



**Isle of Man
Government**

Reilrys Ellan Vannin

COMMUNICATIONS BILL 2018

EXPLANATORY NOTES

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These notes are circulated for the information of Members with the approval of the Member in charge of the Bill, Hom W M Malarkey MHK.

INTRODUCTION

1. These explanatory notes relate to the Communications Bill 2018. They have been prepared by the Communications Commission in order to assist the readers of the Bill and have not been endorsed by the House of Keys.
2. The notes need to be read in conjunction with the Bill. They are not, and not meant to be, a comprehensive description of the Bill.
4. The Bill has been subject to public consultation and has been updated to take account of comments raised.
5. An Impact Assessment of the Bill has been prepared.

BACKGROUND

The Communications Commission is a Statutory Board of the Isle of Man Government, comprised of a Chairman and up to five Members with a range of experiences. The Commission staff consists of the Director and three other staff.

The Commission has responsibility for licensing and regulating telecommunications and broadcasting on the Isle of Man under, primarily, the Telecommunications Act 1984 and the Broadcasting Act 1993. The purpose of the Bill is to modernise the Telecommunications Act 1984 and the Broadcasting Act 1993 and to bring the two areas that the Commission regulates into one piece of legislation.

There have been advances in telecommunications and broadcasting that could not have been envisaged when the original legislation was enacted and this Bill while adapting to those changes also looks to future proof the legislation.

The Bill also sets out the functions of the Commission and provides for a new system of fines and penalties to support its regulatory functions.

Public Service Broadcaster

The Bill may be amended in the Legislative Branches, particularly in relation to provisions for the public service broadcaster which is currently the subject of a Tynwald Select Committee.

Structure of the Bill

The Bill is divided into 9 parts and 9 Schedules. The structure of the Bill is as follows:

Part	Summary
Part 1: Introduction	Introductory provisions relating to the short title, commencement, general interpretation and further interpretation in respect of electronic communications networks and services, meaning of 'available for reception by members of the public' and programme service and amendment provisions.
Part 2: the Communications Commission Schedule 1: Functions of the Communications Commission.	Provisions relating to the continuing existence of the Communications Commission and restrictions on directions by the Council of Ministers.
Part 3: Regulated Activities and Licensing	DIVISION 1 REGULATED ACTIVITIES DIVISION 2 LICENSING DIVISION 3 PROCEDURAL FAIRNESS REQUIREMENTS DIVISION 4 INFORMATION – POWER TO REQUIRE DOCUMENTS DIVISION 5 GENERAL – GUIDANCE & DIRECTIONS
Part 4 : Broadcasting Schedule 2 : Persons disqualified for holding a broadcasting licence Schedule 3 : Programme and Fairness Standards for	DIVISION 1 GENERAL PROVISIONS ABOUT LICENCES DIVISION 2 PROGRAMME AND FAIRNESS STANDARDS FOR BROADCASTING DIVISION 3 – SOUND BROADCASTING SERVICES DIVISION 4 – RADIO LICENSABLE CONTENT SERVICE DIVISION 5 – TELEVISION LICENSABLE CONTENT SERVICE DIVISION 6 – PUBLIC SERVICE BROADCASTING

<p>Broadcasting.</p> <p>Schedule 4 : On Demand Programme Services</p>	<p>DIVISION 7 — ON-DEMAND PROGRAMME SERVICES</p>
<p>Part 5 : Electronic Communications</p> <p>Schedule 5 : The Electronic Communications Code.</p> <p>Schedule 6 : Competition Investigations.</p>	<p>DIVISION 1 — LICENCES</p> <p>DIVISION 2 — TELEPHONE NUMBERS</p> <p>DIVISION 3 — UNIVERSAL SERVICE OBLIGATIONS</p> <p>DIVISION 4 — SIGNIFICANT MARKET POWER</p> <p>DIVISION 5 — ELECTRONIC COMMUNICATIONS CODE</p> <p>DIVISION 6 — COMPETITION PROVISIONS</p> <p>DIVISION 7 — OFFENCES</p> <p>DIVISION 8 — GENERAL including disputes, approval of apparatus and power of Council of Ministers to give directions.</p>
<p>Part 6 : Enforcement</p>	<p>DIVISION 1 — BROADCASTING</p> <p>DIVISION 2 — ELECTRONIC COMMUNICATIONS</p> <p>DIVISION 3 — GENERAL, PUBLIC STATEMENTS.</p>
<p>Part 7 Appeals</p>	<p>Right of Appeal and Rules of Court.</p>
<p>Part 8 Proceedings</p>	<p>Institution of criminal proceedings, Liability for conduct of body corporate, Civil and criminal penalties — relationship, injunctions.</p>
<p>Part 9 : MISCELLANEOUS AND CLOSING PROVISIONS</p> <p>Schedule 7 : Restrictions on disclosure of information.</p> <p>Schedule 8 : Advance Programme Information.</p>	<p>Including Fees and Duties, Registers, restrictions on disclosure of information, Foreign Satellite Services and Applications of UK and EU communications legislation.</p>

EUROPEAN CONVENTION ON HUMAN RIGHTS

In the opinion of the Member moving the Bill, the provisions of the Communications Bill 2018 are compatible with the Convention Rights.

FINANCIAL EFFECTS OF THE BILL

There are not considered to be any direct financial impacts as a result of the Bill.

COMMENTARY ON CLAUSES

Part 1 – Introduction

Part 1 of the Bill (comprising clauses 1 to 7) deals with preliminary and general matters.

Clause 1 gives the Act resulting from the Bill its short title.

Clause 2 enables the making of one or more appointed day orders to bring the resulting Act into operation and to make transitional provision in connection with the Act's commencement.

Clause 3 defines general terms used in the Bill and also defines 'public service broadcaster' as Radio Manx Ltd and the public sector broadcasting obligations.

Clause 4 defines "electronic communications network" and "electronic communications service" this updates the narrower definition in the Telecommunications Act 1984 of telecommunication systems and apparatus to reflect the UK definition from the Communications Act 2003 and the EU definition.

Examples of such networks include satellite networks, fixed networks (whether circuit or packet-switched, and including the Internet) and mobile terrestrial networks and networks used for radio and television broadcasting, including cable TV networks.

Examples of such services include telecommunications services and transmission services in networks used for broadcasting. "Associated facility" is also defined, as a facility which is available for use in association with an electronic communications network or service in order to make the provision of that network or service (or other services) possible, or to support the provision of other services. Examples of such facilities include conditional access systems and electronic programme guides.

"content service" is defined in subsection (7) as so much of a service as consists in (i) the provision of material with a view to it being comprised in signals conveyed over an electronic communications network, or (ii) the exercise of editorial control over the contents of signals conveyed by means of such a network.

*a signal is defined in subsection (10) as including anything consisting of speech, music, sounds, visual images and communications or data of any description, and signals serving for the impartation of anything or for actuating or controlling any apparatus.

Clause 5 defines "available for reception by members of the public" and excludes on-demand programme services from this definition.

Clause 6 defines "programme service" and provides certain exceptions, in broad terms this does not include internet services or two-way services. Further clarification is given in subsequent Clauses 51, 53 & 54.

Clause 7 provides a mechanism for Council of Ministers to amend the preceding provisions of the Division by order if it appears necessary or expedient to do so. This provision allows for future proofing of the Bill.

Part 2 – The Communications Commission

Clause 8 provides for the continued existence of the Commission and requires that, subject to the Act and in particular Clause 9, the Commission is to exercise its functions independently. Schedule 1 gives the functions of the Commission and may be amended by the Council of Ministers by order after consultation with the Commission and any other persons Council of Ministers considers appropriate.

Clause 9 imposes restrictions on the power of the Council of Ministers to give directions to the Commission under para 12(1) of Schedule 2 to the Statutory Boards Act 1987.

Part 3 – Regulated Activities and Licensing

Division 1 Regulated Activities

Clause 10 defines regulated activities for the purposes of the Bill. Whether or not an activity falls within this definition provides boundaries around the Commission's regulatory powers. The Commission's intention is not to regulate new areas that are currently outside of its powers. The Council of Ministers may by order amend this section to allow for changes in technology or where areas that were once thought to be required to be regulated no longer require that regulation.

This Clause also lays out the circumstances under which the provider of a television licensable content service may fall within the regulatory ambit of the Commission. The aim of this Clause is to allow for an activity to be regulated if the conditions in (5)(a) to (d) are met. Television licensable content services are defined in Clause 53.

Clause 11 enables the Council of Ministers to exclude activities from regulation by means of an order which will require Tynwald approval. This is to allow flexibility in the future regarding new technologies or methods of delivery.

Clause 12 imposes a general prohibition on carrying on regulated activities otherwise than in accordance with a licence and contains penalty provisions. The Commission must have regard to its functions as laid out in Schedule 1 in granting a licence.

Clause 13 then provides an exception for activities comprising the provision of television-licensable content services provided by a person within the jurisdiction of a member State of the EU for the purposes of the Audio-Visual Media Services Directive (the "AVMS Directive") and licensed by that member State for the purposes of that Directive.

Clause 14 permits the Commission to exempt persons from provisions of the Act and to apply appropriate alternative provisions in such a case.

Division Two - Licensing

Clause 15 specifies how an application for a licence (other than a class licence) is to be made, and follows the current process for applying for a licence. The matters which the Commission may or must take into account in considering a licence application are laid out in Schedule 1.

Clause 16 deals with the grant of a licence other than a class licence, and that the Commission must act in a way that is open, transparent and non-discriminatory in the granting of a licence.

Clause 17 deals with the grant of a class licence. This is a general authorisation, which usually contains restrictions on the size and extent of the system and the services that can be offered. Provided that a system falls within the description set out in a class licence, and the operator is able to comply with its terms, they can operate under that licence. Unlike an individual licence there is normally no need to register or pay a fee to operate under a class licence. The class licence could cover those activities which may technically fall under the definition of a public Electronic Communication Network or Service but are of little or no economic or social value to the Island, would be disproportionate to license or would impose too great a burden on operators of those systems.

Clause 18 deals with the form and effect of a licence.

Clause 19 deals with the sort of conditions which may be imposed in a licence, and afford the Commission a reasonable degree of latitude as to what may be included in a licence in order to future proof the legislation. Part 4 and Part 5 give further provision regarding broadcasting and electronic communications licences.

Clause 20 sets out what is to happen when a person to whom a licence has been granted fails to commence the regulated activity for which it was granted. The Commission must comply with the procedural fairness requirements in Division 3 before taking any action under this section. This is to allow the Commission to revoke a licence where permission has been granted to use scarce and valuable numbers or spectrum but the service has not commenced.

Clause 21 provides for the making of codes of practice in respect of regulated activities. This provision gives the Commission the ability to set out binding Codes of Practice. This is already the case for Broadcasters where the requirement to follow a Code of Practice is contained in the licence and referred to in the Broadcasting Act. Under the Bill's new provisions compliance with provisions of a code of practice will need to be expressly included as a licence condition for Telecommunications operators also.

Clause 22 deals with the Commission's powers to impose, vary or revoke licence conditions. This provision removes the requirement of the Commission to consult with Council of Ministers prior to imposing, varying or revoking a licence condition. The procedural fairness requirements under Division 3 apply in this case unless the Commission is satisfied that a delay in acting would seriously prejudice public safety or national security or would cause significant economic damage to the Island. There are conditions under which the requirement to give notice are waived, including if the licenceholder consents to the change. This will allow for minor administrative changes to be made quickly.

Clause 23 deals with public consultation about proposals in relation to the Procedural Fairness Requirements.

Clause 24 deals with the imposition variation and revocation of conditions in class licences.

Division 3 Procedural Fairness Requirements

This Division sets out procedural fairness requirements which apply to a number of applications and decisions throughout the Bill. The purpose of the "procedural fairness requirements" is to provide a short hand way of referring to the requirement for the Commission to give a person an opportunity to be heard before the Commission makes a final decision over what action to take. By defining "procedural fairness requirements" in

this way, it saves having to set out the requirements in full each time and therefore helps to keep the Bill shorter than it otherwise would be. Some clauses in the Bill allow the Commission to take action without referring to the “procedural fairness requirements” – the reason for this is because the clauses themselves already have built into them the opportunity for a licenceholder to be heard and make representations.

Clause 25 explains when the Division, and hence the requirements, apply that is the Procedural Fairness Requirement apply if the Act states so.

Clause 26 requires the Commission to give notice of what the Commission is proposing to do.

Clause 27 requires the Commission to consider any written representations from the licenceholder in respect of the proposal.

Clause 28 requires Commission to give notice if the proposal is withdrawn.

Clause 29 makes it clear that the Commission does not have to give further notice if, in the light of submissions made, it elects to modify the proposal.

Division 4 deals with the Commission’s powers to require information from licenceholders (clause 30) and others (clause 31).

Clause 30 states that a licence, as is currently the case, may include requirements for the licenceholder to furnish information to the Commission. This could be financial or otherwise that the Commission requires in order to exercise its functions under the Act. If a licenceholder knowingly provide false or misleading material, acts recklessly or withholds any material information with the intention of causing the Commission to be misled then the enforcement procedures in the Bill (Part 6) will be engaged.

Clause 31 states that the Commission may, in exercise of its functions, require information from persons other than a licenceholder. If a person fails to comply with a notice under this section the Commission may apply to the High Court for an order. Such order may provide for costs to be borne by the person who has failed to comply.

Clause 32 makes it clear that information cannot be required if it is subject to legal professional privilege.

Division 5 (Clauses 33 and 34) deals with the Commission’s powers to publish guidance and issue directions. Before issuing a direction the Commission must comply with the procedural fairness requirements.

Clause 33 gives the Commission powers to publish non-binding guidance in addition to the powers to issue binding Codes of Practice.

Clause 34 gives the Commission the powers to issue written directions to a licenceholder, these directions must be issued in accordance with the procedural fairness requirements. Directions in relation to Significant Market Power Decisions (Division 4 of Part 5) may not be issued under this section.

Part 4 (comprising Clauses 35 to 64) deals with broadcasting.

Division 1 – General Provision About Licences

Clause 35 imposes requirements on the Commission to establish that a broadcasting licence holder is and remains to be a fit and proper person to do so. In considering whether any licensee is fit and proper the Commission will take into account any relevant misconduct of those who manage and control the licensee, this could for example include serious and repeated breaches of licence conditions. These are unchanged from the Broadcasting Act 1993 and reflect the UK requirements and are widely understood.

Clause 36 and Schedule 2 contain exclusions which largely mirror the UK provisions in trying to prevent undue influence on broadcasters and to retain a plurality of news sources. So a newspaper may not own over a specified share of a broadcaster. There are general disqualifications, a new addition is a Schedule 2 para 1 (e) a member of Tynwald. While bodies whose objects are 'wholly or mainly of a political nature' are already precluded in the Broadcasting Act 1993 from holding a licence, the category 'member of Tynwald' has now been specifically added. This acknowledges that the aim of the legislation is to avoid undue political influence in broadcasting. These provisions apply to all forms of broadcasting other than On Demand Programme Services. There are also provisions to allow the Commission to include provisions in the licence requiring the licenceholder to update the Commission re changes in shareholding or directors. The Council of Ministers may by order amend Schedule 2 after consultation with the Commission and any other bodies who are considered appropriate.

Clause 37 sets out some additional considerations for licensing local broadcasting services. The intention of these provisions, which replicate those in the Broadcasting Act 1993 as it was amended in 2007, is to ensure that the Commission considers the effect on the existing broadcasters if another broadcasting service is licensed which is provided with a view to its being broadcast for reception mainly in the Island.

Clause 38 deals with the transferability of a broadcasting licence, making it clear that the Commission's consent is required in relation to a transfer. This is to ensure that the conditions as to media plurality and ownership are met.

Clause 39 is declaratory and provides that the only person to be regarded as providing a broadcasting service is the person with general control over the service.

Clause 40 specifies that a broadcasting licence (other than a licence for sound broadcasting or the licence for the public service broadcaster) will continue in force until it is surrendered or revoked. The sound broadcasting licences granting and extensions are dealt with in Clause 49 and the public service broadcaster licence are dealt with in Clause 56.

Clause 41 deals with the Commission's powers of entry to premises under a licenceholder's control.

Clause 42 gives the Council of Ministers the power to direct a licenceholder to publish certain information in a broadcasting service and also to refrain from doing so. A broadcaster is permitted to announce, as part of the service, that it has been given a direction under this provision. This replicates current powers in the Broadcasting Act 1993, which are also contained in equivalent UK legislation, for the Council of Ministers to direct the Commission to direct licenceholders to include certain announcements in their broadcasts at specified times or to refrain from including any particular matter in their services. Where a licenceholder is obliged to make a particular announcement, they may make clear in their service that this is being

carried out further to a direction given by the Commission. Similarly, where a licence holder has been obliged to refrain from including a particular matter in their service, the licence holder may announce in the service that this is the case, and may also announce when that obligation has come to an end. The purpose of these provisions is principally to allow Council of Ministers to address matters of national security or major public interest, and to do so in such a way that the affected broadcasters are not required to take editorial responsibility for the content of the announcements.

Clause 43 makes it clear that in addition to a licence under the Part, a broadcaster may also require a licence under the UK's broadcasting and wireless telegraphy legislation. Certain UK legislation, including some of the provisions of the Communications Act 2003 and Wireless Telegraphy Act 2006 extend to the Island under UK Orders in Council. Ofcom manages the spectrum for the Island to minimise interference under rules set by the International Telecommunications Union which is the United Nations specialised agency for information and communications technologies. The United Kingdom is constitutionally responsible for the international relations of the Isle of Man and the UK's membership of the International Telecommunications Union (or "I.T.U.") extends to the IOM.

Division 2 – Programme and Fairness Standards for Broadcasting

Clause 44 states that Schedule 3 (programme and fairness standards for broadcasting) has effect which allows the Commission to review and set standards in broadcasting, for example in the protection of minors.

Clause 45 requires holders of broadcasting licences to observe standards set under Schedule 3 and establish and maintain procedures for the handling of those complaints. It also requires the licenceholders to comply with any direction issued by the Commission on advertising, for example, smoking, alcohol, product placement or sponsorship of programmes. The Commission issues a code on Advertising and Sponsorship detailing the requirements.

Clause 46 contains some additional powers in relation to advertising.

Clause 47 requires the Commission to establish and maintain such procedures as it considers appropriate for the handling and resolution of complaints or for the conduct of investigations about the observance of these standards.

Division 3 – Sound Broadcasting Services

Clause 48 imposes additional requirements in relation to the nature of a holder of a sound broadcasting service in order to ensure that the licenceholder is incorporated under the laws of the Island and must have a director who is ordinarily resident in the Island. "Sound broadcasting service" is defined in Clause 3.

Clause 49 provides for the term of a sound broadcasting service to not exceed ten years and to be renewable for a period not extending ten years. This follows recommendations in the June 2011 "Strategic Review of Communications: Key Audio and Audiovisual issues for the Isle of Man Communications Commission". The licence of the public service broadcaster is dealt with separately in Clause 56.

Division 4 – Radio Licensable Content Service

Clause 50 defines “radio licensable content service”. A radio licensable content service is a service provided in digital or analogue form broadcast from a satellite or distributed using an electronic communications network that is to be made available for reception by members of the public and consists of sound programmes. In broad terms, radio licensable content services do not include internet services or two-way services. Further, they do not include a service which is distributed by means of an electronic communications network only to persons who are within a single set of premises, and not connected to an electronic communications network any part of which is outside those premises. Neither do they include services which are provided only for persons who have a business interest in the programmes included in the service or persons who are all on the business premises of the person receiving the service.

Clause 51 defines services which are not, and specifies the extent to which they are not, radio licensable content services.

Clause 52 gives the Council of Ministers a power to amend sections 50 and 51 by order if it thinks it necessary or expedient to do so.

Division 5 - Television Licensable Content Services

Clause 53 defines ‘television licensable content services’. A TLCS is a television service broadcast from a satellite, distributed using an electronic communications network (including services broadcast over the internet), or a service made available by a radio multiplex.

The service must meet two basic criteria:

- i) The service consists of, or has as its principal purpose the provision of, "television programmes or electronic programme guides", or both.
- ii) The service is "available for reception by members of the public". (This does not include on-demand programme services). If a member of the public is able to receive the service (whether free to air, by paying for a subscription or buying a piece of receiving equipment) the service normally meets this criterion.

TLCS are frequently teleshopping channels or a self-promotional service – which consists of a particular kind of advertising whereby the broadcaster promotes its own products, services or channels.

Clause 54 details services that are not television licensable content services. Such as a restricted television service for short term coverage of a specific event at a specific location; two-way services – includes video conferencing and similar services; closed user groups – services only receivable by a specific category of person (for example a professional group) that are not receivable by any other persons, even at a cost; or single premise systems – services distributed by means of an electronic communications network only to persons who are within a single set of premises.

Clause 55 provides that the Council of Ministers may be order amend sections 53 and 54 in order to futureproof these provisions.

Division 6 – Public Service Broadcasting

Clause 56 specifies the terms and content of the public service broadcasting licence. The first licence must be granted for a period not exceeding ten years. The licence may be renewed on one or more occasions. Before renewing the licence the Commission must consult with such persons as the Commission considers appropriate as to the duration of and the conditions attached to the renewed licence.

Clause 57 makes explicit the need for the public service broadcaster to act independently of the Isle of Man Government in making editorial decisions. This is a fundamental precept of public service broadcasting under the Council of Europe.

Clause 58 states that the public service broadcaster must comply with the public service broadcasting obligations as defined in Clause 3.

Clause 59 requires the Commission to include a condition in the licence requiring the public service broadcaster to broadcast a certain proportions of programmes in Manx Gaelic or in English which promote Manx Gaelic as may be specified in or determined in accordance with the licence. The Commission must consult with Manx Heritage Foundation and the public service broadcaster.

Clause 60 requires the Commission to produce a written statement of station requirements which the public service broadcaster must comply with. This shall specify the level of performance and programme quotas the broadcaster must meet in order to fulfil its public service broadcasting obligations. The statement may be reviewed and revised as the Commission sees fit as long as the procedural fairness requirements are met. The Commission may consult such other persons as it sees fit in amending the station requirements. The pre-existing station format serves this function.

Clause 61 this clause requires the public service broadcaster to publish and from time to time review and revise a statement of its programme policy in relation to the fulfilment of the public service broadcasting obligations. In preparing the statement the public service broadcaster must consult with the Commission.

Clause 62 requires the broadcaster, in line with the recommendations of the 2014 Tynwald Select Committee on Public Sector Broadcasting as accepted by Tynwald, to submit its financial statements annually to the Commission and the Treasury. These must be submitted in such a manner as show the income derived and costs incurred by the broadcaster in pursuance of its public service broadcasting obligations.

Clause 63 deals with the funding of the public service broadcaster and that the amount of funding must be approved by Tynwald on an annual basis.

Clause 64 provides for periodic reviews by the Commission of the public service broadcaster and the adequacy of its funding.

Division 7 – on-demand programme services

Clause 65 gives effect to Schedule 4 and sets out when it applies. Schedule 4 contains the detail surrounding on demand programme services including the definition. It applies principles similar to those in the Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in respect of when the Schedule applies.

Clause 66 allows the Commission by regulation to exempt any person or class of person from any of the provisions of Schedule 4. Even if a person is exempt from Schedule 4 the regulations may provide for other provisions of the Act to apply (with or without modification).

Clause 67 deals with the interaction of the Division with European Union law in the case of a provider of on-demand programme services who is subject to the law of a European Union member State. This is to prevent the possibility of requiring double regulation when the Commission knows that the provider is already subject to a well-structured regulatory regime.

Part 5 – Electronic Communications

Division 1 - Licences

Clause 68 deals with the issue of electronic communications licences. The applicant will be required to demonstrate the ability to finance and sustain any service. This is the same condition as currently applies.

Clause 69 provides that the licence may not be transferred or assigned.

Clause 70 permits the connection of an electronic communications network to another such network specified in the licence and the use in connection with the network of approved telecommunications apparatus.

Clause 71 states that the electronic communications licence will continue in force for such period as may be specified in or determined by or under the licence.

Clause 72 makes clear the relationship between a licence under this Part of the Bill and a broadcasting licence under Part 4, and also between a licence under this Part and certain licences issued under UK broadcasting and telecommunications legislation.

Division 2 – Telephone Numbers

Clause 73 permits the Commission, with the consent of OFCOM, to designate OFCOM as the body responsible for the allocation of telephone numbers in the Island. This relationship already exists as Ofcom is responsible for the UK National Numbering Plan and does not allocate numbers designated for Isle of Man use without consulting the Commission.

Division 3 – Universal Service Obligations

Clause 74 details the universal service obligations which must be provided, made available or supplied throughout the Island. This ensures that certain basic telecommunications services are available to all. The clause requires the Council of Ministers to make an order providing for these obligations to be imposed upon holders of telecommunications licences who are universal service providers, who are designated under Clause 75. This order may be amended by Council of Ministers after consultation with the Commission and such persons as the Council of Ministers feel is appropriate.

Clause 75 allows for the Commission to designate a person as a universal service provider and provides a process for doing so.

Clause 76 permits the Commission to impose conditions on the licence of universal service provider to secure compliance with the universal service obligations. And provides a mechanism for the Commission to review the conditions.

Clause 77 empowers the Council of Ministers to establish funding schemes for universal service obligations.

Division 4 – Significant Market Power

Clause 78 sets out the circumstances in which a person is to be taken to have significant market power ("SMP") in a particular market. The Communications Commission follows European best practice in imposing ex ante regulation. The Commission determines whether a market is 'effectively competitive'. If it is not, the Commission identifies which undertakings in that market have significant market power ('SMP'), (defined as undertakings having the 'power to behave to an appreciable extent independently of competitors, customers and ultimately consumers'), and to impose (or amend) regulation of that undertaking, which may include price controls. Such regulation is termed ex ante regulation, it being imposed prospectively to regulate future conduct of the market.

The Commission periodically carries out market reviews to identify markets where operators have SMP and imposes remedies onto operators found to have SMP (a position akin to dominance) to ensure that those markets can work as though there is effective competition. This mainly requires regulating at the wholesale level, and since markets with SMP will have remedies applied to ensure they are competitive, the retail markets should respond accordingly. The Bill is putting pre-existing licence conditions into statute.

Clause 79 sets out the methodology to be applied in identifying a particular market. The Commission in identifying or analysing the relevant markets as are applied from time to time in such European jurisdictions and the circumstances of the Island. There are further factors which the Commission must have regard to in subclause 3.

Clause 80 states the matters that the Commission must have regard to in making a significant market power determination and matters that the Commission may have regard to, among other things.

Clause 81 sets out a procedure for issuing determinations which allows for representations to be made to the Commission when a market is identified for the purposes of making a significant market power determination or a significant market power determination is made.

Clause 82 provides a review mechanism for the identifications of markets, and SMP determinations. Before carrying out further analysis for the purposes of subsection (2), the Commission may review any of their decisions identifying the appropriate markets that they considered in their earlier analysis. Where the Commission concludes that the appropriate markets have changed, it must identify the markets it now considers to be appropriate and those markets must be the identified markets for the purposes of further analysis.

Clause 83 provides for the imposition of SMP conditions, that is to say conditions specified in Clauses 84 to 87 which appear to the Commission to be proportionate and objectively justifiable ways of mitigating the effects of SMP.

Clause 84 provides the type of licence conditions that may be imposed on a licenceholder who provides a public electronic communications network and a licenceholder who makes available facilities that are associated facilities by reference to such a network.

Clause 85 provides for the Commission to impose conditions about network access in exceptional cases.

Clause 87 applies where the Commission has made a determination that a licenceholder has significant market power in a market for a relevant retail service. The Commission must not impose a condition on a licenceholder under this section unless the Commission is unable, by imposing conditions under sections 84 and 85 to perform, or fully to perform, its relevant duties; or such a condition is proportionate and appropriate in order for the Commission to perform, or fully to perform, its relevant duties.

Clause 88 empowers the Council of Ministers to amend clauses 84 to 87 if it appears necessary or expedient to do so.

Division 5 – The Electronic Communication Code

Clause 89 (and on) gives effect to the Electronic Communications Code, which is set out in Schedule 5. The Electronic Communications Code is an updated version of the Telecommunications Code which is part of the Telecommunications Act 1984. It has been updated to reference Electronic Communications Networks and Services. The Code in effect governs the installation of telecommunications infrastructure.

Clause 90 permits a telecommunications operator to apply to the Commission to have the Code applied to it, enabling it to exercise the powers which the Code confers (such an operator is referred to below as a “Code operator” and the powers conferred as “Code powers”. It states the matters to which the Commission must have regard in considering an application. The Commission must also publish a notice of what it is proposing to do and consider any representations made and then publish a further notice confirming or revoking the proposed designation.

Clause 91 empowers the Commission to impose conditions on Code powers having regard to the need to protect the physical environment, the need to promote economic growth, the need to ensure that highways are not damaged or obstructed and traffic is not interfered with, to any greater extent than is reasonably necessary, and the need for the Code operator to have sufficient funds to meet any liabilities that may arise from the exercise of Code powers.

Clause 92 permits the Commission to suspend a Code operator’s designation if it is satisfied that there has been a breach of conditions imposed under clause 91. A procedure is provided for and in urgent cases the procedural fairness requirements would not apply. A matter is an urgent matter if there is an immediate risk of the matters in subsection (7).

Clause 93 contains definitions relevant to the following three clauses.

Clause 94 enables the compulsory acquisition of land by a Code operator for the purposes of its operation. A petition for a resolution of Tynwald authorising a compulsory purchase under this section may only be made with the consent of the Council of Ministers. A code operator who has acquired land under this provision may only dispose of that land or any interest or right over it with the consent of the Council of Ministers.

Clause 95 confers power on a Code operator to enter land for exploratory purposes, the clause contains restrictions around this right and notice required in order to exercise

this right. Any question of disputed compensation under this section is to be determined in accordance with Part III of the Acquisition of Land Act 1984.

Clause 96 permits a Code operator to acquire land by agreement, and applies some provisions of Part IV of the Acquisition of Land Act 1984 for that purpose.

Division 6 deals with competition.

Subdivision 1

Clause 97 imposes a duty on the Commission to regulate competition in electronic communications matters (which are defined by subsection (4) of the clause) and gives the Commission powers in subsection (2).

Clause 98 states the matters which the Commission must have regard to (amongst other things) in determining whether or not to conduct or continue with a competition investigation. The factors are

- (a) the impact of the investigation;
- (b) the strategic significance of the investigation;
- (c) the risks of undertaking an investigation; and
- (d) the resource implications of undertaking the investigation.

The Commission must publish guidance in relation to these factors after consultation with such persons as it considers appropriate.

Schedule 6 (competition investigations) has effect.

Subdivision 2 comprises clauses 99 to 102 and deals with collusive behaviour.

Clause 99 imposes a prohibition on collusive behaviour between persons which has an adverse effect on competition.

Clause 100 provides that agreements which are the subject of an order under section 8(2) of the Fair Trading Act 1996 are excluded from the application of clause 99. Section 8(2) of the Fair Trading Act 1996 provides that a course of conduct does not constitute an anti-competitive practice if it is excluded for those purposes by an order made by the Council of Ministers.

Clause 101 provides for an exemption from the application of Clause 99 of agreements which comply with certain conditions on the promotion of trade or are the subject of a declaration by the Commission. Before making or revoking a declaration under this section the Commission must consult with the Office of Fair Trading.

Clause 102 provides that the Commission may make a direction if the Commission decides that a person's conduct contravenes clause 99 or any condition of an exclusion under clause 100 or an exemption under clause 101.

Subdivision 3 comprises

Clause 103 defines abuse of a person's dominant position in relation to the market in electronic communications in the Island and gives conduct which may in particular constitute such an abuse.

Clause 104 empowers the Commission to give directions in respect of an abuse of dominant position and applies the procedural fairness requirements.

Subdivision 4, comprising clauses 105 to 107, contains supplemental provisions for the purposes of the Division.

Clause 105 empowers the Commission to take interim measures where it has begun, but not completed, a competition investigation and has reasonable grounds for suspecting a breach of the prohibition on collusion, or the prohibition of abuse of dominant position or breach of a condition.

Clause 106 provides for sanctions to be imposed for breach of the Bill's competition provisions in the form of a financial penalty. The Commission must take various factors into account in determining whether or not to impose a penalty. The amount of the penalty must not exceed 10% of the licenceholder's turnover for the period of the contravention of the period in question, subject to a maximum of 3 years, provision is made in subsection (5) for licenceholders whose first complete accounting period has not ended when the penalty is imposed. The grounds of the computation of the amount of the licenceholder's turnover is given in subsection (4). The amounts in subsection (3) and (5) may be amended by order by the Council of Ministers.

Clause 107 deals with co-ordination between the Commission and the Isle of Man Office of Fair Trading in competition investigations. Investigations must not be conducted concurrently with the OFT. If the Commission and the IOM Office of Fair Trading cannot agree which of them is to investigate conduct falling under the relevant provisions they must seek a direction from the Council of Ministers under paragraph 12(1) of Schedule 2 to the Statutory Boards Act 1987.

Division 7 comprises clauses 108 to 112

Clause 108 provides for various offences in respect of the improper use of electronic communications systems. A person is guilty of an offence if he or she sends by means of a public electronic communications network a message or other matter that is grossly offensive or of an indecent, obscene or menacing character; or causes any such message or matter to be so sent. Nothing in this clause limits the scope of section 2 of the Protection from Harassment Act 2000 [offence of harassment]. Clauses 108 to 112 are the same in scope as those in the Telecommunications Act 1984.

Clause 109 provides for an offence in relation to the fraudulent use of electronic communications network or services with intent to avoid payment.

Clause 110 provides an offence for possession or supply of things enabling such fraudulent use.

Clause 111 makes it an offence to intentionally modify or interfere with the contents of a message sent by means of a network that he or she is engaged in the provision of.

Clause 112 makes the unauthorised disclosure of messages and information about public electronic communications systems or networks an offence by a person who is engaged in the provision of an electronic communications network or service, otherwise in the course of that person's duty.

Division 8 comprises clauses 113 to 123. These are a miscellany of general provisions.

Subdivision 1 comprises

Clause 113 applies to disputes between a licenceholder and a person in relation to the provision of network access and allows for a dispute to be referred to the Commission. The types of disputes that may be referred are likely to be between communications providers about network access and terms of access.

Clause 114 provides for the Commission to decide that an alternative means of dispute resolution may be used.

Clause 115 provides for the making of a procedure for the consideration and determination of a dispute and timescales. The clause also sets timescales for the Commission to consider a procedure. These clauses are similar to those in the Communications Act 2003 (of Parliament).

Clause 116 provides for how the Commission is to determine a dispute that has been referred.

When determining a dispute the Commission may :

- issue a declaration setting out the rights and obligations of each party to the dispute;
- fix terms or conditions of transactions between the parties to a dispute
- impose enforceable obligations requiring the parties to enter into a transactions on terms or conditions set by the Commission;
- direct a party to the dispute to make payments to adjust under- or overpayment
- require a party to make payments in respect of costs and expenses incurred by another party;
- require a party to make payments in respect of costs and expenses incurred by the Commission.

Any determination made is binding but is subject to Clause 138 (appeals).

Subdivision 2 - Miscellaneous

Clause 117 gives the Commission powers to require parties to disputes and other persons to provide them with information that enables Commission to:

- decide whether they should handle a dispute;
- determine whether they need to consult the regulatory authorities of other member States; and

- consider and determine a dispute.

Clause 118 deals with the approval by the Commission of apparatus which is to be connected to an electronic communications system or network.

Clause 119 empowers the Commission to specify the information to be marked on, or to accompany apparatus which is to be connected to such a system or network.

Clause 120 deals with the information to be given by providers of apparatus which is intended to be used by persons who are not subscribers to the network or system to which the apparatus is connected (for example public pay telephones).

Clause 121 enables the Commission to prescribe information which must be published in advertisements for apparatus which is intended to be connected to an electronic communications network or system.

Clause 122 provides a mechanism under which a person charged with an offence under clause 119 to 121 can plead the conduct of a third party as a defence to the charge and require the third party to be charged instead.

Clause 123 empowers the Council of Ministers to give directions to the holder of a public telecommunications licence.

Part 6 comprises clauses 124 to 137 and deals with the enforcement of the regime created by the Bill.

Division 1 deals with enforcement for broadcasting.

Clause 124 deals with interpretation for the Division, that "licenceholder" means the holder of a broadcasting licence.

Clause 125 gives the Commission the power to direct a licenceholder to broadcast an apology, a correction or not to repeat a programme.

This provision is subject to the Procedural Fairness Requirements.

Clause 126 gives the Commission the power to impose a financial penalty or shorten a licence period in the case of a failure to comply with a condition of a licence

Clause 127 gives the Commission the power to suspend or revoke a licence in specified circumstances, for example if a licenceholder has deliberately misled the Commission in a licence application.

Division 2 deals with enforcement for electronic communications and comprises clauses 128 to 136.

Clause 128 provides for the interpretation of defined terms used in the Division in that "licenceholder" means the holder of an electronic communications licence, including a person operating under a class licence.

Clause 129 empowers the Commission to serve notice on a licenceholder if it is satisfied that there has been a contravention of the licence, and specifying the steps which the licenceholder must take to remedy and specifying any penalty which it is minded to impose under Clause 130.

Clause 130 Provides penalties for contravention which may be such amount not exceeding £20,000 per day as the Commission may determine. The Council of Ministers may by order amend subsection 5 by substituting a different sum.

Clause 131 provides for the enforcement of a penalty under clause 129 but also provides for reconsideration of a decision in the light of representations made by the licenceholder which may be confirmed by a confirmation decision (as to which, see Clause 132).

Clause 132 allows for a confirmation decision to be given to the licenceholder and may either require immediate action on behalf of the licenceholder or specify a period in which the licenceholder must comply with those requirements.

Clause 133 provides the maximum for a penalty under Clause 129 which must not exceed 10% of turnover.

Clause 134 provides for the suspension and revocation of an electronic communications licence. Clause 134 also makes provision for a shortened process if the matter is an urgent matter. Urgent matter is defined in subsection (8).

Clause 135 gives the Commission the power to revoke a class licence after following a process.

Clause 136 deals with a licenceholder liability in tort for a breach of a licence condition.

Division 3 comprises

Clause 137 empowers the Commission to issue a public statement in certain circumstances.

Part 7 of the Bill deals with appeals against certain decisions of the Commission.

Clause 138 specifies which decisions of the Commission are appealable

Clause 139 provides that in the absence of rules of court under the High Court Act 1991 for the purposes appeals under the Part, the court may adopt such procedure as it considers appropriate.

Part 8 deals with the institution of court proceedings under the Act.

Clause 140 provides that criminal proceedings for an offence under the Act may be instituted only by the Attorney General, and extends the time limit for the institution of proceedings for a summary offence to 12 months from the date of its commission.

Clause 141 deals with the liability of a director or other officer of a body corporate for an offence committed by such a body.

Clause 142 deals with the relationship between civil and criminal penalties.

Clause 143 deals with injunctions.

Part 9 contains the Bill's miscellaneous and closing provisions.

Clause 144 empowers the Commission, with the consent of the Treasury, to determine the amounts of fees and duties payable under the Bill. These may be specified in a notice or in the conditions of the licence. The Commission may vary fees and duties with the consent of Treasury. Fees or duties payable may be expressed to be

- (a) a fixed sum
- (b) calculated by reference to:
 - (i) the turnover of the licenceholder

- (ii) the administrative costs of the Commission
- (iii) the full economic value of the licence as to the applicant or the licenceholder; or
- (c) calculated in such other manner as the Commission considers appropriate.

Clause 145 deals with registers to be maintained under the Act by the Commission and the contents thereof. These registers must be available for public inspection.

Clause 146 imposes restrictions on the disclosure of information.

Clause 147 empowers the Commission, if satisfied that a foreign satellite has been repeatedly engaged in broadcasting material either offending against good taste and decency or inciting crime, to proscribe it.

Clause 148 and Schedule 8 deal with the requirement to publish advance programme information.

Clause 149 deals with the application of the Bill to the Crown.

Clause 150 empowers the Commission to apply UK and EU legislation by order and despite anything to the contrary in an Act of Tynwald.

Clause 151 deals with statutory documents, and states that the Commission must consult before making any regulations or orders under the legislation.

Clause 152 deals with amendments, savings and repeals, and gives effect in consequence to Schedule 9.

Schedule 1

This Schedule is concerned with the Functions of the Commission and its general duties.

Paragraph 1 lays out the functions of the Commission in respect of broadcasting and electronic communications networks and services.

Paragraph 2 states the general duties of the Commission and states that in carrying out its functions, the Commission must, so far as is practicable, seek —

- (a) to further the interests of all members of the public in the Island in relation to communications matters; and
- (b) to further the interests of consumers in relevant markets, where appropriate by promoting competition.

Paragraph 3 gives the Commission's functions in relation to electronic communications and states that the Commission must exercise the functions in the manner which it considers is best calculated —

- (a) to secure that there are provided throughout the Island, save in so far as the provision thereof is impracticable or not reasonably practicable, such electronic communications networks and electronic communications services as satisfy all reasonable demands for them including, in particular, services linking the Island with countries outside the Island, emergency services and services in rural areas; and
- (b) without limiting paragraph (a), to secure that any provider of an electronic communications network or electronic communications service is able to finance the provision of that network or service.

- (3) Subject to sub-paragraph (2), the Commission must exercise the functions to which this paragraph relates in the manner which it considers is best calculated to promote the interests of consumers, purchasers and other users of electronic communications networks and electronic communications services in the Island in respect of the prices charged for, and the quality and variety of, services provided and apparatus supplied.
- (4) Sub-paragraphs (2) and (3) do not prevent the Commission from exercising its functions in the interests of national security or international relations.

Paragraph 4 states the Commission's functions in relation to broadcasting, the Commission is to —

- (a) regulate, in accordance with this Act, broadcasting services;
- (b) keep under review the reception in the Island of programme services provided from the Island or elsewhere, and the quality and content of those services; and
- (c) further the interests of the Island in the whole field of programme services.

The Commission must discharge its functions in relation to the licensing of broadcasting services in the manner which it considers is best calculated to ensure that —

- (a) at least one broadcasting service is provided from a place in the Island;
- (b) all broadcasting services so provided are of a high quality and offer a wide range of programmes calculated to appeal to a variety of tastes and interests; and
- (c) one broadcasting service with public service broadcasting obligations is provided from the Island.

Schedule 2

Schedule 2 states which persons and body corporates are disqualified for holding a broadcasting licence. The intention of this schedule is to ensure media plurality and to try and prevent undue influence on broadcast media. These provisions have the same effect as those in the equivalent UK legislation. (Broadcasting Act 1990 s.89)

Schedule 3

The standards objectives may be expanded on further in the Commission's standards code.

Paragraph 1 sets out the standards that are to be expected for broadcasters to protect minors, ensure political advertising does not infringe the code and ensure that material likely to encourage crime or lead to disorder is not included in broadcasting services.

Paragraph 2 specifies particular requirements. The matters to which the requirements apply are matters of political or industrial controversy, and matters relating to current public policy. The requirements are:

- the service provider must not air its own views on such matters (unless they concern the provision of television or radio programme services);
- the service provider must preserve due impartiality about such matters. The relevant rules in the Commission's standards code must particularly take account of the need to preserve impartiality for major matters of political or industrial controversy or relating to current public policy. Fulfilment of this

requirement need not necessarily be measured programme by programme, but on balance over all programmes included in the relevant service.

- Paragraph 3 provides for the Commission to make standards codes in respect of advertising, sponsorship and product placement and on advertising of a political nature.

Schedule 4

Paragraph 1 defines 'on demand programme services'.

The following are examples of what may be considered on demand programme services:

- a) a 'catch-up service' for a broadcast television channel whether programmes are made available from the broadcaster's own branded website, an online aggregated media player service, or through a 'television platform' to a set top box linked to a television (whether using broadcast 'push' technology, or 'pull' video on demand);
- b) a television programme archive service comprising less recent television programmes from a variety of broadcasters and/or production companies, made available by a content aggregator exercising 'editorial responsibility' over all the programmes (see section 4 below), whether via a dedicated website, online aggregated media player service, or through a television platform;
- c) an on-demand movie service, provided online via a website or using other delivery technology by a provider exercising 'editorial responsibility' over the content;
- d) an on-demand music video service;
- e) an audiovisual service solely comprising TV-like self-promotional programmes or 'advertorials'; and
- f) A non-mainstream audiovisual service comprising programmes comparable to equivalent broadcast genres (for example, religion, politics, sport, adult).

Paragraph 2 gives the Commission permission to, if it so wishes, designate a body to be the appropriate regulatory authority for the purposes of this Schedule.

Paragraph 3 requires that the providers of on demand programme services must give advance notification to the regulatory authority. This would include information such as a contact person for complaints, a brief description of content and also over what medium the content may be viewed. The UK and Ireland also operate a similar notification regime.

Paragraph 4 allows for enforcement of paragraph 3.

Paragraph 5 specifies the duties of the appropriate regulatory authority in relation to on demand programme services.

Paragraph 6 gives the duties of on demand programme services to provide specified information to users of the service, pay any specified fee to the Regulatory Authority and comply with certain requirements.

Paragraph 7 states that an on demand programme service must not contain any material likely to incite hatred based on race, sex, religion or nationality. (2) If an on-demand programme service contains material which might seriously impair the physical, mental or moral development of persons under the age of 18, the material must be made available in a manner which secures that such persons will not normally see or hear it.

Paragraph 8 gives prohibitions around the advertising of cigarettes, electronic cigarettes and refill containers and alcohol. It also gives other boundaries around content of programmes.

Paragraph 9 gives sponsorship rules.

Paragraph 10 is concerned with product placement and exceptions.

Paragraph 11 gives enforcement powers to the Commission or an appropriate regulatory authority.

Paragraph 12 provides for financial penalties.

Paragraph 13 provides that a service may be suspended or restricted for contravention.

Paragraph 14 provides for suspension of a service for inciting crime or disorder.

Paragraph 15 makes supplementary provisions about directions.

Paragraph 16 makes provision for an offence if a person provides an on-demand programme service —

- (a) while that person's entitlement to do so is suspended by a direction under paragraph 13 or 14; or
- (b) in contravention of a restriction contained in such a direction.

Paragraph 17 allows for the Commission to set fees in relation to on demand programme services and requires publication of information about those fees.

Paragraph 18 gives the Commission the power to require information.

Paragraph 19 makes provision for Appeals.

Paragraph 20 provides for rules of court.

Paragraph 21 provides interpretation for the Schedule.

Schedule 5

Schedule 5 contains the provisions of the Telecommunications Code from the Telecommunications Act 1984, with updated references to electronic communications networks and services. The operators who have been awarded Code powers operate under this legislation. The intention is that this Schedule will be replaced by an updated Code in due course.

Schedule 6

Paragraph 1 gives the Commission the powers to carry out investigations and inspections at the premises of the holder of an electronic communications licence for the purpose of investigating whether or not any of the provisions of Division 6 of Part 5 (competition provisions) have been contravened (a "competition investigation").

Paragraph 2 applies the powers under section 31 (power to require documents and information) for the purpose of a competition investigation

Paragraph 3 states that the Commission may make an application to a justice of the peace in respect of an investigation.

Paragraph 4 concerns the issuance of search warrants. A person executing a search warrant must be accompanied by a constable.

Paragraph 5 contains the specifics of offences connected with competition investigations.

Paragraph 6 gives offences in connection with the supply of information.

Schedule 7

Paragraph 1 gives specific instances where the disclosure of information is not precluded under Section 146.

Paragraph 2 provides for disclosure to designated authorities.

Paragraph 3 states that Section 146 does not preclude the disclosure of any information for the purpose of enabling or assisting an authority (whether a governmental or private body) in a country or territory outside the Island to exercise functions similar to any of those of the Commission under this Act or any other enactment. This would primarily in practice be Ofcom.

Paragraph 4 gives further exclusions in relation to notices and registers and public stations.

Schedule 8

This Schedule gives more details around the provisions in Clause 148 regarding Advanced Programme Information in televisual broadcasting.

Paragraph 1 references the Copyright Act 1991.

Paragraph 2 applies the Broadcasting Act 1990 of Parliament as applied in the Isle of Man.

Paragraph 3 applies where the person providing a programme service has assigned to another the copyright in works containing information to which this Schedule applies. The person providing the programme service, not the assignee, is to be treated as the owner of the copyright for the purpose of licensing any act restricted by the copyright done on or after the commencement of this paragraph.

Paragraph 4 details the circumstances in which right is available.

Paragraph 5 states that a person wishing to avail him or herself of the right conferred by paragraph 6 must give notice.

Paragraph 6 deals with exercising the right.

Paragraph 7 deals with the application to settle payments.

Paragraph 8 deals with the right of a person to make an application to the Copyright Tribunal to review any order made under Paragraph 7.

Schedule 9

Deals with consequential amendments and repeals.