Telecommunications (Industry Levy) Bill 2011

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Law and Bills Digest Section

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Telecommunications (Industry Levy) Bill 2011

Date introduced: 2 November 2011
House: House of Representatives
Portfolio: Broadband, Communications and the Digital Economy
Commencement: Sections 1 and 2 commence on the day of Royal Assent. Sections 3–8 commence at the same time as section 3 of the Telecommunications Universal Service Management Agency Act 2011 (2012) commences

Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bill’s home page, or through http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation. When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the ComLaw website at http://www.comlaw.gov.au/.

Purpose

The purpose of the Telecommunications (Industry Levy) Bill 2011 (the Bill) is to impose the telecommunications levy industry levy which will replace the existing universal service obligation (USO) levy and the national relay service (NRS) levy.

Background

This Bill is one of a package of three Bills that includes the Telecommunications Universal Service Management Agency Bill 2011 [and] the Telecommunications Legislation Amendment (Universal Service Reform) Bill 2011.

These three Bills will enable the transition from the existing telecommunications system to the National Broadband Network (NBN). The Government’s intention is to have:

a new entity, the Telecommunications Universal Service Management Agency (TUSMA) [that] is ready to administer contracts under a legislative framework from 1 July 2012. This package will also establish revised industry levy arrangements. A key objective of the agreements reached

1. Information about the Bill is available on the Bill’s home page: http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillhome%2Fr4678%

2. Information about the Bill is available on the Bill’s home page: http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillhome%2Fr4679%

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with Telstra and this legislative package is to ensure continuity in the provision of basic voice and payphones and other public interest services to Australians.³

Basis of policy commitment

USO and NRS Levies

The two levies will be replaced by the Telecommunications Industry levy. Currently they apply to:

carriers as defined under the Telecommunications Act, with flexibility for the Minister to make a determination to also require carriage service providers to contribute. It is intended that the same arrangements would apply under the Telecommunications Industry Levy Scheme.⁴

Announcing the new broadband network

The building of the NBN has formed part of the Government’s Nation Building and Infrastructure projects announced in Budgets since 2008–09.

Recent developments in the NBN project include the announcement on 7 April 2009 by the then Prime Minister Kevin Rudd of the establishment of a new company to build and operate a new super fast National Broadband Network. This current package of Bills contributes to the project in that it seeks to support existing infrastructure in its transition to establishing the NBN.

Initial consultation

In October 2010 the Government issued a discussion paper entitled: Implementation of Universal Service Policy for the transition to the National Broadband Network environment and requested submissions from interested parties such as carriers, carriage providers, businesses and any other interested parties. The information provided in response to the discussion paper assisted the Government in reaching the agreement with Telstra for the ongoing delivery of voice and payphone services, and other public interest services to enable the transition of the telecommunications industry to the National Broadband Network. Thirty four submissions were received from carriers, carriage providers, businesses and various government organisations.⁵

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5. Department of Broadband, Communications and the Digital Economy, Implementation of the Universal Service Policy for the transition to the National Broadband Network environment, Discussion paper and submissions, 23 June 2011,
Telstra Agreement

The Government and Telstra reached an agreement on 23 June 2011 ‘that will ensure basic universal telecommunication service standards during and after the roll out of the National Broadband Network’.  

These measures were announced in conjunction with Definitive Agreements between Telstra and NBN Co that will see super fast broadband delivered sooner to Australians with less disruption and less costs.

Further consultation

On the same day, 23 June 2011, the Government released a further discussion paper, entitled *Universal Service Obligation Legislative Reform for transition to the National Broadband Network*. The discussion paper invited submissions to be made to the Department of Broadband, Communications and the Digital Economy to discuss any of the matters covered in the discussion paper.

Public comment was sought on the proposed legislative reform package through the release of the discussion paper. The reform package establishes TUSMA to administer contracts for the delivery of the universal service obligation and other public interest services from July 2012. Sixteen submissions were made to the Department commenting on the proposals in this paper. Some of the varied comments are explored later in the Digest.

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7. Ibid.  

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Telecommunications Universal Service Management Agency

The Telecommunications Universal Service Management Agency (TUSMA) which will be established under this package of Bills will administer the universal service obligation and other public interest services. TUSMA will ensure that the following services continue:

- all Australians have reasonable access to a standard telephone service (the Universal Service Obligation for voice telephony services)
- payphones are reasonably accessible to all Australians (the Universal Service Obligation for payphones)
- the ongoing delivery of the Emergency Call Service by Telstra (calls to Triple Zero ‘000’ and ‘112’) and the ongoing delivery of the National Relay Service
- appropriate safety net arrangements are in place that will assist the migration of voice-only customers to an NBN fibre service as Telstra’s copper customer access network is decommissioned; and
- technological solutions will be developed as necessary to support continuity of public interest services (that is, public alarm systems and traffic lights).

These measures are vital to ensure continuity of basic services to consumers throughout Australia given the significant changes that will occur to the structure of the telecommunications industry from the rollout of the NBN, including the progressive decommissioning of Telstra’s copper customer access network.

The two levies, the USO levy and the NRS levy, will be combined to assist in funding the TUSMA. The funding contributions will be based on similar eligible revenue principles to those used currently to work out the USO and NRS levies.

To ensure that the transition to the NBN runs smoothly:

The government will provide dedicated base funding to the TUSMA of $50 million per annum for the financial years 2012-13 and 2013-14 and $100 million per annum thereafter. To facilitate the smooth transition to the new arrangements the government and Telstra have agreed to interim funding arrangements for the first two financial years to provide certainty to industry. This interim arrangement will mean the aggregate levy contribution that is made by

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11. J Gillard (Prime Minister), S Conroy (Minister for Broadband, Communications and the Digital Economy) and P Wong (Minister for Finance and Deregulation), *Government and Telstra agree on package of consumer measures*, joint media release, op. cit.
12. Ibid.

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telecommunications firms other than Telstra will for the first two years, remain at the amount non-Telstra contributors are assessed as being required to contribute under the USO and NRS schemes for the 2011-12 period.\footnote{Ibid., p. 4.}

Telecommunications (Industry Levy) Bill 2011

The telecommunications industry levy is imposed by this Bill. However, the detail about the setting up of the scheme, how the levy is to be assessed and collected, and the special account in which levy payments are to reside, are to be found in Parts 5 and 6 of the Telecommunications Universal Service Management Agency Bill 2011.

The significance of having a separate Bill to impose the levy is because the levy is a tax. Section 55 of the Constitution requires that ‘laws imposing taxation shall deal only with the imposition of taxation, and any provision therein dealing with any other matter shall be of no effect.’

Committee consideration

Senate Standing Committee on Environment and Communications


Senate Selection of Bills Committee

The Selection of Bills Committee recommended that the provisions of the package of Bills be referred immediately to the Environment and Communications Legislation Committee. The reason for referring the Bills is ‘to allow for appropriate consideration of the reforms implemented by these Bills’ and to obtain submissions from major players such as the larger telecommunications carriers such as Telstra, Optus and iiNet, consumer representatives such as ACCAN, Telco representative bodies such as the Competitive Carriers Coalition and representatives from regional Australia.\footnote{Senate Selection of Bills Committee, Report No. 15 of 2011, 3 November 2011, viewed 16 February 2012, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=selectionbills_ctte/reports/2011/rep1511.htm}

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House Standing Committee on Infrastructure and Communications

On 3 November 2011, the package of Bills was also referred to the House Standing Committee on Infrastructure and Communications for inquiry by the House Selection Committee. However, on 22 November 2011, the Committee Chair, Ms Sharon Bird MP, made a statement to the House. She reported that the view of the Committee was that an inquiry conducted by the House Committee would duplicate the inquiry process concurrently being undertaken by the Senate Committee. She commented:

It is important, however, that inquiries be conducted in a manner which is both timely and constructive. Where both houses are inquiring into the same legislation at the same time, those individuals and organisations who are interested in participating may wonder why they are being asked to present their views twice in two different review processes. The committee therefore recommends that the bills be further considered by the parliament.\textsuperscript{17}

Position of major interest groups

During the consultation processes, stakeholders have provided views to the Department concerning the proposals in the Implementation discussion paper and the Legislative Reform discussion paper. Some of the more significant points concerning the levies and funding generally raised in submissions on the Legislative Reform discussion paper include:

Vodafone

The submission by Vodafone in response to the second discussion paper indicates that the reforms proposed in this Bill and the other Bills in the legislative package are ‘a good next step on the path to a more cost effective and efficient USO scheme’.\textsuperscript{18} In addition, Vodafone supports the establishment of TUSMA given that this would ‘lead to the streamlining of arrangements for the Universal Service Obligation and the National Relay Service levies’.\textsuperscript{19}

Commenting on the proposed review of funding of TUSMA in 2014, Vodafone stressed that the Commonwealth’s share of funding TUSMA will need to increase through time; industry participants should not be expected to contribute to TUSMA’s costs in the long-term. That being the case, the


\textsuperscript{19} Ibid.
proposed review of funding arrangements should assess a range of matters including whether the industry levy approach should change.\textsuperscript{20}

**Macquarie Telecom**

Macquarie Telecom has stated that it does not agree with the industry funding arrangement. The Agreement between the Government and Telstra for the future provision of the Universal Service Obligation and other public interest services should have ensured that the provision of suitably defined universal services should be fully funded by the Government without taxing competitive carriers.\textsuperscript{21}

**AAPT**

AAPT strongly urged the Government to explore alternative funding arrangements stating that the industry funding levy should be ‘abandoned altogether’ on the grounds that it can cause considerable distortions to economic decisions.\textsuperscript{22} Types of alternative funding arrangements would include a direct levy on all consumers, direct/indirect levy on consumers and funding via general taxation revenue.\textsuperscript{23}

In any event AAPT argued that industry contributions should be more ‘equitable and predictable’. It was suggested that this may be achieved if the USO funding base is broadened to include other participants such as carriage service providers to avoid the burden on only a small group of contributors.\textsuperscript{24}

**Optus**

Optus has expressed a number of concerns about the USO policy which is put into effect by the legislative package. First, the proposal to extend the period that Telstra will be required to keep its copper network in place from 10 to 20 years is ‘extremely disappointing’. That policy will also

\textsuperscript{20} Ibid., p. 3.
\textsuperscript{23} Ibid.
\textsuperscript{24} Ibid.

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provide Telstra with a significant recurring cash benefit which will give it a competitive advantage over its competitors.25

Second, the establishment of TUSMA adds an extra layer of bureaucracy and cost to the delivery of the USO which may act to raise costs and act as a barrier to longer-term reform of the USO.26

Third, a narrow-based industry levy is an inefficient way to fund a government policy objective compared to general taxation. According to Optus, this has been recognised by both the Review Panel for Australia’s Future Tax System (chaired by Dr Ken Henry AC) and by the ACMA in its submission to Australia’s Future Tax System Review. In the final report to the Treasurer, the Review Panel recognised narrow-based taxes such as the USO and industry restructuring levies to be a high cost way to finance spending activities.

On the issue of USO levies, the Review Panel acknowledged the inefficiencies in this taxation mechanism, noting that ‘by requiring certain users of a good or service to cross-subsidise others, the USO taxes one group and transfers revenue to another’. The Review Panel therefore concluded that where USO arrangements continue to be used, the value of these transfers should be made transparent (and policymakers should remain open to alternative funding arrangements). As the USO ‘tax’ is on a relatively narrow base, it is likely to be relatively inefficient. Optus concludes that other ways of funding the USO subsidy should therefore be considered.27

The Henry review, referred to by Optus above, did refer to narrow-based taxes being a high-cost way to finance spending. The Review report had the following to say:

Narrow-based taxes that do not target social cost or provide signals on the value of a public good are no more than a relatively high cost means of raising revenue. Two types of relatively narrow-based taxes that are sometimes used are universal service obligation (USO) levies and industry restructuring levies. 28

Universal service obligations

Governments can impose USOs on some service providers, such as phone, electricity and postal services. USOs can require the provider to provide a service to a particular standard or to certain groups. This requirement needs to be financed by higher charges imposed on customers. By requiring certain users of a good or service to cross-subsidise others, the USO taxes one group and transfers revenue to another.

Where they are used, such arrangements should be made transparent to the community; for

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26. Ibid., p. 5.
27. Ibid., p. 8.

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example, in government financial statements. As the USO ‘tax’ is on a relatively narrow base, they are likely to be relatively inefficient. Other ways of funding the USO subsidy should therefore be considered...

Levies to fund industry adjustment

Australian governments have sometimes hypothecated narrow-based taxes to particular industry adjustment programs. A recent example is the Australian government’s Dairy Adjustment Levy, imposed on milk sales by processors to retailers on a cents per litre basis. The funds raised were used to fund structural adjustment in the dairy industry. The levy raised $228 million in 2007–08 and ceased to operate in February 2009 (Parliament of Australia 2008).

Taxes of this type have much in common with minor taxes used to fund access to essential services for particular groups, such as USOs. They tend to be narrow-based taxes with relatively high efficiency costs. The fact that consumers of milk will benefit from dairy industry restructuring does not justify imposing a levy on them. Raising the consumer price for milk does not send a price signal that reduces social costs. Rather, it imposes higher costs on society as a whole than would be imposed by raising the revenue needed to fund industry restructuring through broad-based revenue-raising taxes.29

Financial implications

According to the Explanatory Memorandum the industry levy will recover ‘the total of TUSMA’s costs, expenses and other obligations that are not covered by Commonwealth funding’.30 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. TUSMA will also make payments of about $17 million for contracts to deliver the National Relay Service. ‘The Government has estimated that TUSMA’s total annual liabilities will be approximately $330 to $340 million’.31 Thus the levy is to raise $23-$33 million from the industry, but has no Budget implications.

Key provisions

Clause 4 binds the Crown in right of the States, the Australian Capital Territory, the Northern Territory and Norfolk Island but this Bill does not bind the Crown in right of the Commonwealth.32

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29. Ibid., p. 340.
31. Ibid.
32. The Crown in right of the Commonwealth and the Crown in right of the states refers to the different legal capacities that the Crown may take in relation to the Commonwealth of Australia. It distinguishes the respective jurisdictions within Australia.

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Clause 3 imports definitions from the Telecommunications Universal Service Management Agency Act (when enacted). Importantly, the term eligible levy period means the 2012–13 financial year; or a later financial year.

Under clause 6 if a person has a levy amount for an eligible levy period worked out according to section 99 of the Telecommunications Universal Service Management Agency Act (when enacted), then the levy is imposed on that amount.

Section 99 contains two separate formulae for calculating the levy amount.

Formula for the first and second eligible revenue period

Subsection 99(3) details how to work out the levy amount in respect of the first or second eligible revenue periods. The first eligible revenue period is the 2011–12 financial year. The levy amount is calculated using the following formula:

\[ \text{levy amount} = \text{levy contribution factor} \times \text{overall levy cap amount} \]

In that formula:

- **levy contribution factor** means the person’s levy contribution factor for the eligible levy period worked out under section 98 of the Telecommunications Universal Service Management Agency Act (when enacted) and

- **overall levy cap amount** means the amount ascertained in accordance with a written instrument made by the Minister. Importantly that written instrument is not subject to the disallowance provisions of the Legislative Instruments Act 2003.

Formula for subsequent eligible revenue period

Subsection 99(1) details how to work out the levy amount for subsequent eligible revenue periods. The levy amount is calculated using the following formula:

\[ \text{levy amount} = \text{levy contribution factor} \times \text{overall levy target amount} \]

In that formula:

- **levy contribution factor** means the person’s levy contribution factor for the eligible levy period worked out under section 98 of the Telecommunications Universal Service Management Agency Act (when enacted) and

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33. Section 4, Telecommunications Universal Service Management Agency Act (when enacted).
34. Subsection 4(5), Telecommunications Universal Service Management Agency Act (when enacted).

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• **overall levy target amount** means the overall levy target amount for the eligible levy period worked out under section 88 of the *Telecommunications Universal Service Management Agency Act* (when enacted).

Importantly subsection 99(2) empowers the Minister to modify the formula by legislative instrument.

**Proposed clause 7** provides that that the amount of the levy that is imposed under this Bill is equal to the levy amount.

### Concluding comments

It may well be of some concern to the carriers on which the burden of paying this levy will fall that the Minister has the power to alter the formula for calculating the amount of the levy by legislative instrument. Whilst the government would argue that this gives flexibility to increase—or decrease—the amount of the levy once the amount of TUSMA’s liabilities is known, carriers may argue that it means that their costs under the levy are uncertain.