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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

TELECOMMUNICATIONS (INTERCEPTION) AMENDMENT BILL 1994

EXPLANATORY MEMORANDUM

(Circulated by the authority of the Attorney-General,
the Hon Michael Lavarch MP
and the Minister for Communications and the Arts
the Hon Michael Lee MP)

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TELECOMMUNICATIONS (INTERCEPTION) AMENDMENT BILL 1994

OUTLINE

The Telecommunications (Interception) Amendment Bill 1994 (the Bill) amends the *Telecommunications (Interception) Act 1979* (the Interception Act) and the *Telecommunications Act 1991* (the Telecommunications Act) to give effect to a number of recommendations of a report to the Government by Mr P J Barrett AM, Deputy Secretary of the Department of Finance.

In August 1993 the Government asked Mr Barrett to conduct a review of the long-term cost-effectiveness of maintaining Australia's current telecommunications interception capability in the light of rapid changes in complex telecommunications technology, the introduction of new telecommunications services and the continuing need to safeguard individual privacy. Mr Barrett reported on 1 March 1994. His key recommendations requiring legislation were:

(a) that telecommunications carriers pay the initial cost of developing interception capabilities in new telecommunications services and recover those costs from Commonwealth and State user agencies;

(b) that the offences which may found an interception warrant under the Interception Act include more serious offences involving corruption or organised crime which are not at present covered;

(c) that a right of action against a person who unlawfully intercepts or publishes a telephone communication should be conferred on the person whose communication is unlawfully intercepted;

(d) that the Interception Act should be amended to prohibit the disclosure of the existence of a warrant otherwise than in accordance with the Act;

(e) that agencies be required to keep a special register with details of warrants which do not lead, directly or indirectly, to a prosecution;

(f) that agencies' reporting obligations include supplying information on the proportion of warrants yielding information used in the prosecution of an offence and the average cost per warrant; and

(g) that in their reports on the execution of particular warrants, agencies be required to include an assessment of how useful the information was and whether it led to an arrest or was likely to do so.

The Bill deals with 7 subjects of amendment.

First, it extends the categories of offences for which interception warrants may be sought by amending the definition of 'class 2 offence' in section 5 of the Interception Act to include bribery or corruption of or by an officer of the Commonwealth or of a State (including police officers) or of a Territory, statutory money laundering offences and organised crime. No change has been made to the fundamental criterion that they be punishable by imprisonment for life or a maximum period of not less than 7 years.

Thus, interception may be used to investigate only the most serious offences. The Bill goes to some lengths to define what is meant by organised crime which is, in essence, a notion of committing particular offences as a 'business' or 'enterprise'. Apart from the 7 year imprisonment criterion, organised crime for the purposes of the Interception Act is characterised by having 2 or more offenders, by involving substantial planning and organisation, the use of sophisticated methods and techniques and by involving offences that are ordinarily committed in conjunction with other similar offences. The Bill specifies the particular offences which constitute organised crime activity, including the organised commission of sexual offences against children.

Second, the Bill amends the Interception Act to oblige the Australian Federal Police (AFP) to compile and submit to the responsible Minister every 3 months a register with details of certain warrants. Warrants which are to be recorded in this register are those which have not led, or are not likely to lead, to the institution of criminal proceedings within 3 months of ceasing to be in force. In order to compile the register, the Commissioner of the AFP will be able to require an agency of a State to provide the necessary information which is held in its records. The special register and records relating to it will be subject to inspection by the Commonwealth Ombudsman in the performance of the functions under Part VIII of the Interception Act. These amendments will enhance privacy by ensuring that warrants which have not had a useful outcome are brought to the notice of the Minister.

Third, to promote privacy the Bill creates new civil remedies for unlawful interceptions or unlawful communication of information derived from an interception. A person who was a party to a communication which was unlawfully intercepted or whose communication was unlawfully communicated to another will have a right to sue for damages (including punitive damages) or an injunction or any other remedy which the court thinks appropriate. The defendant in such actions will be the natural or corporate person who unlawfully intercepted a communication or who unlawfully authorised or enabled the interception or unlawfully communicated or used intercepted information. An action under these provisions must be brought within 6 years of the end of the unlawful interception or of the unlawful communication of intercepted information. This right of civil action under the Interception Act is intended to complement and not displace any other rights of action which may be available under State or Territory laws.

The Bill also amends the Interception Act to prohibit the disclosure of information about the existence of or details of a warrant issued under the Interception Act except as expressly allowed by the Act. The object is to preserve the confidentiality of warrants issued and thereby enhance privacy.

The Bill includes provisions to improve the quality of reports both by Commonwealth agencies to the responsible Minister and by the responsible Minister to Parliament. The chief officer of a Commonwealth agency will be required to include in the report to the Minister on each warrant, as well as the information already required by section 94 of the Interception Act to be provided, information about the number of arrests made or likely to be made on the basis of the intercepted information and an assessment of the usefulness of the intercepted information collected under the particular warrant in question. In addition, annual reports by the Minister to Parliament are to include details for each Commonwealth and State agency of the proportion of the warrants in force in the relevant reporting year which yielded intercepted information leading to the institution of a prosecution or used in support of a prosecution. The annual report is also to include information about the average cost

of warrants issued to Commonwealth and State agencies and in force in the reporting year.

The authority of employees of carriers to monitor or record telephone conversations for the purposes of installing, operating or maintaining the telecommunications network of a carrier or for tracing nuisance callers will be more closely circumscribed. The Bill amends the Interception Act to ensure that employees or subcontractors may intercept communications only where that action is reasonably necessary in order to perform more effectively his or her duties connected with the installation, operation or maintenance of the carrier's telecommunications network or the tracing of nuisance calls. Any interception which is not reasonably necessary in this sense would be unlawful and therefore an offence. In determining whether an interception was reasonably necessary in order for an employee or subcontractor to perform his or her duties effectively, a court is to have regard to matters which are specified in the regulations. Such matters may be guidelines or similar directions issued internally by a carrier or by an outside body such as AUSTEL or the Telecommunications Industry Ombudsman specifying the circumstances in which monitoring or recording by employees of a carrier may take place.

Finally, the Bill amends the Telecommunications Act to make it a licence condition that holders of general and mobile carrier licences are to bear the costs of creating or developing an interception capability of any existing telecommunications service or any new telecommunications services that they may introduce. The licence holders will be able to recover those costs from user agencies over time on terms and conditions as agreed between them. It is proposed that these agreements between the licence holders and user agencies be, as far as possible, normal, arm's-length commercial arrangements subject to market forces. For this reason, the provisions in the Bill leave the parties free to negotiate mutually acceptable arrangements, subject only to the fundamental principles that the licence holders bear the initial development costs which they may later recover from the user agencies.

The proposal does not necessarily mean that licence holders will have to make all new services interceptible. Under the proposed arrangements, user agencies themselves will determine whether they require a particular new service to be interceptible using existing decision-making fora within AUSTEL, the telecommunications industry regulator. Once agencies agree that a new service should be interceptible, the Minister will formally notify the licence holders who will only then be obliged to provide the interception capability specified.

FINANCIAL IMPACT STATEMENT

No direct costs to the Budget are anticipated.

NOTES ON CLAUSES

Clause 1: Short Title

This is a formal provision specifying the short title of the Bill.

Clause 2 Commencement

All the amendments, apart from those relating to the Special Register in Part 2 of Schedule 1, commence on Royal Assent. Part 2 of Schedule 1 will commence on a day fixed by Proclamation or 6 months after the day of Royal Assent, whichever occurs first. This deferral is needed to allow the AFP to make necessary preparations to its computer system in order to compile and produce the 3 monthly Special Register of warrants.

Clause 3: Amendments

The *Telecommunications (Interception) Act 1979* and the *Telecommunications Act 1991* are amended as set out in Schedules 1 and 2 respectively.

SCHEDULE 1

AMENDMENT OF THE TELECOMMUNICATIONS (INTERCEPTION) ACT 1979 (THE ACT)

PART 1 – DEFINITION OF 'CLASS 2 OFFENCE'

Item 1

This provision deletes the definition of 'class 2 offence' from subsection 5(1) of the Act and replaces it with a cross-reference to a new definition of the expression in new section 5D.

Item 2

This provision inserts new section 5D of the Act defining 'class 2 offence'. New subsection 5(2) is the same as the previous definition of class 2 offence except that bribery or corruption of, or by, an officer of the Commonwealth, a State or a Territory is now included. Because the concepts are well settled and in view of the wealth of learning in case law, it is not proposed to define 'bribery' or 'corruption'. It is, nevertheless, intended to cover both common law offences and statutory offences, provided they comply with the fundamental criterion they be punishable by imprisonment for life or for a maximum period of at least 7 years.

New subsection 5D(3) includes within class 2 a new category of offences involving planning and organisation which are intended to cover criminal activity which is popularly known as organised crime. This provision is based on a similar provision in the *National Crime Authority Act 1984*. Apart from the same 7 year imprisonment criterion of seriousness which applies to all class 2 offences, the essential elements are the presence of 2 or more offenders, substantial planning and organisation, the use of sophisticated methods or techniques and the underlying offences ordinarily being committed in connection with other like offences. The actual offences constituting the criminal activity for these purposes are listed in new paragraph 5D(3)(d) and include the 'child sex tours' offences in Part IIIA of the *Crimes Act 1914*.

New subsection 5D(4) adds to the class 2 category statutory offences of money laundering from each jurisdiction except the Northern Territory where there is no offence of this kind. Money laundering is an offence often associated with organised criminal activity.

New subsections 5D(5) and (6) re-enact existing elements of the former definition of 'class 2 offence'.

New subsection 5D(7) specifies that police officers of a State are to be taken as 'officers of a State' for the purposes of new section 5D. This is to overcome the effect of subsection 6G(3) which provides that an officer of a State police force is not an officer of a State for the purposes of the Act.

Item 3

This item specifies that the amendments in Part 1 of Schedule 1 apply to offences committed before or after those amendments come into force.

PART 2 – SPECIAL REGISTER OF WARRANTS

Division 1 – Special register of Warrants

Items 4 and 5

These items delete the existing definition of 'Register' and replace it with a definition of 'General Register' and 'Special Register'. The 'General Register' is the existing register of warrants which section 81A of the Act requires the AFP to keep. The 'Special Register' is a new register of warrants listing those warrants which have not led, or were not likely to lead, (within 3 months of expiry) to criminal proceedings being instituted. The information to be kept on the Special Register is the same as that already kept on the General Register.

Item 6

Item 6 inserts new sections 81C, 81D and 81E into the Act to require the AFP to maintain a Special Register of warrants designed to identify any interceptions under warrant which did not lead ultimately to a prosecution.

Subsection 81C(1) formally imposes on the Commissioner of the AFP an obligation to have a 'Special Register of Warrants' kept.

Subsection 81C(2) specifies the contents of the Special Register which are the same as the details already kept under section 81A of the Act. Only details of certain warrants called 'registrable expired warrants', defined in new subsections 81C(3) and (4), are required to be kept in the Special Register. The subsections deal separately with single original warrants and a series of renewed warrants but their effect is identical. The essential identifying characteristic of a registrable expired warrant is that no criminal proceedings have been instituted, or were likely to be instituted, against a person on the basis of information obtained as a result of intercepting a communication under the warrant within 3 months of the warrant's expiring (or the last renewal warrant's expiring, as the case may be). New subsection 81C(5) extends the reference to the institution of criminal proceedings on the basis of information obtained as a result of intercepting a communication under the warrant to include proceedings supported or likely to be supported by such information.

New section 81D requires the Commissioner of the AFP to deliver the first Special Register to the Minister within 3 months of that provision's coming into force and then every 3 months thereafter. As far as is practicable, delivery of the Special Register is to coincide with that of the General Register.

New section 81E authorises the Commissioner of the AFP to write to the chief officers of State eligible authorities which are agencies (ie, able to apply for warrants under the Act) requiring them to provide the information necessary to allow the AFP to comply with its obligation to produce the Special Register. This obligation is given statutory force by new subsection 81E(3). As under current procedures the AFP already collects the proposed contents of the Special Register for the existing register of warrants, it is anticipated that State agencies need do no more than identify those warrants which are 'registrable expired warrants' to comply with this obligation.

Item 7

Item 7 inserts a new paragraph 82(aa) to include among the Ombudsman's functions the inspection of a Commonwealth agency's records to check the accuracy of entries in the Special Register. This will ensure that agencies' records relating to the Special Register will be inspected routinely by the Ombudsman's officers under the procedures of Part VIII of the Act. The purpose of the amendment is to enhance the accountability of agencies.

Division 2 – General Register of Warrants

Items 8, 9, 10, 11, 12 and 13

These items have the effect of renaming the 'Register of Warrants' which is currently kept under section 81A the 'General Register of Warrants' where occurring in subsections 79(2), 81A(1), 81A(2), 81B(1), 81(2) and subparagraph 82(a)(i) respectively. The renaming is necessary to distinguish the existing Register of Warrants (which continues) from the new Special Register.

Item 14

This provision is necessary to ensure that any action taken under section 81A of the Act in respect of the former 'Register of Warrants' is not made a nullity by the amendments in Part 2 of Schedule 1 but is to be regarded as having been taken in respect of the General Register.

PART 3 – CIVIL REMEDIES

Item 15

This item inserts new section 76A into the Act to ensure that information obtained by unlawfully intercepting a communication or 'designated warrant information' (see item 20) may be given in evidence in a proceeding exercising the new civil right of action created in new section 107A (see item 18). Without this provision, the presentation of such evidence in such proceedings would be prohibited by section 63 of the Act.

Items 16 and 17

These items insert cross-references to new section 76A in paragraphs 77(1)(a) and 77(1)(b). Section 77 provides that intercepted information is inadmissible as evidence in any proceedings except as allowed by that section.

Item 18

This item inserts new Part XA, comprising sections 107A, 107B, 107C, 107D, 107E and 107F, into the Act to create a new right of action in a person whose communications have been unlawfully intercepted in their passage over a telecommunications system of a carrier or where information obtained by an unlawful interception has been communicated or used in contravention of section 63 of the Act.

New subsection 107A(3) confers a right on aggrieved persons to seek remedial relief from the Federal Court of Australia or a court of competent jurisdiction of a State or Territory against any person who intercepted the aggrieved person's communication or authorised, suffered or permitted another to do so or did any act or thing to enable

another to intercept that communication, contrary to subsection 7(1) of the Act. New subsections 107A(7) and 107A(10) list possible remedies, including punitive damages. The inclusion of punitive damages reflects the intention that this right of action act as a measure to enhance privacy. This list is indicative only and is not intended to be exhaustive, nor to fetter a court's discretion to order whatever remedy it thinks appropriate in the circumstances of each case. New subsection 107A(8) authorises a court to grant remedies subject to conditions.

New subsection 107A(2) defines the the person who may bring an action under new Part XA as a person who was a party to the intercepted communication or a person on whose behalf the communication was made. The latter provision recognises that it need not be a party to a conversation who necessarily suffers the damage arising out of an unlawful interception or unlawful communication of intercepted information. A common example is a company on whose behalf an employee is making a communication which is intercepted. The employee may suffer no damage even though the company loses money through its competitors obtaining information unlawfully.

New subsection 107A(9) is a technical provision allowing a court to vary or revoke an order in the nature of an injunction.

New subsection 107A(4) creates a corresponding right of action against a person who communicates information derived from an unlawful interception contrary to section 63 of the Act.

New subsections 107A(5) and (6) allow an aggrieved person to seek the same remedies from a court of criminal jurisdiction which has convicted a person of an offence against subsection 7(1) or section 63 of the Act. As the same conduct may found civil liability as well as the criminal liability, this provision saves an aggrieved person from having to present the same evidence again in a civil court.

New subsection 107A(1) provides that the right of civil action applies only where the interception is unlawful. New subsection 107A(11) further provides that a right of action will not arise where the interception complained of is unlawful only because of a minor defect or irregularity in a warrant not affecting its substance. Therefore, agencies acting properly under warrant will not be liable.

New section 107B specifies the time in which an action under new section 107A must commence. In general, an action pursued in a court of civil jurisdiction must be brought within 6 years of the end of the interception or the communication of intercepted information, as the case may be. Where a remedy is sought in a court of criminal jurisdiction, there is no fixed limitation period but the action must be brought as soon as practicable after the conviction concerned. This recognises that, as prosecutions of indictable offences are not subject to a limitation period and a relevant conviction may occur more than 6 years after the unlawful conduct, it would be unjust to put the civil limitation period on a cause of action related to or arising out of a prosecution.

New subsection 107C ensures that the new right of action augments rather than supplants any other rights of action which may be open to an aggrieved party in respect of the same unlawful conduct. It also provides that the fact of a defendant's being convicted of an offence under the Act does not affect a person's right to make an application to a civil court for relief.

New section 107D preserves similar State and Territory laws to the extent that they can operate with the provisions of Part 3 of Schedule 1.

New section 107E ensures that the remedies in new subsections 107A(3) and (4) may be granted only by courts of appropriate jurisdiction.

New section 107F extends the meaning of 'conviction' for the purposes of seeking relief under the new provisions to those who have been discharged by a court without proceeding to a formal conviction under section 19B of the *Crimes Act 1914*. This ensures that aggrieved persons are not deprived of a right to seek a civil remedy under new subsections 107A(5) or (6) by a technicality of criminal procedure.

Item 19

This item provides that the amendments made by Part 3 of Schedule 1 apply only to contraventions of sections 7(1) and 63 occurring after those amendments come into effect. In respect of contraventions of section 63, the unlawful communication may relate to information collected by an interception occurring before the commencement of these provisions.

PART 4 – DISCLOSURE OF INFORMATION ABOUT THE EXISTENCE OF A WARRANT ETC.

Item 20

This item inserts in subsection 5(1) of the Act a cross-reference to the definition of 'designated warrant information' in new section 6EA (see item 21).

Item 21

Item 21 inserts new section 6EA into the Act defining the expression 'designated warrant information'. Essentially, 'designated warrant information' is any information about the issue or existence of a warrant under Parts III or VI of the Act or any information which would enable a person or telecommunications service named in a warrant to be identified.

Item 22

Item 22 inserts new subsection 63(2) into the Act prohibiting the communication, use, recording, or giving in evidence of designated warrant information except as allowed by the Act. This will have the effect of preserving both privacy and the security of investigations. It will not, however, prevent general statistical information about warrants being communicated, used, etc.

Item 23

This item inserts new section 63AA into the Act permitting the communication, use etc of designated warrant information for the purposes of Parts III, VI, VIII or IX of the Act. This enables officers of ASIO and of Commonwealth and State law enforcement agencies to communicate, use, etc designated warrant information for the purposes of obtaining and executing interception warrants under Parts III and VI respectively, agency heads and the Ombudsman to communicate designated warrant information for the purposes of inspections under Part VIII of the Act and the law enforcement agencies and the Minister to communicate and use designated warrant information for the purposes of reporting under Part IX.

Item 24

This item amends section 63B of the Act to enable employees of a carrier to communicate, use etc designated warrant information if the information is reasonably necessary to enable interceptions under warrant to take place. There is similar provision for communication to the employees of another carrier. This provision is necessary because paragraph 47(b) of the Act requires an interception under a section 45 or 46 warrant to take place as a result of action taken by a carrier. In these circumstances, communication of designated warrant information within a carrier, or between carriers, may be necessary to allow the interception to take place.

Items 25, 26, 27, 28, 29, 30, 31, 32, and 33

These items amend sections 64(1), 65(1), 65A, 67, 68, 74, 76 and 77 of the Act with the effect of authorising the communication etc of designated warrant information in the same circumstances in which information obtained from intercepting a communication under a warranmt (known as 'lawfully obtained information') may be communicated under Part VII of the Act. There is no change in the existing scope of Part VII – it is simply being adapted to regulate the communication of designated warrant information. The principal provisions of Part VII are sections 67 and 68 which allow law enforcement agencies to communicate intercepted information for a 'permitted purpose' of the agency in question or to the chief officer of another agency respectively. 'Permitted purpose' is defined in subsection 5(1) of the Act and means essentially a purpose related to the investigation and prosecution of offences which are punishable by a maximum period of at least 3 years' imprisonment. The other significant provision is section 74 which specifies when intercepted information may be presented as evidence in proceedings. Section 76 deals with intercepted information being presented in proceedings for the prosecution of unlawful interceptions or unlawful communication of intercepted information. Section 77 specifies that, except where nominated provisions of the Act expressly allow intercepted information to be given in evidence, it is otherwise inadmissible in any proceedings.

Item 34

Item 34 applies the amendments relating to 'designated warrant information' to all warrants, whether issued before or after those amendments come into force.

PART 5 – REPORTING OBLIGATIONS

Division 1 – Reports to the Minister

Item 35

This item amends subsection 94(2) which deals with the obligation of the Commissioner of the AFP and the Chairperson of the NCA to report to the Minister on the outcome of individual warrants. The amendments add to the list of information already required to be provided:

(a) information about the number of arrests made, or likely to be made, on the basis of information obtained by interceptions under the warrant in question and;

(b) an assessment of the usefulness of information obtained by interceptions under the warrant in question.

Item 36

This item provides that the amendment in item 35 applies only to warrants which expire after that amendment comes into force.

Division 2 – Reports by the Minister

Item 37

Item 37 amends section 102 of the Act to incorporate an additional category of information which is to be included in the Minister's annual report to Parliament. The annual report is now to contain information about the proportion of all warrants in force during the reporting year which led to, or were likely to lead to, a prosecution being instituted on the basis of information obtained by interception under those warrants. This would include instances where information obtained by interceptions under a warrant supported or was likely to support a prosecution, for example by being given in evidence in a prosecution. Warrants for these purposes may also encompass a series of renewal warrants. This information is to relate both to warrants issued to individual agencies and to all warrants issued and in force in the reporting year. Note that it would be possible for the same warrant to be in force during 2 reporting years.

This information is intended to be an indicator of the usefulness of interception.

Item 38

This item amends section 103 of the Act to require the Minister's annual report to contain information about the cost (including costs of a capital nature) incurred by each Commonwealth and State agency in connection with the execution of warrants during the reporting year.

Existing provisions of the Act will oblige agencies to provide the information referred to in both items 37 and 38 once the amendments commence. In the case of State agencies, paragraph 35(1)(b) of the Act makes it a condition precedent of a State agency's authority to seek interception warrants that there be State legislation requiring the chief officer of the agency or agencies in question to give to the responsible State Minister information which Division 2 of Part IX of the Act requires to be set out in the annual report. Both sections 102 and 103 fall within Division 2 of Part IX of the Act. The relevant State Acts refer broadly to information required to be provided under Division 2 of Part IX of the Act. They will not therefore need amending to pick up the amendments made by items 37 and 38. In the case of Commonwealth agencies, subsection 94(3) puts a corresponding obligation to provide such information direct on the Commissioner of the AFP and the Chairperson of the NCA.

Item 39

The amendments made by items 35 to 38 inclusive apply only to reports relating to financial years beginning after those amendments come into force.

PART 6 – AUTHORITY OF EMPLOYEES OF CARRIERS TO INTERCEPT COMMUNICATIONS

Item 40

This item amends paragraph 7(2)(a) of the Act to tighten the existing exemption which allows an employee of a carrier lawfully to intercept a communication by adding the element of necessity. The effect of the amendment is to allow an employee of a carrier to intercept a communication only when it is reasonably necessary for the employee effectively to perform his or her duties in connection with the following activities:

(a) the installation of a line or equipment used or intended to be used in connection with a telecommunications service;

(b) the operation or maintenance of a telecommunications system; or

(c) the tracing or identification of callers contravening Part VIIB of the *Crimes Act 1914* (Part VIIB creates certain offences relating to the use of a telecommunications system – for example, threatening or abusive calls).

Item 41

This item amends paragraph 7(2)(aa) to put a corresponding limitation on the authority of independent contractors to intercept communications lawfully.

Item 42

This item inserts new subsection 7(2A) to require a court, when considering the issue of what is 'reasonably necessary', to have regard to the matters (if any) which are prescribed by the regulations. It is anticipated that guidelines, directions or similar instruments issued under the Telecommunications Act or under carriers' licences by the Minister for Communications and the Arts or the regulatory authorities and dealing with the circumstances in which carriers may properly intercept communications under subsection 7(2) will be prescribed. Therefore, monitoring communications in accordance with prescribed guidelines and procedures would be, prima facie, reasonably necessary and consequently within the authority of subsection 7(2). It is intended that an employee could rely on this to defend any prosecution for an offence under subsection 7(1).

SCHEDULE 2

AMENDMENT OF THE TELECOMMUNICATIONS ACT 1991 (THE TELECOMMUNICATIONS ACT)

Item 1

This provision inserts a cross-reference to new section 73A of the Telecommunications Act into section 62 of that Act. This has the effect of making the matters specified in new section 73A a condition to which a licence under the Telecommunications Act is subject. As a result, the enforcement provisions of Division 2 of Part 16 of the Telecommunications Act will apply to a condition under new section 73A.

Item 2

This item inserts new section 73A into the Telecommunications Act.

New subsection 73A(1) limits the application of the new section to holders of general and mobile carrier licences. The licence condition will not apply to eligible service providers licensed under section 209 of the Telecommunications Act.

New subsection 73A(3) confers on the Minister a discretion to give a written notice requiring a telecommunications system operated, or proposed to be operated, by a licence holder to have a specified type of interception capability. This is the formal mechanism which brings the licence obligation into effect in relation to particular telecommunications systems. It reflects the underlying proposition that not every new telecommunications system will necessarily be required to be interceptible.

For these purposes, new subsection 73A(8) defines 'interception capability' to mean that, if a warrant were issued to an agency authorising the interception of a communication passing over the telecommunications system in question, the system would be capable of enabling that interception to take place. This definition gives some guidance as to what any negotiations between carriers and agencies are to be about and, by implication, requires agencies to have already identified and settled what it is that they want from the licence holders. It is expected that agencies will have settled the issues of whether the proposed telecommunications system is to be interceptible and technical specifications of the capability sought *before* negotiations with licence holders begin. The Law Enforcement Advisory Committee of AUSTEL is to play the pre-eminent role in coordinating agreement between the agencies.

New subsection 73A(2) makes it a condition of the licence that a licence holder must comply with the matters set out in new subsection 73A(4). New subsection 73A(4) requires a licence holder to provide the interception capability required by the Minister on terms and conditions which are agreed between the holder and the agency or agencies specified by the Minister. If the parties fail to agree, the terms and conditions may be as determined by an arbitrator appointed by the parties. If they fail to agree on the appointment of an arbitrator, AUSTEL is to appoint the arbitrator.

New subsection 73A(7) authorises procedures for the conduct of arbitrations to be prescribed in the regulations. It is anticipated that an arbitrator will be able to operate in accordance with normal arbitration procedures under the laws of the relevant State or Territory, in which case no regulations will be necessary. The power is intended to

be exercised only if problems arise in practice, requiring formal procedures to be prescribed.

The parties are free to negotiate any terms and conditions (including the period within which an interception capability is to be provided – new subsection 73A(6)) subject only to the fundamental principles set out in new subsection 73A(5). These are that the licence holder is to incur the costs (whether capital or other) of creating or developing the required interception capability and that the licence holder may recover those costs over time from the user agency or agencies.

New subsection 73A(11) provides that 'agency' in the section includes the Australian Security Intelligence Organization as well as Commonwealth law enforcement agencies and State law enforcement agencies which may apply for warrants under Part VI of the Interception Act. New subsection 73A(9) provides that all other terms used in both new section 73A and the Interception Act have the same meaning as in the Interception Act.

New subsection 73A(11) provides a mechanism for agencies to enter into binding agreements with licence holders. As none of the agencies has a legal personality, the Commonwealth or the State, as the case may be, has to act on their behalf.

New subsection 73A(12) provides that new section 73A has no effect to the extent (if any) to which it purports to authorise the imposition of taxation or the acquisition of property otherwise than on just terms within the meaning of section 55 of the Constitution. The purpose of this provision is to avoid any possible argument that it may be invalid for Constitutional reasons.

Item 3

This item provides that the proposed licence condition applies to all licences, whether issued before or after the commencement of the amendments of the Telecommunications Act.