

1993-1994

THE PARLIAMENT OF THE COMMONWEALTH
OF AUSTRALIA

HOUSE OF REPRESENTATIVES

TELECOMMUNICATIONS AMENDMENT ACT 1994

EXPLANATORY MEMORANDUM

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

TELECOMMUNICATIONS AMENDMENT ACT 1994

OUTLINE

The purpose of the Bill is to remove any doubt that a carrier in a position to dominate a market ("a dominant carrier") may offer certain discriminatory charging options, providing they meet certain tests, and to enable AUSTEL to disallow tariffs if they materially and adversely affect the development and maintenance of commercially sustainable competition.

It is intended to establish a proper balance between:

- (a) ensuring that the benefits of competition are passed on to all customers; and
- (b) ensuring that a dominant carrier in relation to telecommunications services, does not use its market power to hinder the development of commercially sustainable competition.

The Bill will remove or amend certain provisions of the *Telecommunications Act 1991* (the Principal Act) that have cast doubt on the ability of a dominant carrier to offer certain tariffs.

It will replace them with provisions that charging options which are generally available to customers are permitted and give AUSTEL (the telecommunications regulatory body) a discretion to approve other discrimination that is broadly cost based, is in the community interest or is an appropriate trial program.

To balance these provisions, AUSTEL will also be given strengthened powers to disallow, in respect of a dominant carrier, tariffs or provisions of tariffs that are, or are likely to, materially and adversely affect the development and/or maintenance of commercially sustainable competition in a market.

FINANCIAL IMPACT STATEMENT

Telstra may need to consider whether, in the light of the clarification given to the Government's telecommunications competition policy intentions through these changes, it needs to modify some of its pricing arrangements to comply with the amended Act and associated Ministerial directions. Any such modifications may have indirect implications for payments to the Commonwealth.

It is proposed that AUSTEL will be provided with additional funding to undertake its proposed new functions. This funding will be recoverable from the carriers through their licence fees.

Notes on Clauses

Clause 1 - Short title etc

Subclause 1(1) allows for the citation of the Telecommunications Amendment Act 1994.

Subclause 1(2) provides that, in the amending Act, the term "Principal Act" means the Telecommunications Act 1991.

Clause 2 - Commencement

This clause provides for the commencement of the amending Act. The Act is taken to have commenced on 15 March 1994, the date on which the Government announced the changes embodied in the amending Act.

Clause 3 - Definitions

Section 5 of the Telecommunications Act 1991 (the Principal Act) contains definitions of the terms used in the Act. This clause amends the definition of "BCS tariff" to exclude from the definition of the tariffs for basic carriage services tariffs or provisions of tariffs that have been disallowed by AUSTEL under proposed section 238A (clause 15).

Clause 4 - Minister may give directions to AUSTEL

This amendment is consequential on proposed section 238C (clause 15). Under that proposed section, the Minister has certain powers of direction in respect of AUSTEL. This amendment will require the Minister to exercise those powers only under the specific requirements of that section and not under the provision for general directions under section 50.

Clause 5 - Carrier not to discriminate against resuppliers

This amendment removes subsection 184(3). The application of this subsection has been found to be uncertain in practice. The new provisions being inserted clarify the Government's policy intent.

Clause 6 - Exceptions

This amendment removes the current exceptions (subsections 185 (1) and (2)) to the rules on non-discriminatory pricing under sections 183 and 184 and substitutes new exceptions.

The proposed exceptions are:

- (a) **proposed subsection 185(1)** - AUSTEL has permitted the discrimination under proposed section 185A (clause 7); and
- (b) **proposed subsection 185(2)** - the discrimination is provided for in a tariff and, following a request by the carrier for an AUSTEL decision under section 185A, the discrimination has been permitted by AUSTEL under **proposed section 185A** (clause 7). This applies to all tariffs, whether or not in place before the

commencement of the amending Act. If AUSTEL does not permit the discrimination, the exception under proposed subsection will not apply, and will be taken never to have applied (**proposed subsection 185A(2A)**); and

- (c) **proposed subsection 185(2B)** - the discrimination is under a "legitimate charging option".

A "legitimate charging option" is defined in **proposed subsection 185(2C)**. It is a charging option, including a standard or non standard option, that is available to all, or all but an insubstantial minority of, customers (generally or in the classes of business or residential customers or in a class determined in writing by AUSTEL) to whom the supply of the relevant services is "technically feasible", a term defined in **proposed subsection 185(2D)**.

A charging option will be a legitimate charging option where the service is available to be acquired on the same terms and conditions by all (or all but an insubstantial minority of) customers (as defined in **proposed subsection 185(4)**) where those terms and conditions are broadly of appeal. So, as a general rule, charging options that are only offered to selected persons will not fall within this exception.

The discretion for AUSTEL to determine a class of persons ensures that evolving circumstances can be accommodated. For example, any doubt about pro-competitive tariffs provided to "re-sellers" of telecommunications services can be removed, if necessary, under this provision.

In deciding whether to make a determination, AUSTEL must have regard to the objects of the Principal Act and to its general functions under section 37 of that Act (**proposed subsection 185(2E)**). The AUSTEL determination is a disallowable instrument under the *Acts Interpretation Act 1901* (**proposed subsection 185(2F)**).

The definition of "customers" in **proposed subsection 185(4)** covers not only actual service users, but also persons who propose to acquire the service and persons who might reasonably be expected to acquire or propose to acquire the service.

The definition of "terms and conditions" in that provision will be read as including charges and terms and conditions about the calculation and application of charges.

The **proposed subsections 185(2B), (2C) and (4)** also ensure that certain kinds of differentiation, which could be considered to be discrimination, will not be treated as contravening section 183 or 184. These include:

- (a) time of day (peak/off peak), day of the week (eg reduced Sunday rates) and similar charging differences; and
- (b) tariffing of different charges for different service or performance features (eg a charging option under which charges or rates vary according to different performance characteristics or different amounts of service capacity); and

(c) flat and incremental volume based discounts (eg that apply to customers who exceed particular levels of aggregate service charges or numbers of service connections).

Subclause (2) provides that if the discrimination occurs at any time up to one month after the amending Act receives the Royal Assent and if subsection 185(2) of the Principal Act would have applied to the discrimination, that subsection continues to so apply.

Clause 7 - New section 185A - Decisions permitting discrimination

This provision will allow AUSTEL to decide that specific types of discrimination in relation to the charges for, and terms and conditions applicable to, telecommunications services, should be permitted. It also specifies the circumstances in which that discretion can be exercised. The provision is linked to **propos d subsection 185(1)** (clause 6).

AUSTEL will be able to permit discrimination of that nature in the following circumstances:

1. **Proposed paragraph (2) (a)** Where there is, or is likely to be, a significant difference in costs borne by the carrier that is related to the discrimination. The difference in costs may consist of cost savings or other benefits to the carrier or additional costs borne by the carrier. It must be a difference in costs that is or is likely to be related to the discrimination and by reason of which the discrimination can be reasonably considered to be economically or otherwise commercially justified. However, there is no requirement for the cost difference to be justified by relative differences in the costs of supplying different customers or otherwise on the basis of any customer by customer comparison.

2. **Proposed paragraph (2) (b)** If the arrangement would serve the community interest in promoting the objects of the Act delineated in subparagraphs 3(a) (ii) and (iii) of the Principal Act, which relate to ensuring that standard telephone services are reasonably accessible to all Australians on an equitable basis and to ensuring that services are provided at performance standards that reasonably meet the social, industrial and commercial needs of the Australian community. This ensures the continuation of certain established tariff arrangements that benefit customers (provided AUSTEL does not disallow them as "anti-competitive" under **proposed s 238A**). For example, services provided to rural or remote communities under community/pastoral charging rates may fall within this exception.

3. **Proposed paragraph (2) (c)** If the arrangement is desirable to promote trial programs, pilot programs and demonstrations that promote the objects of the Act (**section 3** of the Principal Act). This provision will ensure that the carriers can develop and test innovative concepts of service provision in a commercial environment, thereby improving the scope for technical and service expansion of the capabilities of the telecommunications networks and eventually offering the public both cost and service benefits. Telstra's current "Reachout" trials, which extend the boundaries for untimed local calls in return for a higher flat rate charge, and trials of caller identification systems could, for example, be considered by AUSTEL under this provision.

AUSTEL must, under general administrative law principles, exercise its discretion under **proposed paragraphs (2) (a), (b) and (c)** reasonably.

Proposed subsection 185A(3) identifies a range of technical and practical factors relating to the provision of the service that AUSTEL may take into account in considering the cost differences to a carrier under **proposed paragraph 185A(2) (a)**. The list ensures that certain factors can be taken into account by AUSTEL in considering whether to make a decision on the ground referred to in that proposed paragraph. The list is not exhaustive and AUSTEL would consider any other relevant factors.

Proposed subsection 185A(4) provides that AUSTEL may, in writing, revoke or vary a decision under this proposed section, but may only do so where there has been a material change in the circumstances to which the decision relates or information which was material to the decision proves incorrect, or both.

Under **proposed subsection 185A(5)**, a decision under **proposed subsection 185A(1)** is taken to be in force on and from the day it is made, unless it relates to a tariff in force:

- (a) before the commencement of the amending Act (15 March 1994), in which case it is taken to be in force since that commencement; or
- (b) after that date but before the date of Royal Assent to the amending Act, in which case it is taken to have been in force since the tariff came into force.

Under **proposed subsection 185A(6)**, revocation or variation of a decision under **proposed subsection 185A(4)** does not affect the previous application of the decision.

Under **proposed subsection 185A(7)**, decisions, revocations or variations of decisions are to be made public in the way AUSTEL thinks appropriate.

Proposed subsection 185A(8) makes it clear that AUSTEL's power to make a decision under this proposed section does not in any way limit its more general power to disallow a tariff of a carrier, even if that action removes a provision of a tariff under which discrimination was permitted.

Clause 8 - New section - Operation of Part IV of the Trade Practices Act 1974

The fact that Division 4 of Part 9 of the Principal Act prohibits certain acts of discrimination and also provides for exceptions could lead to arguments that the general anti-competitive requirements of the Trade Practices Act 1974 were intended to be displaced by these specific provisions. **Proposed section 189A** makes it clear that there is no intention to displace the operation of paragraph 51(1) (a) of the Trade Practices Act 1974.

Clause 9 - Tariff of basic services

Subsection 190(4) of the Principal Act provides that a tariff for a basic carriage service does not come into force until either the third business day after it has been given to AUSTEL or during the currency of a previous tariff of that nature. **Proposed subsection 190(4A)** makes it clear that this provision does not apply so as to limit the power of AUSTEL to disallow a tariff within 15 business days after receiving the tariff under **proposed section 238B** (clause 15).

Clause 10 - AUSTEL may disallow non-complying tariff

Section 191 gives AUSTEL powers to disallow certain tariffs for basic carriage services of telecommunications carriers. This clause adds an explanatory note to the section to alert users to the fact that **proposed section 238A** (clause 15) also gives AUSTEL powers to disallow tariffs having an anti-competitive effect.

Clause 11 - Variation and revocation of BCS tariff

Section 192 of the Principal Act gives AUSTEL powers to vary and revoke certain tariffs for basic carriage services of telecommunications carriers. This clause adds a **proposed subsection 192(3A)** which makes it clear that this power is not intended to be limited by the introduction of the power to disallow anti-competitive tariffs within 15 business days after receiving the tariff under **proposed section 238B** (clause 15).

Clause 12 - AUSTEL may disallow variation that is contrary to section 192

Section 193 of the Principal Act gives AUSTEL powers to disallow certain variations of tariffs for basic carriage services of telecommunications carriers that, in the opinion of AUSTEL, would contravene section 192 of the Principal Act (which imposes time limitations and requirements for compliance with other sections of the Act). This clause adds an explanatory note to the section to alert users to the fact that **proposed section 238A** (clause 15) also gives AUSTEL powers to disallow tariffs.

Clause 13 - Dominant carrier must charge in accordance with its BCS tariff

Proposed subsection 197(3) will ensure that, if certain tariffs are disallowed by AUSTEL under **proposed section 238A** (clause 15), the disallowance will not have the effect of preventing the carrier recovering payment for services rendered before the disallowance. However, **proposed subsection 238A(13)** precludes a carrier from charging for services provided under a tariff, or a provision of a tariff, that has been disallowed as anti-competitive under **proposed section 238A**.

Clause 14 - New section - Operation of Part IV of the Trade Practices Act 1974

The fact that Division 5 of Part 9 of the Principal Act provides for certain powers in relation to tariffs could lead to arguments that the general anti-competitive requirements of the *Trade Practices Act 1974* were intended to be displaced by these specific provisions. **Proposed section 201A** makes it clear that there is no

intention to displace the operation of paragraph 51(1)(a) of the Trade Practices Act 1974.

Clause 15 - New sections - AUSTEL may disallow anti-competitive tariff etc

Proposed section 238A confers new powers on AUSTEL to examine and disallow a tariff, or provisions of a tariff, of a carrier which is in a position to dominate a market for a particular kind of telecommunications service at any time if AUSTEL is of the opinion that the operation of the tariff or of any of its provisions, or its operation in conjunction with other tariffs or commercial arrangements, are "anti-competitive" in effect.

Proposed subsection 238A(14) makes it clear that a tariff or part thereof is to be taken to be anti-competitive if and only if it would materially and adversely affect "the development and/or maintenance of commercially sustainable competition" in a market. This test is deliberately different from those applicable under the Trade Practices Act 1974 to cope with the particular issues in transition from the former regulated monopoly market to full competition.

These powers operate in addition to, and not in substitution for, any other powers of disallowance of tariffs.

Proposed subsection 238A(5) makes it clear that AUSTEL's powers of disallowance can be exercised in relation to a basic carriage service tariff of a telecommunications carrier whether or not the anti-competitive pricing provisions in section 183 or 184 of the Principal Act have been contravened.

Disallowance is achieved by AUSTEL giving written notice (**proposed subsection 238A(2)**) setting out the reasons for the decision (**proposed subsection 238A(3)**). The power may be exercised at any time during which the tariff is in force or during the period AUSTEL has to consider the tariff under **proposed section 238B (proposed subsection 238A(4))**. The notice takes effect on a date specified in the notice (**proposed subsection 238A(6)**) - not being later than 5 days after the date the notice is given (**proposed subsection 238A(11)**), continuing during the period specified in the notice or, if no period is specified, while the tariff remains in force or during the period AUSTEL is considering the tariff before it comes into force (**proposed subsection 238A(11)**).

AUSTEL may, in a notice, state that the disallowance does not apply in relation to specific purposes or persons or purposes of a specified kind (**proposed subsection 238A(8)**). This allows AUSTEL to put in place transitional arrangements it considers appropriate. A statement cannot be made in relation to persons to whom the carrier was not supplying services at the time of disallowance (**proposed subsection 238A(10)**). Under **proposed subsection 238A(9)**, AUSTEL may vary or revoke a statement under **proposed subsection 238A(8)** at any time.

Under **proposed subsection 238A(12)**, a notice and revocations or variations of statements in notices, under this proposed section are to be made public in the way AUSTEL thinks appropriate.

The effect of disallowance is set out in **proposed subsection 238A(13)**. A carrier may not demand or receive payment of a charge after a tariff has been disallowed. It can receive payment for periods prior to disallowance.

Proposed section 238B ensures that a tariff or variation of a tariffs for basic carriage services of telecommunications carriers to which **proposed section 238A** applies do not come into force before:

- (a) the 15th business day after the carrier has given AUSTEL notice of the tariff; or
- (b) an earlier day notified by AUSTEL (**proposed subsection 238B(2)**);

unless the variations were in force before commencement of the section (**proposed subsection 238B(3)**).

This proposed section is intended to allow AUSTEL time to consider tariffs and variations and, if necessary, disallow them before they come into effect. This does not affect the fact that a disallowance may occur at any time under **proposed subsection 238A(4)**.

Proposed section 238C allows the Minister to give AUSTEL directions on how it is to perform its functions under **proposed section 238A**. The power is only to be general in nature (**Proposed section 238D**) - the Minister may not direct AUSTEL to disallow provisions of a particular tariff - and is disallowable under section 46A of the *Acts Interpretation Act 1901* (**Proposed subsection 238C(4)**).

A list of matters the Minister may raise in the directions is set out in **proposed subsection 238C(2)**. This list is not exhaustive, but is indicative of the major topics likely to be covered. It is proposed that the Minister will issue a direction after the amending Act commences. In particular, it is proposed to identify particular circumstances in which AUSTEL must consider whether there is an anti-competitive effect in a market. Examples of those circumstances may include the following:

- (a) where a discount or incentive is conditional on taking another service and any one of the services is not subject to effective competitive or there are significant differences in the intensity of competition between the services;
- (b) where a discount or other incentive is offered for the supply of two or more different types of services (eg PSTS and PMTS services).

D

D

D

D









