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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

TELSTRA (DILUTION OF PUBLIC OWNERSHIP) BILL 1996

EXPLANATORY MEMORANDUM

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

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TELSTRA (DILUTION OF PUBLIC OWNERSHIP) BILL 1996

OUTLINE

The principal purpose of the Telstra (Dilution of Public Ownership) Bill 1996 is to facilitate the sale of up to one third of the Commonwealth's equity in Telstra Corporation Limited (Telstra), while imposing strict aggregate and individual foreign ownership limits. The Bill also requires general telecommunications carriers to provide the option of untimed local calls to all customers in local call areas and introduces a new "customer service guarantee".

In summary, the proposed amendments of the *Telstra Corporation Act 1991* (the Telstra Act) would:

- enable the Commonwealth to sell one third of its equity interest in Telstra, while requiring the Commonwealth to retain the remaining two thirds (Item 24 of the Schedule to the Bill - Division 2 of proposed new Part 2 of Telstra Act);

- require Telstra to keep the Minister and the Minister for Finance informed of its operations, to notify the Minister of significant proposals and to provide to the Minister a Corporate Plan (Division 3 of proposed new Part 2 of Telstra Act);

- facilitate the process of selling part of the Commonwealth's equity interest in Telstra - including exemptions from stamp duty; appropriation from Consolidated Revenue for costs incurred in the sale; capacity for the Commonwealth to take over certain obligations of Telstra or Telstra subsidiaries; requiring Telstra to assist in the sale process; enabling the Commonwealth to use information obtained from Telstra; facilitating alteration of Telstra's constitution and restructure of its capital to support the sale process; and enabling the offer document for the sale of equity in Telstra to be registered under the Corporations Law (Divisions 4 and 5 of proposed new Part 2 of the Telstra Act);

- set ownership limits in relation to the one third equity in Telstra which can be held by persons other than the Commonwealth - including restricting aggregate foreign ownership to an 11.6667% ownership stake in Telstra (ie 35% of the one third of Telstra equity that can be held by persons other than the Commonwealth); restricting individual foreign ownership in Telstra to a 1.667% ownership stake (ie, 5% of the non-Commonwealth equity in Telstra); and related offence, anti-avoidance and enforcement provisions (Divisions 4 -7 of proposed new Part 2A of the Telstra Act);

ensure that the Telstra's Head Office, base of operations and incorporation remain in Australia and that its Chairperson and majority of directors are Australian citizens (Divisions 8 and 9 of proposed new Part 2A of the Telstra Act);

enable remedial action to be taken where there has been a contravention of the foreign ownership limits or other requirements in Part 2 or Part 2A, including provision enabling Telstra or the Minister to make applications to the Federal Court for injunctions and special provisions for prosecution of offences (proposed new Part 2B of Telstra Act); and

- re-affirm that transfer of part of the Commonwealth's equity in Telstra will not affect the "Universal Service Obligations" that apply to Telstra and other telecommunications carriers under the *Telecommunications Act 1991* (Telecommunications Act) (new Part 2C of Telstra Act).

The amendments to the Telecommunications Act would:

extend the statutory obligation on general telecommunications carriers to provide the option of untimed local calls to all customers in local call areas (the obligation is currently limited to residential customers and charitable and welfare bodies in those areas) (Items 9, 10 and 19 of the Schedule to the Bill);

introduce a new scheme for a customer service guarantee (Items 6 - 8, 11, 12 and 14 of the Schedule), which:

- sets performance standards for carriers in relation to arrangements about the period taken for connecting telecommunications services, the period for rectifying faults and service difficulties and keeping appointments with customers;

- imposes penalties on carriers where they fail to comply with performance standards, to take the form of a liability to pay specified damages to the customer;

- establishes a mechanism for carriers to discharge their liabilities by accrediting the customer's account;

- provides for the issue of an evidentiary certificate which will be prima facie evidence of a contravention of a performance standard - the function to be performed by the Telecommunications Industry Ombudsman if he or she accepts the function and, if not, by AUSTEL;

- obliges AUSTEL to review and report annually on the appropriateness and adequacy of the approaches taken by carriers in carrying out their obligations and discharging their liabilities under the new scheme; and

- empowers AUSTEL to make provision for customers to choose to waive their rights under the customer service guarantee; and extend AUSTEL's functions of developing indicative performance standards about quality of goods and services and reporting annually on carrier performance against those standards to include:

- developing indicative performance standards about matters incidental to the supply of goods or services, including timeliness and comprehensibility of bills, procedures to generate standard billing reports to assist investigation of consumer complaints and other customer billing matters (Items 1 to 5 of the Schedule); and

- requiring AUSTEL to review and report annually on carrier performance in complying with these standards (Item 13 of the Schedule).

FINANCIAL IMPACT STATEMENT

The main financial impact from the sale of up to one third of the Commonwealth's equity in Telstra will be the offset to outlays occurring when the sale receipts are credited to the Commonwealth Public Account. While the amount of such receipts will depend on market conditions at the time of the sale, it is estimated that the sale will yield about $8 billion.

Of this, an amount of $1 billion derived from the partial sale is to be transferred to the Natural Heritage Trust of Australia, which is to be established under the *Natural Heritage Trust of Australia Bill 1996.*

The Bill contains further provisions which have financial implications for the Commonwealth:

New section 8AL of the Telstra Act provides for the Consolidated Revenue Fund to be appropriated to the extent necessary to cover the costs and expenses incurred by the Commonwealth in connection with a Telstra sale scheme. No limit has been set on this appropriation as this may signal the extent of reasonable expenses contemplated by the Government and not result in the Government achieving best value for money. For these reasons, it would also not be appropriate to provide an estimate of the likely amount of appropriation.

New section 8AM of the Telstra Act provides that the Treasurer may enter into an agreement to take over certain obligations of Telstra or Telstra subsidiaries. New section 8A0 also provides for any payment made by the Treasurer under such an agreement to be made out of the Consolidated Revenue Fund. (Telstra currently has around $700m of explicitly Government guaranteed debt which the Commonwealth may take over.)

New section 8AS of the Telstra Act provides that the Consolidated Revenue Fund may be appropriated for the purposes of the Commonwealth making payments to Telstra, or to members of Telstra's Board, by way of reimbursement of expenses incurred in giving assistance in connection with a Telstra sale scheme. It is not possible to estimate the likely amounts involved under this provision.

New section 8AK exempts various transactions associated with the sale of the Commonwealth's equity in Telstra from stamp duty or other tax that would otherwise be payable under a law of a State or Territory.

The amendments to the Telecommunications Act are not expected to have a significant financial impact on Commonwealth expenditure or revenue.

NOTES ON CLAUSES

Part 1 - Preliminary

Clause 1 - Short title

The Bill, when enacted, would be known as the *Telstra (Dilution of Public Ownership) Act 1996*.

Clause 2 - Commencement

The Telstra (Dilution of Public Ownership) Act would commence on the day it receives Royal Assent, with the exception of Item 25 of the Schedule to the Bill - repeal of section 9 in Part 3 of the *Telstra Corporation Act 1991* (the Telstra Act), which enables the Minister to issue directions to Telstra in the national interest. The latter amendment would commence on the first day after the minority interest sale time (ie, the first day after any of the voting shares in Telstra are held by a person other than the Commonwealth).

Clause 3 - Amendments

Schedule 1 amends the Telstra Act and make consequential amendments to other Commonwealth Acts specified in the Schedule.

Schedule 1 - Amendments

Telecommunications Act 1991

The amendments to the *Telecommunications Act 1991* (Telecommunications Act) implement several measures to give effect to policies announced in the Government's 'Better Communications' policy. Those measures would:

- extend the statutory obligation on general carriers to provide the option of untimed local calls to all customers in local call areas (the obligation is currently limited to residential customers and charitable and welfare bodies in those areas) (items 9, 10 and 19);

  introduce a new scheme for a customer service guarantee (items 6 - 8, 11, 12 and 14);

enable AUSTEL to develop indicative performance standards about matters incidental to the supply of goods or services, including:

- timeliness and comprehensibility of bills;
- procedures to generate standard billing reports to assist investigation of consumer complaints; and
- other customer billing matters (items 1 - 5); and

require AUSTEL to review and report annually on carrier performance in complying with these standards (item 13).

Items 9, 10 and 19 - Untimed local calls

The Government's 'Better Communications' policy indicates that the existing right to untimed local calls would be maintained for both residential and business customers.

The existing right of continued access to untimed calls made using the standard telephone service is set out in section 73 of the Telecommunications Act. That section requires a general carrier not to supply a standard telephone service to eligible customers in existing local call areas except on terms and conditions which give those customers the option of choosing to have local calls charged for on an untimed basis.

'Eligible customer' is defined in subsection 73(3) to mean:

a residential customer; or
a customer that is:
- a charitable body or organisation; or
- a welfare body or organisation.

Item 9 - Subsection 73(2)
Item 10 - Subsection 73(3) (definition of *eligible customer*)

These items amend section 73 of the Act to extend the obligation to give customers the option of choosing to have untimed local calls from eligible customers in existing local call areas to all customers in those areas.

The amendment could have taken the form of extending the current definition of 'eligible customer' to expressly include business customers. However, such an approach would have led to anomalies, such as no right to untimed local calls for non-profit community organisations which are not charitable or welfare organisations.

Item 9 omits the reference to 'an eligible customer' from subsection 73(2) and substitutes a reference to 'a customer'.

Item 10 omits the definition of 'eligible customer' from subsection 73(3).

Item 19 - Application - amendments of section 73 of the *Telecommunications Act 1991*

This item is an application provision intended to prevent the amendments to section 73 from interfering in any contractual arrangements which do not provide for the option of choosing to have untimed local calls entered into between a general carrier and a business customer in a local call area before the amendments commence.

Clause (2) of item 19 provides that the amendments of section 73 do not apply in relation to a contract for the supply of a standard telephone service if:

- the contract was entered into before the commencement of item 19; and
- the contract would not have complied with section 73 if it had been entered into after that commencement

Items 6 to 8, 11, 12 and 14 - Customer service guarantee

The Government's 'Better Communications' policy indicates that the Government will introduce a new legislated customer service guarantee to be met by all telephone companies.

These items introduce a new scheme for a customer service guarantee which involves:

- performance standards for carriers in relation to arrangements about the period taken for connecting telecommunications services, the period for rectifying faults and service difficulties and keeping appointments with customers;
- penalties for carriers where they fail to comply with performance standards, to take the form of a liability to pay specified damages to the customer;
- a mechanism for carriers to discharge their liabilities by accrediting the customer's account;
- enabling the issue of an evidentiary certificate which will be prima facie evidence of a contravention of a performance standard - the function to be performed by the Telecommunications Industry Ombudsman if he or she accepts the function and, if not, by AUSTEL;
- requiring AUSTEL to review and report annually on the appropriateness and adequacy of the approaches taken by carriers in carrying out their obligations and discharging their liabilities under the new scheme; and

enabling AUSTEL to make provision for customers to choose to waive their rights under the customer service guarantee.

Item 11 - After section 87C

This item inserts a new Division 6 in Part 5 of the Telecommunications Act to provide for the customer service guarantee scheme.

Division 6 - Customer service guarantee

New section 87D - Interpretation

This section is an interpretation provision which sets out definitions of terms used in the new Division 6 and contains an interpretive rule requiring these definitions to be disregarded in determining the meaning of the terms when used other than in the new Division.

New section 87E - Performance standards

This section provides for the making of performance standards.

New subsection 87E(1) gives AUSTEL the power to make standards to be complied with by carriers in relation to:

- the making of arrangements with customers about the period taken to comply with requests to connect customers to specified kinds of telecommunications services;
- the periods that carriers may offer to customers when making the above arrangements;
- compliance by carriers with the terms of those arrangements;
- the period taken to comply with requests to rectify faults or service difficulties relating to specified kinds of telecommunications services; and
- the keeping of appointments to meet customers (or their representatives, eg family members) about such connections and rectifications.

'Customer' is defined in new subsection 87D(1) to include a prospective customer, to avoid any argument that a person who is not receiving a service from a carrier but has requested a connection may not yet be a customer of the carrier.

The term 'arrangements' used in new subsection 87E(1) is intended to include arrangements that are informal or not legally binding. In many cases, arrangements to connect customers are made informally by telephone.

New subsection 87E(2) is intended to provide protection for a carrier from the requirement to comply with a performance standard for a particular kind of telecommunications service where the carrier does not offer to supply that kind of service at a particular location. For example, if a carrier has installed cable in particular suburbs of a city and offers local call services using that cable at locations in close proximity to where that cable is installed, it should not be subject to a performance standard for connection of local call services at those locations which are not in close proximity to where the cable has been installed.

New subsection 87E(3) prevents AUSTEL making a standard unless directed to do so by the Minister under new section 87P. This provision is included because it may not be appropriate for all telecommunications services to be subject to performance standards, for example services used only by large corporate customers. The Minister will have the power to direct AUSTEL to impose standards in relation to particular services where regulatory attention should be focussed - for example, the standard telephone service used by residential and business customers and other services commonly used by small business.

New subsection 87E(4) provides that a standard may be of general application or may be limited as provided for in the standard. This provision is included because a standard may need to recognise circumstances where the standard should not apply, for example in circumstances beyond the carrier's control, such as when a natural disaster has occurred.

New subsection 87E(5) provides for the commencement of a standard.

New subsection 87E(6) provides that a standard is a disallowable instrument which accordingly must be notified in the Gazette and tabled in the Parliament and is subject to Parliamentary disallowance.

Performance standards are to be made by disallowable instrument in order to enable standards to be made for new services, as they are developed, and to enable standards to be increased progressively over time, as carrier performance improves.

New section 87F - Damages for breach of performance standards

New subsection 87F(1) makes a carrier liable to pay damages to a customer if the carrier contravenes a performance standard in relation to that customer.

New subsection 87F(2) makes the amount of damages payable equal to the relevant amount specified in the scale of damages determined by AUSTEL under new section 87G. 'Damages' is defined in new subsection 87D(1) to include punitive damages in recognition that the scale of damages is intended to specify a penalty for the carrier and accordingly may include amounts that go beyond the real measure of damages suffered by a customer for a contravention of a performance standard.

New subsection 87F(3) enables a customer to recover the amount by action against the carrier in a court of competent jurisdiction.

New subsection 87F(4) enables the liability to be discharged by giving the customer a credit in an account the customer has with the carrier. However, in some circumstances, the customer may not have an account with the carrier, for example because the customer is now using a different carrier or has left the country. This subsection allows the carrier and customer to come to an agreement about another manner for the discharge of the liability to deal with such circumstances.

New subsection 87F(5) requires any court action to be instituted within 2 years of the contravention occurring or beginning.

New subsection 87F(6) ensures that where a customer dies, the executor can continue to recover the damages from the carrier.

New section 87G - Scale of damages for breach of performance standards

New subsection 87G(1) enables AUSTEL to specify a scale of damages for contraventions of performance standards.

New subsection 87G(2) requires the scale to specify categories of contraventions and a dollar amount as the amount of damages payable for contraventions covered by each of those categories.

It is intended that the scale would specify different amounts based on the number of days that a contravention continued in relation to a specified service. For example, the dollar amount for delays in connecting or rectifying faults with the standard telephone service would be set at an amount equivalent to the monthly standard telephone rental fee for each day of delay, until a maximum is reached. The dollar amount for delays in connecting or rectifying faults with other services would be set at an amount equivalent to the monthly rental fee for those services for each day of delay up to a maximum. It may be appropriate in the case of particularly expensive services to set a lower figure. The Ministerial power of direction in new section 87P will be able to be used, if necessary, to ensure that AUSTEL gives effect to Government policy in this regard.

New subsection 87G(3) requires a dollar amount to not exceed $3000. This provision is included to put a cap on the maximum amount of damages which can be determined by AUSTEL to minimise any concern that giving this power to AUSTEL represents an inappropriate delegation of legislative power.

The $3000 maximum is considered to be the highest amount appropriate to be awarded under the customer service guarantee scheme, which is mainly aimed at residential and small business customers. The amount is more than adequate to cover most envisaged penalties - for example, the maximum intended penalty for a failure to rectify a fault with the standard telephone service under the performance standard is intended to be 6 times the monthly rental fee, which for Telstra customers is some $70.00 for a residential line and $120.00 for a business line. The maximum will allow higher penalties for more expensive services if they are included in a performance standard.

New subsection 87G(4) makes it clear that a category of contraventions can be specified by reference to the number of days the contravention continues and new subsection 87G(5) makes it clear that this does not by implication limit the ways a category can be specified.

New subsection 87G(6) provides that an instrument specifying a scale of damages is a disallowable instrument which accordingly must be notified in the Gazette and tabled in the Parliament and is subject to Parliamentary disallowance.

New section 87H - Evidentiary certificate issued by the Telecommunications Industry Ombudsman

The Telecommunications Industry Ombudsman (TIO) is an industry ombudsman established by the carriers in accordance with a condition of their licences requiring them to enter into, and comply with, an Ombudsman scheme providing for investigation in relation to complaints by consumers about all matters relating to service, billing and the manner of charging for telecommunications services.

Given the nature of the TIO's role, it would be appropriate for it to investigate complaints about breaches of performance standards. The involvement of the TIO is expected to reduce the need for customers to take action in the courts. However, if such action were necessary, it is proposed to provide a mechanism to assist the customer.

New subsection 87H(1) will give the TIO the power to issue evidentiary certificates stating that a specified carrier has contravened a performance standard and setting out particulars of the contravention.

Such a certificate becomes prima facie evidence of the matters contained in it for the purposes of any proceedings under new Division 6 (new subsection 87H(2)).

However, in recognition that the TIO scheme is an industry-based scheme, the TIO will only obtain these powers if the TIO gives a written notice consenting to the conferral of the powers (new subsection 87H(4)). The notice must be published in the Gazette (new subsection 87H(6)).

If the TIO does not consent to the conferral of the powers or subsequently revokes consent, AUSTEL is able to exercise them (new subsection 87H(5)). Note that although there is no specific reference to revoking consent, subsection 33(3) of the *Acts Interpretation Act 1901* would provide the basis for the TIO to do so and the reference to a notice 'in force' under subsection (4) is intended to recognise that a notice previously given may be revoked.

New subsection 87H(7) makes it clear that the continuity of a notice under subsection (4) is not affected by a change in occupancy of the TIO position. However, if a vacancy in the TIO position continues for more than 4 months, the power would revert to AUSTEL and the new TIO would need to give the Minister a new notice under subsection (4).

New section 87J - Waiver of customer service guarantee

New subsection 87J(1) enables AUSTEL, by written instrument, to make provision for customers of carriers to waive, in whole or in part, their protection and rights under this Division in relation to a particular service supplied, or proposed to be supplied, by the carrier concerned.

New subsection 87J(2) provides that if such a waiver is made then, to the extent of the waiver, the carrier is not bound by the performance standards which apply to the supply of the particular service to the customer.

New subsection 87J(3) requires a waiver to be made in accordance with the rules set out in the instrument.

New subsection 87J(4) provides that an instrument setting out a waiver scheme is a disallowable instrument and accordingly must be notified in the Gazette and tabled in the Parliament and is subject to Parliamentary disallowance.

The waiver power is included because it is intended to ensure that as far as possible customers are not restricted in the choices they make. It is expected that AUSTEL would exercise this power to enable a carrier to offer cheaper prices for a service where a customer is prepared to waive some or all of the customer's rights under this Division. Any such scheme would, of course, need to take into account other requirements under the Act (such as those in Division 4 of Part 9).

New section 87K - Savings of other laws and remedies

This section is intended to ensure that new Division 6 is not interpreted as excluding, limiting, restricting or affecting any right a person may otherwise have under State or Territory or common law where a carrier fails to comply with a performance standard.

New section 87L - Sections 121 and 122 do not apply to actions under this Division

Sections 121 and 122 of the Telecommunications Act enable AUSTEL to limit carriers' tort liability in respect of supplying specified basic carriage services.

This section makes it clear that those sections do not apply to a cause of action under new Division 6.

New section 87M - Breach of performance standard is not an offence

This clause makes it clear that a contravention of a standard in force under new section 87E is not an offence. New section 87F provides the mechanism for dealing with a contravention of such a standard.

New section 87N - Paragraph 62(a) does not apply to a breach of a performance standard

Paragraph 62(a) of the Telecommunications Act makes a carrier licence subject to a condition that the holder of the licence comply with the Act and the regulations. Division 2 of Part 16 sets out a mechanism for enforcing contraventions of licence conditions by the Minister applying to the Federal Court. This mechanism is inappropriate in relation to contraventions of performance standards, as new section 87F provides a mechanism for recovering damages for such a contravention. Accordingly, this new section prevents paragraph 62(a) from applying to such a contravention.

New section 87P - Minister may direct AUSTEL about the use of its powers under this Division

New subsection 87P(1) enables the Minister to give AUSTEL directions about how it is to exercise its powers under new Division 6.

Such a direction could be given, for example, to identify the kinds of telecommunications services in relation to which performance standards should be imposed, the standard that should be imposed for a specified service, the level of penalty that should be specified in a scale of damages, what provision AUSTEL should make for waiver or processes AUSTEL should follow in making a performance standard.

New subsection 87P(2) requires AUSTEL to comply with such a direction.

New subsection 87P(3) is an interpretive rule which prevents the ambit of other directions powers in the Act being read down by reference to this specific power.

New subsection 87P(4) makes a direction under this section a disallowable instrument which accordingly must be notified in the Gazette and tabled in the Parliament and is subject to Parliamentary disallowance.

New section 87Q - Review of performance standards following Ministerial direction

New subsection 87E(3) requires a Ministerial direction to be given under new section 87P before AUSTEL makes a performance standard. This will enable the Minister to direct AUSTEL as to where regulatory attention should be focussed.

New subsection 87Q(2) ensures that where the Minister revokes such a direction, AUSTEL must revoke the relevant standard.

New subsection 87Q(3) ensures that if the Minister varies such a direction, AUSTEL must either vary, or revoke and remake, the relevant standard so that it complies with the varied direction.

New subsection 87Q(4) is included to make it clear that the previous rules do not prevent AUSTEL varying, or revoking and remaking, a performance standard on its own initiative as long as it complies with the Ministerial direction.

Item 6 - Before paragraph 50(3)(a)

This item makes an amendment to subsection 50(3) of the Telecommunications Act consequential upon the insertion of new section 87P in the Act by item 12.

Subsection 50(1) enables the Minister to give directions to AUSTEL and subsection 50(3) prevents the Minister giving a direction under subsection 50(1) that he or she is empowered to give under other provisions of the Act.

This item amends subsection 50(3) to include a reference to the new directions power in new section 87P.

Item 7 - At the end of section 55

This item amends the objects of Part 5 of the Telecommunications Act to make it an object of the Part to help achieve the objects of the Act by providing for a customer service guarantee that requires carriers to comply with certain performance standards. This amendment is consequential to the insertion of new Division 6 in Part 5 of the Act by item 11.

Item 8 - At the end of subsection 61(1)

This item makes an amendment consequential upon the insertion of new section 87P in the Telecommunications Act by item 11. The amendment ensures that the Minister's power under subsection 61(1) to delegate to AUSTEL the Minister's functions and powers under Part 5 does not extend to delegating the power to give directions under new section 87P.

Item 12 - Before paragraph 333(a)

Section 333 of the Act includes a list of matters that AUSTEL can investigate under Part 15 of the Telecommunications Act.

This item inserts a new paragraph (aa) in section 333 to enable AUSTEL to investigate a failure by a carrier to comply with an obligation, or discharge a liability, under the new customer service guarantee scheme.

If the TIO accepts the function of issuing evidentiary certificates, it would be expected that AUSTEL would refer complaints made to it under Part 15 to the TIO for investigation, in accordance with section 339 of the Act. The amendment ensures that AUSTEL will have the power to investigate a complaint if it is more convenient or effective for AUSTEL to deal with the complaint.

Item 14 - After paragraph 399(2)(d)

Subsection 399(2) of the Telecommunications Act gives AUSTEL the duty of reviewing and reporting to the Minister on carrier performance. Subsections 399(4) and (5) require AUSTEL to report annually and the Minister to table the reports in each House of the Parliament.

This item inserts a new paragraph (da) in subsection 399(2) which requires AUSTEL to include in its report the appropriateness and adequacy of the approaches taken by carriers in carrying out their obligations, and discharging their liabilities, under the new customer service guarantee scheme.

Items 1 to 5 and 13 - Performance standards about billing matters

The Government's 'Better Communications' policy indicates that the Government will impose requirements on the industry in relation to certain billing matters:

- requirements to comply with an AUSTEL devised specific billing standard in order to ensure that timely, accurate and comprehensible financial information is available to all Australian residents and business; and

- a requirement for AUSTEL to set up procedures for the generation of standard billing reports, to be made available to customers on request enabling independent analysis and audit of telecommunications bills.

AUSTEL is currently developing a technical standard relating to charging and billing accuracy in accordance with the 'Telecommunications (Charging and Billing Accuracy Standard) Direction No. 1 of 1995'. However, this standard will relate only to accuracy of charging and billing and does not address timeliness and comprehensibility of billing or procedures to enable independent audit. It is not clear that a technical standard under section 244 of the Telecommunications Act would be able to address such matters.

It is proposed to amend the Act to:

enable AUSTEL to develop indicative performance standards about a wider range of matters to ensure that these kinds of billing matters can be dealt with; and

require AUSTEL to review and report annually on carrier performance in complying with these standards.

Item 1 - Subsection 38(2)
Item 4 - At the end of paragraph 38(2)(b)
Item 5 - At the end of section 38

Paragraph 38(2)(b) of the Telecommunications Act gives AUSTEL the function of, amongst other things, protecting consumers from unfair practices of carriers and other persons in the supply of telecommunications services and, for that purpose, developing indicative performance standards relating to the quality of certain goods and services.

Item 1 amends the opening words of sub-section 38(2) to expand AUSTEL's function to protecting consumers from unfair practices of carriers and other persons "in connection with" the supply of telecommunications services to ensure that associated and incidental matters such as billing are included in the function.

Item 4 adds a new subparagraph 38(2)(b)(iv) to give AUSTEL the function of developing indicative performance standards relating to matters associated with, or incidental to, the supply of the goods or services referred to in subparagraphs 38(2)(b)(i), (ii), and (iii).

Item 5 adds a new subsection 38(4) which makes it clear that the matters referred to in new subparagraph 38(2)(b)(iv) include:

- the timeliness and comprehensibility of bills;
- procedures to generate standard billing reports to assist in the investigation of consumer complaints about bills; and
- any other matter relating to customer billing.

Item 2 - Paragraph 38(2)(b)
Item 3 - At the beginning of subparagraphs 38(2)(b)(i), (ii), and (iii)

These items make minor amendments to paragraph 38(2)(b) consequential upon the addition of new subparagraph 38(2)(b)(iv) by item 5.

Item 13 - After paragraph 399(2)(b)

Subsection 399(2) of the Telecommunications Act gives AUSTEL the duty of reviewing and reporting to the Minister on carrier performance. Subsections 399(4) and (5) require AUSTEL to report annually and the Minister to table the reports in each House of the Parliament.

This item inserts a new paragraph (ba) in subsection 399(2) which requires AUSTEL to include in its report compliance by the carriers with the standards developed under new subparagraph 38(2)(b)(iv).

Item 15 - Section 400
Item 16 - At the end of section 400
Item 17 - Subsection 401(1)
Item 18 - After subsection 401(1)

Sections 400 and 401 enable AUSTEL to obtain information and documents relevant to the performance of its functions or the exercise of its powers.

Section 400 enables AUSTEL to give a carrier a written notice directing the carrier to give information or produce a document to AUSTEL.

Section 401 enables AUSTEL to give a person other than a carrier a written notice directing the person to give information or produce a document to AUSTEL.

It is not clear that AUSTEL, in a notice under section 400 or 401, can specify the form in which information is to be provided to it. In order for AUSTEL to perform its functions under new subsections 399(2)(ba) and (da) effectively, it is proposed to make it clear that AUSTEL can require carriers under section 400 to give information in a specified manner and format. A similar amendment is made to section 401 for the purpose of consistency.

Item 15 amends section 400 to enable AUSTEL to direct a carrier by written notice to give information or produce documents to AUSTEL within the time 'and in the manner' specified in the notice.

Item 16 adds a new subsection 400(2) to make it clear that a notice under subsection 400(1) directing a carrier to give AUSTEL information may require the information to be given in a specified form.

Item 17 amends the information gathering power in subsection 401(1) by making a similar amendment to that in item 15 for the purpose of consistency.

Item 18 amends the information gathering power in section 401 by making a similar amendment to that in item 16 for the purpose of consistency.

Telstra Corporation Act 1991

The Telstra Act provides for Telstra Corporation Limited (Telstra), which is a company registered under the Corporations Law, to take over the undertakings and assets, and be the successor in law, of the former Telecom and OTC (Part 4). The Telstra Act also includes provisions requiring the Commonwealth to retain ownership of all Telstra shares (Part 2) and giving the Minister powers of direction over the operation of Telstra (Part 3).

Item 20 - Title

This item of the Schedule omits the existing (long) title of the Telstra Act, which relates to the original provisions in the Act providing for the take over by Telstra of assets of the former Telecom and OTC, and replaces it with a generic title.

Item 21 - Section 3 - (definition of *rights*)

This item of the Schedule ensures that the definition of "rights" in section 3 of the Telstra Act would not apply to the ownership and related provisions in proposed new Parts 2-2C.

Item 22 - Section 3 - Interpretation

This item of the Schedule amends section 3 of the Telstra Act to introduce new definitions of:

- "constitution" (as in the Corporations Law, the memorandum and articles of association of a company);
- "Federal Court" (the Federal Court of Australia);
- "minority interest sale time" (the first time after commencement of proposed new Part 2A that any voting shares in Telstra are held by a person other than the Commonwealth);
- "sale scheme trust deed" (a trust deed which establishes a trust for the transfer of interests in Telstra shares as part of a Telstra sale scheme - see explanatory notes on proposed new section 8AJ);
- "sale scheme trustee" (a company acting as trustee of a trust established by a trust deed to whom the Commonwealth has transferred its interest in Telstra shares as part of a Telstra sale scheme - see explanatory notes on proposed new section 8AJ);
- "Senior Executive Service office" (as defined in the *Public Service Act 1922*);

- "Telstra sale scheme" (a scheme for the transfer, or progressive transfer, to other persons of a part of the Commonwealth's equity in Telstra - see explanatory notes on proposed new section 8AJ);
- "Telstra subsidiary" - a body corporate that is a subsidiary of Telstra under the Corporations Law (see section 5 of the Telstra Act); and
- "unacceptable foreign ownership situation" (defined by foreign ownership limits in proposed new section 8BG).

Item 23 - Section 3 - Reference to Schedule

This item of the Schedule adds a note that the purpose of the Schedule is to define expressions relating to provisions in Part 2A governing the ownership of Telstra.

Item 24 - Part 2 - Ownership of Shares in Telstra

This Item of the Schedule repeals existing Part 2 of the Telstra Act and inserts new Part 2, Part 2A, Part 2B and Part 2C.

Existing section 8 in Part 2 of the Telstra Act requires the Commonwealth to retain ownership of Telstra and expressly prohibits the Commonwealth or Telstra from taking action that would result in the Commonwealth no longer holding all of the voting shares in Telstra, or no longer being in a position to control all of the voting rights attaching to shares in Telstra.

PART 2 - COMMONWEALTH OWNERSHIP OF TELSTRA

New Part 2 of the Telstra Act would:

- prevent the Commonwealth or Telstra from taking action that would result in the Commonwealth no longer holding at least two thirds of relevant interests in Telstra shares, measured in terms of share capital, voting rights and rights to distribution of capital or profits (proposed new sections 8AB and 8AC);

- make Telstra subject to reporting obligations - the provision of financial statements, notification of significant events, keeping the Minister and Minister for Finance informed of the operations of the company and provision of a Corporate Plan (proposed new sections 8AD - 8AI);

- provide an exemption from State or Territory stamp duty or other tax in respect of a Telstra sale scheme (proposed new section 8AK);

- enable an appropriation to be made out of the Consolidated Revenue Fund to cover costs and expenses associated with a Telstra sale scheme (proposed new section 8AL);

enable the Commonwealth to take over Telstra obligations, in order to facilitate a Telstra sale scheme (proposed new section 8AM);

ensure co-operation by Telstra, including the Telstra Board and individual directors of Telstra, in the formulation and carrying out of a Telstra sale scheme (proposed new section 8AQ - 8AS);

ensure that the Commonwealth can use information supplied to it by Telstra for the purposes of its capacity as majority shareholder in Telstra and formulating and carrying out a Telstra sale scheme (proposed new section 8AW);

for the purposes of a Telstra sale scheme, enable the Commonwealth to register an offer document with the Australian Securities Commission (ASC) that would be subject to the fundraising provisions of the Corporations Law (proposed new section 8AT); and

facilitate any alteration of Telstra's constitution and restructure of capital as part of a Telstra sale scheme (proposed new sections 8AU and 8AV).

Division 1 - Simplified Outline

New section 8AA - Simplified Outline

New section 8AA provides a simplified outline of Part 2.

Division 2 - Commonwealth to retain majority ownership of Telstra

New section 8AB - Commonwealth to retain majority ownership of Telstra

New subsection 8AB(1) prohibits the Commonwealth from transferring any of its shares in Telstra in circumstances that would result in a breach of new subsection 8AB(2).

New subsection 8AB(2) prohibits the Commonwealth and Telstra from taking action that would result in the Commonwealth no longer:

- holding shares carrying at least two thirds of total voting rights attached to shares in Telstra (new paragraph 8AB(2)(a));
- controlling at least two thirds of total voting rights attached to shares in Telstra (new paragraph 8AB(2)(b));
  holding at least two thirds of total paid up share capital in Telstra (new paragraph 8AB(2)(c)); or
- being entitled to hold at least two thirds of total rights attached to shares in Telstra to any distribution of capital or profits on winding up (new

paragraph 8AB(2)(d)), or to any distribution of capital or profits otherwise than on winding up (new paragraph 8AB(2)(e)).

New section 8AC - Compliance by Telstra

New subsection 8AC(1) requires Telstra to take all reasonable steps to ensure that there is no breach of the requirements in new section 8AB regarding the retention by the Commonwealth of majority ownership of Telstra.

New subsection 8AC(2) establishes an offence of 500 penalty units if Telstra knowingly or recklessly contravenes subsection 8AB(1). On conviction, a fine not exceeding $50,000 for individuals or $250,000 for corporations would apply (see sections 4A and 4B of the *Crimes Act 1914* (Crimes Act). The fault elements of the offence are consistent with Division 5 of Part 2.2 of the *Criminal Code*.

Division 3 - Telstra's reporting obligations

New section 8AD - Financial statements

New subsection 8AD(1) empowers the Minister to give Telstra a written direction to provide specified financial statements for specified periods. This power could be used, for example, to require Telstra to provide quarterly financial statements (new subsection 8AD(3)).

Any financial statements provided by members of the Telstra Board in accordance with new subsection 8AD(1) must:

- cover Telstra and its subsidiaries (new paragraph 8AD(6)(b));
- be prepared in accordance with any written guidelines issued by the Minister to Telstra (new subsection 8AF(4)); and
- be given to the Minister within 2 months after the end of the relevant financial period to which the financial statement relates (new subsection 8AD(4)), unless the Minister has granted an extension of time in special circumstances (new subsection 8AD(5)).

New section 8AE - Minister to be notified of significant events

New subsection 8AE(1) requires the members of the Telstra Board to notify the Minister of proposed business activities of specified kinds and to provide written particulars of these proposals. This requirement is intended to ensure that the Minister is informed of any proposed involvement by Telstra in significant new business ventures or changes in such ventures. Prior notification of such 'significant events' could highlight a change in the strategic direction of Telstra and would provide the Minister with an opportunity to respond on behalf of the Commonwealth as majority shareholder in the company.

The Minister may also:

- exempt the Telstra Board from the specific requirement in new paragraph 8AE(1)(b) to notify the Minister of the formation of a company or participation in the formation of a company (new subsection 8AE(2)); and
- issue written guidelines to the Telstra Board on the extent of reporting required in providing notice of 'significant events' (new subsection 8AE(3)).

New section 8AF - Keeping the Minister and the Minister for Finance informed

New section 8AF requires the Telstra Board to keep the Minister informed of the operations of Telstra and give the Minister or the Minister for Finance such reports, documents or information as are requested by those Ministers. These provisions ensure that the Minister and the Minister for Finance have the power to obtain ongoing information regarding the operations of Telstra, in order to protect the Commonwealth's interests as majority shareholder in the company.

New section 8AG - Corporate Plan for Telstra

The requirement in new subsection 8AG(1) that the Telstra Board must prepare a Corporate Plan ensures that the Minister, representing the Commonwealth's interests as majority shareholder, is informed of the strategic direction proposed by Telstra and of Telstra's performance against previous plans.

The Corporate Plan must:

- cover a period of between 3 to 5 years (new subsection 8AG(2);
- cover both Telstra and its subsidiaries (new subsection 8AG(3)); and
- include certain minimum information (new subsection 8AG(6)).

The Telstra Board will also be required to keep the Minister informed about changes to the Corporate Plan (new subsection 8AG(4)) and to provide written notice to the Minister explaining particular matters that may affect compliance with the Corporate Plan (new subsection 8AG(5)).

New section 8AH - Consequences of contraventions of this Division

New section 8AH provides that a contravention of a requirement in Division 3 of new Part 2 is not an offence, but would provide a ground for obtaining an injunction under Division 1 of new Part 2B.

New section 8AI - This Division has affect despite the Corporations Law etc.

New section 8AI ensures that the mere provision of information, documents etc in accordance with Division 3 of new Part 2 does not result in a breach of the Corporations Law or any rule of common law or equity (other than a rule of administrative law).

Division 4 - Provisions relating to the sale by the Commonwealth of its shares in Telstra

New section 8AJ - Telstra sale scheme

New subsection 8AJ(1) sets out the related terms defined by the section - ie, "Telstra sale scheme", "sale-scheme trustee" and " sale-scheme trust deed".

The definition of "Telstra sale scheme" determines the scope of relevant provisions in Division 4 which, in relation to the process for selling of up to one third of the Commonwealth's equity in Telstra, would provide for stamp duty and tax exemptions (new section 8AK); an appropriation from Consolidated Revenue (new section 8AL); co-operation of Telstra in a Telstra sale scheme and use by the Commonwealth of information for the purposes of a Telstra sale scheme (new sections 8AQ and 8AW); registration by the ASC of an offer document (new section 8AT); and modified application of the Corporations Law in relation to an alteration of Telstra's constitution (new section 8AU) or a reduction of share capital (new section 8AV) for the purposes of a Telstra sale scheme.

New subsection 8AJ(2) defines a "Telstra sale scheme" as a scheme the object of which is to achieve the transfer or progressive transfer of a part of the Commonwealth's equity in Telstra to other persons. This broad definition is intended to cover the different mechanisms which may be used for the sale of Telstra shares. The specific mechanisms to be used for the sale of Telstra shares will be determined following completion of a scoping study for the sale.

New subsection 8AJ(3) requires a Telstra sale scheme to be consistent with proposed new sections 8AB and 8AC (ie, the result of any Telstra sale scheme must be that the Commonwealth retains at least a two thirds ownership stake in Telstra).

New subsection 8AJ(4) provides examples of the different elements that may be included in a Telstra sale scheme, such as:

- the simple transfer by the Commonwealth of particular shares in Telstra;
- the transfer by the Commonwealth of interests in Telstra shares to a sale scheme trustee (ie, the trustee of a trust established by a sales scheme trust deed) who would sell relevant share interests on behalf of the Commonwealth; and
- instalment schemes which would require full payment before all interests in relevant shares are transferred to investors.

Related elements of the above or other Telstra sale schemes may include a reduction of share capital, a cancellation or buy-back of shares, the redemption of redeemable preference shares and related changes to Telstra's constitution.

New subsection 8AJ(5) would require a Court, in determining whether a scheme is a Telstra sale scheme for the purposes Division 4 of Part 2, to have regard, among other relevant considerations, to the economic and commercial substance of the scheme (ie, the real effect of the scheme rather than its legal form).

New subsection 8AJ(6) makes it clear that neither the list of possible elements of a Telstra sale scheme (new subsection 8AJ(4)), nor the requirement that the Court have regard to the economic and commercial substance of a Telstra sale scheme (new subsection 8AJ(5)), are intended to limit the broad definition which is provided by new subsection 8AJ(2).

New subsection 8AJ(7) defines expressions used in the section.

New section 8AK - Exemption from stamp duty - transfer by the Commonwealth of its shares in Telstra etc.

New subsection 8AK(2) provides an exemption from stamp duty or other tax that would otherwise be payable under a law of a State or Territory in respect of a "designated matter"; or anything done because of, or for a purpose connected with a designated matter (for example, the entering into of a transaction or the making or lodgement of a document).

New subsection 8AK(1) defines a "designated matter". This definition is linked to the definition in proposed new subsection 8AJ of a "Telstra sale scheme". The overall intention of new section 8AK is to provide an exemption from stamp duty in respect of matters that relate to the entering into or carrying out of a Telstra sale scheme.

A "designated matter" is defined to include not just a simple transfer by the Commonwealth of shares in Telstra (including the transfer itself, the related agreement and receipt of money in respect of such a transfer), but also:

- a transfer by a sale scheme trustee who is acting on behalf of the Commonwealth (see explanatory notes on new section 8AI); and
- a reduction in share capital, a cancellation or buy-back of shares, the redemption of redeemable preference shares or other matters specified by regulations, to the extent that they relate to a Telstra sale scheme.

New section 8AL - Appropriation - costs incurred in connection with a Telstra sale scheme

Proposed new subsection 8AL(1) provides for the Consolidated Revenue Fund to be appropriated to the extent necessary to cover the costs and expenses incurred by the Commonwealth in connection with a Telstra sale scheme. Proposed new subsection 8AL(2) provides examples of relevant costs and expenses that are likely to be incurred in the sale process.

No limit has been set on the appropriation which can be made under this section, as this may signal the extent of reasonable expenses contemplated by the Government and not result in the Government achieving best value for money.

New section 8AM - Commonwealth takeover of certain obligations of Telstra or Telstra subsidiaries

It is intended that the Commonwealth be able during the sale process to take over direct responsibility for Telstra's Commonwealth guaranteed debt.

New subsection 8AM(2) enables the Treasurer, on the Commonwealth's behalf, to enter into an agreement to take over an obligation (including a contingent obligation) of Telstra or a Telstra subsidiary. This power may, however, only be exercised:

- at or before the "minority interest sale time" (defined in amended section 3 of the Telstra Act as the first time after commencement when a person other than the Commonwealth becomes the legal owner of any voting shares in Telstra), and
- for the purposes of facilitating a Telstra sale scheme.

New section 8AN - Authorisation of payments - Commonwealth takeover of obligations

New section 8AN enables the Treasurer, if he or she enters into an agreement under subsection 8AM(2), to take over an obligation of Telstra or a Telstra subsidiary, to authorise the payment of money to discharge the Commonwealth's obligations under the agreement.

New section 8AO - Appropriation - Commonwealth takeover of obligations

New section 8AO enables the Treasurer to authorise payment out of the Consolidated Revenue Fund to give effect to an agreement under new subsection 8AM(2).

New section 8AP - Application of *Loans Securities Act 1919*

New section 8AP is intended to allow any overseas borrowings that are taken over by the Commonwealth under new section 8AN to be managed in the same manner as other overseas Commonwealth borrowings covered by the *Loans Securities Act 1919*.

New section 8AQ - Assistance given by Telstra or the Board in connection with a Telstra sale scheme

New section 8AQ ensures co-operation by Telstra where information or other assistance is required by the Commonwealth in relation to a Telstra sale scheme, whether the maximum permitted one third of equity in Telstra (see proposed new section 8AB) is sold in one tranche or in more than one tranche (for example, the initial offer to investors of one sixth of equity in Telstra, followed by a later offer to investors of the remaining one sixth of equity in Telstra). In the latter case, the second tranche would be undertaken when there are minority shareholders in Telstra. New section 8AQ would therefore remove any possible legal risk that the mere provision of information by Telstra to the Commonwealth for the purposes of the second tranche of a Telstra sale scheme could be taken to be unfairly prejudicial to the interests of those minority shareholders .

The provisions in new section 8AQ ensure that co-operation can be provided by Telstra, the Board of Telstra and by individual directors of Telstra in connection with a Telstra sale scheme, either at the initiative of Telstra, the Board or individual directors (new subsections 8AQ(1)-(3)); and that Telstra and the Board is able to comply with a written request by the Minister for assistance (new subsection 8AQ(4)).

New subsection 8AQ(5) ensures that the giving of such assistance does not result in a contravention of the Corporations Law (for example, the requirement in section 205 that a company not give financial assistance to another person in connection with the sale of shares in that company); or result in a breach of any related rule of common law or equity (eg, the fiduciary duty of company directors to act in the interests of the company as a whole, including minority shareholders).

The exemptions from the Corporations Law that are provided by new section 8AQ are, however, confined to the provision of information or other assistance in connection with a Telstra sale scheme and do not extend to other aspects of the conduct of a Telstra sale scheme.

New subsection 8AQ(6) provides that a contravention of new section 8AQ is not an offence, but is a ground for obtaining an injunction under Division 1 of Part 2B.

New section 8AR - Giving of assistance - ancillary provisions

New subsection 8AR(1) ensures that the legislative protection given by new section 8AQ will apply where the assistance provided by Telstra, the Board or individual directors for the purposes of a Telstra sale scheme takes the form of the giving of information, financial assistance (within the meaning of section 205 of the Corporations Law), a financial benefit to a related party (within the meaning of Part 3.2A of the Corporations Law) or assistance by Telstra's directors or employees with due diligence or market briefing.

New subsections 8AR(2) and (3) ensure that the operation of new section 8AR is not affected by the renumbering of relevant provisions in the Corporations Law, or their replacement by provisions that regulate the same subject matter.

New subsection 8AR(4) ensures that the specific forms of assistance mentioned in new subsection 8AR(1) do not limit the forms of assistance that may be given.

New subsection 8AR(5) provides that new section 8AQ does not limit any rights that are conferred on the shareholders of Telstra by other laws. For example, new section 8AQ is not intended to limit the operation of section 319 of the Corporations Law which enables a shareholder to seek a Court order for inspection of company records by an auditor or legal practitioner on the shareholder's behalf.

New subsection 8AR(6) ensures that new section 8AQ does not authorise the imposition of taxation.

New subsection 8AR(7) confirms that the section does not by implication limit the powers of the Commonwealth, Telstra and members of the Board to enter into agreements relating to the giving of assistance for the purposes of a Telstra sale scheme (for example, through a Co-operation Agreement between the Commonwealth and Telstra).

New subsection 8AR(8) ensures that new section 8AQ extends to assistance given from places outside Australia.

New section 8AS - Reimbursement of expenses occurred in giving assistance

New section 8AS enables the Minister for Finance to authorise the payment by the Commonwealth to Telstra, or a member of the Telstra Board, of reasonable expenses which have arisen in providing assistance as required by new section 8AQ.

New section 8AT - Commonwealth to be bound by Chapter 7 of the Corporations Law

New section 8AT provides that the fundraising provisions in Chapter 7 of the Corporations Law bind the Crown in the right of the Commonwealth in the formulation, entering into, or carrying out of a Telstra Sale scheme. This will enable the Commonwealth to register with the ASC an offer document in relation to a Telstra sale scheme, which would be required to comply with Chapter 7 of the Corporations Law.

New subsection 8AT(3) ensures that the other provisions in the section do not make the Commonwealth liable to criminal prosecution.

New subsection 8AT(4) ensures that the operation of subsection 8AT(1) is not affected by the renumbering of relevant provisions in the Corporations Law, or their replacement by provisions that regulate the same subject matter.

New section 8AU - Alterations of Telstra's constitution

New section 8AU applies in relation to a proposed alteration of Telstra's constitution which takes place before the minority interest sale time (ie before any voting shares in Telstra are transferred to a person other than the Commonwealth), if the alteration relates to the formulation, entering into or carrying out of a Telstra sale scheme (see explanatory notes on proposed new section 8AJ).

Subsection 172(1) of the Corporations Law enables a company by special resolution to alter or add to its objects as set out in its constitution. Subsection 172(6) of the Corporations Law would require notice of the meeting of the company to be provided to all members and all trustees for debenture holders and, if there are no trustees for debenture holders, all debenture holders. Subsection 172(10) would also enable the Court, on application by the holders of not less than 10% in nominal value of all the company's debentures, to cancel or confirm such an alteration to the constitution of the company.

New subsections 8AU(2) -(4) modify the application of section 172 of the Corporations Law, to the extent that:

- Telstra would not be required to give notice to trustees for debenture holders or debenture holders specifying an intention to propose a resolution for an alteration of Telstra's constitution relating to a Telstra sale scheme; and
- the Court would not be empowered to cancel the alteration.

New subsections 8AU(2) -(4) are intended to remove any possibility that a Telstra sale scheme could be delayed or frustrated by the need to identify all debenture holders and to notify them of a proposed change to the objects of the company which relates to the carrying out of that scheme, and the possible need for the Court to consider whether it should block the resolution because of objections by creditors.

New subsection 8AU(5) ensures that the section is not affected by the renumbering of relevant provisions in the Corporations Law, or their replacement by provisions that regulate the same subject matter.

New section 8AV - Reduction of Telstra's share capital

New section 8AV applies where there is a reduction of Telstra's capital as part of a Telstra sale scheme, if the reduction involves the replacement of a particular kind of share with another kind of share and the replacement of the reduced capital.

Section 195 of the Corporations Law requires that a reduction in the share capital of a company be authorised by the company's constitution, be approved by a special resolution of the company and be confirmed by the Court. If the share capital reduction involves the payment of any paid up share capital to a shareholder, there is also an obligation on the company to seek the consent of creditors, unless the Court directs otherwise under subsection 195(4) of the Corporations Law.

It is possible that one element of a Telstra sale scheme could involve a conversion of shares and re-structuring of share capital. If such a Telstra sale scheme results in the replacement of the reduced share capital, it would not affect the capital reserves of Telstra, the solvency of the company, or the interests of creditors. There is, however, potential for the procedures under section 195 to delay or frustrate the carrying out of a Telstra sale scheme.

New subsection 8AV(2) therefore modifies the application of section 195 of the Corporations Law so that, if the reduction of capital as part of a Telstra sale conforms with new subsection 8AY(1), Telstra would not be required to give creditors notice of a proposed share capital reduction relating to a Telstra sale scheme, creditors would not be entitled to object to the reduction and the reduction would not need to be confirmed by the Court.

Division 5 - Miscellaneous

New section 8AW - Use by the Commonwealth of information obtained from Telstra or the Board

New section 8AW is intended to ensure that the Commonwealth and an "associated person" (defined in new subsection 8AW(6) as a Minister, Commonwealth officers or other persons performing services on behalf of the Commonwealth) are able, without risk of any contravention of the Corporations Law, or breaching any rule of common law or equity, to use or disclose information provided by Telstra, the Board or a member of the Board pursuant to:

- the reporting obligations in Division 3 of new Part 2; or
- Telstra's obligations in new section 8AQ to assist the Commonwealth in the formulation, entering into or carrying out of a Telstra sale scheme.

New subsections 8AW(2) and (3) enable the Commonwealth or an "associated person" to use or disclose relevant information for the purposes of a Telstra sale scheme.

Where relevant information is not used for the purposes of a Telstra sale scheme, the Commonwealth or an associated person may use or disclose that information for the purposes of shareholder oversight of Telstra, as long as that use or disclosure does not involve giving the information to a person who is not an associated person (new subsection 8AW(4)).

New section 8AX - Agreements relating to protection of information obtained from Telstra or the Board

New subsection 8AX(1) enables the Minister for Finance, on behalf of the Commonwealth, to enter into an agreement with Telstra or one or more members of the Board, relating to the protection of commercially sensitive information provided to the Commonwealth under Division 3 of proposed new Part 2 or proposed new section 8AQ.

New subsection 8AX(2) ensures that such an agreement is legally enforceable as if it were a contract.

New subsection 8AX(3) confirms that the section does not limit the Commonwealth's executive power to enter into agreements.

New section 8AY- Telstra's obligations to disclose information

New section 8AY removes any doubt that the mere provision of information by Telstra to the Commonwealth under Division 3 or section 8AQ would, of itself, trigger any obligation by Telstra to disclose that information under the listing rules of a securities exchange (such as the Australian Stock Exchange Listing Rules dealing with "continuous disclosure").

New section 8AZ - Rights of Telstra's shareholders, debenture holders and creditors to be subject to this Act

New section 8AZ is intended to provides notice that the rights of Telstra's shareholders, debenture holders and creditors are subject to the Telstra Act (see explanatory notes on new section 8AU (Alterations of Telstra's constitution) and new section 8AV (Reduction of Telstra's share capital).

New section 8BA - Compensation - constitutional safety net

New subsection 8BA(1) provides that the Commonwealth is liable to pay compensation appropriated from the Consolidated Revenue Fund (new subsection 8BA(3)) if the operation of new Part 2 would result in an "acquisition of property" within the meaning of paragraph 51(xxxi) of the Australian Constitution. While it is not expected that the operation of the Part would result in such an "acquisition of property", new subsection 8BA(1) is included to remove any doubt about the constitutional validity of relevant provisions in new Part 2.

New subsection 8A(2) enables a person who is entitled to compensation under new subsection 8A(1), but has been unable to reach agreement with the Commonwealth regarding the amount of compensation, to take action in the Federal Court to recover an amount determined by the Federal Court.

New section 8BB - Delegation

New subsection 8BB(1) enables the Minister to delegate to the Secretary of the Department, or a person holding office under the Senior Executive Service (whether or not an officer of the Department), all or any of the Minister's powers under new Part 2.

An corresponding delegation power is given to the Minister for Finance under new subsection 8BB(2).

New section 8BC - Provision to attract the corporations power and the communications power

New section 8BC is intended to ensure that proposed new Part 2 is supported by the Commonwealth's powers to make laws with respect to trading and financial corporations (paragraph 51(xx) of the Australian Constitution) and with respect to "postal telegraphic and other like services" (paragraph 51(v) of the Australian Constitution).

PART 2A - RESTRICTIONS ON OWNERSHIP OF TELSTRA

This Part sets out aggregate and individual restrictions on the ownership of equity in Telstra by foreign persons. The effect of these rules is to:

prohibit two or more foreign persons (ie, natural persons or companies) from holding more than a 35% ownership stake in non-Commonwealth shares (proposed new section 8BG); and

prohibit any individual foreign person from holding more than a 5% ownership stake in Telstra shares that are held by persons other than the Commonwealth (proposed new section 8BG).

Proposed new Part 2A would also:

establish offence provisions in respect of transactions (proposed new sections 8BH) and related avoidance arrangements (proposed new section 8BM) that cause or contribute to a breach of the foreign ownership limits;

provide a range of related enforcement mechanisms, including obligations on Telstra to ensure compliance (proposed new section 8BI), power of Federal Court to make remedial orders on application from the Minister or Telstra (proposed new section 8BJ) and power to make regulations requiring information on ownership matters (proposed new section 8BN); and

oblige Telstra to ensure that its head office, base of operations and place of incorporation remain in Australia (proposed new sections 8BQ-8BS) and require the Chairperson and the majority of other directors of Telstra to be Australian citizens (proposed new sections 8BT-8BU).

Division 1 - Simplified Outline

New section 8BD - Simplified outline

New section 8BD provides a simplified outline of the Part.

Division 2 - Definitions in the Schedule

New section 8BE - Definitions in Schedule

Definitions of expressions used in Part 2A would be provided in a Schedule to the Telstra Act (see explanatory notes on "Schedule - Ownership Definitions").

The ownership definitions in the Schedule are of central importance to the provisions in this Part. In particular:

- clauses 11 and 12 of the Schedule define "a particular type of stake" in a company as the aggregate of any "direct control interests" that are held by the person and his or her associates (defined in clause 5 of the Schedule), measured in terms of either:

  - paid up capital;
  - voting power;
  - rights to distributions of capital or profits to shareholders on winding-up; or
  - rights to distributions of capital or profits to shareholders other than on winding-up; and

- clauses 2 and 3 of the Schedule define when a person (whether a natural person or a company) is taken to be a "foreign person" for the purposes of the foreign ownership limits in Division 4 of this Part.

Division 3 - Extra-territorial operation

New section 8BF - Extra-territorial operation

New section 8BF ensures that new Part 2A and related provisions in new Part 2B extend to acts, omissions, matters and things outside Australia, whether or not in a foreign country. This would mean for example that a person who entered into a transaction in a foreign country that resulted in a breach of the foreign ownership limits in Division 4 would be subject to relevant enforcement and remedial provisions in this Part and Part 2B.

Division 4 - Limit on foreign ownership

This Division implements the Government's commitment to restricting foreign ownership of Telstra.

New section 8BG - Meaning of unacceptable foreign-ownership situation

New section 8BG provides that an "unacceptable foreign-ownership situation" exists in relation to Telstra if:

- a group of foreign persons hold, in total, a particular type of stake in the company of more than 11.6667% (representing 35% of the one third of equity in Telstra which, by virtue of proposed new section 8AB, could be held by persons other than the Commonwealth); or
- one or more foreign persons each of whom hold a particular type of stake in the company of more than 1.6667% (representing 5% of the one third of equity in Telstra which, by virtue of proposed new section 8AB, could be held by persons other than the Commonwealth).

The expression "foreign person" is defined in clauses 2 and 3 of the Schedule to mean a foreign citizen not ordinarily resident in Australia; a company in which any individual foreign person or company holds more than a 15% ownership stake; a company in which an ownership stake of 40% or more is held by two or more foreign persons or foreign companies; and a trustee of a trust estate in which foreign persons or foreign companies hold, either individually or together, a "substantial interest" (see explanatory notes on clause 13 of the Schedule).

Clauses 11 and 12 of the Schedule define the different types of stake in Telstra to which the foreign ownership limits would apply. Clause 11 provides that a person's stake in Telstra is the aggregate of "direct control interests" held by the person and by the person's associates. Clause 12 enables "direct control interests" to be measured as a percentage of paid up share capital, voting power, rights to distribution of capital or profits on winding up and rights to distribution of capital and profits otherwise than on winding up.

Clause 5 of the Schedule provides that persons will be taken to be an "associate" of another person if they are a relative, partner, employee of the person; a company in which the person is an officer, or an officer in the same company; a co-employee; trustee of a trust where the other person benefits from the trust; a company in accordance with whose directions the directors are accustomed to act; a company in which the person has an ownership stake of 15% or more; and a person who holds more than 15% stake in another company.

New section 8BK enables the aggregate and individual foreign ownership limits in new section 8BG to be reduced if the Commonwealth's equity in Telstra is sold in more than one tranche (see explanatory notes on new section 8BK).

New section 8BH - Acquisitions of shares

New section 8BH creates an offence if a person or persons acquire shares in a company either knowing, or reckless as to whether, the acquisition would create or exacerbate an "unacceptable foreign-ownership situation" in relation to Telstra, as defined by new section 8BG. On conviction, a fine not exceeding $40,000 for individuals or $200,000 for corporations would apply, at the current conversion rate for penalty units (see sections 4AB and 4B of the Crimes Act). The fault elements of the offence are consistent with Division 5 of Part 2.2 of the Criminal Code.

New section 8BI - Compliance by Telstra

New section 8BI requires Telstra to take all reasonable steps to ensure that an unacceptable foreign-ownership situation does not exist in relation to the company and make it an offence for Telstra to knowingly or recklessly fail to take such steps. On conviction, a fine not exceeding $50,000 would apply, at the current conversion rate for penalty units (see sections 4AB and 4B of the Crimes Act). The fault elements of the offence are consistent with Division 5 of Part 2.2 of the Criminal Code.

New section 8BJ - Remedial orders

If an unacceptable foreign-ownership situation exists in relation to Telstra, new subsection 8BJ(1) enables the Federal Court, upon application from the Minister or Telstra, to make such orders as it considers appropriate for the purpose of ensuring that the situation ceases to exist.

New subsection 8BJ(2) sets out specific matters that could be covered by Federal Court orders (eg, an order directing disposal of shares or restraining the exercise of rights attaching to shares), while new subsection 8BJ(3) would allow other matters to be considered.

New subsection 8BJ(4) enables the Federal Court to make ancillary or consequential orders, including an order directing a person to do or refrain from doing a specified act or thing.

New subsection 8BJ(5) enables the Federal Court, before making an order, to direct that notice of the Minister's application be given to such persons, or be published in such manner as it thinks fit.

New subsection 8BJ(6) empowers the Federal Court to make orders which rescind, vary, discharge or suspend the operation of orders it has made under the section.

Division 5 - Special provisions that apply if the Commonwealth's one- third equity interest in Telstra is sold in 2 or more tranches

Division 5 enables the aggregate and individual foreign ownership limits in new section 8BG to be reduced if the maximum permitted one third of Commonwealth equity in Telstra is sold in more than one tranche.

New section 8BK- Regulations reducing the ownership limit percentages

New section 8BK enables regulations to be made specifying reduced percentage limits in respect of aggregate and individual foreign ownership limits that are specified in new section 8BG.

This power to make regulations is intended to cover the situation where the Commonwealth's one-third equity interest in Telstra might be sold in two or more tranches (for example a sale of one sixth of Telstra shares followed by a subsequent sale of another sixth of Telstra shares).

In this event, regulations could be made which set a reduced percentage limit that would apply during the first tranche, thereby ensuring that the aggregate and individual foreign ownership of equity in Telstra in the first tranche was limited to 35% and 5% respectively of the equity in Telstra that would be sold in the first tranche.

New subsection 8BK(3) requires that the first of any regulations made for the purposes of the section be made before the sale of any voting shares in Telstra to persons other than the Commonwealth. This requirement is intended to ensure that persons purchasing Telstra shares as part of a first tranche, in conformity with the aggregate and individual foreign ownership limits, cannot be required to subsequently divest those interests because of initial regulations made under the section.

New section 8BL - Rules about regulations reducing the ownership limit percentages

New section 8BL ensures that the repeal of any regulations made under proposed new section 8BL would automatically repeal all such regulations, that no further regulations can then be made under proposed new section 8BK and that regulations cannot be changed to further reduce a specified percentage limit. Consistent with proposed new subsection 8BK(3), these provisions are intended to ensure that foreign persons purchasing Telstra shares as part of a first tranche, in conformity with the aggregate and individual foreign ownership limits which applied at the time of acquisition, cannot be required to divest those interests as a result of a subsequent regulation which has the effect of imposing a reduced percentage limit.

Division 6 - Anti-avoidance

Division 6 gives the Minister power to take action against schemes intended primarily to circumvent the aggregate or individual foreign ownership limits in Division 4 of proposed new Part 2A .

New section 8BM - Anti-avoidance

New subsection 8BM(1) applies where one or more persons enter into, or begin to carry out, or have carried out a scheme, where it would be concluded that this action was taken for the sole or dominant purpose of avoiding the application of the individual or aggregate foreign ownership limits in Division 4 of new Part 2A. In these circumstances, the Minister would be empowered under subsection 8BM(1) to give the stakeholder a written direction to cease holding that ownership stake within a specified time.

New subsection 8BM(2) establishes an offence, which at the current conversion rate for penalty units (see sections 4AB and 4B of the Crimes Act) would be punishable on conviction by a fine not exceeding $40,000 for individuals or $200,000 for corporations, if a person to intentionally or recklessly contravened a direction under new subsection 8BM(1)). The fault elements of the offence are consistent with Division 5 of Part 2.2 of the Criminal Code.

Clauses 11 and 12 of the Schedule define the different types of stake in Telstra to which the ownership limits would apply. Clause 11 provides that a persons stake in Telstra is the aggregate of "direct control interests" (clause 12 of the Schedule) held in Telstra by the person and by the person's "associates" (defined in clause 5 of the schedule).

Division 7- Record-keeping and giving of information

Division 7 relates to the keeping of records and giving of information to ensure enforcement of the aggregate and individual foreign ownership limits in Division 4.

New section 8BN - Record-keeping and giving of information

New subsection 8BN (1) enables the making of regulations requiring a person to:

- keep and retain records relevant to an "ownership matter" (defined in new subsection 8BN(6)); and
- give relevant information to the Minister and to Telstra.

New subsection 8BN(2) enables the regulations to require that relevant ownership information be verified by a statutory declaration.

New subsection 8BN(3) ensures that an individual is not required to give information that might tend to incriminate the individual, or expose him or her to a penalty.

New subsection 8BN(4) establishes an offence, which at the current conversion rate for penalty units (see sections 4AB and 4B of the Crimes Act) would carry a penalty of $5,000 for an individual and $25,000 for a corporation, if a person intentionally or recklessly contravened a requirement covered by new subsection 8BN(1). The fault elements of the offence are consistent with Division 5 of Part 2.2 of the Criminal Code.

New subsection 8BN(5) enables regulations made under the section to confer discretionary powers on the Minister including, for example, a power for the Minister to require that specified information be provided by Telstra to the Minister in relation to an ownership matter.

New subsection 8BN(6) defines an "ownership matter" as a matter relating to whether a person holds a particular ownership stake in Telstra and, if so, the level of that ownership stake.

Clauses 11 and 12 of the Schedule define the different types of stake in Telstra to which the ownership limits would apply. Clause 11 provides that a person's stake in Telstra is the aggregate of "direct control interests" (clause 12) held in Telstra by the person and by the person's "associates" (defined in clause 5).

Regulations requiring provision of information on ownership matters will enable the Minister and Telstra to monitor compliance with the aggregate and individual foreign ownership limits and, where there is a breach of those limits:

- the Minister may initiate prosecution action for deliberate breaches (under the offence provisions in new section 8BH); and
- the Minister or Telstra may make application to the Court to seek divestment of excess interests (under new section 8BJ).

New section 8BO - Incorrect Records

New subsection 8BO(1) prohibits a person from making a false record of an ownership matter, in purported compliance with a requirement under a regulation made pursuant to new section 8BN.

New subsection 8BO(2) establishes an offence, punishable on conviction by imprisonment for a term not exceeding 6 months, for a person who intentionally or recklessly, rather than by mere mistake, contravenes new paragraph 8BO(1). The fault elements of the offence are consistent with Division 5 of Part 2.2 of the Criminal Code.

New section 8BP - False or misleading information

New section 8BP establishes an offence, punishable on conviction by imprisonment for a term not exceeding 6 months, for a person to intentionally supply false or misleading information about an ownership matter to the Minister or to Telstra, in purported compliance with requirement covered by paragraph 8BN(1)(b) or (c). The fault elements of the offence are consistent with Division 5 of Part 2.2 of the Criminal Code 1995.

As in relation to new section 8BO, an offence would not be committed if a person breached a requirement under paragraph 8BN(1)(b) or (c) by mere mistake.

Division 8 - Head Office, base of operations and place of incorporation of Telstra

Division 8 requires Telstra's central management and control to remain in Australia (new section 8BQ), Telstra's base of operations to be maintained in Australia (new section 8BR) and Telstra to remain incorporated in Australia (new section 8BS). These provisions and those in Division 9 complement the foreign ownership restrictions in Division 4 of this Part.

New section 8BQ - Head office to be in Australia

New subsection 8BQ(1) requires Telstra to ensure that the central management and control of the company is ordinarily exercised at a place in Australia. While a contravention of this requirement would not be an offence, it would provide grounds for obtaining an injunction under Division 1 of Part 2B (new subsection 8BQ(2)). In order to protect the interests of third parties, new subsection 8BQ(3) provides that such a contravention would not affect the validity of any transaction.

New section 8BR - Base of operations to be in Australia

New subsection 8BR(1) requires Telstra to ensure that it maintains a substantial business and operational presence in Australia, while not limiting Telstra's capacity to engage in activities outside Australia. A contravention of this requirement is not an offence, but would provide a ground for the Minister to obtain an injunction under Division 1 of proposed new Part 2B (new subsection 8BR(3)). In order to protect the interests of third parties, new subsection 8BR(4) provides that such a contravention would not affect the validity of any transaction.

New section 8BS - Telstra to remain incorporated in Australia

New subsection 8BS(1) requires that Telstra remain incorporated under the Corporations Law as it applies in the Australian Capital Territory. While a contravention of this requirement is not an offence, it would provide grounds for obtaining an injunction under Division 1 of new Part 2B (new subsection 8BS(2)). In order to protect the interests of third parties, new subsection 8BS(3) provides that such a contravention would not affect the validity of any transaction.

Division 9 - Citizenship of Chairperson and directors of Telstra

Division 9 requires the Chairperson and majority of other directors of the Telstra Board to be Australian citizens (new sections 8BT and 8BU). The provisions in this Division and those in Division 8 complement the foreign ownership restrictions in Division 4 of this Part.

New section 8BT - Chairperson must be Australian citizen

New subsection 8BT(1) requires Telstra to ensure that its Chairman (however described in the constitution of the company) is an Australian citizen. While a contravention of this requirement is not an offence, it would provide grounds for obtaining an injunction under Division 1 of Part 2B (new subsection 8BT(2)). In order to protect the interests of third parties, new subsection 8BT(3) provides that such a contravention would not affect the validity of any transaction.

New section 8BU- Majority of directors must be Australian citizens

New subsection 8BU(1) requires Telstra to ensure that a majority of its directors are Australian citizens. A contravention of this requirement is not an offence, but would provide grounds for obtaining an injunction under Division 1 of new Part 2B (new subsection 8BU(2)). In order to protect the interests of third parties, new subsection 8BU(3) provides that such a contravention would not affect the validity of any transaction.

Division 10 - Miscellaneous

New section 8BV - Separate classes of shares in Telstra

New subsection 8BV(1) enables the Minister, before the minority interest sale time (ie before the transfer of any of the Commonwealth's shares in Telstra to another person) to give a written direction to Telstra requiring its constitution to provide for different classes of Telstra's ordinary share capital as are specified in the direction.

New subsection 8BV(2) provides examples of requirements that may be included in a direction given under new subsection 8BV(1) - relating to division of ordinary share capital into different classes, preventing foreign persons and their associates from holding interests in particular classes of shares and preventing persons other than the Commonwealth from holding particular classes of shares.

New subsection 8BV(3) confirms that the examples provided in subsection 8BV(2) are not intended to limit the general application of subsection 8BV(1).

Telstra would be required to comply with a direction given under new section 8BV (new subsection 8BV(4)). While a failure to comply would not be an offence (new subsection 8BV(5)) or affect the validity of any transaction (new subsection 8BV(6)), it would provide grounds for the Minister to obtain an injunction under Division 1 of proposed new Part 2B (new subsection 8BV(5)).

New subsection 8BV(8) confirms that directions issued under the section would create additional obligations to the general obligation on Telstra in new section 8BI to ensure compliance with the individual and aggregate foreign ownership limits set out in proposed new section 8BG.

Clause 9 of the Bill provides limited exemptions from the aggregate and individual foreign ownership limits in respect of interests held by bona-fide lenders and underwriters of a Telstra sale scheme. New subsection 8BV(9) ensures that any exemptions which apply under Clause 9 of the Schedule do not affect the application of requirements under new section 8BV.

New section 8BW - Concurrent operation of State/Territory laws

New section 8BW provides for the operation of State and Territory laws concurrently with this Part, to the extent that such laws are capable of concurrent operation.

New section 8BX - Validity of acts done in contravention of this Part

In order to protect the interests of third parties, new section 8BX preserves the validity of acts that constitute an offence against this Part.

New section 8BY - Winding up of Telstra not prevented by this Act

As a company incorporated under the Corporations Law, Telstra is liable to be wound up under relevant provisions of that Law (for example, if it were insolvent). These provisions in the Corporations Law provide an important protection to the creditors of any company. New section 8BY is an "avoidance of doubt" provision which is intended to remove any implication that relevant provisions in this Part, particularly those in Division 8 which require Telstra's head office, base of operations and place of incorporation to remain in Australia, would prevent Telstra from being wound up in accordance with the Corporations Law.

New section 8BZ - Acquisition of property

New section 8BZ ensures that the Federal Court may not make an order under this Part which would be invalid under paragraph 51(xxxi) of the Constitution because it results in an acquisition of property otherwise than on just terms.

New section 8CA- Review of decisions by Administrative Appeals Tribunal

New section 8CA enables an application to be made to the Administrative Appeals Tribunal (AAT) for review of the merits of a decision by the Minister under:

- proposed new subsection 8BM(1) (a decision to issue a direction that the person cease holding a particular ownership stake in Telstra that has been acquired through an anti-avoidance scheme); or
- proposed subclauses 9(2) and (3) of the Schedule (a decision to exempt an interest in Telstra shares held by a bona fide lender or underwriter / sub-underwriter of a Telstra sale scheme from the aggregate and individual foreign ownership limits in proposed new section 8BG, for a period of 90 days or such longer period specified by the Minister).

A decision by the Minister under proposed new subsection 8BM(1) or subclauses 9(2) or (3) of the Schedule could significantly affect the commercial interests of the applicant and it is appropriate that review on the merits be provided in these circumstances. This right of AAT review would be in addition to any right of judicial review (eg, an appeal to the Federal Court under the *Administrative Decisions (Judicial Review) Act 1977*).

New section 8CB - Delegation

New subsection 8CB(1) provides a general power for the Minister by written instrument to delegate to the Secretary of the Department, or to a person in the Senior Executive Service (whether or not in the Department), all or any of the Minister's powers under Part 2 or the Schedule. A similar power of delegation is also provided in respect of powers that may be exercised by the Minister for Finance under this Part.

New section 8CC - Provision to attract the corporations power and the communications power

New section 8CC is intended to ensure that proposed new Part 2A is supported by the Commonwealth's powers to make laws with respect to trading and financial corporations (paragraph 51(xx) of the Australian Constitution) and with respect to "postal telegraphic and other like services" (paragraph 51(v) of the Australian Constitution).

PART 2B - REMEDIAL PROVISIONS RELATING TO OWNERSHIP OF TELSTRA

New Part 2B would empower the Minister to apply to the Federal Court for injunctions to restrain people from acting in contravention of, or to require people to act in accordance with, the ownership requirements in the Act (ie, the provisions in proposed new Part 2 requiring the Commonwealth to retain majority ownership of Telstra and the limits in new Part 2A on individual and aggregate foreign ownership of Telstra).

The enforcement mechanisms in new Part 2B would operate in conjunction with relevant penalties for specific offences under new Part 2 or 2A. Failure to comply with an injunction would be a contempt of court, punishable by a fine and/or imprisonment.

New Part 2B would also set out criteria and procedures to apply to the prosecution of offences against Part 2 or Part 2A.

Division 1 - Injunctions

New section 8CD - Injunctions

New subsections 8CD(1) and (2) would enable the Federal Court (the Court), on application of the Minister or Telstra, to grant restraining or mandatory injunctions for existing or proposed conduct leading to a contravention of the ownership provisions in new Part 2 or Part 2A.

New subsections 8CD(3) and (4) would enable the court, upon application from the Minister or Telstra, to grant a performance injunction requiring a person to comply with Part 2 or Part 2A.

New section 8CE - Interim injunctions

Under subsection 8CE(1), the Court would be able to grant an interim restraining injunction, which runs for a limited period of time set by the Court, or until the final determination of the issue by the Court.

New subsection 8CE(2) precludes the Court from making it a condition of granting an interim injunction that the Minister or Telstra give an undertaking as to damages. (Such an undertaking would have required the Minister or Telstra, in the event the injunction was not granted at the end of the interim injunction period, to pay to the respondent to the application damages caused by the operation of the interim injunction). However, the Court would have power by virtue of new section 8CH to order that the Minister or Telstra pay damages to the respondent on final determination of the issue.

New section 8CF - Discharge etc. of injunctions

New section 8CF would allow the Court to discharge or vary an injunction granted under Division 1 of this Part.

New section 8CG - Certain limits on granting injunctions not to apply

In order to give full effect to the ownership rules and related enforcement provisions in proposed new Parts 2 and 2A of the Act, new section 8CG would modify the following technical principles of equity that would otherwise be considered by a court in deciding whether to grant an injunction:

- a court may be reluctant to grant an injunction where it is unlikely that the person against whom the injunction is sought ("the respondent") will continue to act in a way that the injunction is seeking to remedy; and
- a court may be reluctant to grant an injunction where there is no imminent danger of substantial damage to the applicant or a third party if the injunction is not issued.

New section 8CG, which is similar in its operation to statutory injunction provisions in numerous Commonwealth Acts, ensures strict enforcement of the ownership provisions in situations where there is a proven breach.

Proposed new paragraphs 8CG(1)(a) and 8CG(2)(a) would enable the Court to grant an injunction if satisfied that the respondent has engaged in conduct in contravention of the ownership provisions, or has refused to comply with the ownership provisions, regardless of whether it appears to the Court that the person intends to continue to engage in conduct of that kind or to continue to refuse to comply.

Proposed new paragraphs 8CG(1)(b) and 8CG(2)(b) would enable the Court to grant an injunction if satisfied that if an injunction is not granted it is likely that the respondent will engage in conduct in contravention of the ownership provisions or will refuse to comply with the ownership provisions, regardless of whether the person has previously engaged in conduct of that kind or previously failed to comply, or whether there is imminent danger of substantial damage to any person.

New section 8CH - Other powers of the court unaffected

New section 8CH confirms that the power of the Court to issue injunctions under Division 1 of new Part 2B is in addition to, and does not exclude, any of the Court's other powers.

Division 2 - Prosecutions

Division 2 of new Part 2B deals with matters of proof in prosecutions of offences against the ownership rules and related enforcement provisions.

Where offences are not of a strict liability nature, it is necessary to establish the state of mind of the offender. Division 2 of new Part 2B provides guidance for a court dealing with prosecutions for offences under Part 2 and Part 2A, in particular how to ascribe a state of mind to a corporation or other person acting through employees or agents.

The following offence provisions in proposed new Part 2 and Part 2A of the Act would require the prosecution to show that the offender intentionally or recklessly engaged in conduct which constituted the offence:

- compliance by Telstra with requirement that Commonwealth retain majority ownership of Telstra (new section 8AC);
- acquisition of shares in contravention of aggregate or individual foreign ownership limits (new section 8BH);
- compliance by Telstra with aggregate or individual foreign ownership limits (new section 8BI); and
- contravention of a direction in relation to anti-avoidance arrangements (new section 8BM)

New section 8CI - Prosecutions of corporations

For the purpose of proceedings for an offence against Part 2 or Part 2A, new subsection 8CI(1) ascribes to a corporation the state of mind of the director, employee or agent of the corporation who is engaged in conduct that constitutes the offence.

New subsection 8CI(3) defines "state of mind" for the purposes of subsection 8CI(1) to include:

- knowledge, intention, opinion, belief or purpose; and
- reasons for intention, opinion, belief or purpose.

New subsection 8CI(2) ascribes the conduct of the director, employee or agent of a corporation who has engaged in conduct that constitutes an offence under the Act to the corporation of which he or she is a director, employee or agent - provided that the conduct was engaged in on behalf of the corporation and was within that director's, employee's or agent's actual or apparent authority.

For the purposes of new subsections 8CI(1) and (2):

- new subsection 8CI(4) extends the meaning of "director" to constituent members of bodies incorporated for public purposes;
- new subsection 8CI(5) extends the meaning of "engaging in conduct" to failing or refusing to engage in conduct; and
- new subsection 8CI(6) extends the meaning of "offence against Part 2 or Part 2A" to the offences of being an accessory after the fact, attempt to commit an offence, inciting or urging the commission of an offence, and conspiracy to commit an offence (see sections 6 - 7A and subsection 86(1) of the Crimes Act).

New section 8CI is similar in terms to section 65 of the *Ozone Protection Act 1989*.

New section 8CJ - Prosecutions of persons other than corporations

New section 8CJ applies to prosecutions of persons other than corporations who are acting through employees or agents. The provisions in new section 8CJ are similar in their operation to section 34 of the *Financial Transaction Reports Act 1988*, section 85 of the *Proceeds of Crime Act 1987* and section 84 of the *Trade Practices Act 1974*.

Other than new subsection 8CJ(3), new section 8CJ is identical in its terms to new section 8CI.

New subsection 8CJ(3) ensures that a person cannot be imprisoned, where the person would not be convicted of an offence that is punishable by imprisonment if the state of mind or conduct of their employee or agent was not ascribed to the person under new subsections 8CJ(1) or (2).

The proposed new offences in the Telstra Act that would be punishable by imprisonment are:

- proposed new section 8BO (intentional or reckless making of incorrect records); and
- proposed new section 8BP (reckless provision of false or misleading information required under proposed new section 8BN).

New section 8CK - Service of summons or process on foreign corporations - criminal proceedings

New section 8CK enables a summons or process to be served in Australia on the agent of a body corporate if it is incorporated outside Australia, or does not have a registered or principal office in Australia.

New section 8CL - Indictable offences

New section 8CL provides that an offence against Part 2 or Part 2A is an indictable offence.

PART 2C - RE-AFFIRMATION OF UNIVERSAL SERVICE OBLIGATION

New section 8CM - Re-affirmation of universal service obligation

New section 8CM re-affirms the Parliament's intention that the provisions in new Part 2 which enable the transfer by the Commonwealth of up to one third of its equity in Telstra do not affect the "universal service obligations" that apply to Telstra and other telecommunications carriers under the Telecommunications Act .

Item 25 - Part 3 - Operation of Telstra

Existing Part 3 of the Telstra Act is comprised of section 9, which empowers the Minister to give Telstra written directions in relation to the exercise of the powers of Telstra as the Minister considers to be in the national interest.

This item of the Schedule would repeal Part 3.

Item 26 - Section 41 - Compensation for acquisition of property

Section 41 of the Telstra Act provides for the payment of reasonable compensation where the operation of the Act would result in an "acquisition of property" within the meaning of paragraph 51(xxxi) of the Australian Constitution.

This item of the Schedule would amend subsection 41(1) of the Telstra Corporation Act to exclude from the general application of the section those provisions in proposed new Part 2 - Part 2C of the Telstra Act that provide similar, but not identical, provisions in relation to acquisition of property.

Item 27 - Insertion of Schedule

SCHEDULE - OWNERSHIP DEFINITIONS

The Schedule defines terms relevant to the ownership restrictions in new Part 2A of the Telstra Act.

Clause 1 - Object

This clause notes that the object of the Schedule is to define terms used in Part 2A.

Clause 2 - Definitions

The clause defines terms used in Part 2A and the Schedule, in particular the terms "foreign persons and "ownership provisions".

"Foreign person" is defined as a foreign citizen not ordinarily resident in Australia; a company in which natural foreign person or a foreign company holds more than a 15% ownership stake; a company in which natural foreign persons or foreign companies hold more than a 40% ownership stake; and a trustee of a trust estate in which foreign persons or foreign companies hold, either individually or together, a substantial interest. (The term "ordinarily resident in Australia" is defined in Clause 3 of the Schedule. Clause 11 of the Schedule defines a particular type of "stake" in a company).

"Ownership provisions" is defined as the provisions in Part 2A and the Schedule.

Clause 3 - When foreign citizens are *ordinarily resident in Australia*

The clause specifies, for the purposes of the foreign ownership limits in proposed new Part 2A, when a foreign citizen would be taken to be "ordinarily resident in Australia".

Clause 2 of the Schedule defines a "foreign person" to includes a foreign citizen not ordinarily resident in Australia.

The effect of Clause 3 is that a foreign citizen will be taken to be ordinarily resident in Australia if he or she either has been in Australia on 200 or more days during the last 12 months; or has permission to remain in Australia indefinitely, or is not in Australia but has a right to re-enter Australia and to remain indefinitely; or is a New Zealand citizen, holds a New Zealand passport and either has, or has a right to, to be granted a special category visa under section 32 of the *Migration Act 1958*.

Clause 4 - Entering into an agreement or arrangement

The clause defines, for the purposes of the ownership provisions, the expression "entering into an agreement". This expression is used in:

- Clause 5 of the Schedule, which defines "associates" of a person to include another person who enters, or proposes to enter, into certain arrangements with the first person; and
- Clause 11 of the Schedule, which defines a "stake" of a person in a company to include certain interests not only of that person but also of associates of the person.

Clause 5 - Associates

This clause defines, for purposes of the ownership provisions, the term "associates" of a person. The clause provides that associates of a person include, among other specified persons:

- a company whose directors are accustomed or under an obligation to act in accordance with the directions, instructions or wishes of the person;
- a company where the person is accustomed or under an obligation to act in accordance with the directions, instructions or wishes of the company;
- a company in which the person has a particular type of stake of not less than 15%;
- if the person is a company, a person who holds a particular type of stake in the company of not less than 15%; and
- the trustee of a trust.

The clause specifies that associates of a person include associates of the person's associates.

One of the effects of this definition of "associates" is to provide a mechanism for tracing interests through a series of companies, for the purpose of determining whether there is a breach of the foreign ownership limits in proposed new Part 2A. For example, if company A held a 0.5% ownership stake in Telstra and also held more than a 15% ownership stake in company B that itself held a 0.5% ownership stake in Telstra, then company A would be taken to hold a 1% stake in Telstra, comprising the direct 0.5% stake and the 0.5% stake attributed to company A by virtue of company B being an associate of company A.

Clause 6 - Power to appoint director

This clause specifies circumstances in which, for the purposes of the ownership provisions, a person would be taken to have "power to appoint a director". The latter expression is used in clause 5, under which persons are associates of each other if they enter, or propose to enter, into an arrangement with each other related to their power, by acting together, to appoint or remove a director of a company.

Clause 7 - Meaning of *entitled to acquire*

This clause provides that, for purposes of the ownership provisions, a person is "entitled to acquire" anything that the person is absolutely or contingently entitled to acquire, for any reason. The expression "entitled to acquire" is used in clause 8.

Clause 8 - Meaning of *interest in a share*

This clause specifies the circumstances in which a person is taken to hold an "interest in a share". Under clause 12, the interest of a person in a share is relevant to determining the "direct control interest" of the person in a company, which in turn is relevant to determining under clause 11 the particular stake a person holds in the company.

Clause 9 - Certain interests in shares to be disregarded

Clause 9(1) enables interests in Telstra shares to be disregarded for the purposes of the ownership provisions if they are held by the sale scheme trustee in accordance with a sale-scheme trust deed; or by a lender in the ordinary course of business; or by a person by virtue of holding a prescribed office; or the interest is of a kind prescribed by regulations.

Clause 9(2) enables an interest in a Telstra share to be disregarded for a period of 90 days or such longer period approved by the Minister, if it is held by a lender in the ordinary course of business who holds the share for a continuous period by reason of enforcement of the loan security.

Clause 9(3) is intended to ensure that an underwriter or sub-underwriter to a Telstra sale scheme (ie a scheme for the sale of all or part of the one third of equity in Telstra which can be held by persons other than the Commonwealth) does not breach the foreign ownership limits in proposed new Part 2A of the Telstra Act only by reason of the temporary acquisition of interests which they are obliged to acquire through agreements entered into for the purposes of the Telstra sale scheme.

The terms "underwriter" and "sub-underwriter" are defined in Clause 2 of the Schedule and apply to a person who is a party to an agreement with the company that is issuing shares as part of a Telstra sale scheme (or another person who is party to a subcontract with such a person), where the contract includes a provision obliging either of those persons to subscribe for any of the shares in the event of a shortfall in public subscriptions.

Where the conditions of Clause 9(3) are satisfied, the interest in Telstra shares held by the underwriter or sub-underwriter would be exempted from the operation of the ownership limits in Part 2A for a period of 90 days or such longer period as is approved by the Minister.

Clause 10 - Voting power

This clause defines, for the purposes of the ownership provisions, the expression "voting power" in a company. Under clause 12, voting power in a company is relevant to determining the "direct control interest" of the person in a company, which in turn is relevant to determining under clause 11 the particular stake a person holds in the company.

Clause 11 - Stake in a company

Clause 11(1) provides that a particular type of stake that a person holds in a company at a particular time is the aggregate of the direct control interests of that type that the person and associates of the person hold at that time. Clause 12 specifies the types of "direct control interests".

Clause 11(2) prevents double counting in determining a particular type of stake a person holds in a company.

Clause 11(3) prevents double counting in determining the total of the stakes of a particular type that are held by foreign persons.

Clause 12 - Direct control interests in a company

This clause defines four types of "direct control interests" in a company.

The clause provides that a person holds a direct control interest in a company at a particular time equal to the percentage:

- of the total paid-up share capital of the company in which the person holds an interest at that time (subclause (1));
- of the voting power in the company that the person is in a position to control at that time (subclause (2));
- that the person holds, or is entitled to acquire, at that time of the total rights to distributions of capital or profits of the company to its shareholders on winding-up (subclause (3)); or
- that the person holds, or is entitled to acquire, at that time of the total rights to distributions of capital or profits of the company to its shareholders otherwise than on winding-up (subclause (4)).

Subclause (5) provides a mechanism for measuring percentage interests that can be 'traced' through a series of companies in a corporate investment chain.

Clause 13 - Substantial interests in trust estates

This clause defines the circumstances in which a person is taken to hold a "substantial interest", or two or more persons are taken to hold an "aggregate substantial interest", in a trust estate. The expressions "substantial interest" and "aggregate substantial interest" are used in the definition of "foreign person" in clause 2 of the Schedule.

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