Telecommunications Universal Service Management Agency Bill 2011

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Law and Bills Digest Section

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Telecommunications Universal Service Management Agency Bill 2011

Date introduced: 2 November 2011
House: House of Representatives
Portfolio: Broadband, Communications and the Digital Economy
Commencement: Various dates as set out in the table contained in Section 2 of the Bill

Purpose

The Telecommunications Universal Service Management Agency Bill 2011 (the Bill) forms part of a package of legislation to facilitate the transition to the National Broadband Network (NBN). The other Bills in the package are the Telecommunications Legislation Amendment (Universal Service Reform) Bill 2011 (the Universal Service Reform Bill) and the Telecommunications (Industry Levy Bill) 2011 (the Levy Bill).

The Bill establishes the Telecommunications Universal Service Management Agency (TUSMA) as the statutory agency that will have the responsibility for the implementation and administration of service agreements or grants that deliver universal service and other public policy telecommunications outcomes.

In addition, the Bill:

• sets out TUSMA’s corporate governance structure and reporting and accountability requirements and
• provides for the Minister, subject to the scrutiny of Parliament, to set the standards, rules and minimum benchmarks for TUSMA’s contracts and grants, and
• sets out arrangements for consolidating the two current Universal Service Obligation (USO) and National Relay Service (NRS) industry levy regimes into a single regime to contribute funding towards TUSMA’s costs.¹

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¹ Explanatory Memorandum, Telecommunications Universal Service Management Agency Bill 2011, p. 2.

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Background

The main public interest telecommunications services are regulated under current telecommunications legislation. These are the USO (for standard telephone services and payphones) and emergency call service provision. Current legislation also provides for the Commonwealth to contract with the private sector for the provision of the NRS.

The USO requires Telstra, as the current primary universal service provider, to ensure that standard telephone services and payphones are reasonably accessible to all people in Australia on an equitable basis, wherever they reside or carry on business. Under the *Telecommunications (Consumer Protection and Service Standards) Act 1999* (Consumer Protection Act), the telecommunications industry contributes funding towards the delivery of the USO through levy arrangements.²

Further background on the USO can be found on the Department of Broadband, Communications and the Digital Economy’s (Department of BCDE) website.³

Basis of policy commitment

The existing USO regulatory arrangements were designed for a market where there was a vertically integrated operator of a national telecommunications network. The progressive decommissioning of Telstra’s copper fixed-line network will occur as NBN Co rolls out its next generation fibre network as the foundation of the National Broadband Network (NBN). It is expected that this will create an environment where all retail service providers are able, via the NBN, to offer high quality voice and high-speed broadband services nationally. That being the case, the Government considers that the model for delivering universal service and other public policy telecommunications outcomes should be reformed to facilitate competitive supply.

Telstra’s role as provider of the emergency call service reflects its historical position as the vertically integrated owner of a national telecommunications network. The Government’s intention is that, while the suppliers of the emergency call service will remain subject to direct regulation, the service will be delivered through contracts with the Commonwealth; and the telecommunications industry will contribute to the costs of the emergency call service through levy arrangements. This will enable the provision of the emergency call service to be opened up through a competitive process to alternative suppliers.

The government argues that a competitive process will place a very high priority on reliable and robust service arrangements.

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². Ibid., p. 3.
³. For example, information about the universal service obligation in relation to connecting the telephone can be viewed at: [http://www.dbcde.gov.au/telephone_services/voice_telephone_services/connecting_the_telephone](http://www.dbcde.gov.au/telephone_services/voice_telephone_services/connecting_the_telephone)

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Committee consideration

The Bill has been referred to the Senate Standing Committee on Environment and Communications (the Committee) for inquiry and report by 27 February 2012.\(^4\)

The Bill has been reviewed by the Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills Committee).\(^5\) The Scrutiny of Bills Committee notes that policy objects associated with public interest requirements of the USO will be set out in regulations—and these will be deemed to be conditions of the universal service components of the existing agreement with Telstra and any future contracts and grants entered into by TUSMA. The Scrutiny of Bills Committee expresses its concern that this enables important matters to be determined by a legislative instrument. However it leaves ‘the question of whether this delegation of legislative power is appropriate to the consideration of the Senate as a whole’.\(^6\)

Policy position of non-government parties/independents

At the time of writing, the position of non-government parties/independents in relation to the Bill had not been publicly stated.

Position of major interest groups

Macquarie Telecom

In its submission to the Committee, Macquarie Telecom stated that it was concerned about many aspects of the three Bills and that these concerns reflected matters which Macquarie Telecom previously had raised with the Department of BCDE.

Macquarie Telecom addressed the following points:\(^7\):

- the limited scope of industry participation in the formulation of the policy
- the flawed basis on which universal service is funded\(^8\) and
- the scope of universal service.\(^9\)

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6. Ibid.
8. Macquarie Telecom argues that Telstra alone should fund the USO, or that a more broadly based levy (for example on consumers) should fund it.

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Optus

In Optus’ view, the USO Bills that have been introduced into Parliament are a ‘missed opportunity’.\textsuperscript{10} Given the significant structural changes being brought about through the deployment of the NBN, the traditional USO framework is no longer required to deliver the Government’s universal service policy objectives. The most efficient and effective response would have been to either remove or significantly scale back that framework.

In its submission, Optus outlined significant concerns about the increase in the cost of the USO from $160.5 million per annum to $340 million per annum without any additional consumer benefits.\textsuperscript{11}

Optus was also concerned that the proposed changes to the costing and funding arrangements are not competitively neutral: Telstra’s supply costs will be unchanged whilst the payments it receives (funded by its competitors) will be significantly increased under the new arrangements. Telstra has valued the benefit at $0.7 billion on a post-tax net present value basis.\textsuperscript{12}

Optus argues that the proposed TUSMA simply adds a further layer of bureaucracy and cost to the delivery of the USO, which may lead to further cost increases and act as a barrier to longer-term reform. Further, the proposed policy arrangements allow for TUSMA’s scope of operations to grow over time in an undisciplined manner, for example through the addition of ‘statutory functions’ and the fact that the Minister will retain discretion to determine the scope of the USO.

In its submission, Optus proposed a number of amendments to the Bills, including:

a) removal of the industry levy
b) extension to the current cap on industry funding of the USO with any shortfall in funding to be made up by government funding
c) mechanisms to encourage TUSMA to operate efficiently to minimise operating costs, including guiding principles and consultation requirements
d) controls to prevent undisciplined growth in TUSMA’s scope of operations; and a
e) regular review of the scope of the USO with an overall objective of scaling-back the scope of the USO over time.\textsuperscript{13}

\begin{itemize}
\item[9.] Macquarie Telecom observes that the USO is conceived only in terms of a fixed line standards telephone service and does not take into account the recent adoption of mobile phones and internet.
\item[11.] Ibid.
\item[12.] Ibid.
\item[13.] Ibid.
\end{itemize}

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Telstra

The TUSMA Bills follow the entry into an agreement by the Commonwealth with Telstra on 23 June 2011 (the TUSMA Agreement). The TUSMA Agreement was one of a number of agreements Telstra entered into that day as part of a package of definitive agreements between Telstra and NBN Co and Telstra and the Commonwealth.14

In its submission to the Committee, Telstra states that it supports the TUSMA Bills in the context of facilitating the implementation of the TUSMA Agreement as part of the broader arrangements for Telstra’s participation in the rollout of the NBN. More broadly, Telstra supports the move to a contractual basis for the implementation of government policy objectives together with a more transparent and certain funding commitment. Telstra does, however, observe that the TUSMA Bills will increase administrative costs; and they raise a number of issues with respect to delegations and discretions.15

ACCAN

The Australian Communications Consumer Action Network (ACCAN) supports the transition from universal service being the sole responsibility of Telstra, to a universal service model which is open for new players to bid to supply services. However, ACCAN notes that the legislative framework enacted by these Bills, is accompanied by a policy that entrenches Telstra as the universal service provider for 20 years.16

TIO

The Telecommunications Industry Ombudsman’s (TIO’s) view on the Bill is that while the objectives are appropriate, several of the specific objectives in the Consumer Protection Act are not reflected in the TUSMA Bill. For example, the requirement for the USO to be fulfilled in ways that are, as far as practicable, responsive to the needs of consumers, and consistent with Australia’s open and competitive telecommunications regime – are not expressly reflected in the TUSMA Bill:

15. Ibid.

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these objectives would be more transparent, and their application to TUSMA’s management of the contracts and grants for the delivery of the USO and public interest telecommunications services clearer, if they were included in the TUSMA Bill.\textsuperscript{17}

Financial implications

The Government will provide dedicated funding to TUSMA of $50 million per annum for the years 2012–13 and 2013–14, and then $100 million per annum thereafter. The proposed telecommunications industry levy will also have a financial impact on industry. The levy is designed to recover from service providers the total of TUSMA’s costs, expenses and other obligations that are not covered by Commonwealth funding. The total amount to be collected in any eligible levy period will depend on the total residual amounts to be collected.\textsuperscript{18}

The current contracts for the NRS are about $17 million per annum and the agreement with Telstra provides for annual payments to Telstra of $290 million to cover the provision of standard telephone services, payphones and the emergency call service. Other amounts may be required to cover contracts or grants to support the transition of carriage services to the NBN. The Government has estimated that TUSMA’s total annual liabilities are likely to be in the region of $330–$340 million.\textsuperscript{19}

Main issues

The main issues are outlined by major interest groups in the ‘Position of major interest groups’ section above.

Key provisions

\textbf{Clauses 4–7} set out definitions of key terms used in the Bill.

Public interest telecommunications services

\textbf{Clause 11} sets out the policy objectives of the Bill including, but not limited to, objectives in respect of standard telephone services, payphones, and the National Relay Service.

\textbf{Clause 12} imposes on the TUSMA an obligation to take all reasonable steps to ensure that the policy objectives enunciated in \textbf{clause 11} are achieved.

\begin{itemize}
\item \textsuperscript{18} Explanatory Memorandum, pp. 10-11.
\item \textsuperscript{19} Ibid., p. 11.
\end{itemize}

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Clause 13 empowers TUSMA to enter into a contract (clause 13 contract) with a person (contractor) or to make a grant of financial assistance (clause 13 grant) to a person (grant recipient) for a purpose or purposes related to the policy objectives in clause 11.

Clause 14 requires that the terms and conditions for a clause 13 grant be set out in a written agreement (clause 14 agreement), entered into by TUSMA on behalf of the Commonwealth. Where TUSMA proposes to enter into a clause 13 contract, or to make a clause 13 grant that is likely to increase the amounts that could be debited from the Telecommunications Universal Service Special Account (TUSSA)(clause 84), it must first give the Minister a written statement setting out specified information, including details of the proposal and its likely impact: clause 19. TUSMA must also provide written notice to the Minister about variations to contracts that are likely to result in material changes to the nature of the agreement, or to increase the amounts that could be debited from the TUSSA: clause 20. Clause 21 provides for similar notification of proposed variations to clause 13 grants.

Clause 15 provides that it is a condition of a clause 13 contract, or a clause 14 agreement that the contractor, or grant recipient, comply with a determination by the Minister under clause 15, setting out standards, rules and minimum benchmarks. The Scrutiny of Bills Committee notes that this would give the Minister ‘a broad power to make contract standards, rules or performance benchmarks to enable the Government to set requirements in relation to all future TUSMA contracts and grants’. The Committee notes the statement in the Explanatory Memorandum that this approach would ‘provide flexibility where there is a need for TUSMA to cover future public interest requirements in the terms of contracts and grants’ and that, as legislative instruments, determinations would be subject to scrutiny and possible disallowance. However, the Committee has left it to the Senate the question of whether or not this delegation of legislative power is appropriate.

Subclause 15(2) empowers the Minister, by legislative instrument, to make determinations setting out standards, rules and minimum benchmarks to apply to section 13 contracts or grants.

Determinations may be of general or more limited application, as specified in the determination (subclause 15(3)), and the existence of a determination would not, by implication, limit the conditions that could be applied to contracts or grants: subclause 15(5).

20. This requirement does not apply to determinations by the Minister under clause 15.
22. Ibid.
23. According to the Explanatory Memorandum, examples of Ministerial determinations include, but are not limited to, performance standards or minimum performance benchmarks for standard telephone services, payphones, the emergency call services or the National Relay Service; rules concerning the requirements for customer equipment used for supplying a standard telephone service or rules about the location or removal of payphones, including rules concerning public consultation and complaint resolution processes. Explanatory Memorandum, p. 42.
Terms or conditions in clause 13 contracts and clause 14 agreements are of no effect to the extent that they are inconsistent with a relevant determination (subclause 15(6)). Subclauses 15(7)–(10) set out exceptions to this rule. For example, subclauses 15(7) and 15(9) provide that a Ministerial determination does not operate so as to override a term or condition of a clause 13 contract or clause 14 agreement which gives the contractor a right to adjustment of payment for a change in the services, facilities or customer equipment supplied under the contract or in accordance with the agreement. Similarly, subclauses 15(8) and 15(10) provide that a Ministerial determination does not operate to override a term or condition that specifies the price or methods of ascertaining the price for the services, facilities or customer equipment to be supplied by a contractor or grant recipient.

Subclause 15(11) provides that the functions of TUSMA include taking all reasonable steps to ensure that a contractor or grant recipient complied with an applicable clause 15 determination.

Clause 17 provides that TUSMA has all the rights, responsibilities, duties and powers of the Commonwealth as a party to a section 13 contract or grant. Subclause 17(2) gives relevant examples.

Clause 18 provides that TUSMA may exercise any power conferred on it by a clause 13 contract or a clause 14 agreement. Clauses 18–20 operate to ensure that the Minister is informed by TUSMA, at an early stage, about entering into contracts or making grants, or of any variations to contracts or grants.

Clauses 22–26 provide for transitional arrangements for contracts entered into with Telstra for standard telephone services, payphones, emergency call services, the National Relay Service, and the continuity of supply of carriage services during the transition to the NBN.

Clause 27 requires TUSMA to maintain a publicly available electronic Register of Public Interest Telecommunications Contracts which includes specified details of each current section 13 contract. Similarly, clause 28 would require TUSMA to maintain a Register of Public Interest Telecommunications Grants.

Clause 29 requires TUSMA to monitor and report each financial year on specified aspects of the performance of contractors and grant recipients. This report is to be included in TUSMA’s annual report: subclause 29(3).

Telecommunications Universal Service Management Agency

Part 3 of the Bill contains provisions relating to the establishment, functions, powers and liabilities of TUSMA (clauses 31–35); its constitution and membership (clauses 36–40); terms and conditions for TUSMA members (clauses 41–48) and decision making by TUSMA (for example, meetings procedures, voting at meetings) (clauses 49–54).
These provisions are standard provisions for the creation of a Commonwealth statutory authority which is to be governed by the *Financial Management and Accountability Act 1997*.\(^{24}\)

TUSMA is to comprise a Chair and at least four, but not more than six members: **clause 37**. The Minister is to appoint members by written instrument and only if he or she is satisfied that the person has substantial experience or knowledge and significant standing in the operation of a sector of the telecommunications industry, economics, business or financial management, law or public administration: **clause 38**. Appointments of members are for a period not exceeding five years and a member is eligible for reappointment for only one further term: **clause 39**.

**Clause 56** enables TUSMA to establish committees to advise or assist it. The committees can be constituted wholly of TUSMA members or non-members, or by a combination of both.

The Chief Executive Officer of TUSMA is to be appointed by TUSMA by written instrument. However, under **subclause 60(1)** TUSMA must consult the Minister before making the appointment. The period of appointment must not exceed five years—although there is no limitation on the number of possible reappointments: **clause 61**.

Part 3 also establishes an accountability framework setting out TUSMA’s planning and reporting obligations. **Clause 75** requires that TUSMA provide the Minister with a report, as soon as practicable after the end of each financial year, for presentation to the Parliament. The report must include information about the amounts paid under a clause 13 contract, the amounts of each section 13 grant made in the relevant year and the details of any action taken by TUSMA in response to any Ministerial directions: **subclause 75(2)**.\(^{25}\) The Explanatory Memorandum notes that this framework is supplemented by the contract and grant reporting and performance monitoring powers set out in Part 2 of the Bill.\(^{26}\)

The Scrutiny of Bills Committee expresses concern that while TUSMA is subject to a number of planning and reporting obligations, including with respect to breaches by contractors and grant recipients, and action taken with respect to those breaches:

> ...the fact that public interest requirements are to be enforced through contract law raises a question about whether persons aggrieved by a breach of public interest requirements (who are not privy to the contract) are able to have these obligations enforced or decisions concerning them reviewed. For example, decisions taken to enter into contracts or pursuant to existing contracts are unlikely to be considered as having been ‘made under an enactment’ for the purposes of ADJR Act review.\(^{27}\)

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24. Details about the structure and governance arrangements for TUSMA are contained in the Explanatory Memorandum, pp. 7-9.
25. **Clause 77** provides that the Minister may, by legislative instrument, give directions to TUSMA in relation to the performance of its functions.
27. Senate Standing Committee for the Scrutiny of Bills, op. cit., p. 42.

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The Committee has sought the Minister’s advice on the review mechanisms ‘available to consumers and others who may be aggrieved by an alleged breach of the public interest requirements or a failure by TUSMA to adequately enforce these obligations through contract law’.\(^\text{28}\) At the time of writing this Bills Digest the Minister’s response had not been provided.

Access to information or documents held by an NBN corporation

**Clause 78** enables the Minister to require an NBN corporation\(^\text{29}\) to provide information, documents or copies of documents to TUSMA where the Minister believes on reasonable grounds that the information is relevant to the performance by TUSMA of any of its functions, or to the exercise of its powers.

An NBN corporation issued with a notice to produce any of these materials commits an offence if it does not comply with the notice (subclause 78(5)), although the obligation is to comply to the extent that the corporation is capable of doing so: subclause 78(4).

**Clause 83** provides for the continued operation of the provisions relating to information access in the Bill in the event of a successful constitutional challenge, noting section 51(xx) (corporations power) and section 51(v) (communications power) of the Constitution as possible heads of power upon which the Part can draw if its operation is expressly confined to only one of those constitutional powers.

**Telecommunications Universal Service Special Account**

**Clause 84** establishes the Telecommunications Universal Service Special Account (TUSSA) to be administered by TUSMA.

Amounts equal to amounts paid to the Commonwealth by way of levy, section 13 contract, damages for breach of a section 13 contract, and by way of the repayment of the whole or part of a section 13 grant would be required to be credited to the TUSSA: **clause 85**.

The purpose of the TUSSA is to pay amounts under clause 13 contracts, to make clause 13 grants, to pay TUSMA’s administrative costs, to make distributions under clause 87 and to repay refunds under clause 111: **clause 86**.

**Clause 87** provides that TUSMA may distribute the remaining balance of the Special Account for an eligible levy period to past or current *participating persons*.\(^\text{30}\) **Subclause 87(2)** empowers the

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\(^{28}\) Ibid.  
\(^{29}\) Clause 1 of Schedule 1 to the *National Broadband Network Companies Act 2011* provides that the term ‘NBN corporation’ includes NBN Co, NBN Tasmania and a company over which NBN Co is in a position to exercise control.  
\(^{30}\) Clause 92 defines *‘participating persons’* as holders of a carrier licence under the Telecommunications Act for that eligible revenue period, or carriage service providers, if the Minister determined by legislative instrument that they were participating persons.

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Minister to make rules by way of legislative instrument with respect to distributions. TUSMA would have to comply with these rules.

Assessment, collection and recovery of levy

Part 6 of the Bill contains provisions relating to the assessment, collection and recovery of the industry levy to be imposed under the *Telecommunications (Industry Levy) Act* (when enacted). The Explanatory Memorandum explains that the levy is ‘broadly based on existing legislative provisions for the assessment and collection of the universal service levy in Part 2 of the Consumer Protection Act’.  

Clause 88 defines the ‘overall levy target amount’ as the sum of all payments made by TUSMA under section 13 contracts and grants and the total of its ‘administrative costs’ during that period, less appropriations during that period for that purpose. The overall levy target amount would be multiplied by each person’s ‘levy contribution factor’ as set out in clause 98 to determine the person’s levy amount.

The first two eligible levy periods (2012–13, 2013–14) would be subject to an ‘overall levy cap amount’ as defined in clause 99, and not the clause 88 formula.

Clause 89 requires the Minister to prepare a written estimate of the ‘overall levy target amount’ for each eligible levy period before the start of that period, while clause 90 would require the Minister to prepare a statement setting out the actual overall levy target amount.

The Explanatory Memorandum states that:

> Providing for an estimate enables participating persons to estimate in advance their levy amounts for the period. Since the actual statement of the overall levy target amount made under clause 90 is made after the eligible levy period, this means the calculations of levy amounts will be based on exact figures and so should reduce the need for adjustments later on.

The clauses also require the Minister to consult with TUSMA in the preparation of the statements, and to include a breakdown of the different components of which the overall target levy is composed. Both types of statement must be published on TUSMA and the ACMA websites: subclauses 89(7) and 90(7).

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32. TUSMA’s *administrative costs* are defined in proposed clause 4 as being remuneration and allowances of TUSMA members and the CEO, remuneration and other employment-related costs and expenses in respect of member of the staff of TUSMA, any other costs, expenses and other obligations incurred by TUSMA in connection with the performance of TUSMA’s functions or the exercise of TUSMA’s powers.
33. Explanatory Memorandum, p. 62.
Clause 91 requires each ‘participating person’ (defined in clause 92) for a relevant review period (other than the first) to provide the ACMA with a written return of their eligible revenue for that period. Failure to provide a return is a strict liability offence under clause 120.

The information submitted to the ACMA under this clause is for use in assessing each participating person’s eligible revenue (defined in clause 93) under clause 96 and their levy contribution factor under clause 98. Subject to possible exemption by the ACMA, the return is to be accompanied by a report prepared by an approved auditor in a form approved in writing by the ACMA: clause 94. The Explanatory Memorandum states that for the first eligible revenue period (financial year 2011–12), the obligation to lodge an eligible revenue return is to be under the Consumer Protection Act rather than the Bill. 34

Subclause 93(1) defines the eligible revenue of a person for an eligible revenue period (other than the first such period which is dealt with in subclause 93(7)) as the amount ascertained in accordance with a written determination made by the ACMA.

To allow for particular industry groupings to be adequately covered, or to cover any levy avoidance strategies 35 , subclause 93(4) permits the ACMA to refer to the revenue of other persons in working out eligible revenue.

Subclause 93(5) clarifies that a determination made under subclause (1) must not include in the calculation of a participating person’s eligible revenue any amount payable under a contract entered into (or taken to have been entered into), or any grant moneys received, pursuant to clause 13.

Subclause 93(3) provides for a threshold amount of eligible revenue for participating persons, as determined by the Minister.

Clause 95 enables the ACMA to make whatever inquiries it thinks are necessary or desirable to assess whether an eligible revenue return has correctly stated the person’s eligible revenue for an eligible revenue period. The information may be used by the ACMA to assess eligible revenue under clause 96. The Explanatory Memorandum states that, as a result of this provision the ACMA has ‘the power to require information from service providers who are not participating persons under section 521 of the Telecommunications Act’. 36

Details of the process by which the ACMA can assess eligible revenue, and work out the levy contribution factor and the levy amount under clauses 96, 98 and 99, are explained in the Explanatory Memorandum to the Bill. 37

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34. Ibid., p. 64.
35. Ibid., p. 65.
36. Ibid., p. 67.
37. Ibid., pp. 67–70.

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Clause 100 requires written assessments by the ACMA of the levy amount, and of the levy payable by each participating person for the eligible levy period, and the assessments must be published by the ACMA on its website: clause 101.

Clause 105 makes the levy due and payable by a participating person 28 days after the provision by the ACMA to the person a copy of the assessment under clause 100. This time-frame may be extended by the ACMA to a later date: paragraph 105(1)(b). A penalty is payable for late payments: clause 121.

Clause 106 makes a levy that is due and payable, recoverable in a court of competent jurisdiction as a debt due to the ACMA on behalf of the Commonwealth.

Clause 107 provides that to prevent the validity of an assessment being challenged on a minor technical matter or failure of procedure, the validity of an assessment under the Bill is not affected by a contravention of the Bill, either by a person or by the ACMA.

Clause 108 raises a presumption, unless the contrary is established, that a document produced in a proceeding purporting to be a copy of an assessment, is a copy of the assessment, that the ACMA has duly made the assessment and that the amounts and other particulars set out in the assessment are correct.

Clause 109 provides that the onus of establishing that an assessment is incorrect is on the party making that assertion. This clause mirrors the terms of section 20ZD of the Consumer Protection Act.

Clause 110 enables the Minister, for the financial years 2012–13 and 2013–14, to set-off the whole or part of the amount of levy payable by the person against the whole or part of any amount payable by the Commonwealth to the person.

Clause 111 provides for the repayment of levy overpayments by TUSMA on behalf of the Commonwealth.

Clause 112 cancels the effect of a provision of another Act in existence before the commencement of this clause, that exempts a person from liability to pay levy, except if the provision referred specifically to levy imposed by the Telecommunications (Industry Levy) Bill 2011.

Clause 113 confirms that the Commonwealth is not liable to pay levy.

Clause 114 enables the Minister, by written determination, to require a person who has a liability (or anticipated liability) to pay the levy to obtain performance bonds or guarantees in respect of the person’s liability (or anticipated liability). This clause mirrors clause 20ZH of the Consumer Protection Act.

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**Clauses 115–118** ‘enable the process regarding the ACMA’s assessment of the new industry levy to be open to public and industry scrutiny’. These provisions are said to ‘provide a balance between making information available to the public as against ensuring persons do not incur substantial damage to their commercial or other interests as a result of the disclosure of information’. The clauses are ‘largely modelled on Division 15 of Part 2 of the Consumer Protection Act’.

**Clause 115** enables a member of the public to request information from the ACMA about the basis for, and the working out of, assessments. The Explanatory Memorandum explains that:

> This is to enhance industry and public scrutiny in relation to the preparation of the assessments. However, the ACMA is not required to comply with the request if the information sought was obtained from, or relates to, a participating person and the disclosure of that information could reasonably be expected to cause substantial damage to the participating person’s commercial or other interests (which would include any disclosure of personal information in breach of the Privacy Act 1988).

Additionally, the ACMA is not required to disclose prescribed information: **subclause 115(3)**.

**Clause 116** enables a participating person for an eligible revenue period to request from the ACMA specified information, being information that the ACMA could not provide under **clause 115**.

**Clause 118** enables the Minister to obtain from a carrier or carriage service provider information that is relevant to the exercise of his or her powers, or the performance of his or her assessment, collection or levy recovery functions. According to the Explanatory Memorandum, ‘[i]t is anticipated that information covered by this clause will be business or financial information rather than personal information’, in the event that any personal information is received, ‘it is intended that such information not be disclosed in breach of the Privacy Act 1998’. The privilege against self incrimination, in addition to legal professional privilege, are protected by **subclauses 118(5) and (6)**.

**Clause 119** enables the Minister to delegate, in writing, any or all of his or her functions or powers under Part 6 of the Bill to an SES or acting SES member of the staff of the ACMA.

**Clause 120** creates a strict liability offence for failing to lodge an eligible revenue return. The Scrutiny of Bills Committee notes that the Explanatory Memorandum provides no reasons for the strict liability nature of the offence, and seeks the Minister’s advice about the justification for this approach.

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38. Ibid., p. 73.
39. Ibid.
40. Ibid.
41. Ibid.
42. Ibid.
43. Standing Committee for the Scrutiny of Bills, op. cit., p. 43.

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**Subclause 122(1)** enables TUSMA to disclose information to the ACMA or the ACCC where it is satisfied that the information would assist either entity in the exercise any of its functions or powers. TUSMA may impose binding written conditions in relation to the information disclosed (subclause 122(2)). The Explanatory Memorandum indicates that it not anticipated that the information provided under clause 122 would fall within the Privacy Act’s definition of ‘personal information’. 44

**Clause 123** provides for a review of specified aspects of the operation of the Bill, the legislative instruments made under the Bill and the Telecommunications Act to the extent to which that Act relates to this Bill, prior to 1 January 2018. The review must involve public consultation: subclause 123(4). The report of the review must be tabled in the parliament: subclause 123(5).

**Clause 124** requires the Commonwealth to pay compensation to any person whose property is acquired by operation of the Bill, on anything other than just terms.

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44. Explanatory Memorandum, p. 75.

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