on carriers by subclause 3.3 of the Telecommunications (General Telecommunications Licences) Declaration No. 1 of 1991, which clarify the obligations imposed on existing carriers by Part 8 of the *Telecommunications Act 1991*. Clarification is made in the proposed subsection that the obligation regarding faults extends beyond fault detection to including handling and rectification.

Proposed s. 152AR(4) provides that the obligation in subsection (3) to supply an active declared service is limited to the extent (if any) to which the imposition of the obligation would have the effect of:

- preventing a service provider who already has access to the declared service or the access provider from obtaining a sufficient amount of the service to meet the service provider's or access provider's reasonably anticipated requirements determined at the time the request was made (which may be greater or less than actual usage at the time the request was made);
- preventing a person who has a right to access a declared service under a contract or under a determination that was in force at the time the request was made, from obtaining a sufficient level of access to the declared service to be able to meet the person's actual requirements; or
- depriving any person of a contractual right in force at the beginning of 13 September 1996 (the date the provisions were released for public comment).

This proposed subsection will give protection to: the reasonably anticipated usage of a declared service as at the time the request was made; the future use of a declared service by the exercise of rights that existed at the time the request was made, so far as they relate to the user's actual requirements; and all contractual rights relating to access to the declared service (either of the access provider or a third party) existing at 13 September 1996.

The proposed subsection is based on equivalent TPA provisions which restrict the ACCC's ability to make a determination which would have similar effects (see s. 44W and proposed s. 152CQ). Note, however, that a dispute may still be notified with the ACCC under proposed s. 152CM(2) if a request made would have the effects described in this subsection. This will enable an access seeker to request the ACCC make a determination which would avoid those effects (for example, require the capacity of the facility used to supply the declared service to be enhanced).

Proposed s. 152AR(5) requires an access provider to permit, on request, the interconnection of service provider facilities to facilities an access provider either owns, controls or is responsible for under a nominated carrier declaration, for the purpose of enabling a service provider to be supplied with active declared services. It also requires the access provider to take all reasonable steps to ensure that the technical and operational quality and timing of the interconnection is equivalent to that which the access provider provides to itself and is compliant with any technical standard for interconnection made by the ACA and that fault detection, handling and rectification is supplied at a technical and operational quality and timing equivalent to that which the access provider provides to itself.

The requirements in this proposed subsection regarding the technical and operation quality of interconnection and related fault detection, handling and rectification arrangements are based on subclause 3.3 of the Telecommunications (General Telecommunications Licences) Declaration No. 1 of 1991, which clarifies the obligations imposed on existing carriers by Part 8 of the *Telecommunications Act 1991*.

Proposed ss. 152AR(6) and (7) require an access provider supplying an active declared service to a service provider to also, if requested, provide billing information in regard to the supply of active declared services at such times, manner and with such content as are determined in regulations. This obligation is based on subclauses 4.1 and 4.2 of the Telecommunications (General Telecommunications Licences) Declaration No. 1 of 1991.

Proposed s. 152AR(8) requires access providers supplying active declared services by means of conditional-access customer equipment (such as set-top boxes used for the supply of pay television), when requested by a service provider who has made a request under proposed s. 152AR(3) to be supplied with that active declared service, to also supply any services necessary to enable the service provider to supply carriage or content services by means of the conditional access customer equipment using the active declared service.

Possible examples of the necessary services include: access to a subscriber management system which manages the services that customers are authorised to receive via conditional-access customer equipment; provision of necessary technical information about the conditional-access system; or access to, or information about, “smart cards” used to control access by customers and/or billing.

Proposed s. 152AR(9) provides that an access provider is not obliged to comply with the standard access obligations if the provider has reasonable grounds for believing that the access seeker would fail either to comply with the terms and conditions on which the access provider complies, or is reasonably likely to comply, with the obligation (paragraph (9)(a)), or the access seeker would fail, in connection with the obligation, to protect the integrity of a network or the safety of individuals working on or using services supplied by means of a network or facility (paragraph (9)(b)).

Proposed s. 152AR(10) provides examples of grounds for believing that an access seeker would fail to comply with the terms and conditions on which the access provider complies with the obligation.

Proposed paragraph 152AR(9)(a) and subsection 152AR(10) are based on ss. 234(7) and (8) of the *Telecommunications Act 1991* which provide for circumstances where a carrier is not under an obligation to interconnect with service providers. Proposed paragraph 152AR(9)(b) reflects matters addressed under technical standards regulation in the Telecommunications Bill.

Proposed s. 152AR(11) provides that an obligation imposed by this section does not arise before 1 July 1997. While this Part will commence on Royal Assent, primarily to enable transitional and preparatory work to take place on matters such as access codes, it is not intended that access obligations themselves commence until 1 July 1997.

Obligations imposed under this section relating to the provision of technical and operational quality of services, interconnection or fault handling equivalent to that which an access provider provides itself are not intended to prevent individual access seekers from voluntarily agreeing to quality of a lower or higher level.

Proposed section 152AS – Class exemptions from standard access obligations

Under proposed s. 152AS, the ACCC may, by written instrument, exempt a specified class of carrier or carriage service provider from one or more of the standard access obligations. An exemption may be subject to such terms and conditions as are specified in the instrument. An exemption is a disallowable instrument which must be tabled in Parliament and is subject to Parliamentary disallowance.

The ACCC must not make the determination unless it is satisfied that the making of the determination would promote the long-term interests of end-users of carriage services or services supplied by means of carriage services (see proposed s. 152AB).

The ACCC is obliged to publish a draft and invite comment on any determination it proposes to make under this proposed section where it is of the opinion that the making of the determination is likely to materially affect the interests of any person.

Proposed section 152AT – Individual exemptions from standard access obligations

Proposed s. 152AT provides a mechanism for individual carriers or carriage service providers to apply in writing to the ACCC for an exemption from one or more standard access obligations. Upon receipt of the application, the ACCC must either make an order exempting the carrier or provider from one or more of the standard access obligations or refuse the application. Where the ACCC decides to refuse the application, the ACCC must give the unsuccessful applicant a written statement setting out the reasons for refusing the application.

The ACCC may only make an order exempting the carrier or carriage service provider from one or more standard access obligations where it is satisfied that it will promote the long-term interests of end-users of carriage services or of services provided by means of carriage services (see proposed s. 152AB).

This section will enable individual carriers or carriage service providers to present a case to the ACCC that the long-term interests of end-users will be promoted by the limitation or removal of the standard access obligations on that carrier or carriage service provider or which may in the future be placed on that carrier or carriage service provider. Given the service declaration itself (which has industry wide application) was made on the basis that it would promote the long-term interests of end-users, it is appropriate that a similar test apply where an individual seeks to have the relevant obligation removed.

This mechanism could be used in circumstances where infrastructure investments of national or regional significance are proposed which would provide long-term and substantial benefits to end-users of carriage services and services supplied by means of carriage services, but would not proceed or would be severely hampered if the standard access obligations applied in their entirety. The provision is drafted in broad terms because ACCC judgments about the giving of an exemption and the precise nature of exemptions given need to be made on a case-by-case basis.

An order exempting a carrier or provider from one or more standard access obligations may be subject to such conditions as are specified in the order, and may be expressed to come into effect immediately or at a later date specified in the order.

Proposed s. 152AT(8) provides that where an order is made which specifies an expiry date, the ACCC may make a fresh order in the same terms as the expired order.

Under proposed s. 152AT, a person whose interests are affected by a decision to make, or refuse to make, an exemption will be able to seek merits review of the decision by the Australian Competition Tribunal.

Proposed section 152AU – Individual exemptions – request for further information

Proposed s. 152AU provides that where a carrier or carriage service provider applies for an exemption under proposed s. 152AT(1), the ACCC may request further information from the applicant. The ACCC may refuse to consider the application until the information is provided by the applicant.

Proposed section 152AV – Review by Tribunal of exemption order decision

Proposed s. 152AV provides a mechanism for review of a decision of the ACCC to grant, or refuse to grant, an exemption to a person from one or more standard access obligations under proposed s. 152AT. A person whose interests are affected by a decision of the ACCC under proposed s. 152AT may apply to the Australian Competition Tribunal within 21 days after the decision. The ACT must then review the decision.

Proposed section 152AW – Functions and powers of Tribunal

Proposed s. 152AW sets out the functions and powers of the Australian Competition Tribunal when reviewing a decision of the ACCC made under proposed s. 152AT.

Proposed section 152AX – Provisions that do not apply in relation to a Tribunal review

Proposed s. 152AX clarifies that Division 1 of Part IX of the Trade Practices Act, to the extent that the Division is relevant, does not apply to a review of an ACCC decision to refuse or approve an application for an exemption under proposed s. 152AT.

Proposed section 152AY – Compliance with standard access obligations

Proposed s. 152AY elaborates on the manner in which a carrier or provider must comply with standard access obligations. Proposed s. 152AY provides that the terms and conditions upon which a carrier or carriage service provider complies with the standard access obligations are, as a primary route, to be agreed between the carrier or carriage service provider and the access seeker.

Where the parties cannot agree on terms and conditions, the terms and conditions about a matter will be those contained in an access undertaking submitted by the carrier or carriage service provider that relate to the matter. If no access undertaking

has been submitted by the carrier or provider, or the access undertaking does not contain any terms and conditions relating to the matter in dispute, the terms and conditions are to be those determined by the ACCC under the arbitration provisions contained in Division 8.

It may be that in a particular case, the terms and conditions on which a carrier or a carriage service provider must comply with a particular standard access obligation in relation to a particular declared service will be:

- partly agreed (for example, arrangements to supply billing information);
- partly set out in an access undertaking (for example, arrangements about provisioning of networks); and
- partly determined under an arbitration (for example, the pricing arrangements).

Proposed section 152AZ – Carrier licence condition

Proposed s. 152AZ makes a carrier licence subject to a condition that the carrier comply with any standard access obligations that are applicable to the carrier. Contravention of a standard access obligation by a carrier will therefore be a breach of a licence condition and subject to the provisions of the Telecommunications Bill governing such breaches.

Proposed section 152BA – Service provider rule

Proposed section 152BA makes it a service provider rule for the purposes of cl. 97 of the Telecommunications Bill 1996 that a carriage service provider comply with standard access obligations that are applicable to the provider. Contravention of a standard access obligation by a carriage service provider will therefore be a breach of service provider rules and subject to the provisions of the Telecommunications Bill governing such breaches.

Proposed section 152BB – Judicial enforcement of standard access obligations

Proposed s. 152BB provides for judicial enforcement of standard access obligations. Proposed s. 152BB(1) gives standing to the ACCC or any person whose interests are affected by a contravention of a standard access obligation to apply to the Federal Court for an order in respect of the contravention. If it is satisfied that a contravention of a standard access obligation has occurred, the Federal Court may make an order directing the carrier or provider to comply with the standard access obligation, or ordering the payment of compensation for loss or damages incurred as a result of the contravention or any other order that the Court thinks appropriate.

Division 4 – Telecommunications access code

Subdivision A – TAF telecommunications access code

Subdivision A provides for the preparation and submission of telecommunications access codes to the ACCC for approval. An access code will establish model terms and conditions which carriers or carriage service providers may voluntarily adopt.

The code mechanism provides the necessary tools for the industry to develop standard access arrangements where an industry consensus is possible.

Proposed section 152BC – The TAF may submit a draft TAF telecommunications access code to the Commission for approval

Proposed s. 152BC provides that the TAF may give a written draft access code to the ACCC for approval. The draft code may be expressed to replace an existing TAF code.

No other body may prepare a draft access code for ACCC approval (although Subdivision B of this Division provides that the ACCC may, in certain circumstances, itself make an access code).

Proposed section 152BD - Content of draft or approved TAF telecommunications access code

Proposed s. 152BD sets out the matters that a draft TAF code must include. A draft or approved TAF code must include model terms and conditions relating to compliance with the standard access obligations. These terms and conditions must be presented in a manner capable of being adopted by access undertakings. It is expected that an access code will be prepared in a modular format, enabling one or more particular sets of model terms and conditions to be adopted by carriers or carriage service providers in undertakings.

Proposed s. 152BD(2) clarifies that the TAF has a wide degree of flexibility in the manner in which it wishes to prepare model sets of terms and conditions. The code may set out different terms and conditions relating to different kinds of standard access obligations (that is, each declared service may have differing model terms and conditions for any single obligation). Alternatively, the TAF code may set out a single set of model terms and conditions to apply to the same kind of obligation in regard to two or more declared services.

Any terms and conditions included in the TAF code must be consistent with the standard access obligations.

Proposed section 152BE – Approval of draft TAF telecommunications access code by Commission

Proposed s. 152BE provides that where the TAF gives a draft code to the ACCC for approval, the ACCC must approve or refuse to approve the code. If approved, the code becomes the approved TAF telecommunications access code. To avoid excessive complexity for industry participants, the ACCC must ensure that not more than one code is in force at a particular time.

It is expected, however, that a code will take a modular format addressing model terms and conditions for particular declared services or particular aspects of access which are generally applicable.

Proposed section 152BF – Criteria for approval of draft TAF telecommunications access code

Proposed s. 152BF sets out the criteria for approval by the ACCC of a draft TAF telecommunications access code. The ACCC must be satisfied that:

- in preparing the draft code, the TAF has carried out a process of consultation with representatives of persons who are likely to become access seekers in relation to the declared services covered by the code and consumer representatives;
- the code is consistent with the standard access obligations;
- if any part of the code deals with price or a method of ascertaining price, the code is consistent with any pricing determination (see proposed s. 152CH); and
- each set of models and conditions set out in the code is reasonable (see proposed s. 152AH).

This Part provides no protection from Part IV of the TPA for conduct engaged in under this Part or for codes developed under this Part. It is expected that the TAF will ensure a draft access code is either consistent with Part IV or seek authorisation under Part VII of the TPA.

Proposed section 152BG – Notification of decision

Proposed s. 152BG provides that the ACCC must notify the TAF and the ACA in writing of any decision to approve or refuse to approve a draft TAF code. Where the ACCC refuses to approve a draft code, it must notify the TAF in writing of the reasons for the refusal.

Proposed section 152BH – Commission must invite public submissions on draft TAF telecommunications access codes

Proposed s. 152BH requires that the ACCC engage in public consultation prior to making a decision to approve a draft code. The ACCC must publish the draft code, invite submissions on that draft and consider any submissions received within the time limit specified by the ACCC.

Proposed section 152BI – Commission must consult the ACA

Proposed s. 152BI requires that the ACCC consults the ACA prior to making a decision whether or not to approve a draft TAF code.

Subdivision B – ACCC telecommunications access code

Subdivision B provides for circumstances in which the ACCC may itself make an access code. The power for the ACCC to make an access code provides a mechanism for the regulator to establish industry-wide benchmark or model terms and conditions for access where an industry consensus fails to develop. An ACCC access code, like its TAF counterpart, is not binding on a carrier or carriage service provider unless the carrier or provider undertakes to be so bound (see Division 5).

Proposed section 152BJ – Commission may make telecommunications access code

Proposed s. 152BJ provides for circumstances in which the ACCC may make a telecommunications access code. The ACCC may make an access code in two situations:

- (1) Where an approved access code is in force at a particular time but the ACCC is satisfied that, if submitted to the ACCC at the time, the code would not be approved and:
 - the ACCC has provided written notice to the TAF that it is so satisfied, including its reasons for its opinion and has requested the TAF to submit either a draft variation of the current code or a new draft code: and
 - the TAF has either refused to comply with the request or has submitted a draft variation or a draft new code and the ACCC has rejected the variation or new code under proposed s. 152BE or 152BQ;

or
- (2) Where no approved access code is in force at a particular time and the ACCC has given a written notice to the TAF requesting that the TAF make an access code and:
 - the TAF does not comply with the request; or
 - the TAF gives a draft code to the ACCC but the ACCC rejects the draft code under proposed s. 152BE.

The ACCC must give the TAF a period of between 30 and 180 days to submit a draft code or variation for approval before making its own code. It is expected that the period given would depend upon the complexity of the matters to be dealt with by the TAF.

An ACCC access code is a disallowable instrument for the purposes of s. 46A of the *Acts Interpretation Act 1901*.

To avoid complexity, the ACCC must also ensure that not more than one code is in force at a particular time.

Proposed section 152BK – Content of ACCC telecommunications access code

Proposed s. 152BK establishes the content of an ACCC telecommunications access code. It substantially parallels proposed s. 152BD (which guides the content of a TAF telecommunications access code) and proposed s. 152BF (which provides criteria for approval of a TAF telecommunications access code).

Proposed section 152BL – Commission must invite public submissions on ACCC telecommunications access code

Proposed s. 152BL places an obligation on the ACCC to publish a proposed ACCC access code before making the code under proposed s. 152BJ. The ACCC must invite public comment on the draft ACCC code and consider any submissions made in relation to the draft ACCC code within the time limit specified by the ACCC.

Proposed section 152BM – Commission must consult the ACA about code

Proposed s. 152BM requires the ACCC to consult with the ACA where the ACCC is proposing to make a telecommunications access code.

Proposed section 152BN – Copy of code to be given to TAF and the ACA

Proposed s. 152BN requires the ACCC to give a copy of an approved telecommunications access code to the TAF and the ACA upon making a code.

Proposed section 152BO – Effect of ACCC telecommunications access code

Proposed s. 152BO provides that a telecommunications access code made by the ACCC has the same effect as if it were a TAF access code. It does not have this effect for the purpose of the specific provisions relating to the making of a TAF access code (proposed ss. 152BD to 152BI).

Subdivision C – Duration, variation and revocation of telecommunications access codes

Proposed section 152BP – Duration of approved TAF telecommunications access code

Proposed s. 152BP provides that an approved TAF telecommunications access code comes into force from the time it is approved and remains in force until either:

- a fresh approved TAF access code expressed to replace the current code comes into force; or
- the current code is revoked under proposed s. 152BQ.

Note that an access code made by the ACCC is deemed to be a TAF access code for the purposes of this proposed section (see proposed s. 152BO).

Proposed section 152BQ – Variation or revocation of approved TAF telecommunications access codes

Proposed s. 152BQ provides for the variation or revocation of an approved TAF access code with the approval of the ACCC.

The ACCC may only approve a variation or revocation of an approved code where the ACCC has published details of the proposed variation or revocation, invited

submissions on the proposed variation or revocation and considered any comments made within the time limit specified for submissions.

Note that an access code made by the ACCC is deemed to be a TAF access code for the purposes of this section (see proposed s. 152BO).

Subdivision D – Register of telecommunications access codes

Proposed section 152BR – Register of telecommunications access codes

Proposed s. 152BR requires the ACCC to maintain a Register of all approved TAF telecommunications access codes (including those no longer in force), as well as all variations of approved TAF telecommunications access codes. The Register may be maintained by electronic means and any person may upon payment of any fee specified in the regulations, inspect and take an extract from, or copy of, the Register.

Division 5 – Access undertakings

Division 5 concerns undertakings given by carriers or carriage service providers in relation to access to declared services. An access undertaking sets out terms and conditions under which the carrier or provider undertakes to comply with the applicable standard access obligations.

Where an undertaking deals with particular terms and conditions of access, the ACCC may not make a determination about terms and conditions of access in an arbitration which is inconsistent with the undertaking. The undertaking therefore provides some certainty to a carrier or carriage service provider subject to an access obligation (or which will become subject to an access obligation in the future), for the term of the undertaking and in relation to the matters addressed in the undertaking.

Proposed section 152BS – What is an *access undertaking*?

Proposed s. 152BS defines an “access undertaking” as a written undertaking given by a carrier or a carriage service provider to the ACCC under which the carrier or provider undertakes to comply with the terms and conditions specified in the undertaking in relation to the applicable standard access obligations.

The “applicable standard access obligations” are those standard access obligations set out in proposed s. 152AR that are applicable to the carrier or provider making the access undertaking. A standard access obligation may not be applicable because of an exemption under proposed s. 152AS or 152AT, or because the carrier or carriage service provider does not supply the declared service concerned.

The undertaking may specify relevant terms and conditions or alternatively may adopt a set of model terms and conditions set out in a TAF telecommunications access code (see Division 4). It is not intended that, where an undertaking adopts a set of model terms and conditions set out in a TAF telecommunications access code, that it be able for:

- those terms and conditions to be modified;
- that any specific conditions within that set be excluded; or

- within the same undertaking, that those conditions be supplemented by other terms and conditions.

While an undertaking may not adopt a combination of the approaches described in proposed ss. 152BS(3) and (4), two separate undertakings may be submitted in regard to a declared service, one adopting the first route, the other adopting the second.

An undertaking which specifies terms and conditions must include an expiry time (which cannot exceed three years – see proposed s. 152BV) which may be described by reference to a period beginning on the date the undertaking comes into operation.

Terms and conditions in an undertaking may be expressed to come into effect immediately after the undertaking is accepted by the ACCC or at a later time specified in the undertaking.

Proposed section 152BT – Further information about undertaking

Proposed s. 152BT provides that the ACCC may request further information about an undertaking from a carrier or carriage service provider before deciding whether or not to approve the undertaking. The ACCC may refuse to consider the undertaking until the carrier or provider provides the information requested.

Proposed section 152BU – Commission to accept or reject access undertaking

Proposed s. 152BU provides that where a carrier or carriage service provider has given an undertaking to the ACCC, the ACCC must give the carrier or service provider written notice of the acceptance or rejection of the undertaking. Where the undertaking is rejected, the ACCC must include the reasons for the rejection in the written notice.

Proposed section 152BV – Acceptance of access undertaking – model terms and conditions in access code not adopted

Proposed s. 152BV sets out the circumstances in which the ACCC may accept or reject an access undertaking where the undertaking does not adopt a set of model terms and conditions set out in an approved TAF access code.

Where a carrier or carriage service provider submits such an access undertaking to the ACCC, the ACCC may only approve the undertaking where:

- the undertaking has been published by the ACCC and any submissions concerning the undertaking received within the time limit have been considered by the ACCC;
- the ACCC is satisfied that the undertaking is consistent with standard access obligations that are applicable to the carrier or provider;
- the ACCC is satisfied that the undertaking is consistent with any Ministerial pricing principles (if the undertaking deals with price or a method of ascertaining price);
- the ACCC is satisfied that the undertaking contains terms and conditions that the ACCC is satisfied are reasonable (see proposed s. 152AH);

- the undertaking includes an expiry time within three years after the undertaking is proposed to come into operation.

Proposed section 152BW – Acceptance of access undertaking - model terms and conditions in access code adopted

Proposed s. 152BW provides that the ACCC must accept an access undertaking where the undertaking adopts a set of model terms and conditions set out in an approved TAF telecommunications access code.

Proposed section 152BX – Duration of access undertaking

Proposed s. 152BX sets out the duration of an access undertaking given to, and accepted by, the ACCC. An access undertaking comes into effect according to the terms of the undertaking, either at the time of acceptance by the ACCC or at some later time ascertained in accordance with the undertaking.

If the access undertaking adopts terms and conditions set out in an approved TAF access code, the undertaking ceases to have effect when the code is revoked or a variation is made to the code which omits the set of terms and conditions which the undertaking adopts. The undertaking will continue to have effect, however, if the terms and conditions set out in the code are varied (and will bind the carrier or carriage service provider to those varied terms and conditions).

If the undertaking does not adopt TAF access code terms and conditions, the undertaking ceases to have effect at the expiry time expressed in the undertaking (which is to be no longer than 3 years - see proposed s. 152BV). In either case, the undertaking ceases to have effect where the undertaking is withdrawn or replaced under proposed s. 152CA or 152CB.

Proposed section 152BY – Variation of access undertakings

Proposed s. 152BY provides for the variation of an access undertaking where the undertaking is in operation. Where the carrier or carriage service provider gives the ACCC a variation of the undertaking, the ACCC must accept or reject the variation and give the carrier or carriage service provider written notice of its decision. Where the variation is accepted, the written notice must include the terms of the variation. Where the variation is rejected, the written notice must include the reasons for the rejection.

Proposed s. 152BY(4) provides that the proposed ss. 152BV and 152BW which detail the criteria against which the ACCC must consider a draft undertaking and the procedures to be followed, apply to a draft variation of an undertaking. Where the variation is of a minor nature, the ACCC is not required to engage in a public consultation process.

Proposed section 152BZ – Further information about variation of access undertaking

Proposed s. 152BZ provides that the ACCC may request further information about a draft variation to an undertaking from a carrier or carriage service provider before

deciding whether or not to accept the variation. The ACCC may refuse to consider the variation until the carrier or provider provides the information requested.

Proposed section 152CA – Voluntary withdrawal of undertaking

Proposed s. 152CA allows a carrier or carriage service provider to give written notice to the ACCC withdrawing an access undertaking currently in operation.

Proposed section 152CB – Replacement of access undertaking

Proposed s. 152CB provides that where an access undertaking is in operation, the carrier or carriage service provider may give the ACCC an access undertaking expressed to replace the current undertaking. The ACCC must accept or reject the replacement access undertaking under proposed s. 152BU. Where the undertaking is accepted by the ACCC, the undertaking which was in operation is taken to have been withdrawn immediately before the time when the replacement undertaking comes into operation.

Proposed section 152CC – Register of access undertakings

Proposed s. 152CC provides that the ACCC must maintain a register of all access undertakings accepted by the ACCC (including those no longer in operation) and all variations of access undertakings.

The Register may be maintained by electronic means and may be inspected by a person upon payment of any fee specified in the regulations. A person may request a copy of, or extracts from, the Register. An extract or copy may be provided in the form of a print out or by electronic means.

Proposed section 152CD – Enforcement of access undertakings

Proposed s. 152CD provides a mechanism for the direct enforcement of access undertakings accepted by the ACCC. The ACCC or a person whose interests are affected by the access undertaking may apply to the Federal Court where the ACCC or the person thinks that the carrier or carriage service provider has breached the undertaking.

Where the Federal Court is satisfied that the carrier or service provider has breached the access undertaking, the Court may make all or any of the following orders:

- (1) an order directing the carrier or service provider to comply with the undertaking;
- (2) an order directing the carrier or service provider to compensate any other person who has suffered loss or damage as a result of the breach;
- (3) any other order that the Court thinks appropriate.

Proposed section 152CE – Review by Tribunal

Proposed s. 152CE provides that a person whose interests are affected by a decision of the ACCC to:

- (1) accept or reject an access undertaking under proposed subsection 152BU(2);
or
- (2) accept or reject a variation of an access undertaking under proposed subsection 152BY(3)

may apply within 21 days of the making of the decision to the Australian Competition Tribunal for a review of the decision. Where so requested, the Tribunal must review the decision.

Proposed section 152CF – Functions and powers of Tribunal

Proposed s. 152CF gives the Tribunal all the powers and functions of the ACCC for the purposes of reviewing a decision of the ACCC made under proposed subsections 152BU(2) or 152BY(3). Upon reviewing the decision, the Tribunal may make an order affirming, setting aside or varying the decision. The Tribunal may have regard to any information, document or evidence given to the ACCC in connection with the making of the decision to which the review relates.

Proposed section 152CG – Provisions that do not apply in relation to a Tribunal review

Proposed s. 152CG clarifies that Division 1 of Part IX of the TPA, to the extent that the Division is relevant, does not apply to a review of an ACCC decision made by the Commission under proposed subsections 152BU(2) or 152BY(3).

Division 6 – Ministerial pricing determinations

Division 6 provides for the making of Ministerial pricing determinations.

Proposed section 152CH – Ministerial pricing determinations

Proposed s. 152CH provides that the Minister may make a written determination setting out principles dealing with price or a method of ascertaining price relating to the standard access obligations set out in proposed s. 152AR. A Ministerial pricing determination is a disallowable instrument for the purposes of s. 46A of the *Acts Interpretation Act 1901*.

Proposed ss. 152BF, 152BK(3), 152BV(2) and 152CQ(6) provide that the ACCC may not approve an access code, make an access code itself, accept a draft access undertaking or make a determination under the arbitration provisions which would be inconsistent with a Ministerial pricing determination. Proposed s. 152CI provides that an access code or access undertakings in force at the time a determination is made under this section have no effect to the extent of any inconsistency with that determination.

While it is intended that, following the making of a Ministerial pricing determination, terms and conditions of access determined by means of an undertaking or determination by the ACCC under Division 8 are bound by a Ministerial determination, access agreements and ACCC determinations made prior to the date of the Ministerial determination will not automatically be affected. However, should

future access disputes be notified in regard to such agreements or determinations, the ACCC will be bound by the Ministerial determination.

Proposed section 152CI – Undertakings and codes that are inconsistent with Ministerial pricing determinations

Proposed s. 152CI ensures that access undertakings and approved TAF telecommunications access codes are consistent with Ministerial pricing determinations. It provides that if any provision of an access undertaking or approved TAF access code is inconsistent with any Ministerial pricing determination, that provision has no effect to the extent of the inconsistency.

Proposed section 152CJ – Register of determinations

Proposed s. 152CJ requires the ACCC to keep a Register of Ministerial pricing determinations. The Register may be maintained by electronic means and may be inspected by any person upon the payment of any fee specified in the Regulations. Any person may take an electronic copy, including the provision of information on computer disk.

Division 7 – Relationship between this Part and Part IIIA

Proposed section 152CK – Relationship between this Part and Part IIIA

Proposed s. 152CK provides for a seamless operation of both the telecommunications access regime embodied in this Part and the general access regime in Part IIIA of the Act.

Proposed s. 152CK does not restrict the declaration of a service under this Part which has already been declared under Part IIIA, or the declaration of a service under Part IIIA which has already been declared under this Part. However, where this Part regulates access by service providers to a particular service, persons may not seek to have Part IIIA regulate that access. There are three circumstances in which overlap of the two Parts may occur (but for the operation of this proposed section).

First, where a service is declared under both Parts, parties might have been able to seek arbitration under both Parts. Proposed s. 152CK(1) addresses this circumstance by providing that if a service is declared under both Parts and a dispute exists between parties who may seek arbitration under this Part, that dispute may not be notified under s. 44S of Part IIIA.

Second, where a service is declared under this Part, but not declared under Part IIIA, an access provider might have sought to control the terms and conditions of access available to service providers for that service by submitting an undertaking under Part IIIA. Proposed s. 152CJ(2) addresses this circumstance by prohibiting the ACCC from accepting an undertaking under s. 44ZZA of Part IIIA relating to a service which has been declared under this Part if the terms and conditions set out in the undertaking relate to the provision of access to service providers (although nothing prevents an undertaking being submitted in regard to that service where the undertaking sets out terms and conditions for the provision of access to non-service providers).

Third, if an undertaking that has been submitted under Part IIIA sets out terms and conditions for access to a service which later is declared under this Part, the access provider might have sought to continue to control the terms and conditions of access by service providers to that service via the Part IIIA undertaking. Proposed s. 152CK(3) addresses this circumstance by providing that if an undertaking made under s. 44ZZA is in operation in relation to a particular service which becomes a declared service under this Part, then that undertaking ceases to be in operation to the extent (if any) to which it sets out terms and conditions relating to the provision of access to service providers.

Division 8 – Resolution of disputes about access

This Division provides for the resolution of disputes about access to declared services. It is based on the arbitration provisions set out in Division 3 of Part IIIA of the Trade Practices Act. References throughout the Division to a carrier or provider are references to a carrier or carriage service provider as referred to in proposed s. 152CM(1)(a) or 152CM(2)(a).

Subdivision A – Introduction

Proposed section 152CL – Definitions

Proposed s. 152CL defines the terms “determination” and “party” for the purposes of the Division.

Subdivision B – Notification of access disputes

Proposed section 152CM – Notification of access disputes

Proposed s. 152CM provides for parties to a dispute to notify the ACCC of that dispute, thereby initiating an arbitration procedure under this Division. This provision is broadly based on s. 44S of Part IIIA.

Proposed s. 152CM(1) provides that if an access seeker and a carrier or carriage service provider who supplies or proposes to supply a declared service, in relation to which one or more standard access obligations apply or will apply, are unable to agree on the terms and conditions under which the carrier or provider must comply with standard access obligations (proposed s. 152AR) in relation to the supply of declared services, the access seeker or the carrier or provider may notify the ACCC in writing that an access dispute exists.

Proposed s. 152CM(2) provides that if an access seeker and a carrier or carriage service provider who supplies or proposes to supply a declared service, in relation to which one or more standard access obligations apply or will apply, are unable to agree on one or more aspects of access to a declared service, the access seeker or the carrier or provider may notify the ACCC in writing that an access dispute exists.

Where a dispute is notified under proposed s. 152CM(2), in considering whether one or more standard access obligations apply or will apply in relation to a declared service, it is to be assumed that proposed s. 152AR(4) (which places limitations on the obligation to supply a declared service where it would have specified impacts on existing user rights) had not been enacted. This is intended to enable, for example, an

access seeker who has been refused access to a declared service because the supply of that service would have one of the effects detailed in proposed s. 152AR(4) to notify a dispute with the ACCC and seek a determination which would avoid such an outcome (for example, by requiring the capacity of a facility to be enhanced – see proposed s. 152CP(2)(e)).

By way of example, proposed s. 152CM(5) provides that access disputes may exist in relation to price, or the method of ascertaining prices at which access is to be provided, or whether a previous determination ought to be varied. These are examples only, and do not limit the types of disputes which may be notified to the ACCC.

Reference in proposed ss. 152CM(1) and (2) to the application of one or more standard access obligations is intended to reflect that conditional or unconditional exemptions from the standard access obligations may have been given to the carrier or carriage service provider concerned. A dispute may not be notified if no standard access obligation applies in relation to the declared service concerned.

Once it is given written notification, the ACCC must give written notice of the access dispute to:

- the carrier or carriage service provider, if it was the access seeker which notified the dispute;
- the access seeker, if it was the carrier or provider which notified the dispute;
- if the ACCC is of the opinion that the resolution of the dispute may involve requiring another person to do something, that person; and
- any other person the ACCC believes might want to be a party to the arbitration.

The ACCC may come to the opinion that the resolution of a dispute may involve requiring another person to do something where the carrier or provider supplying the declared service is not in a position to comply with that requirement. For example, while the ACCC may consider that resolution of a dispute will involve the extension or enhancement of the capacity of a facility (proposed s. 152CP(2)(e)) in a dispute where the carrier or provider does not own the facility or have control over decisions regarding further investment in the facility – it may merely have a contractual right which gives it effective control over access to the supply of the declared service supplied by means of that facility. In this case, the owner of the facility may be given notice of the dispute and may become a party to the dispute (proposed s. 152CO).

Proposed section 152CN – Withdrawal of notifications

Proposed s. 152CN is based on s. 44T of the TPA.

Proposed s. 152CN provides for the withdrawal of notifications of disputes. Notification may be withdrawn by the access seeker or the carrier or provider, where they were the person who originally notified the ACCC of the dispute, at any time before the ACCC makes a determination.

The access seeker may also withdraw the carrier or service provider's notification at any time after the ACCC issues a draft determination but prior to the issuing of a final determination. This will enable, for example, an access seeker who is unwilling to be bound by the terms and conditions included in a draft determination to withdraw the notification and avoid the possibility of being bound by those access terms.

Subdivision C – Arbitration of access disputes

Proposed section 152CO – Parties to the arbitration

Proposed s. 152CO identifies who the parties to an arbitration are and is broadly based on s. 44U of the TPA. It allows the ACCC to join a person to the proceedings where either the ACCC is of the opinion that the resolution of the dispute may involve that person doing something or where a person applies in writing to join the dispute and the ACCC is satisfied that the person has a sufficient interest in the proceedings. See the explanation of proposed s. 152CM for an example of the circumstances where a third person may be required to become a party.

Proposed section 152CP – Determination by Commission

Proposed s. 152CP provides that, unless the arbitration is terminated under proposed s. 152CS, the ACCC must make a written determination on the access seeker's access to the declared service. The section is based on s. 44V of the TPA.

Before making a final determination, the ACCC must give a draft determination to the parties. The final determination must be in writing and may deal with any matter relating to access by the access seeker to the declared service, including matters that were not the basis for notification of the dispute.

Proposed s. 152CP(2) sets out examples of matters that the ACCC may include in a determination. These matters include the terms and conditions on which the carrier or carriage service provider is to comply with the standard access obligations applicable to the carrier or provider and a determination that a party extend or enhance the capability of a facility by means of which the declared service concerned is supplied. Unlike the equivalent provision in Part IIIA, reference is made here to 'enhance the capability' of a facility. A determination may require changes to a telecommunications facility which may not involve physical extension (for example, an enhancement of capabilities by replacing analogue technology with digital technology or the extension of the geographic range of radiocommunications facilities).

Proposed s. 152CP(3) prohibits the ACCC from making a determination requiring access where access is already required under a standard access obligation or any other law of the Commonwealth. This is intended to reinforce that the ACCC's determination power is an arbitral power (creating new rights and obligations), not a judicial one (enforcing existing rights).

The ACCC must also give the parties to the dispute reasons for its determination.

Proposed section 152CQ – Restrictions on access determinations

Proposed s. 152CQ limits the ACCC's power of determination and is based on s. 44W of the TPA. The ACCC must not make a determination that would have the effect of:

- preventing the carrier or carriage service provider which is, or will be, supplying the declared service concerned, or a service provider who already has access to the declared service from obtaining a sufficient amount of the service to meet the carrier's or service provider's (as the case may be) reasonably anticipated requirements (which may be greater or less than actual usage at the time the dispute was notified);
- preventing a person who has a right to access a declared service under a contract or under a determination that was in force at the time the dispute was notified, from obtaining a sufficient level of access to the declared service to be able to meet the person's actual requirements;
- depriving any person of a contractual right in force at the beginning of 13 September 1996 (the date the exposure draft of this legislation was released);
- resulting in the access seeker becoming the owner of any part of a facility without the consent of the owner of the facility;
- requiring a party (other than the access seeker) to contribute to the costs of extending or enhancing the capability of a facility or maintaining extensions to or enhancements of the capability of a facility;
- requiring a carrier or provider to provide the access seeker with access to a declared service where there are reasonable grounds to believe that either the access seeker would fail to a material extent to comply with the terms and conditions on which access is provided or would fail to protect the integrity of a network or to protect the safety of individuals working on, or using services supplied by means of a network or facility.

While a determination may not require any party other than the access seeker to contribute to the costs of extending or enhancing the capability of a facility or for the maintenance of those extensions, proposed s. 152CR(1)(e) does enable the ACCC to have regard to the value to any party of extensions or enhancements when determining terms and conditions or other matters relating to access.

Proposed s. 152CQ(2) provides that where there is a dispute between the provider and third party about an earlier determination between them, the ACCC can over-ride the limitations referred to in paragraphs (1)(a) to (d) in relation to the requirements and rights of the access seeker and the carrier or carriage service provider.

Proposed s. 152CQ(3) provides that the ACCC may take into account evidence that the access seeker is not creditworthy or repeated failure by the access seeker to comply with the terms and conditions on which the same or similar access has been provided when assessing whether or not there are reasonable grounds to believe that the access seeker will not comply with the terms and conditions of access.

Further, the ACCC must not make a determination that is inconsistent with:

- any of the standard access obligations that are, or will be, applicable to the carrier or provider (proposed s. 152CQ(4))
 - reference in this proposed subsection to the application of one or more standard access obligations is intended to reflect that conditional or unconditional exemptions from the standard access obligations may have been given to the carrier or carriage service provider concerned – a determination must not be inconsistent with access obligations as they apply to the declared service concerned;
- an access undertaking given by the carrier or provider (proposed s. 152CQ(5)); or
- a Ministerial pricing determination (proposed s. 152CQ(6)).

Proposed s. 152CQ(7) provides that a determination breaching any of the restrictions in proposed ss. 152CQ(1), (4), (5) or (6) has no effect.

Proposed s. 152CQ(8) deals with the effect of an ACCC determination where it deprives a person of a pre-notification right (which is not a protected contractual right) which does not infringe paragraphs 152CQ(1)(c) or (d) in so far as the person will not actually need to exercise the right to meet his or her actual requirements. Where a determination has the effect of depriving a person of a right in force at the time of notification of the dispute, the determination must also require the access seeker to:

- pay to the person such compensation (if any) that the ACCC considers fair compensation for the loss of the contractual right; and
- reimburse the carrier or provider and the Commonwealth for any compensation that the carrier or provider or the Commonwealth agrees or is required under court order to pay to the person as compensation for the loss of the contractual right.

Proposed section 152CR – Matters that the Commission must take into account

Proposed s. 152CR (broadly based on s. 44X of the TPA) sets out the matters that the ACCC must take into account when making a determination. These matters are:

- the promotion of the long-term interests of end-users of carriage services or of services supplied by means of carriage services;
- the legitimate business interests of the carrier or provider and the carrier's or provider's investment in facilities used to supply the declared service;
- the interests of all persons who have rights to use the declared service;
- the direct costs of providing access to the declared service;
- the value to a party of extensions, or enhancement of capability, the cost of which is borne by someone else;

- the operational and technical requirements necessary for the safe and reliable operation of a carriage service, a telecommunications network or a facility;
- the economically efficient operation of a carriage service, a telecommunications network or a facility.

These considerations broadly reflect the matters the ACCC must have regard to when considering the reasonableness of terms and conditions in an access code or an access undertaking (proposed s. 152AH) and should be interpreted in a similar way.

Proposed s. 152CR(2) provides that the ACCC may take into account any other matter it considers relevant.

Proposed section 152CS – Commission may terminate arbitration in certain cases

Proposed s. 152CS provides for the termination of an arbitration by the ACCC. The proposed section is broadly based on s. 44Y of the TPA. Two key adjustments have been made to the circumstances contained in s. 44Y under which an arbitration may be terminated by the ACCC. Firstly, the ACCC may terminate an arbitration where it thinks any party has not negotiated in good faith. This widens the ability of the ACCC to terminate an arbitration under Part IIIA (which refers only to the party which notified the dispute). This extension is intended to enable the ACCC to terminate a dispute and give a direction under proposed s. 152CT where it thinks that doing so will enable the resumption of commercial negotiations. It is not expected that the ACCC exercise this power unless it is of the opinion that commercial negotiations can be facilitated by such a direction.

The second change adds to the grounds set out in s. 44Y. Proposed paragraph 152CS(1)(e) allows for the termination of proceedings notified under proposed subsection 152CM(2) where the ACCC believes that the arbitration is not likely to make a significant contribution to competition in a market or the access seeker's carriage service or content service is not of significant social and/or economic importance. This is intended to give the ACCC a wider power to terminate a dispute where that dispute is not directly related to determining the terms and conditions of legally enforceable standard access obligations.

Proposed s. 152CS(2) enables the ACCC to terminate an arbitration if it relates to a dispute about an existing determination and the ACCC thinks there is no sufficient reason why the existing determination should not continue to have effect in its present form.

Proposed section 152CT – Commission may direct a party to engage in negotiations in good faith

Proposed s. 152CT provides that the ACCC, if it has reason to suspect that a person who is or was a party to the arbitration of an access dispute has not negotiated or is not negotiating in good faith, may give the person a procedural direction requiring the person to do, or refrain from doing, a specified act or thing relating to the conduct of those negotiations. The giving of the direction must be for the purpose of facilitating the negotiations.

Proposed s. 152CT(2) provides a list of examples of the types of directions which might be issued. It is not intended that this power enable the ACCC to direct a party as to the outcomes it wishes to see from commercial negotiations; rather, this directions power is intended to remove obstacles from the resumption of negotiations in good faith (by, for example, addressing information asymmetries or removing unreasonable conditions which the party is imposing for its participation in negotiations).

Proposed s. 152CT(5) and (6) provide that the ACCC may formulate a set of guidelines in relation to when it will use the directions power in proposed s. 152CT(1). These guidelines (if any) are not binding on the ACCC, although it must have regard to them when deciding whether to use the directions power.

Proposed section 152CU - Enforcement of directions

Proposed s. 152CU provides that if the Federal Court is satisfied that a person has contravened proposed s. 152CT(3) or (4) it may order the person to pay a pecuniary penalty not exceeding \$250,000 for a body corporate or \$50,000 for a person other than a body corporate. Proposed s. 152CU(2) provides examples of relevant matters the Court may consider when determining the level of pecuniary penalty.

Proposed s. 152CU(7) clarifies that criminal proceedings do not lie against a person only because the person has contravened proposed s. 152CT(3) or (4).

Subdivision D – Procedure in arbitrations

Proposed section 152CV – Constitution of Commission for conduct of arbitration

Proposed s. 152CV is based on s. 44Z of the TPA and provides that the ACCC, when conducting an arbitration, is to be constituted by at least two members nominated in writing by the Chairperson.

Proposed section 152CW – Member of the Commission presiding at an arbitration

Proposed s. 152CW, based on s. 44ZA of the TPA, provides that the Chairperson of the ACCC will normally preside at an arbitration. If the Chairperson is not a member of the ACCC as constituted for the purposes of an arbitration, the Chairperson must nominate a member of the ACCC to preside at the arbitration.

Proposed section 152CX – Reconstitution of Commission

Proposed s. 152CX provides that if a member of the ACCC constituted for a particular arbitration stops being a member of the ACCC or is otherwise unavailable for the arbitration, the Chairperson of the ACCC must either direct that the remaining members of the ACCC shall constitute the ACCC for the purposes of finishing the arbitration or direct that one or more other members of the ACCC shall join the remaining members to finish the arbitration.

Proposed s. 152CX(3) makes it clear that the ACCC as constituted by a direction made under this section may have regard to any record of proceedings of the arbitration as previously constituted.

Proposed section 152CY – Determination of questions

Based on s. 44ZC of the TPA, proposed s. 152CY provides that a question before the ACCC is to be resolved according to the opinion of a majority of members of the ACCC or, in the event of an even division of opinion, according to the opinion of the member presiding.

Proposed section 152CZ – Hearing to be in private

Proposed s. 152CZ provides that hearings of an arbitration are to be held in private unless the parties agree to public hearings. This proposed section is based on s. 44ZD of the TPA.

The presiding member of the ACCC may give written directions as to the persons who may be present at a private hearing, having regard to the wishes of the parties and the need for commercial confidentiality.

Proposed section 152DA – Right to representation

Proposed s. 152DA allows parties to the dispute to appear either in person or be represented by someone else. This proposed section is based on s. 44ZE of the TPA.

Proposed section 152DB – Procedure of Commission

Proposed s. 152DB, which is based on s. 44ZF of the TPA, provides that the ACCC is not bound by the rules of evidence when hearing an access dispute and may require that evidence or argument be presented in writing and may decide those matters on which it will require oral evidence or argument. Hearings should be conducted in a speedy manner, having regard to the matters affecting resolution of the dispute and may be conducted by telephone, closed circuit television or any other means of communication.

The ACCC may also determine the length of time reasonably necessary for the parties to fairly and adequately present their cases and may require that the cases be presented within that length of time.

Proposed section 152DC – Particular powers of Commission

Proposed s. 152DC sets out particular powers of the ACCC for the purpose of arbitrating an access dispute.

The ACCC may, under proposed s. 152DC(1), give a direction during the course of, or for the purposes of, an arbitration hearing. The ACCC may also hear disputes in the absence of a person summoned or served notice to appear, sit at any place and time, refer matters to an expert and give all such directions or do all things necessary for the speedy hearing and determination of the dispute.

Proposed s. 151DC(2) provides that the ACCC's powers under proposed s. 151DC(1) have effect subject to any other provisions of this Part and any regulations.

Proposed s. 151DC(3) enables the ACCC to give an oral or written order to a person not to divulge or communicate, without the ACCC's permission, specified information which was given to the person during the course of an arbitration.

Proposed section 152DD – Power to take evidence on oath or affirmation

Proposed s. 152DD sets out evidential powers of the ACCC when conducting a hearing into an access dispute, including the power to summon witnesses and to take evidence on oath or affirmation.

Proposed section 152DE – Failing to attend as a witness

Proposed s. 152DE provides that a summonsed witness must attend as required by the summons unless excused or released by an ACCC member unless the witness has a reasonable excuse for not doing so.

Proposed section 152DF – Failing to answer questions etc.

Proposed s. 152DF provides that a witness must not, without reasonable excuse, refuse or fail to:

- be sworn or make an affirmation;
- answer ACCC questions; or
- produce documents required by a summons.

An individual can refuse to answer a question or produce a document on the ground that the answer or production of the document may tend to incriminate him or her, or expose him or her to a pecuniary penalty.

Proposed section 152DG – Giving false or misleading evidence

Proposed s. 152DG provides that it is an offence for a person to knowingly give evidence that is false or misleading in a material particular.

Proposed section 152DH – Provision of false or misleading document

Proposed s. 152DH provides that a person complying with a summons under proposed s. 152DD must not produce a document that, to the knowledge of the person, is false or misleading in a material particular, unless it is accompanied by a statement detailing the false or misleading nature of the document.

Proposed section 152DI – Intimidation etc.

Proposed s. 152DI establishes as an offence intimidation of witnesses (or proposed witnesses) and persons who produce (or who propose to produce) documents to the ACCC for the purposes of an arbitration.

Proposed section 152DJ – Disturbing an arbitration hearing etc.

Proposed s. 152DJ provides that it is an offence for a person, in relation to an arbitration of an access dispute, to insult or disturb a member of the ACCC, interrupt an arbitration hearing, use insulting language towards a member of the ACCC or create a disturbance or take part in the creation or continuation of a disturbance in a place where the ACCC is holding an arbitration hearing.

Contravening these provisions is punishable by imprisonment for a term not exceeding 6 months.

Proposed section 152DK – Party may request Commission to treat material as confidential

Proposed s. 152DK sets out procedures for protecting the commercial confidentiality of documents, and the powers of the ACCC in relation to confidential documents.

Proposed section 152DL – Sections 18 and 19 do not apply to the Commission in an arbitration

Proposed s. 152DL provides that ss. 18 and 19 of the TPA do not apply to the ACCC as constituted for an arbitration. Those sections relate to procedures for ACCC meetings and the exercise of ACCC powers sitting in Divisions. These provisions are unnecessary as this Division sets out the procedures the ACCC is to follow in arbitrations.

Proposed section 152DM – Parties to pay costs of an arbitration

Proposed s. 152DM provides for the making of regulations to allow the ACCC to charge and apportion costs incurred in holding an arbitration among the parties.

Subdivision E – Effect of determinations

Proposed section 152DN – Operation of determinations

Proposed s. 152DN provides that where there is no application for review of a determination under proposed s. 152DO, the determination has effect 21 days after the determination is made. Where a party applies for a review of the determination, the determination has no effect until the application for review is resolved.

Subdivision F – Review of determinations

Proposed section 152DO – Review by Tribunal

Proposed s. 152DO provides for reviews of determinations by the Australian Competition Tribunal. A party to a determination may apply in writing to the Tribunal within 21 days of the making of the determination. A review of a determination is a re-arbitration of the access dispute and the Tribunal has the same powers as the ACCC for the purposes of the review. The Tribunal may affirm or vary the original determination. The determination of the Tribunal takes effect from when it is made.

Proposed section 152DP – Provisions that do not apply in relation to a Tribunal review

Proposed s. 152DP provides that the procedural requirements set out in ss. 37 and 39 to 43 of the TPA and the evidential and procedural matters set out in ss. 103 to 110 of the TPA do not apply in relation to a review of a determination by the Tribunal.

Proposed section 152DQ – Appeals to Federal Court from determinations of the Tribunal

Proposed s. 152DQ provides that a party to an arbitration may appeal to the Federal Court on a question of law from a decision of the Tribunal.

Proposed section 152DR – Operation and implementation of a determination that is subject to appeal

Proposed s. 152DR provides that a decision of the Tribunal the subject of a Federal Court appeal has effect notwithstanding the appeal, unless the Court makes an order staying or otherwise affecting the decision.

Proposed section 152DS – Transmission of documents

Proposed s. 152DS ensures that all documents relevant to the matter before the Tribunal are transmitted to the Court.

Subdivision G – Variation of determinations

Proposed section 152DT – Variation of determinations

Proposed s. 152DT allows for the ACCC to vary a determination with the consent of the parties to the determination. If the parties cannot agree on a variation, a new access dispute can be notified under proposed s. 152CM. Proposed s. 152DT(2) provides that the ACCC is still bound by proposed ss. 152CQ and 152CR when varying a determination.

Subdivision H – Enforcement of determinations

Proposed section 152DU – Enforcement of determinations

Proposed s. 152DU provides that the Federal Court may, on the application of a party to the determination, grant relief where it is satisfied that a person is engaging, or proposing to engage in, conduct that constitutes a contravention of the determination. Such an order may also be made against a person involved in the contravention.

Proposed section 152DV – Consent injunctions

Proposed s. 152DV provides that the Court may also grant an injunction under proposed s. 152DU by consent of all parties to the proceedings, whether or not it is satisfied that proposed s. 152DU applies.

Proposed section 152DW – Interim injunctions

The Federal Court may also grant an interim injunction pending determination of an application under proposed s. 152DU.

Proposed section 152DX – Factors relevant to granting a restraining injunction

Proposed s. 152DX provides that the Federal Court power to grant an injunction under proposed s. 152DU restraining a person from engaging in conduct may be exercised whether or not it appears to the Court that the person intends to engage again or to continue to engage in the conduct of that kind; the person has previously engaged in conduct of that kind; or there is imminent danger of substantial damage to any person if that conduct is engaged in.

Proposed section 152DY – Factors relevant to granting a mandatory injunction

Proposed s. 152DY provides that the Federal Court power to grant an injunction under proposed s. 152DU requiring a person to do a thing may be exercised whether or not it appears that the person intends to refuse or fail again or continue to refuse or fail to do that thing, the person has previously refused or failed to do that thing, or whether there is an imminent danger of substantial damage to any person if the first-mentioned person refuses or fails to do that thing.

Proposed section 152DZ – Discharge or variation of injunction or other order

Proposed s. 152DZ provides that the Federal Court may vary or discharge any order granted under the Subdivision.

Subdivision I – Miscellaneous**Proposed section 152EA – Register of determinations**

Proposed s. 152EA requires the ACCC to maintain a Register of information about each determination, including the names of parties to the determination, the declared service to which the determination relates and the date on which the determination was made. The Register may be maintained by electronic means and is to be open for public inspection.

Proposed section 152EB – Compensation for acquisition of property

Proposed s. 152EB provides that the Commonwealth must pay a reasonable amount of compensation to a person where a determination would result in an acquisition of property within the meaning of paragraph 51(xxxi) of the Constitution and the determination would otherwise be invalid because a particular person has not been sufficiently compensated. The amount of compensation is that either agreed by the person and the Commonwealth or, failing agreement, that determined by a court of competent jurisdiction.

Division 9 – Registered agreements for access to declared services

Division 9 provides for registration of agreements for access to declared services.

Proposed section 152EC – Agreements to which this Division applies

An agreement may be registered by the ACCC if the agreement:

- (1) embodies any or all of the terms or conditions on which a carrier or carriage service provider is to comply with any of the standard access obligations applicable to the carrier or service provider; or
- (2) provides for access to a declared service, was made after the service was declared and the parties to the agreement are an access seeker and the carrier or service provider who supplies or proposes to supply the service.

Proposed section 152ED – Registration of agreement

Proposed s. 152ED provides that the ACCC, where it decides to register an agreement, must include the names of the parties to the agreement, the declared services to which the agreement relates and the date on which the agreement was made.

Proposed s. 152ED(2) provides that, in deciding whether or not to register an agreement, the ACCC must take into account the public interest (including the public interest in having competition in markets) and the interests of all persons who have rights to use the declared service to which the agreement relates. The ACCC must give written reasons to the parties to the agreement where it decides not to register an agreement.

Proposed s. 152ED(5) provides that if an agreement is registered under proposed s. 152ED and all parties to the agreement apply in writing to the Commission for the agreement to be deregistered, the Commission must deregister that agreement by removing its details from the register.

The Register of agreements is to be open for public inspection and may be maintained by electronic means.

Proposed section 152EE – Effect of registration of agreement

Proposed s. 152EE provides that the parties to a registered agreement may enforce the agreement as if the agreement were a determination of the ACCC under proposed s. 152CP and they were parties to the determination. Once registered, the parties substitute the enforcement provisions of Subdivision H of Division 5 for the remedies available under contract law.

As with matters which were the subject of an ACCC determination and matters which are the subject of commercial agreement, the registration of agreements under this Division is not intended to preclude the notification of new disputes with the ACCC under proposed s. 152CM in relation to matters covered by the agreement.

Division 10 – Hindering access to declared services

Division 10 relates to conduct engaged in for the purpose of preventing or hindering access by a service provider to a declared service.

Proposed section 152EF – Prohibition on hindering access to declared service

Proposed s. 152EF(1) prohibits a person engaging in conduct for the purpose of preventing or hindering access by a service provider to a declared service. A carrier or carriage service provider supplying a declared service, a service provider to whom a declared service is being supplied by a carrier or service provider, or a body corporate that is related to any of those carriers or providers, must not engage in conduct for the purpose of preventing or hindering access to the declared service if the access is in accordance with any of the standard access obligations or a determination.

Proposed s. 152EF(2) provides that a person is taken to have engaged in conduct for the purposes referred to in proposed s. 152EF(1) even though, after all the evidence has been considered, the existence of that purpose is ascertainable only by inference from the conduct of the person or from other relevant circumstances. Proposed s. 152EF(2) does not, however, limit the manner in which the purpose referred to in proposed s. 152EF(1) can be established.

Proposed s. 152EF(3) provides that while this Part commences on Royal Assent, the prohibition in proposed s. 152EF(1) does not have effect until 1 July 1997.

Proposed section 152EG – Enforcement of prohibition on hindering access

Proposed s. 152EG provides that the Federal Court, upon application by any person, may grant relief where it is satisfied that another person has engaged in, is engaging in, or is proposing to engage in, conduct constituting a contravention of proposed s. 152EF.

Proposed section 152EH – Consent injunctions

Proposed s. 152EH provides that the Court may also grant an injunction under proposed s. 152EG by consent of all parties to the proceedings, whether or not it is satisfied that proposed s. 152EG applies.

Proposed section 152EI – Interim injunctions

The Federal Court may also grant an interim injunction pending determination of an application under proposed s. 152EG.

Proposed section 152EJ – Factors relevant to granting a restraining injunction

Proposed s. 152EJ provides that the Federal Court power to grant an injunction under proposed s. 152EG restraining a person from engaging in conduct may be exercised whether or not it appears to the Court that the person intends to engage again or to continue to engage in the conduct of that kind; the person has previously engaged in conduct of that kind; or there is imminent danger of substantial damage to any person if that conduct is engaged in.

Proposed section 152EK – Factors relevant to granting a mandatory injunction

Proposed s. 152EK provides that the Federal Court power to grant an injunction under proposed s. 152EG requiring a person to do a thing may be exercised whether or not it appears that the person intends to refuse or fail again or continue to refuse or fail to do

that thing, the person has previously refused or failed to do that thing, or whether there is an imminent danger of substantial damage to any person if the first-mentioned person refuses or fails to do that thing.

Proposed section 152EL – Discharge or variation of injunction or other order

Proposed s. 152EL provides that the Federal Court may discharge or vary an injunction or order granted under this Division.

Division 11 – Miscellaneous

This Division sets out various miscellaneous matters in respect of Part XIC.

Proposed section 152EM – Continuity of partnerships

Proposed s. 152EM ensures that, for the purposes of Part XIC, a change in the composition of a partnership does not affect the continuity of the partnership.

Proposed section 152EN – Treatment of partnerships

Proposed s. 152EN provides that in the case of partnerships, obligations under the Part are imposed on each member of the partnership, but may be discharged by the other members of the partnership.

Proposed section 152EO – Conduct by directors, servants or agents

Proposed s. 152EO provides that, where it is necessary to establish the intention of a body corporate, it is sufficient to show that the conduct was engaged in by a director, servant or agent of the corporation within the scope of his or her actual or apparent authority and that person had the intention.

Proposed section 152EP – Regulations about fees for inspection etc. of registers

Proposed s. 152EP allows for the making of regulations for the inspection of registers maintained under the Part (including the provision for fees).

Items 7, 8 and 9 – Amendments to section 155

These items amend s. 155 of the TPA to:

- enable the ACCC to request a person to produce a document, furnish information or give evidence in connection with the performance of ACCC functions or the exercise of an ACCC power under the Telecommunications Bill 1996, the *Telstra Corporation Act 1991* or Parts XIB or XIC of this Bill; and
- enable the ACCC, or its staff to enter any premises and inspect any documents in the possession or under the control of a person if the ACCC, the Chairperson or the Deputy Chairperson has reason to believe the person is contravening or has contravened Part 20 of the Telecommunications Bill or Part 6 of the *Telstra Corporation Act 1991*.

Item 10 – Insertion of new section 155AB

This item inserts before s. 155A a new s. 155AB which prohibits any ACCC official from disclosing any information collected by the ACCC under s. 155 or proposed s. 151AU, 152AU, 152BT or 152BZ and which relates to a matter arising under Parts XIB or XIC except where the official is performing duties or functions as an ACCC official or is otherwise required by law to disclose the information. Proposed s. 155AB(2) provides that s. 28 of the TPA, which allows for dissemination of information for research purposes, does not override the prohibition in proposed s. 155AB on the disclosure of information.

Item 11 – Amendment of paragraph 162(1)(b)

This item amends paragraph 162(1)(b) to extend the prohibition on a person interrupting a conference to a conference held under proposed s. 151AZ.

Items 12 and 13 – Amendments to section 163A

These items amend s. 163A to prevent a person bringing proceedings in the Federal Court seeking a declaration in relation to the operation or effect of new Part XIB or XIC. Action will be able to be brought, however, seeking a declaration in relation to the validity of things done, proposed to be done or purported to be done under these Parts.

Item 14 – Insertion of section 171B

This item inserts a new s. 171B which expressly provides that Division 3 of Part IIIA and Division 8 of Part XIC of the TPA have no effect to the extent (if any) that they purport to confer judicial power on the ACCC. This provision is intended to operate as a safeguard to ensure that the arbitration provisions of the TPA are not vulnerable to challenge on the basis of conferring judicial power on the ACCC.

Item 15—Application—amendments of section 163A of the Trade Practices Act

This item provides that the amendments made in this Bill to s. 163A of the TPA do not apply to a proceeding instituted before the commencement of this item (date of Royal Assent).