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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

NATIONAL TRANSMISSION NETWORK SALE BILL 1998

**NATIONAL TRANSMISSION NETWORK SALE (CONSEQUENTIAL
AMENDMENTS) BILL 1998**

EXPLANATORY MEMORANDUM

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

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OUTLINE

The principal purposes of the National Transmission Network Sale Bill 1998 (the Sale Bill) are to facilitate the sale of the national transmission network and to set in place a regulatory framework for the provision of national broadcasting and other transmission services after the sale.

Part 2 of the Sale Bill will facilitate the process of selling the national transmission network, which will proceed by way of the sale of shares in one or more Commonwealth-owned companies (referred to in the Sale Bill as a National Transmission Company or NTC). The Part includes provisions for the transfer of Commonwealth assets to the company or companies and exemption of those transfers from State or Territory taxes. In addition, in order to ensure that assets can properly be dealt with in connection with the sale, provision will also be made to ensure Commonwealth ownership of facilities where those facilities might otherwise be fixtures on non-Commonwealth land and to remedy any omissions in relation to compliance by the Commonwealth with the *Lands Acquisition Act 1989* or previous Lands Acquisition Acts.

The Sale Bill will impose certain obligations upon, and give certain benefits to, the company or companies to whom the national transmission network assets are transferred. These obligations are imposed, and benefits given, to reflect the public interest in the continued provision of core transmission services for the purposes of providing national broadcasting services and certain other kinds of broadcasting services.

It is proposed to provide for continuity of existing transmission services for the Australian Broadcasting Corporation (ABC), the Special Broadcasting Service (SBS), government and non-profit self help retransmission groups and Radio for the Print Handicapped services (RPH) and access to sites and facilities for those parties, emergency service organisations, remote commercial licensees and community broadcasters by a combination of contractual obligations reinforced by statutory protections.

The contracts between the ABC/SBS/RPH and an NTC will set out the core performance obligations for continued supply of transmission services until such time as those bodies cease to require those services. It is intended that the contracts will be for 5 years, with an option for the ABC and SBS to renew for 3 further terms of 3 years and for RPH to renew for 2 further terms of 5 years on the same terms and conditions. The contracts will be enforceable through contractual remedies.

Part 4 of the Sale Bill prevents the transfer of an asset originally used by the National Transmission Agency (NTA) or the replacement for such an asset unless approved by the Minister. This will enable the Minister to ensure that the proposed transferee has entered into satisfactory contracts with the ABC/SBS/RPH in relation to the core performance obligations and test the likely commercial or financial ability of the proposed transferee to continue to meet the obligations.

The Minister will have the power to declare a person to whom national transmission network assets are transferred to be a declared successor (clause 22). This provides a mechanism to give the owner of an NTC the flexibility to restructure its commercial arrangements or sell assets to a third party while ensuring that the obligations and benefits of the post-sale rules continue to apply to the new owner.

Part 3 of the Sale Bill applies an access regime, based on Part XIC of the *Trade Practices Act 1974* (Trade Practices Act), to:

- certain carriage services supplied by an NTC or declared successor; and
- the provision of access to sites and towers by an NTC or declared successor;

in favour of certain nominated customers (for example, the ABC, the SBS and RPH).

The access regime will impose an obligation to supply nominated services to nominated customers either on terms as agreed or arbitrated. The access regime could result in the Australian Competition and Consumer Commission (ACCC) arbitrating on the terms and conditions of renewal of the initial ABC/SBS/RPH contracts (in addition to arbitrating on access arrangements for any other nominated customers) if the parties cannot reach agreement.

Part 6 of the Sale Bill will authorise an NTC or declared successor to carry out the maintenance of existing facilities on the same basis as telecommunications carriers, by applying the powers and immunities contained in Schedule 3 to the *Telecommunications Act 1997* which relate to the maintenance of facilities. However, an NTC or declared successor will not be given a carrier's powers to inspect land or to carry out the installation of new facilities contained in Divisions 2 and 3 of Schedule 3.

Part 5 of the Sale Bill provides for the transfer to the national broadcasters of certain radiocommunications licences to operate transmitters for the purpose of providing national broadcasting services. The licences are currently held by the Commonwealth.

The National Transmission Network Sale (Consequential Amendments) Bill 1998 (the Consequential Amendments Bill) would make consequential amendments to the *Australian Broadcasting Corporation Act 1983* and the *Special Broadcasting Service Act 1991* relating to the powers of the national broadcasters in relation to the provision of transmission services, annual reporting requirements and a mechanism for dealing with complaints about the degradation of signal quality. The Consequential Amendments Bill would also make minor amendments to the licensing provisions of the *Radiocommunications Act 1992*.

The Bills were first introduced in 1997 and were considered by the Senate Legislation Committee for Environment, Recreation, Communications and the Arts. The Committee reported in March 1998 and recommended that the services included in the access regime in Part 3 of the Sale Bill extend to ancillary services such as closed captioning. This recommendation has been adopted and provision made to include in the access regime one or more ancillary services carried by means of the main carrier signal of a national broadcasting service. In addition the Sale Bill extends the access regime to ensure that persons who are providing or proposing to provide an open narrowcasting television service for community or educational purposes will have access to national transmission network sites and telecommunications towers.

FINANCIAL IMPACT STATEMENT

The main financial impact from the sale of the national transmission network will be the offset to outlays occurring when the sale receipts are credited to the Commonwealth Public Account. The sale is expected to be settled in the first half of 1999, with the return to the Budget being in the 1998/99 financial year. Following the sale of the network, the Government will provide funding to the ABC and the SBS to enable them to meet their contractual obligations to purchase transmission services from the NTCs. In this context, there will be no increase in existing recurrent budget outlays associated with the ongoing transmission of national broadcasting services. The Government's commitment to the social policy programmes of RPH and remote area broadcasters will continue, with funding to be met from within an agreed outlay cap.

The other provisions in the Sale Bill and the Consequential Amendments Bill are expected to have no significant impact on Commonwealth expenditure or revenue.

REGULATION IMPACT STATEMENT

Issues

Following the sale of the national transmission network, there will be a need to maintain current ABC and SBS coverage and service levels and the availability of existing analog transmission services and/or facilities to meet existing social policy objectives, which include access to facilities for providers of RPH services, community broadcasters, self-help retransmission groups, emergency services and providers of commercial services in declared remote areas.

At the vast majority of sites within the national transmission network, particularly in regional and remote areas, there is no competitive market for the provision of transmission services. This means that there are no readily available alternatives for the provision of national broadcasting services or transmission services and/or facilities for other nominated customers. There are also likely to be significant barriers to the development of greater competition in the market in the medium term, particularly for existing analog terrestrial transmission services, given the capital

investment that would be required to duplicate existing facilities, the limited client base and natural barriers such as environmental considerations.

The current monopoly character of the national transmission network means that a future owner may be in a position to exclude national broadcasters or other nominated customers from its facilities or extract monopoly rents.

Objective

The objective is to ensure the continued availability of existing analog transmission services and facilities to national broadcasters and other nominated customers on fair and reasonable terms and conditions. This objective is consistent with the Government's decision that, in selling the national transmission network, existing service commitments to regional and rural Australia will continue and existing social policy obligations will be maintained.

Options

(a) *No regulation* To rely on contracts between the transmission provider and the purchaser of the transmission services or facilities to set in place service obligations and charging levels and on contracts between the transmission provider and land owners in relation to the operation of facilities on land not owned by the transmission provider.

(b) *A prescriptive legislative scheme* To establish a prescriptive legislative scheme which sets out the rights of, and imposes specific obligations on, the transmission provider and sets out a framework for the direct enforcement of those rights and obligations, with little scope for commercial decision making.

(c) *Minimal regulation to achieve social objectives* To establish a scheme which relies primarily on contractual agreement but which is backed by safety net legislation that provides for statutory dispute resolution and limited powers and immunities in respect of maintenance of transmission facilities.

Assessment of impacts

Option (a) would primarily benefit the purchaser (or purchasers) of the national transmission network as it would not be subject to any obligation that had not been negotiated on a purely commercial basis, although the lack of legislative support in respect of its facilities would be to the purchaser's disadvantage as it may need to make significant concessions to land owners to ensure proper maintenance of the transmission sites. Importantly, this option would not alleviate any potential threat to the continuation of national broadcasting services.

Option (b) would provide greater certainty that the objective would be met but would greatly diminish the purchaser/provider relationship between the transmission provider and the national broadcasters and other nominated customers. It would also have a significant detrimental effect on the value of the network, by placing undue

constraints on the transmission provider in the operation of its business, and would hinder the potential for development of a competitive market. Administration of a prescriptive regulatory regime would also involve significant administrative costs for government.

Option (c) would limit competition only to the extent of the transmission provider's compliance with the limited obligations imposed. This would be offset by the advantages to the transmission provider of statutory powers and immunities in respect of its facilities. The costs to government would be minimal, as direct government involvement would be necessary only in the context of arbitration of disputes. The objective would be met in that legislative safeguards would operate in critical areas, affording protection to the national broadcasters and other nominated customers for their existing analog services, but at the same time no unnecessary constraints would be placed on the operation of the transmission provider's business.

The legislation implements option (c) as it meets the objective and at the same time strikes an appropriate balance between the commercial interests of the transmission provider and the national interest in the continued provision of national broadcasting services and the meeting of community service obligations.

Consultation

Relevant government agencies, including the Treasury and the ACCC, and the ABC and the SBS have been consulted and support the proposed approach. The proposal to sell the national transmission network is a long standing Government commitment. Public consultation on the proposed package has not taken place.

Implementation and review

Once the sale process is completed, the implementation of the preferred option will have minimal administrative impact.

The arrangements will be reviewed regularly as part of the triennial funding reviews of the ABC and the SBS.

NOTES ON CLAUSES

NATIONAL TRANSMISSION NETWORK SALE BILL 1998

Part 1 - Preliminary

Clause 1 - Short title

Clause 1 provides for the citation of the *National Transmission Network Sale Act 1998* (the Act).

Clause 2 - Commencement

Clause 2 of the Bill provides for the Act to commence on Royal Assent.

Clause 3 - Definitions

This clause contains definitions of key terms used in the Bill.

The definition of “community broadcasting licensee” includes licensees who are allocated a community broadcasting licence under Part 6 of the *Broadcasting Services Act 1992* (BSA) and licensees who are allocated a temporary community broadcasting licence under Part 6A of the BSA.

The term “NBS transmitter licence” is defined to mean a transmitter licence for a transmitter that is for use for transmitting, to the public, a national broadcasting service within the meaning of the BSA.

It is intended that the term mean only those transmitters which transmit the relevant signal to the public directly, including transmitters that transmit both to the public and to another transmitter or translator which then transmits directly to the public, whether the relevant transmitters are transmitting a signal in the broadcasting services bands or not.

Clause 4 - Crown to be bound

Clause 4(1) provides that the Act is to bind the Crown in right of the Commonwealth, the States, the Australian Capital Territory, the Northern Territory and Norfolk Island.

Clause 4(2) provides that the Act does not make the Crown liable to be prosecuted for a criminal offence.

Clause 5 - External Territories

This clause extends the Act to all of Australia’s external territories.

Clause 6 - Extra-territorial operation

This clause extends the application of the Act internationally.

Part 2 - Sale of the National Transmission Network

Clause 7 - Fixtures on non-Commonwealth land

The clause provides that, where a network facility is specified by the Minister for Finance and Administration by notice in the *Gazette*, that facility is, at the end of the day on which the notice is published, severed from the land and remains severed and ownership of the facility vests in the Commonwealth.

It is possible that the law of fixtures may operate in relation to some national transmission network facilities which have been constructed on land not owned by the Commonwealth. The purpose of this clause is to provide a mechanism to ensure Commonwealth ownership of facilities where those facilities might otherwise be fixtures on non-Commonwealth land.

Clause 8 - Effect of Lands Acquisition Act on past grants etc. of interests in land

This clause provides that grants or transfers of interests in land to or from the Commonwealth before the commencement of the Act will not be invalid solely because the grant or transfer was not made in accordance with the Lands Acquisition Act (as in force from time to time). This clause operates to validate retrospectively such acquisitions or disposals for the purposes of the Lands Acquisition Act (as in force from time to time), where the relevant interests are transferred under clause 9.

Clause 9 - Transfer of assets and liabilities

This clause makes provision for Commonwealth assets and liabilities to be transferred, at the discretion of the Minister for Finance and Administration, to a company specified in the notice. The purpose of the provision is to authorise the transfer of assets and liabilities, connected with the operation of the national transmission network, to one or more NTCs prior to or after the sale of shares in that NTC.

Clause 9(1) enables the Minister for Finance and Administration, by notice in the *Gazette*, to declare, in relation to a specified company, that a specified Commonwealth asset vests in the company at a specified time (the transfer time) without any conveyance, transfer or assignment and/or the company becomes the Commonwealth's successor in law in relation to that asset and/or a specified instrument relating to that asset continues to have effect after the transfer time, as if a reference to the company were substituted for a reference to the Commonwealth or the NTA.

Clause 9(2) enables the Minister for Finance and Administration, by notice in the *Gazette*, to declare, in relation to a specified company, that a specified

Commonwealth liability ceases to be such a liability and becomes a liability of the company at the transfer time and/or the company becomes the Commonwealth's successor in law in relation to that liability and/or a specified instrument relating to that liability continues to have effect after the transfer time, as if a reference to the company were substituted for a reference to the Commonwealth or the NTA.

Clause 9(3) provides that declarations in relation to assets and liabilities may be included in the same notice, and that a notice may include declarations in relation to more than one asset or liability. This clause will facilitate the transfer of contracts under this clause.

Clause 9(4) provides that a declaration will have effect according to its terms.

Clause 10 - Exemption from stamp duty and other taxes

This clause provides for the transfer of assets and liabilities to an NTC, and anything done in connection with such a transfer, to be exempt from stamp duty and other taxes under a law of a State or Territory, provided the transfer takes place while the Commonwealth owns all the shares in that company.

This clause is not intended to exempt from stamp duty or other taxes the transfer of shares in an NTC to a purchaser.

Clause 11 - Registration of transfers of land

This clause enables a land registration official (as defined in clause 3 of the Bill) to register certain assets transferred under clause 9. It provides that, where the Minister for Finance and Administration has given a specified certificate relating to land, a land registration official may register the matter in the usual way and deal with and give effect to the certificate (clause 11(2)). The certificate must be signed by that Minister or a person authorised by him (as provided for in clause 11(3)) and must identify the land in question and state that the right, title and interest in the land has become vested in the company (clause 11(1)).

Clause 11(3) establishes a rebuttable presumption that a certificate that appears to have been issued under clause 11 is such a certificate and was properly given.

Clause 12 - Part does not place person in breach of contract etc.

The object of this clause is to ensure that the transfers of assets and liabilities under clause 9 do not operate to place any person (including the Commonwealth) in breach of any contract or confidence, or otherwise make a person guilty of a civil wrong, or release any surety from any of the surety's obligations in relation to a liability transferred under clause 9. In addition, this clause operates so that a person will not be in breach of any contractual provision which prohibits, restricts or regulates the assignment or transfer of any asset, liability, right or obligation, or the disclosure of any information. In the absence of this clause, a contract may, for example, operate to prohibit assignment of certain rights and obligations without the consent of one or both parties.

Part 3 - Access to services etc.

This Part applies an access regime, based on Part XIC of the Trade Practices Act, to:

- certain carriage services supplied by an NTC or declared successor; and
- the provision of access to sites and towers by an NTC or declared successor;

in favour of certain nominated customers.

Provision is made in clause 22 of the Bill for the Minister to declare a person who has acquired an NTA asset, or a replacement for that asset, to be a declared successor. That provision gives the owner of NTA assets the flexibility to restructure its commercial arrangements in relation to those assets or sell the assets to a third party, while enabling the access regime to continue to apply to services supplied by means of the assets.

Clause 13 - Deemed application of telecommunications access regime

This clause provides for the application of the telecommunications access regime in relation to a nominated service in accordance with Part 3 of the Bill.

“Telecommunications access regime” is defined in clause 3 of the Bill to mean Part XIC of the Trade Practices Act, other relevant provisions of that Act and certain provisions of the Telecommunications Act which are relevant to the enforcement of Part XIC.

The telecommunications access regime requires, amongst other things, carriers to supply declared services to service providers on request.

Clause 13(2) makes the telecommunications access regime have effect as if:

- each nominated service were a declared service;
- each provider of a declared service were a carrier; and
- each nominated customer were a service provider.

Clause 14 - Nominated services

This clause defines a nominated service for the purpose of the application of the access regime.

There are two kinds of services which the NTA currently provides to third parties for which special access arrangements are required.

The first are carriage services in relation to the analog transmission of broadcasting services or ancillary services.

The second are land or facilities access services - the NTA giving access to a site it owns or controls for a third party to:

- install a tower and transmission facilities (eg. antenna, cabling, transmitter hut and transmitter); or
- install an antenna on an existing tower, cabling or a transmitter in an existing transmitter hut.

This clause makes the following services provided by an NTC or declared successor a nominated service:

- the provision of a carriage service for the analog transmission of broadcasting services using original assets or replacement assets;
- the provision of a carriage service for the transmission of ancillary services; and
- the provision of access to a site or telecommunications transmission tower which is an original asset or replacement asset.

Nominated services are confined to services supplied using an asset transferred to an NTC under clause 9 of the Bill (original asset), or an asset which subsequently replaces that asset (replacement asset). Replacement assets are defined in clause 3 of the Bill.

The Part 3 access regime is intended to ensure that, where the NTA currently provides the ABC, SBS and other nominated customers (see clause 15) with carriage services for the transmission of existing analog broadcasting services, the nominated customers have a statutory right of access to those transmission services after the sale of the national transmission network. This right of access to carriage services will underpin contractual arrangements, that will be transferred to an NTC, for the supply of those services. It is intended that these nominated customers will be able to purchase carriage services for the purpose of the transmission of broadcasting services to the public in digital mode in a competitive market, without imposing on the NTC an access regime in relation to those services.

All nominated customers, including those with a right of access to carriage services for the purpose of the transmission of broadcasting services in analog mode, will, under Part 3 of the Bill, have a right of access to national transmission network sites to install their own digital broadcasting transmitters. However, in the case of digital television, Part 5 of Schedule 4 of the BSA gives the commercial and national broadcasters a general right of access to broadcasting transmission sites for the purpose of installing digital transmitters. This general access regime overrides the national transmission network access regime in Part 3 of the Bill, to the extent of any overlap.

Subparagraph 14(1)(a)(iii) is intended to limit the application of the access regime to carriage services provided for the transmission of a broadcasting service in analog mode. Subsection 14(2) provides that where a carriage service is provided for the purpose of transmission of a broadcasting service in both analog and digital mode, the carriage service is a nominated service only to the extent to which it is provided for

the purpose of analog transmission. The intention is that, where a carriage service is provided by an NTC or declared successor for the purposes of analog transmission, that carriage service would be a nominated service but, where a carriage service is provided for the purposes of digital transmission, it would not be a nominated service.

In some circumstances there may be common elements to the two carriage services or the NTC may provide a single carriage service for the transmission of the same broadcasting service in both analog and digital mode. In those cases, it is intended that only the part of the carriage service or services that is provided for analog transmission purposes will be a nominated service. That part of the carriage service that is provided for digital transmission purposes will not be subject to the Part 3 access regime.

Ancillary services are defined in clause 3 of the Bill as services ancillary to a national broadcasting service, carried by means of an analog main carrier signal that is used for the transmission of a national broadcasting service. Ancillary services are secondary communications services carried embedded within the main carrier signal for a broadcasting service, including in the vertical blanking interval of a television signal or within an FM sub-carrier frequency of an FM radio broadcasting signal. Ancillary services include, but are not limited to, services such as closed captioning for the hearing impaired and teletext services. The reference to "analog" is intended to make it clear that the access right for ancillary services is limited to services embedded in an analog broadcasting signal even though the signal for the secondary communications service or services may be in a digital form.

Paragraph 14(b) provides that the provision of access to sites or telecommunications towers that are original or replacement assets (as defined in clause 3 of the Bill) is a nominated service where the provider of the access is an NTC or declared successor.

Clause 15 - Nominated customers

Clause 15(1) limits the application of the telecommunications access regime to cases where the access seeker is a nominated customer and is seeking access for a nominated purpose.

The following persons are specified as nominated customers for the purpose of carriage of broadcasting services:

- the ABC and SBS for the purpose of carriage of national broadcasting services (clause 15(2)(a));
- a community broadcasting licensee for the purpose of carriage of broadcasting services solely or principally to supply RPH (clause 15(3)(a)); and
- self-help groups (ie, government bodies or local community bodies who raise money for the provision of transmission services that will reach their community) for the purpose of carriage of broadcasting services for retransmission under section 212 of the BSA (clauses 15(6)(a) and (7)(a)).

The following persons are specified as nominated customers for the purpose of access to sites and telecommunications transmission towers:

- the ABC and SBS for purposes connected with national broadcasting services (clause 15(2)(b));
- a non-profit body for the purpose of access to sites and telecommunications transmission towers, where that access is for community or educational purposes connected with an open narrowcasting television service;
- a community broadcasting licensee for purposes connected with a community broadcasting service (clause 15(3)(b));
- an emergency service organisation for purposes connected with radiocommunication transmissions by the organisation (clause 15(4));
- a commercial broadcasting licensee for purposes connected with providing a commercial broadcasting service in a declared remote area (clause 15(5)); and
- self-help groups for purposes connected with retransmission under section 212 of the BSA (clauses 15(6)(b) and (7)(b)).

An emergency service organisation is defined in clause 3 to mean various kinds of listed organisations or any other organisation specified by the Minister in writing for the purposes of paragraph (b) of the definition. Clause 29(b) makes an instrument for this purpose a disallowable instrument.

A “declared remote area” is defined in clause 3 to mean an area specified in writing by the Minister for the purposes of the definition. Clause 29(a) makes an instrument made for this purpose a disallowable instrument. It is expected that the instrument would specify particular remote zones referred to in licence area plans prepared by the Australian Broadcasting Authority (ABA) under section 26 of the BSA.

Provision is made for access to sites and telecommunications transmission towers to give nominated customers the right to install their own transmission facilities on those sites or towers.

Clause 15(8) makes it clear that a person or body can be a nominated customer under more than one of the subsections in clause 15.

Clause 16 - Miscellaneous modifications of telecommunications access regime

The telecommunications access regime was designed to apply to access to telecommunications services in circumstances where competitors would need to gain access to a provider’s services in order to supply competitive services.

Some modifications are required to the operation of that regime to reflect the different circumstances for access by broadcasters to the analog transmission network operated by the NTCs.

The following provisions of the telecommunications access regime do not apply.

Subsections 152AB(2) to (8) set out criteria which limit what can be taken into account in interpreting the long-term interests of end-users. Those criteria do not sit well in the context of access by broadcasters to the analog transmission network (see in particular paragraphs 152AB(2)(c) and (d)). Accordingly, it is proposed to remove these provisions to remove the limitations on what can be taken into account by the ACCC when determining whether something promotes the long-term interests of end-users. In the context of broadcasting services, it is intended that 'end-users' would be taken to be the members of the public who view, or listen to, those broadcasting services.

Paragraph 152AR (4)(b) and subsections (5) to (8) set out certain standard access obligations which an access provider must supply if requested by a service provider. These specific obligations reflect circumstances applying generally in the telecommunications industry where access is sought to supply services competitively with the access provider, but which do not sit well in the context of the NTC services. Accordingly, the provisions will not apply in this context.

Division 6 of Part XIC sets out powers to determine Ministerial pricing principles. It is inappropriate to apply these provisions in the context of the sale of the national transmission network as they would give the vendor the power to subsequently change the prices that the purchaser can charge, even though the purchaser had purchased on the basis of 5 year contracts with the ABC and the SBS setting out the prices that can be charged.

Paragraph 152CQ(1)(b) places certain restrictions on the ACCC's powers in an arbitration reflecting circumstances applying in the telecommunications industry where access is sought to supply services competitively with the access provider. It is inappropriate to apply the restriction which relates to the access provider's reasonably anticipated requirements in a context where the NTC is not supplying broadcasting services in competition with its broadcasting customers.

The telecommunications access regime gives protection for certain contractual rights in existence prior to the date of public exposure of the draft telecommunications legislation. Clause 16(2) allows for the protection of similar rights, modifying the relevant date to the date of introduction of the Bill.

Paragraph 152BV(2)(d) of the Trade Practices Act provides that the ACCC must not accept an access undertaking unless it is satisfied that the terms and conditions of that undertaking are reasonable. Section 152AH of the Trade Practices Act contains a list of matters to be taken into account in determining whether those terms and conditions are reasonable. The criterion in paragraph 152AH(1)(e) relates to operational and technical requirements.

Section 152CR of the Trade Practices Act sets out criteria the ACCC must take into account in making a determination following an arbitration about access. The criterion in paragraph 152CR(1)(f) relates to operational and technical requirements.

Clauses 16(3) and 16(4) set out more detailed criteria for technical and operational matters and fault detection in substitution for paragraphs 152AH(1)(e) and 152CR(1)(f) in recognition that as part of the sale process, a benchmark level will be developed setting out more detailed minimum requirements in relation to these matters.

Clause 16(5) defines the term 'benchmark level' as the level specified by the Minister in writing. Clause 29(c) makes an instrument made for this purpose a disallowable instrument.

Clause 17 - Relationship with other access regimes

This clause sets out the relationship between the modified telecommunications access regime in Part 3 of the Bill and other access regimes.

In brief, the Part 3 access regime will override any other access regime in relation to access to nominated services by nominated persons for nominated purposes. Clause 17(1) makes it clear that the Part 3 access regime does not prevent the telecommunications access regime in Part XIC of the TPA applying to:

- access to a nominated service by persons who are not nominated customers; and
- access to a nominated service by nominated customers for purposes other than nominated purposes.

Whether the telecommunications access regime applies in the circumstances set out in clauses 17(1)(a) and (b) has to be determined by reference to Part XIC itself and the related provisions of the Telecommunications Act.

Clause 17(2) makes it clear that a notification of an access dispute cannot be given under Part IIIA of the Trade Practices Act in relation to access to a nominated service by a nominated customer for a nominated purpose.

Clause 17(3) makes it clear that the ACCC cannot accept an undertaking under Part IIIA of the TPA if terms and conditions of the undertaking relate to access to a nominated service by a nominated customer for a nominated purpose.

Clause 50 of Schedule 4 of the BSA, which was included in the BSA by the *Television Broadcasting Services (Digital Conversion) Act 1998* provides that Part 3 of the "*National Transmission Network Sale Act 1998*" does not apply in relation to an access seeker seeking access to a broadcasting transmission tower or a site to the extent to which Part 5 of Schedule 4 of the BSA applies in relation to the access seeker seeking access to that tower or site. That provision is intended to have the effect of ensuring that, in relation to digital television broadcasting, the facilities access regime in the BSA prevails over the access regime in Part 3 of the Bill to the extent of any overlap. That provision is intended to have effect even though it was enacted before the Bill.

Part 4 - Restrictions on transfer of assets

Clause 18 - Minister's approval required for transfers of original assets or replacement assets

Part 4 of the Bill prevents the transfer of an asset originally used by the NTA or the replacement for such an asset unless approved by the Minister. This will, for example, enable the Minister to ensure that the proposed transferee has entered into satisfactory contracts with the ABC/SBS/RPH in relation to the core performance obligations and test the likely commercial or financial ability of the proposed transferee to continue to meet the obligations.

This provision will also ensure that the Minister will have notice of proposed transfers to enable consideration of whether the power to declare the proposed transferee to be a declared successor under clause 22 will need to be exercised following the transfer, if approved (see the explanatory notes to clause 22).

Clause 18(1) provides that a transfer of an original asset or replacement asset is of no effect unless approved in writing by the Minister before the time of transfer.

Clause 18(2) requires the Minister to approve an application for approval of such a proposed transfer unless the Minister refuses under clause 18(3).

Clause 18(3) sets out the grounds on which the Minister may refuse to approve a transfer. Those grounds include where the Minister has reason to believe that the transfer might jeopardise continued access by a nominated customer to a nominated service for a nominated purpose.

Clause 18(3)(b) provides a reserve power for further grounds to be prescribed in regulations. Any such ground must relate to the head of power in paragraph 51(v) of the Constitution.

Clause 18(4) enables application to be made to the Administrative Appeals Tribunal (AAT) for review of a decision to refuse approval of a transfer.

Clause 18(5) enables the Minister to exempt assets from the operation of clause 18 by notice in the *Gazette*. It is intended that this power would be used, for example, to exempt assets that were not necessary to ensure continued provision of services. One example would be original facilities which had been replaced by new facilities. There would be no need to regulate any subsequent transfers of the assets which had been replaced. Clause 29(d) makes a notice under this provision a disallowable instrument.

Part 5 - Transmitter licences

Clause 19 - Transfer of transmitter licences to ABC and SBS

Currently, transmitters used to transmit the national broadcasting services provided by the ABC and the SBS are licensed under section 100 of the Radiocommunications Act

and these licences have been held by the Commonwealth in its capacity as provider of transmission services to the national broadcasters.

As a result of the sale of the national transmission network, the national broadcasters, rather than the NTCs, are to be entitled to be licensed under the Radiocommunications Act to operate transmitters for the purpose of providing national broadcasting services to the public. The ABC and the SBS will be able to apply to the Australian Communications Authority (ACA) for a transmitter licence for new transmitters intended to be used for the provision of national broadcasting services (see explanatory notes to item 10 of Schedule 1 of the Consequential Amendments Bill).

This clause is a transitional provision which allows transmitter licences currently held by the Commonwealth to be transferred to the national broadcasters.

Clause 19(1) empowers the Minister to make a declaration in relation to specified NBS transmitter licences that are held by the Commonwealth, and under clause 19(2), the specified licences will vest in the ABC or the SBS by force of that clause.

Clause 19(3) provides that any transfers of transmitter licences from the Commonwealth to the ABC or the SBS is not to be subject to any fees or taxes. In particular, it is intended that these transfers not be subject to any charges determined by the ACA relating to its costs under section 53 of the *Australian Communications Authority Act 1997*.

Part 6 - Powers and immunities of NTC or declared successor

The purpose of the Part is to authorise an NTC or declared successor to carry out maintenance of existing facilities on the same basis as other participants in the communications industry.

The Part, read together with the definition of "telecommunications carrier rules" in clause 3, proposes to confer on an NTC and a declared successor, as defined in clause 3 of the Bill, the power to maintain an existing facility to the extent to which telecommunications carriers are so authorised under Schedule 3 to the Telecommunications Act. In exercising its power, an NTC will be required to comply with the relevant conditions in Schedule 3 to the Telecommunications Act, with which a carrier is required to comply in exercising its like power. It is intended that an NTC and a declared successor will be subject to the Telecommunications Act only to the extent necessary for the proper administration and enforcement of Part 1 of Schedule 3 and not for other purposes.

The Part will not authorise an NTC to enter onto and inspect land to determine whether it is suitable for its purposes nor to carry out the installation of new facilities. (Carriers are authorised to enter onto land under Division 2 and to carry out the installation of new facilities under Division 3 of Schedule 3 to the Telecommunications Act. Those Divisions are expressly excluded by operation of clause 21(a) of the Bill. Those Divisions will apply to an NTC or a declared

successor only if it is the holder of a telecommunications carrier licence issued in accordance with the provisions of the Telecommunications Act.)

Clause 20 - Deemed application of telecommunications carrier rules

Clause 20(1) provides that the power will be exercisable only in respect of the maintenance of certain assets that are telecommunications facilities, within the meaning of the Telecommunications Act, and are owned by an NTC or a declared successor. The relevant asset must be either land or an original or replacement asset that is located at land on which there is a telecommunications transmission tower that is an original or replacement asset. Maintenance, for the purpose of clause 7 of Schedule 3 to the Telecommunications Act, is defined in clause 7(3) of that Schedule. The effect of this provision is to limit the power to the maintenance of those telecommunications facilities (or replacements for those facilities) that are transferred to an NTC from the Commonwealth under clause 9 of the Bill.

Clause 20(2) provides that an NTC or declared successor is to be deemed to be a telecommunications carrier and to hold a carrier licence for the purpose of the application of the telecommunications carrier rules. The purpose of this provision is to enable enforcement of the applied provisions of Schedule 3 to the Telecommunications Act. Its effect is that the obligations imposed on an NTC or declared successor by application of Schedule 3 will have effect as carrier licence conditions and may be enforced as such.

Clause 20(3) provides that, if an NTC or declared successor holds a telecommunications carrier licence the provisions in this Part will not apply to it. However, the power under this Part to maintain a facility will revive if the NTC or declared successor ceases to hold a carrier licence or a relevant asset is transferred to a declared successor that does not hold a carrier licence.

Clause 21 - Miscellaneous modifications of telecommunications carrier rules

Clause 21 provides for certain provisions of Schedule 3 to the Telecommunications Act not to apply. Those provisions mainly deal with matters relating to the power to enter land to determine whether it is suitable for a carrier's purposes and to the power to install a facility.

Part 7 - Miscellaneous

Clause 22 - Declared successors

Clause 22(1) enables the Minister to declare a person to whom national transmission network assets are transferred to be a declared successor.

This is intended to provide a mechanism to give the owner of an NTC the flexibility to restructure its commercial arrangements while ensuring that the obligations under the access regime in Part 3 and the benefits of the powers and immunities in Part 6 continue to apply to the new owner.

It also ensures that if an NTC proposes to sell assets to a third party purchaser and the Minister approves the transfer, the obligations and benefits of the post-sale rules can continue to apply to the new owner.

Clause 22(2) provides that the notice has no effect unless the person is the owner of an original or replacement asset at the date of publication of the notice. This ensures that the Minister's power to declare declared successors is limited to persons who own the relevant assets.

Clause 22(3) enables application to be made to the AAT for review of a decision to declare, or refuse to declare, a declared successor, or a decision to revoke such a declaration.

Clause 23 - Delegation

This clause allows the Minister to delegate his powers under the Act to the Secretary to the Department or to a Senior Executive Service officer in the Department.

Clause 23(2) allows the Minister to direct a delegate under clause 23(1) in relation to the exercise of a delegated power.

Clause 24 - Immunity from State and Territory regulatory laws

In carrying out activities relating to the construction and maintenance of transmission sites that are or have been solely or principally used in connection with the provision of national broadcasting services or other broadcasting services in the broadcasting services bands, the Commonwealth has generally sought to meet equivalent standards to those imposed by the relevant State or Territory laws. However, prior to the decision of the High Court of Australia of 12 August 1997 in *Re the Residential Tenancies Tribunal of New South Wales and Henderson; ex parte the Defence Housing Authority*, which defined the scope of Commonwealth immunity from State law, the Commonwealth relied on such immunity as was thought to exist, as protection in respect of any occasion on which the Commonwealth may have failed to comply with the technical requirements of State or Territory laws.

The purpose of clause 24(1) is to restore the Commonwealth, in relation to its activities solely or principally connected with the provision of such broadcasting services, to the position that was thought to exist before the decision in *Henderson*.

Clause 24(2) expressly negates any inference about the application of laws other than those in respect of which specific provision has been made in the clause.

Clause 24(3) ensures that, the protection conferred by clause 24(1) continues to exist in relation to a site or telecommunications facility, while that site or facility remains in Commonwealth ownership or is owned by an NTC or declared successor.

Clause 24(4) is intended to put it beyond doubt that a site or telecommunications facility to which clause 24(1) applies does not, merely by remaining in place,

constitute a trespass to the land on which it is located, while that site or facility remains in Commonwealth ownership or is owned by an NTC or declared successor.

Clause 24(5) makes it clear that clauses 24(3) and 24(4) do not extend the protection conferred by clause 24(1) to buildings, structures or other telecommunications facilities where construction commenced after the Act commences.

Clause 24(6) defines terms used in the clause.

Clause 25 - Application of Trade Practices Act to sale of shares in NTC

This clause makes it clear that the transfer of shares in an NTC will be an acquisition to which section 50 of the Trade Practices Act applies. The application of that section is consistent with national competition policy.

Clause 26 - Lands Acquisition Act does not apply

This clause provides that the Lands Acquisition Act will not apply in relation to anything done pursuant to the provisions of the Bill once enacted. The purpose of this clause is to simplify the administration of the sale process.

Clause 27 - Commonwealth records

This clause provides that Commonwealth records are to be dealt with in accordance with the provisions of the *Archives Act 1983* and that the transfer of records is to be subject to the permission of Australian Archives in accordance with paragraph 24(2)(b) of the Archives Act. The purpose of this clause is to ensure that the transfer of Commonwealth records to an NTC is managed by Australian Archives in accordance with the provisions of the Archives Act and policies and procedures put in place by Australian Archives to ensure that records of archival value are retained in Commonwealth ownership.

Clause 28 - Compensation for acquisition of property

If, apart from this clause, the operation of the Act would result in the acquisition of property from a person otherwise than on just terms in contravention of paragraph 51(xxxi) of the Constitution, the Commonwealth will be liable to pay reasonable compensation to the person in respect of the acquisition (clause 27(1)).

If the person and the Commonwealth cannot agree on the amount of the compensation, the person will be able to institute proceedings in the Federal Court of Australia for the recovery from the Commonwealth of such amount of reasonable compensation as the Court determines (clause 27(2)).

Clause 29 - Disallowable instruments

This clause makes certain instruments under the Act disallowable instruments, which accordingly must be notified in the *Gazette*, tabled in both Houses of the Parliament and are subject to Parliamentary disallowance.

Clause 30 - Regulations

This clause enables the Governor-General to make regulations for the purposes of the Act.

NATIONAL TRANSMISSION NETWORK SALE (CONSEQUENTIAL AMENDMENTS) BILL 1998

Clause 1 - Short title

Clause 1 provides for the citation of the *National Transmission Network Sale (Consequential Amendments) Act 1998*.

Clause 2 - Commencement

Clause 2 of the National Transmission Network Sale (Consequential Amendments) Bill 1998 (the Consequential Amendments Bill) provides for the Act to commence on Royal Assent.

Clause 3 - Schedule(s)

This clause makes the amendments set out in the Schedule to the Acts specified in the Schedule and gives force to the other provisions in the Schedule.

Clause 4 - Transitional

Section 74 of the ABC Act imposes an obligation on the Commonwealth to provide transmitting stations for use in connection with the performance of the functions of the ABC.

Section 71 of the SBS Act provides that the Minister may arrange for the provision and operation of transmission facilities for the purpose of broadcasting programs of the SBS.

Items 6 and 20 of this Schedule repeal these sections (see explanatory notes to items 6 and 20). This item provides that despite their repeal, these sections continue to have effect in relation to a particular area until the Commonwealth ceases to have a controlling interest in the company to which the assets for that area have been transferred in accordance with the *National Transmission Network Sale Act 1998*.

This item clarifies that the Commonwealth retains the responsibility to provide transmission facilities to the national broadcasters during the sale process whilst the Commonwealth continues to control those facilities.

SCHEDULE 1 - AMENDMENTS

Amendments to the *Australian Broadcasting Corporation Act 1983*

Item 1 - Subsection 3(1)

Item 2 - Subsection 3(1)

Subsection 3(1) of the ABC Act contains definitions of key terms used in that Act.

These items amend subsection 3(1) by respectively defining “ABA” to mean the Australian Broadcasting Authority and “national broadcasting service” to have the same meaning as in the BSA. These amendments are consequential on the amendments in items 7 and 8 of this Schedule (see explanatory notes to items 7 and 8).

Item 3 - Subsection 3(1) (definition of *technical equipment*)

Item 4 - Subsection 3(1) (definition of *wireless telegraphy*)

Subsection 3(1) of the ABC Act currently contains definitions of the terms “technical equipment” and “wireless telegraphy”. These terms are used only in Part VII of the ABC Act, which is repealed by item 6 of this Schedule (see explanatory notes to item 6). As a consequence of the amendment in item 6, this item repeals the definitions of “technical equipment” and “wireless telegraphy”.

Item 5 - After paragraph 25(1)(d)

Section 25 of the ABC Act sets out the general powers of the ABC.

This item amends subsection 25(1) of the ABC Act by inserting new paragraphs (da) to (dc), which give the ABC the power to:

- (da) produce, promote or present programs, or arrange, or provide facilities, for the production, promotion, or presentation of programs;
- (db) transmit programs or other matter by means of guided or unguided electromagnetic energy, or provide facilities for such transmissions; and
- (dc) arrange for the transmission of programs or other matter by means of guided or unguided electromagnetic energy.

It is necessary to insert these powers as a result of the repeal of Part VII of the ABC Act by item 6 of this Schedule.

Subsection 74(4) in Part VII requires the ABC to provide all technical equipment to connect studios to the local transmitting station. New paragraphs (da) to (dc) ensure that the ABC can still provide such technical equipment and can arrange for the transmission of programs. These paragraphs are consistent with similar general powers given to the SBS under paragraphs 44(1)(a), (b) and (c) of the SBS Act (as amended by item 18 of this Schedule).

Item 6 - Part VII

Part VII of the ABC Act sets out the technical services provisions of that Act, which provide for transmitting stations and technical equipment, transfer to the ABC of certain assets, provision of satellite systems and electric lines.

This clause repeals Part VII as its provisions are out of date and make use of terms which are no longer used in other broadcasting legislation.

Item 7 - After section 79

This item inserts new section 79AA into the ABC Act. It provides that if a person has made a complaint to the ABC about degradation of the quality of signal reception of a national broadcasting service provided by the ABC from an analog terrestrial radiocommunications transmitter, and the person has not received an adequate response within 60 days, the Minister may direct the ABA to conduct an investigation into the matter.

The ABC is to have primary responsibility for the provision of transmission services for the purposes of the performance of its functions. All complaints about the degradation of signal quality by members of the public would be handled by the ABC in the first instance and it is anticipated that complaints would normally be resolved by the ABC.

The provision, however, provides an avenue for the Minister to obtain independent expert advice where complaints do not appear to have been satisfactorily resolved by the ABC. It is expected that this power would be exercised on limited occasions in circumstances where the Minister has received a number of complaints from members of a local community or their representatives about a degradation of signal quality in that community and no adequate response has been received from the ABC.

Item 8 - At the end of section 80

Section 80 of the ABC Act sets out particular matters that must be included in the ABC's annual report.

This item inserts the additional requirement that the ABC include particulars of any significant changes during the year in the transmission coverage, or transmission quality, of national broadcasting services provided by the ABC.

This amendment reflects the public interest in the continued provision of core transmission services for the purposes of providing national broadcasting services.

Amendments to the *Radiocommunications Act 1992*

Item 9 - Section 5

This item inserts a definition of the term “NBS transmitter licence” which would be used in the amendments to the Radiocommunications Act made by this Bill. The term is defined to mean a transmitter licence for a transmitter that is for use for transmitting, to the public, a national broadcasting service within the meaning of the BSA.

It is intended that the term mean only those transmitters which transmit the relevant signal to the public directly, including transmitters that transmit both to the public and to another transmitter or translator which then transmits directly to the public, whether the relevant transmitters are transmitting a signal in the broadcasting services bands or not.

Item 10 - After subsection 100(3)

Section 100 of the Radiocommunications Act empowers the ACA to issue apparatus (transmitter and receiver) licences on application. This item amends section 100 of the Radiocommunications Act to insert new subsection 100(3A), which provides that an NBS transmitter licence cannot be issued to any person other than the ABC, the SBS or the Commonwealth.

After the sale of the national transmission network, the national broadcasters, rather than the purchaser(s) of the network, are to hold licences under section 100 of the Radiocommunications Act to operate transmitters for the purpose of providing national broadcasting services to the public.

This is to ensure that the national broadcasters retain access in the long-term to frequencies for the provision of their national broadcasting services and to ensure the national broadcasters are in a reasonable position to negotiate with other transmission service providers after the sale of the network.

Item 11 - Subsection 106(1)

Subsection 106(1) of the Radiocommunications Act empowers the ACA to determine in writing a price-based allocation system for allocating and/or issuing specified transmitter licences (other than licences issued under section 101A).

This item amends subsection 106(1) so that the ACA may not determine a price-based allocation system for NBS transmitter licences. It is not intended that the national broadcasters be required to bid for NBS transmitter licences.

Item 12 - At the end of subsection 106A(2)

Subsection 106A(1) of the Radiocommunications Act provides that for the purposes of section 50 and related sections of the Trade Practices Act, the issue of an apparatus

licence to a person is taken to be an acquisition by the person of an asset of another person.

Section 50 of the Trade Practices Act prohibits the acquisition of an asset by a person if the acquisition would have the effect, or is likely to have the effect, of substantially lessening competition in a market.

This item amends section 106A so that subsection 106A(1) does not apply to the acquisition of an NBS transmitter licence by the ABC, the SBS or the Commonwealth. It is not intended that the issue of NBS transmitter licences be prevented by the operation of section 50 of the Trade Practices Act.

Item 13 - At the end of section 131AA

Subsection 131AA(1) allows an apparatus licensee to apply in writing to the ACA for the licence to be transferred to another person. This item amends section 131AA by inserting new subsection 131AA(4), which provides that an NBS transmitter licence cannot be transferred to any person other than the ABC, the SBS or the Commonwealth.

This amendment gives effect to the intention that the national broadcasters, rather than the NTCs are to hold licences under section 100 of the Radiocommunications Act to operate transmitters for the purpose of providing national broadcasting services to the public.

Amendments to the *Special Broadcasting Service Act 1991*

Item 14 - Section 3

Section 3 of the SBS Act sets out definitions of key terms used in that Act.

This item amends section 3 by defining “ABA” to mean the Australian Broadcasting Authority. This amendment is consequential on the amendments in item 19 of this Schedule (see explanatory notes to item 19).

Item 15 - Section 3 (definition of *electric line*)

Section 3 of the SBS Act currently contains a definition of the term “electric line”. This term is used only in section 72 of the SBS Act, which is repealed by item 21 of this Schedule (see explanatory notes to items 20 and 21). As a consequence of the amendment in item 21, this item repeals the definition of “electric line”.

Item 16 - Section 3

This item amends section 3 of the SBS Act by defining “national broadcasting service” to have the same meaning as in the BSA. This amendment is consequential on the amendments contained in items 19 and 22 (see explanatory notes to items 19 and 22).

Item 17 - Section 3 (definition of *transmission facilities*)

Section 3 of the SBS Act currently contains a definition of the term “transmission facilities”. This term is used only in sections 71 and 72 of the SBS Act, which are repealed by items 20 and 21 of this Schedule (see explanatory notes to items 20 and 21). As a consequence of the amendments in items 20 and 21, this item repeals the definition of “transmission facilities”.

Item 18 - Paragraphs 44(1)(b) and (c)

Section 44 of the SBS Act sets out the general powers of the SBS. Paragraphs 44(1)(b) and (c) confer on the SBS the powers to:

- (b) transmit programs or provide facilities for the transmission of programs; and
- (c) arrange for the transmission of programs.

This item amends these paragraphs to widen the scope of the relevant powers from “programs” alone to programs “or other matter by means of guided or unguided electromagnetic energy”. This amendment is consistent with the amendments to subsection 25(1) of the ABC Act inserted by item 5 of this Schedule.

Item 19 - After section 70

This item inserts new section 70AA into the SBS Act. It provides that if a person has made a complaint to the SBS about degradation of the quality of signal reception of a national broadcasting service provided by the SBS from an analog terrestrial radiocommunications transmitter, and the person has not received an adequate response within 60 days, the Minister may direct the ABA to conduct an investigation into the matter.

The SBS is to have primary responsibility for the provision of transmission services for the purposes of the performance of its functions. All complaints about the degradation of signal quality by members of the public would be handled by the SBS in the first instance and it is anticipated that complaints would normally be resolved by the SBS.

The provision, however, provides an avenue for the Minister to obtain independent expert advice where complaints do not appear to have been satisfactorily resolved by the SBS. It is expected that this power would be exercised on limited occasions in circumstances where the Minister receives a number of complaints from members of a

local community or their representatives that there has been a degradation of signal quality in that community and no adequate response has been received from the SBS.

Item 20 - Section 71

Item 21 - Section 72

Section 71 of the SBS Act provides that the Minister may arrange for the provision and operation of transmission facilities for the purpose of broadcasting programs of the SBS.

Section 72 of the SBS Act allows a person acting under the authority of the Minister to install and maintain electric lines and arrange for and obtain the supply of electric current necessary for the operation of transmission facilities as arranged by the Minister under section 71.

As a consequence of the sale of the national transmission network, the SBS itself will be arranging for the provision and operation of transmission facilities for the purpose of broadcasting its programs. These items repeal sections 71 and 72 accordingly.

Item 22 - At the end of section 73

Section 73 of the SBS Act sets out particular matters that must be included in the SBS's annual report.

This item inserts the additional requirement that the SBS include particulars of any significant changes during the year in the transmission coverage, or transmission quality, of national broadcasting services provided by the SBS.

This amendment reflects the public interest in the continued provision of core transmission services for the purposes of providing national broadcasting services.