

2010-11

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

THE SENATE

**NATIONAL BROADBAND NETWORK COMPANIES BILL 2010  
TELECOMMUNICATIONS LEGISLATION AMENDMENT (NATIONAL  
BROADBAND NETWORK MEASURES — ACCESS ARRANGEMENTS) BILL 2011**

REVISED EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Broadband, Communications  
and the Digital Economy, Senator the Hon. Stephen Conroy)

THIS MEMORANDUM TAKES ACCOUNT OF AMENDMENTS MADE BY  
THE HOUSE OF REPRESENTATIVES TO THE TELECOMMUNICATIONS  
LEGISLATION AMENDMENT (NATIONAL BROADBAND NETWORK MEASURES —  
ACCESS ARRANGEMENTS) BILL 2011 AS INTRODUCED

**NATIONAL BROADBAND NETWORK COMPANIES BILL 2010  
TELECOMMUNICATIONS LEGISLATION AMENDMENT (NATIONAL  
BROADBAND NETWORK MEASURES — ACCESS ARRANGEMENTS)  
BILL 2011**

**OUTLINE**

On 7 April 2009, the Government announced the establishment of a new company, NBN Co Limited ('NBN Co'), to build and operate a new National Broadband Network (NBN). A key element of the Government's NBN initiative is that NBN Co is to operate as a wholesale only company and provide access to the NBN to all telecommunications retail service providers on an open and equivalent basis.

In a discussion paper released on 7 April 2009, *National Broadband Network: Regulatory Reform for 21st Century Broadband*, the Government indicated that it would introduce legislation that establishes:

- governance, ownership and operating arrangements for the wholesale-only NBN company; and
- the access regime to facilitate open access to the NBN for retail level telecommunications service providers.

The two bills that are the subject of this Explanatory Memorandum address this Government commitment. They are:

- the National Broadband Network Companies Bill 2010 (the Companies Bill); and
- the Telecommunications Legislation Amendment (National Broadband Network Measures – Access Arrangements) Bill 2011 (the Access Bill).

The Government consulted widely in developing the bills. During July and August 2009 it sought comments on the design of the legislative framework for the NBN. More than 30 submissions were received, and meetings were also held with more than 20 stakeholders. In February 2010 the Government issued exposure drafts of the Companies Bill and the Access Bill, receiving more than 20 submissions. The Implementation Study on the NBN also consulted more than 100 stakeholders in preparing its report, and more than 50 submissions were received on the final report following its release on 3 May 2010.

In this Outline, references to NBN Co should generally be taken to apply also to any NBN corporations. The exceptions are the sale and ownership provisions in the Companies Bill, which apply only to NBN Co Limited, and any existing legislative provisions which do not apply to subsidiaries of Commonwealth-owned companies (such as some reporting obligations under the *Commonwealth Authorities and Companies Act 1997* (CAC Act)).

Together, the bills ensure that NBN Co will remain true to its wholesale-only mandate and deliver open and equivalent access to retail providers, thereby providing a platform for retail-level competition to flourish.

## **National Broadband Network Companies Bill 2010**

The Companies Bill establishes the regulatory framework covering the ownership and operations of NBN Co, and the arrangements for the eventual sale of the Commonwealth's stake in NBN Co.

It should be read together with the Access Bill and Part XIC of the *Competition and Consumer Act 2010* (CCA), as proposed to be amended by the Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2010 (the CCS Bill).

There are seven parts to the Companies Bill.

Part 1 comprises the preliminary sections, including commencement, objects and definitions.

Part 2 deals with the operations of NBN Co and any NBN corporations, including provisions relating to NBN Co's wholesale-only nature, the functional separation of NBN corporations and the divestiture of assets by NBN corporations.

Part 3 deals with the ownership and control of NBN Co and sets out Commonwealth ownership provisions and arrangements for terminating those provisions and introducing an NBN Co sale scheme. It also establishes a head of power for the Governor-General to make regulations concerning private ownership and control of NBN Co.

Part 4 deals with the reporting obligations that will fall upon NBN Co during any period when the Commonwealth commences to sell down its stake in the company. These obligations will end when the Commonwealth no longer controls NBN Co.

Part 5 sets out an anti-avoidance obligation to ensure that NBN Co continues to meet its obligations.

Part 6 sets out powers for the Federal Court to grant injunctions in relation to contraventions of the Act.

Part 7 sets out miscellaneous provisions, including provisions to establish that NBN Co is not a public authority and NBN Co (and any NBN corporations) are not subject to the *Public Works Committee Act 1969*.

### **Definition of NBN Co**

Fundamental to the operation of the regime is the definition of an NBN corporation. An NBN corporation is defined in Schedule 1 as:

- NBN Co;
- NBN Tasmania; and
- a company over which NBN Co is in a position to exercise control.

This definition recognises that NBN Co and NBN Tasmania have already been established. It also captures the possibility that, should NBN Co, in the future,

establish subsidiaries in addition to NBN Tasmania, those companies will be subject to the same wholesale-only and other obligations as NBN Co.

Similarly, should NBN Co purchase a carriage service provider, that provider would be considered to be an NBN corporation and be subject to the same wholesale-only obligations. The Government considers that NBN Co should not be prevented from purchasing telecommunications companies, even if they have retail businesses, if such an acquisition could support the early development and rollout plan of the NBN. However NBN Co would need to set in place transitional arrangements for divesting any such retail operations. Under the NBN Companies Bill there is a 12 month window for such transitions. The Australian Competition and Consumer Commission (ACCC) could also, under section 50 of the CCA, assess such an acquisition to determine if it would have the effect, or be likely to have the effect, of substantially lessening competition in a market. As part of a section 50 assessment, NBN Co could submit undertakings under section 87B of the CCA to divest any retail activities associated with the acquisition.

NBN Co will need to notify the Commonwealth of any proposed acquisitions, including acquisition of a significant shareholding, as part of its reporting obligations under the CAC Act and under Part 4 of the Companies Bill.

### **Wholesale-only supply obligations**

Central to the definition of NBN Co's wholesale-only nature, clause 9 of the Companies Bill provides that NBN Co must not supply an eligible service to another person unless the other person is a carrier or a service provider. This clause ensures that NBN Co will only supply services on a wholesale basis, thereby enshrining in legislation one of the key elements of the Government's NBN announcement.

Clause 9 does provide for NBN Co to supply network management services to a number of utilities which would otherwise not be able to receive a service from NBN Co. These utilities are limited to transport authorities, electricity supply bodies, gas supply bodies, water supply bodies, sewerage service supply bodies, storm water drainage services bodies and State or Territory road authorities. This is to ensure such utilities have direct and ready access to the NBN for the provision of 'smart' services that are an increasingly important aspect of effective and efficient infrastructure management.

NBN Co is only permitted to supply a service that is used to carry communications necessary or desirable for specific uses by these entities. For example, in the case of traffic authorities, this is effectively a basic connectivity service that permits monitoring of signals, so that the authority can monitor and manage traffic flows. In the case of the electricity industry, NBN Co could facilitate the rollout of smart grids and smart metering.

### **Line of business restrictions**

Consistent with NBN Co's wholesale-only mandate, the Companies Bill includes provisions to limit and focus NBN Co's business activities to the supply of goods or services, or investments, that are associated with its primary function as a supplier of

wholesale telecommunications services. The provisions will also prevent entry of NBN Co, particularly in an era of strong convergence, into related markets, which could potentially impact on competition in those markets.

For instance, the Companies Bill establishes that NBN Co must not supply a non-communications service to another person. This restricts NBN Co to supplying an eligible service or a service that is ancillary or incidental to the supply by NBN Co of an eligible service.

Further, NBN Co must not supply a content service. A content service is defined at section 15 of the *Telecommunications Act 1997* (Tel Act) and covers services such as broadcasting services, on-line information services or on-line entertainment services.

However, the Companies Bill does allow for some other services to be supplied if they are associated with the supply of wholesale telecommunications services. NBN Co may provide advisory or consulting services that relate to the supply of eligible services or goods for use in connection with the supply of an eligible service, or facilities (within the meaning of the Tel Act). NBN Co may also provide, grant or confer intellectual property rights that relate to the supply of eligible services or goods for use in connection with the supply of an eligible service, or facilities (within the meaning of the Tel Act), thereby providing it with scope to exploit opportunities that may arise, both in Australia and overseas, from its cutting edge research, development and operational activities.

The Companies Bill also provides that NBN Co must not supply goods to another person unless the goods are for use in connection with the supply, or prospective supply, of an eligible service by NBN Co. NBN Co may need, for example, to supply customer premises equipment in connection with the supply of mobile or satellite wholesale services, and may also need to install an optical network termination unit in a premises in connection with the supply of fibre-based services. These activities are clearly in connection with the supply of eligible services and should be permitted. However, the supply of goods that are not in connection with the supply of an eligible service could see NBN Co losing focus on the objectives which it has been established to deliver.

Provisions in the Companies Bill limit the investment activities of NBN Co to the supply, or prospective supply, of eligible services, or of goods in connection with the supply, or prospective supply, of eligible services. NBN Co may invest money in the shares of a company if the company carries on, proposes to carry on, or has the object of carrying on, a business that consists of or includes the supply of a carriage service (although as noted above, if it purchases a controlling stake in a carriage service provider, that provider becomes an NBN corporation). NBN Co may invest in securities of the Commonwealth or of a State or Territory, or in securities guaranteed by the Commonwealth, a State or a Territory. NBN Co may also earn interest from bank deposits, and may make any other form of investment prescribed by regulations made under the *Financial Management and Accountability Act 1997*. Again these provisions are designed to limit and focus NBN Co's activities on its core objectives and prevent potential impacts on competition through its entry into related but distinct markets.

## **Functional separation**

Division 3 of Part 2 of the Companies Bill provides a mechanism for the future functional separation of NBN Co should it be required to maximise transparency and competitive outcomes. As observed in the Implementation Study on the NBN, NBN Co has been established as an integrated passive and active network operator, in which the passive elements of the network are the network facilities and fibres and the active elements are the electronic equipment used to transmit services over the fibre.

In the future, subject to how the telecommunications market and technology develop, it may be appropriate for the Commonwealth Government to require NBN Co to implement measures to provide greater transparency and equivalence of treatment in the way in which it operates in light of this integration.

The Communications and Finance Ministers will have flexibility to determine the appropriate form of separation at any time, based on the functional separation principles outlined at clause 24. Separation arrangements could include full functional separation of all of the business units of NBN Co, or could be more ‘light touch’, such as requiring separate financial statements and asset registers for different business units.

## **Divestiture of assets**

The Companies Bill also establishes powers for the Communications and Finance Ministers to require NBN Co to dispose of one or more specified assets, or to transfer one or more specified assets from one NBN corporation to another. The power to require an NBN corporation to transfer assets to another NBN corporation is limited to the period during which the Commonwealth ownership provisions are in effect. However, the power to require NBN Co to dispose of assets is not limited in this way.

These powers provide a further mechanism to facilitate greater transparency in NBN Co’s operations and equivalence of treatment and could be used to structure the eventual privatisation of NBN Co to maximise its appeal to different investors. Post-sale, they provide a strong mechanism to address competition or other concerns that may arise from the integration of passive and active businesses, notwithstanding NBN Co’s wholesale-only mandate. As such they arm the Commonwealth with the powers it needs to tackle issues of integration that have been of concern with Telstra and forewarn NBN Co that the Commonwealth reserves this right for the future.

## **Services to be supplied and not supplied**

The Minister may impose a condition on NBN Co’s carrier licence that would have the effect of requiring it to supply a specified telecommunications service. Such a service would be a mandatory service, and would be specified by the Communications Minister following consultation with NBN Co and the ACCC (as provided for in clause 42). The Minister may also make a condition of NBN Co’s carrier licence that prohibits NBN Co from supplying a specified carriage service to carriers or service providers.

The Government has announced that NBN Co is to connect 93 per cent of homes, schools and workplaces with fibre-to-the-premises infrastructure that is capable of providing broadband services with speeds of up to 1 Gigabit per second. The remaining premises will be connected with next generation wireless and satellite technologies that will be able to deliver 12 megabits per second or more to people living in more remote parts of Australia. Historically, the Government has established coverage obligations on a carrier by placing a condition on its carrier licence. For example, this mechanism was used in relation to Optus' network roll-out and Telstra's CDMA switchover.

These provisions could also be used to provide stakeholders with certainty, once NBN Co has finalised its product specifications, as to the level of services that NBN Co will and will not provide. The Minister can use this mechanism to specify the layer at which NBN Co operates. For example, NBN Co has indicated that it will provide Layer 2 bitstream services over its fibre network. The Government envisages that NBN Co will operate at a lower, rather than higher, layer in the network stack.

### **Commonwealth ownership and privatisation arrangements**

Part 3 of the Companies Bill sets out arrangements for the future privatisation of NBN Co.

This Part makes clear that the Commonwealth must retain total ownership of NBN Co until such time as a declaration is made by the Communications Minister that the NBN is built and fully operational, the Productivity Commission has concluded an inquiry into certain specified matters relating to the NBN and NBN Co, the Parliamentary Joint Committee on the Ownership of NBN Co (established by this Bill) has examined the report of the Productivity Commission inquiry, and the Finance Minister has declared that conditions are suitable for the entering into and carrying out of an NBN sale scheme. Such a declaration would be made through a disallowable instrument to allow for an appropriate level of Parliamentary scrutiny. Retaining ownership of NBN Co until the National Broadband Network is built and fully operational will give the Commonwealth greater flexibility to pursue its objectives in the rollout of the network.

Division 2 of Part 3 sets out arrangements for an NBN sale scheme. These arrangements are largely based on previous legislation dealing with the sale of Commonwealth entities, such as the *Telstra (Transition to Full Private Ownership) Act 2005* and the *Medibank Private Sale Act 2006*.

### **Productivity Commission inquiry**

At any stage after a declaration is made by the Communications Minister that the NBN is built and fully operational, the Minister responsible for the Productivity Commission may refer certain matters concerning the NBN and NBN Co to the Productivity Commission for inquiry. The Productivity Commission inquiry will consider the following matters:

- the regulatory framework for the NBN;
- the impact on future annual Commonwealth budgets of the sale of NBN Co,
- the impact of a sale of the Commonwealth's equity in NBN Co on the:

- supply of affordable broadband carriage services;
- supply of non-broadband carriage services;
- equity and social inclusion; and
- the impact on competition in telecommunications markets of a sale of the Commonwealth's equity in NBN Co.

With respect to the regulatory framework for the NBN, the inquiry would look at a wide range of issues pertaining to the Government objectives for the NBN including the equity of access to broadband carriage services in metropolitan, regional, rural and remote areas, competition in telecommunications markets, the structural features of telecommunications markets, the structural organisation of NBN Co and issues relating to ownership and control of the NBN, as well as such other matters the Productivity Commission considers relevant.

The Finance Minister cannot make a declaration that conditions are suitable for entering into and carrying out an NBN sale scheme before the report of the Productivity Commission inquiry has been tabled in each House of Parliament, and the Parliamentary Joint Committee on the Ownership of NBN Co has examined that report.

### **Parliamentary Joint Committee on the Ownership of NBN Co**

Once the report of the Productivity Commission inquiry has been tabled in each House of Parliament, the Bill requires a joint committee of the Parliament to be established, to be known as the Parliamentary Joint Committee on the Ownership of NBN Co. The membership and role of that committee is set out in Schedule 2 to the Companies Bill. The committee will examine the Productivity Commission report and will report to each house of Parliament within 180 days of the establishment of the Committee.

### **Private ownership and control of NBN Co**

Until the NBN is built and fully operational, concerns that retail service providers could invest in NBN Co with a view to gaining control of it and favouring their downstream operations, contrary to the intention of NBN Co's wholesale-only mandate, are addressed by the Commonwealth retaining full ownership. After the Commonwealth has commenced to sell down its stake in NBN Co, such a situation could arise. As a result, the Companies Bill sets out a head of power for the Governor-General to make regulations in relation to unacceptable private ownership or control situations in relation to NBN Co. The regulations can confer a power to make a decision of an administrative character on the ACCC.

As referred to above, the Productivity Commission will consider ownership and control issues as part of its inquiry into the regulatory framework for the NBN. It is possible that the Productivity Commission could recommend that limits on investments in NBN Co by retail service providers be specified in statute prior to sale. This would be a matter that would need to be considered by the Government of the day.



## **NBN Co's reporting obligations**

Part 4 of the Companies Bill largely reproduces reporting obligations previously placed on Telstra under the *Telstra Corporation Act 1991*. These obligations are largely present already in the CAC Act, but the relevant provisions in the CAC Act only apply to wholly-owned Commonwealth companies. As a result, if the Commonwealth transfers part of its stake after the Commonwealth ownership provisions cease, the CAC Act would cease to apply. This Part ensures the reporting obligations continue to apply until the Commonwealth ceases to hold a majority of the voting shares in NBN Co.

The reporting obligations on NBN Co include:

- providing financial statements (clause 79);
- notifying the Communications and Finance Ministers of significant events (clause 80);
- keeping the Communications and Finance Ministers informed of the operations of NBN corporations, and giving the Ministers such reports, documents and information in relation to those operations as the Ministers require (clause 81); and
- preparing a corporate plan for NBN Co at least once a year, covering a period of at least three years and not more than five years, and also keeping the Ministers informed about changes to the plan (clause 82).

## **Miscellaneous provisions**

The Companies Bill includes a number of provisions that clarify the status of NBN Co for the purposes of various pieces of Commonwealth legislation. In particular, clause 72 provides that the *Public Works Committee Act 1969* does not apply to NBN Co. This is to ensure NBN Co has sufficient commercial flexibility to undertake the investments needed to rollout the NBN and is consistent with arrangements that apply to Australia Post and that previously applied to Commonwealth-owned carriers such as Telstra, the Overseas Telecommunications Corporation and Aussat.

The Companies Bill also includes provisions dealing with a number of enforcement-related matters (such as anti-avoidance and injunctions) necessary to ensure the effective operation of the main provisions of the Companies Bill.

## **Telecommunications Legislation Amendment (National Broadband Network Measures—Access Arrangements) Bill 2011**

The Access Bill amends the CCA and the Tel Act to introduce new access, transparency and non-discrimination obligations relating to the supply of wholesale services by NBN Co Limited. It also extends technical and open access obligations to owners of other superfast networks.

The Access Bill operates in conjunction with the accompanying Companies Bill, which establishes the regulatory framework for the operation, ownership, governance and eventual sale of NBN Co.

The Access Bill builds upon the Companies Bill by applying additional rules for the supply of services by NBN Co and transparency and non-discrimination requirements. It also sets out the processes to follow if the Communications Minister makes conditions of carrier licence in relation to the supply of services by NBN Co.

On 7 April 2009, in announcing the NBN initiative, the Government indicated that NBN Co would be wholesale-only, and operate on an open and equivalent access basis, subject to clear oversight by the ACCC. As such it would provide an open platform for the development of robust retail level competition. Amongst other things, this approach responds to longstanding concerns about barriers to competition in the Australian telecommunications market flowing from Telstra's control of the access network and its vertical integration.

The Access Bill also follows reforms proposed under the CCS Bill to the telecommunications competition regime. The CCS Bill is intended to reform the access regime in Part XIC of the CCA to reduce delays and opportunities for gaming and provide upfront certainty on access prices and terms and conditions. NBN Co will be subject to this reformed access regime, but with additional measures being introduced by the Access Bill to reflect the unique wholesale-only nature of the company. The amendments in the Access Bill need to be read together with the CCS Bill.

In preparing the Access Bill, the Government drew on the Implementation Study on the National Broadband Network, which made recommendations that went to the access arrangements that should apply to NBN Co and the broader regulatory framework within which NBN Co should operate. Amongst other things, the Implementation Study proposed that NBN Co should operate on a more level regulatory playing field to ensure the Government's objectives in establishing the NBN are achieved.

### **Supply of services by NBN Co**

Key objectives of the access arrangements for NBN Co are to ensure:

- services needed by its wholesale customers are available,
- information about the services and the terms and conditions of supply is available and transparent,
- there is open, non-discriminatory access to those services, and

- there is scrutiny by, and recourse to, the ACCC in relation to access issues, including terms and conditions.

Under the existing provisions in Part XIC of the CCA, the ACCC has the power to compel service providers to supply a service if the ACCC declares that service. Service providers may also give the ACCC a Special Access Undertaking (SAU) setting out proposed services and the terms and conditions of those services. Otherwise, service providers make available a number of wholesale services that are not declared services, and therefore not subject to the standard access obligations (SAOs) in Part XIC. Service providers negotiate the terms and conditions of those services with their customers.

The Access Bill sets out three mechanisms, which need not be mutually exclusive, under which NBN Co provides services:

- NBN Co can choose to provide services and publish a Standard Form of Access Agreement (SFAA) in relation to a service, or give an SAU to the ACCC in relation to the provision of access to a service;
- if the Minister makes a condition of NBN Co's carrier licence that it must supply a specified eligible service that NBN Co is not currently supplying, NBN Co must give an SAU or formulate an SFAA in relation to that service; and
- the ACCC may, under proposed subsection 152AL(8A), declare a service that NBN Co has not indicated it will supply, but which it is capable of supplying and the ACCC considers, after consultation, would be in the long-term interests of end-users to supply.

NBN Co can publish an SFAA in relation to a new service not set out in an SAU, or publish an SFAA as the means of specifying the terms and conditions which are either not covered by, or complement the terms and conditions contained in, an SAU it has given to the ACCC. Once an SFAA is published, the service becomes a declared service and subject to Part XIC. This will ensure that at all times NBN Co's customers and potential customers will know what services are available, and that they can receive non-discriminatory access to those services.

Section 152CJA establishes that NBN Co must not supply an eligible service unless:

- the service has been declared by the ACCC under subsection 152AL(8A); or
- NBN Co has published an SFAA that relates to access to the service on its website; or
- an SAU relating to the service is in operation.

As a result, the terms and conditions for access to all services offered by NBN Co will be published.

The section also establishes that, if NBN Co has published an SFAA that relates to access to a service, and an access seeker requests NBN Co to enter into an access agreement that contains the same terms and conditions as set out in the SFAA, NBN Co must comply with the request.

The Access Bill also specifies that the current SAOs, as specified under the CCA, will not apply to NBN Co. These obligations are designed for vertically integrated access providers who provide services to their own retail units and to access seekers. As

NBN Co is a wholesale-only company, it would not be appropriate for it to be subject to the existing SAOs. The Access Bill proposes to establish two categories of SAOs: category A SAOs, applicable to access providers other than NBN Co; and category B SAOs, applicable specifically to NBN Co.

There are three category B SAOs under the Access Bill. The first guarantees supply of declared services, subject to the standard exemptions (for example, in relation to creditworthiness or security) already in the CCA. The second guarantees interconnection of facilities to the NBN. The third ensures that, if NBN Co supplies a declared service by means of conditional-access customer equipment (such as, for example, an optical network termination unit to control access), then NBN Co must enable an access seeker to access that equipment.

In the first instance the terms and conditions of access will be as set out in an SAU and/or SFAA. NBN Co will be permitted to negotiate access agreements with individual access seekers to vary the terms but only under clearly specified arrangements (see below). Moreover, the ACCC will be able to make an access determination in the event that it considers it necessary:

- at the time it declares a service in relation to NBN Co;
- where a matter is not covered in an SAU; and
- where a matter is not adequately covered by an SFAA.

An ACCC access determination will not, however, override an access agreement between NBN Co and an access seeker.

Under section 152CH of the CCA, the Communications Minister may make a ministerial pricing determination setting out principles dealing with price-related terms and conditions relating to the SAOs. This existing legislative mechanism could be used, if required, to establish a uniform wholesale pricing obligation for NBN Co.

### **Non-discrimination and transparency**

To further reinforce the open access principles underpinning the NBN, the Access Bill also sets out a clear non-discrimination obligation applying to NBN Co, giving effect to the Government's commitment for NBN Co to provide equivalent access to all access seekers. As a basic principle, NBN Co must not discriminate between access seekers. However, NBN Co will be permitted to negotiate with individual access seekers to vary the terms and conditions set out in an SFAA, SAU or an access determination, but only under clearly specified criteria and subject to ACCC oversight. The first criterion is discrimination if an NBN corporation has reasonable grounds to believe that the access seeker would fail, to a material extent, to comply with the terms and conditions on which the NBN corporation complies, or on which the NBN corporation is reasonably likely to comply, with the relevant obligation. Examples provided of reasonable grounds include evidence that the access seeker is not creditworthy, and repeated failures by the access seeker to comply with the terms and conditions on which the same or similar access has been provided. These examples, and the overall exclusion permitting discrimination, are consistent with current trade practices law.

The second criterion is on grounds or circumstances as specified by the ACCC. The third criterion is that NBN Co may offer different terms if this aids efficiency, and access seekers in like circumstances have an equal opportunity to benefit from any variations.

The concept of differentiation that aids efficiency already exists under Part IIIA of the CCA, and has been reflected in a number of undertakings made under that Part. It recognises that a blanket requirement to offer equal treatment to all access seekers can lead to inefficient outcomes. For example, some service providers may want to make small changes to standard services to reflect their existing products and processes, and being required to re-engineer these could be both costly and disruptive.

Submissions on the draft Access Bill called for clearer definition of conduct that aids efficiency, and as a result the Access Bill requires the ACCC to publish guidance material on non-discrimination within six months of the Access Bill taking effect. The ACCC will therefore be able to bring its considerable expertise in this area into play, providing greater certainty for industry.

Examples of conduct that may aid efficiency could include, but not be limited to:

- the sharing of risks between NBN Co and an access seeker which has the effect of reducing NBN Co's operational risks (e.g. risk of assets being stranded);
- a material reduction in NBN Co's direct costs as a result of differing network or technology requirements;
- a material reduction in the operational or supply support requirements that NBN Co would otherwise provide;
- a material reduction in the operating costs incurred by NBN Co as a result of access seekers' involvement; and
- a reduction by NBN Co and/or access seekers in the consumption of finite (scarce) resources.

NBN Co will be able to define what constitutes 'like circumstances', subject to ACCC oversight. NBN Co may, for example, set out its approach to discrimination when it submits an SAU or an SFAA in relation to a service. Consistent with the CCS Bill, NBN Co must lodge access agreements with the ACCC, which could take action if it considered that the non-discrimination rule had been breached.

If NBN Co can offer different terms from those set out in published offers, it follows that access seekers need to know what variations to standard terms are available, to judge whether they are in like circumstances and able to receive those varied terms. To address this, NBN Co must supply the ACCC, within seven days of entering into an agreement containing different terms and in a form approved in writing by the ACCC, with clear information on the deal. The ACCC must then publish this information, redacting such commercial-in-confidence information as it considers is necessary, and maintain a register of NBN Access Agreement Statements on its website. As noted above, the ACCC will also publish guidance material on non-discrimination issues which could, for example, set out its approach to defining 'like circumstances'. The ACCC would refer to that guidance in assessing an SAU, considering a complaint that an access agreement was discriminatory or making an access determination.

Submissions on the draft bills expressed concern that NBN Co could offer volume discounts that would favour the largest service providers, thereby providing them with an unfair competitive advantage over smaller players. Similar concerns were expressed in the NBN Implementation Study. The Senate Select Committee recommended that NBN corporations be prohibited from offering volume discounts. Given that differentiation of standard price terms can aid efficiency, the Access Bill does not prohibit volume discounts. However, recognising the concerns of smaller players, the Access Bill provides that, should NBN Co choose to offer volume discounts, it would not be able to do so unless proposed volume discounting arrangements are consistent with those set out in a SAU that has been approved by the ACCC and is in operation. This should provide industry with certainty that volume discounts are in the long-term interests of end-users.

It should also be noted that section 45 of the CCA already applies and prohibits agreements that substantially lessen competition.

### **Level playing field arrangements**

Amongst other things, the NBN Implementation Study identified that difficulties could arise for the delivery of the Government's NBN policy objectives as a result of NBN Co being subject to strict regulatory requirements while competing against other, less regulated, providers of superfast broadband. In particular, the Study noted the scope for competing providers to target high-income and low-cost, high-density areas, operate as vertically-integrated providers and advantage themselves over independent retail service providers (RSPs) on the NBN, and ignore technical specifications employed by NBN Co. This could mean that where other providers rolled out superfast networks in advance of the NBN, these would not deliver consumers in those areas the same benefits as the NBN. Moreover, by cherry-picking high-value markets such providers could undermine NBN Co's ability to deliver the Government's policy objectives for the NBN nationally. The Implementation Study therefore recommended that the Government look at measures to provide a more level playing field for all superfast broadband networks (recommendations 73 and 74).

In this context, the Access Bill seeks to amend the Tel Act to place specific technical and open access requirements on carriers who build or upgrade fixed-line superfast access networks after 25 November 2010, the date of the Access Bill's introduction into the Parliament.

There are three main parts to these arrangements.

First, provision is made to simplify the making of industry codes and standards under Part 6 of the Tel Act in relation to fibre infrastructure and services. These provisions are set out in Part 1 of Schedule 1 to the Access Bill (items 12 to 16). This provides a mechanism for codes and standards based on NBN Co specifications to be developed. Codes are developed by industry bodies like the Communications Alliance. Standards can be made by the Australian Communications and Media Authority (ACMA). Application of such codes and standards based on NBN Co specifications would lead to new FTTP networks being consistent with the technical specifications for the NBN.

Second, where a telecommunications network (other than the NBN) comes into existence or is altered or upgraded, after 25 November 2010, to supply or be capable of supplying a superfast carriage service to customers, other than individual government or corporate end-users, that network must offer a Layer 2 bitstream service. These provisions are set out in Part 3 of Schedule 1 to the Access Bill (items 86 to 88). A Layer 2 bitstream service is a basic connectivity service, of a wholesale nature. A superfast carriage service is defined as carriage services with a download transmission speed normally of more than 25 Mbps. This rule would apply to any type of fixed line network, whether it be FTTP, hybrid fibre-coaxial (HFC) or fibre-to-the-node (FTTN). The rule would not apply, however, to point-to-point connections provided to single individual government or corporate end-users or proprietary networks (consistent with recommendation 73 of the NBN Implementation Study). To support these arrangements the ACMA will be able to make technical standards relating to Layer 2 bitstream services.

Third, the Layer 2 bitstream service that would have to be made available on these new or upgraded designated superfast telecommunications networks would be subject to access rules based on those applying to services supplied by NBN Co. These provisions are set out in Part 3 of Schedule 1 to the Access Bill (items 89 to 114). The ACCC would need to declare a specified Layer 2 bitstream service as soon as practicable. The Layer 2 bitstream service would need to be supplied on a non-discriminatory basis, subject to the same kinds of exceptions as apply in relation to services provided by NBN Co. Activities related to the supply of the service would be subject to non-discrimination requirements, either set out in an SAU or the statute. Any volume discounting would need to be covered in an SAU. Any access agreements varying from an SAU or an access determination would need to be lodged with the ACCC for publication.

Access to other services provided over new or upgraded superfast telecommunications networks would be subject to the usual access arrangements applying under Part XIC of the CCA.

In summary, these requirements will mean that mass market fixed-line access networks which supply superfast carriage services with a download transmission speed normally of more than 25 Mbps, must offer a Layer 2 bitstream service. The supply of this service is then subject to the key access, non-discrimination and transparency obligations set out in the Access Bill. Furthermore, once the appropriate codes and standards are in place, carriers will be required to build and operate FTTP networks so they are consistent with NBN technical specifications.

Together these amendments should ensure that end-users have access to the same high-quality superfast broadband services, regardless of the network provider, and assist the NBN in meeting its objectives nationally by ensuring it operates on a more level regulatory playing field.

To provide a period for industry to adjust to these requirements, the provisions commence on Proclamation or otherwise 12 months after the Access Bill receives the Royal Assent.

## **Freedom of information**

The Access Bill includes amendment to the *Freedom of Information Act 1982* (FOI Act). The purpose of these amendments is to make NBN Co subject to the Commonwealth freedom of information laws and to provide a targeted exemption to NBN Co in order to protect the confidentiality of its commercial activities. The objects of the FOI Act are to give the Australian community broad access to information held by the Government by requiring agencies to proactively publish certain information and giving citizens a right of access to documents held by prescribed authorities and the proposed amendments are consistent with the objects of the FOI Act.

## **FINANCIAL IMPACT STATEMENT**

These reforms will have a moderate financial impact on administration costs for the ACCC and the ACMA, which will be funded by increasing the carrier licence charges levied by the ACMA under the *Telecommunications (Carrier Licence Charges) Act 1997*. This will mean that the proposal has a limited fiscal impact for the Commonwealth.

## **REGULATION IMPACT STATEMENT**

In April 2009 the Prime Minister granted an exceptional circumstances exemption to the requirement to develop a Regulatory Impact Statement (RIS) for the National Broadband Network measures, including key principles for the regulatory framework for NBN Co. Accordingly, these measures did not require a RIS to be prepared for the introduction of these elements of the NBN package.

The RISs accompanying this Explanatory Memorandum were prepared in accordance with Australian Best Practice Regulation requirements as they represented the further development of the original policy.

Under Australian Government Best Practice Regulation requirements, if exceptional circumstances have been granted by the Prime Minister, this should be noted in the explanatory material accompanying the introduction of the relevant regulation, and the proposal is subject to a post-implementation review within one to two years of implementing the proposal.

### **Regulation Impact Statement 1.**

#### **Entities to which NBN Co's wholesale-only obligations apply**

##### **1. Issues which give rise to the need for action**

On 24 February 2010, the Government released exposure drafts of the National Broadband Network Companies Bill 2010 (Companies Bill) for public comment. This draft legislation defined an NBN corporation to mean:

- (a) NBN Co; or
- (b) NBN Tasmania; or
- (c) a company that is a wholly-owned subsidiary of NBN Co.



A number of stakeholders objected to this definition, stating that NBN Co could purchase a controlling stake in a retail provider and use that provider to offer retail services, thereby avoiding its obligations<sup>1</sup>. There is also nothing to prevent NBN Co from establishing a subsidiary and then selling a small share in that company to another carrier or service provider.

In its submission to the Department, Telstra commented that NBN Co could own 99.9% of a retail provider and that:

“NBN Co could, consistently with the Bill, be little more than a holding company which majority owns and controls one or more vertically integrated retail providers. This outcome appears directly contrary to the Government’s separation objectives.”

The definition in the draft bill was proposed to give NBN Co the flexibility to invest in and divest itself of assets, flexibility considered especially important during the roll-out of the NBN. For example, it is possible that NBN Co may wish to purchase a retail provider because it could use the physical assets of that provider (such as fibre, ducts, buildings or other network equipment) to expedite the roll-out of the NBN. As the Government had stated that it intended to retain majority ownership of NBN Co until roll-out is complete (therefore having full oversight of the company’s operations), it was considered that a more restrictive definition of an NBN corporation was unnecessary. The explanatory material to the draft bill noted that the Government could use its power as shareholder to require NBN Co to seek its approval for any acquisitions.

The draft bill also relied on existing legislation to ensure that any acquisition in or divestment by NBN Co would not allow the company to avoid its obligations. Section 50 of the *Trade Practices Act 1974* (TPA) prohibits mergers that would have the effect, or be likely to have the effect, of substantially lessening competition in a market. Merger parties are not legally required to notify the ACCC of a merger and merger parties can proceed without seeking regulatory consideration. Merger parties have three avenues available to have a merger considered and assessed:

- the ACCC assesses the merger on an informal basis;
- the ACCC assesses an application for formal clearance of a merger; and
- the Australian Competition Tribunal assesses an application for authorisation of a merger.

The ACCC grants formal or informal clearance if it forms the view that a merger would not substantially lessen competition in a market.

If the ACCC does not grant formal or informal clearance, parties can still proceed with the merger, but may face court action under s. 50.

---

<sup>1</sup> NBN Co is required to offer wholesale-only services on open and equivalent terms to all access seekers. This requirement is set out in the draft NBN legislation.

The Australian Competition Tribunal may grant authorisation if it is satisfied that the proposed merger is likely to result in such a benefit to the public that the merger should proceed.

If NBN Co were to acquire shares in the capital of a corporation, and similarly if a third party were to acquire shares in NBN Co, the ACCC can provide formal clearance for such a transaction. In making its decision the ACCC is required to consider a number of criteria, including “the nature and extent of vertical integration in the market”. Consequently, the ACCC could scrutinise share transactions to ensure that NBN Co’s wholesale-only status is maintained. However, under section 50 the ACCC is not required to address NBN Co’s non-discrimination and transparency obligations, which are proposed to be established under the draft Telecommunications Legislation Amendment (National Broadband Network Measures – Access Arrangements) Bill 2011 (Access Bill).

The non-discrimination obligation prohibits discrimination between access seekers, with the exception of limited circumstances (discrimination is permitted in relation to creditworthiness, if it aids efficiency and all access seekers with like circumstances have an equal opportunity to benefit; or in grounds or circumstances specified in a legislative instrument made by the ACCC). The transparency obligation requires NBN Co not to offer a service unless it has published all its terms and conditions for that service on its website, and also requires NBN Co to publish a detailed summary of any changes it makes to its standard terms (for example, because the different terms could aid efficiency). The transparency obligation ensures that access seekers at all times know what NBN Co’s service offers are and what the standard terms and conditions are, and whether they have an opportunity to receive different terms and conditions that have been supplied to another access seeker.

The issue examined in this Regulation Impact Statement (RIS) is whether NBN Co should be permitted to invest in corporations and divest itself of shares in subsidiaries, and if so, what measures should be in place (if any) to ensure it meets its wholesale-only obligations.

### ***Background***

On 7 April 2009, the Government announced its plan to establish a new company to build and operate the National Broadband Network, NBN Co, in part to address long-standing competition issues in the telecommunications market, brought about by the dominance of the vertically and horizontally integrated incumbent, Telstra. It is the Government’s intention that NBN Co offer wholesale-only services on open and equivalent terms to all access seekers.

The NBN Co Bill forms part of a package of legislation designed to reform the telecommunications access regime. This package includes the NBN Access Bill and the Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009 (CCS Bill).

On 6 May 2010, the Government released the NBN Implementation Study. The Implementation Study does not address the issue of NBN Co’s acquisition of, or sale

of shares in, a subsidiary company, but it does recommend that the Government retain full ownership of NBN Co until the NBN roll-out is complete (Rec.58). The Implementation Study also recommends that NBN Co be prohibited from investing in retail telecommunications providers and content service providers, subject to special transitional ownership provisions to permit the acquisition of assets (Rec.69). The Implementation Study also recommends that ownership caps of 15 per cent in relation to shareholdings in NBN Co, subsidiaries of NBN Co or any company resulting from structural separation of NBN Co should be introduced once the Commonwealth begins to sell down its stake in the Company – subject to practical control tests (Rec.83).

## **2. Objective**

The Government's objective is to ensure that:

1. NBN Co has the flexibility to invest in and divest itself of assets as necessary, especially to facilitate the cost-effective roll-out of the NBN;
2. NBN Co's wholesale-only and other obligations are effectively applied, especially after the Government sells down its stake in the company; and
3. Regulatory arrangements for NBN Co are simple and efficient, and stakeholders also have certainty how the regulatory arrangements will apply.

**3. Options (regulatory and/or non-regulatory) that may constitute viable means for achieving the desired objective(s)**

Five alternative options (regulatory and non-regulatory) have been identified to address the Government's objectives. All could in practice meet the Government's objective, although with variable degrees of effectiveness. These are:

1. Do nothing – rely on existing Commonwealth shareholder powers and ACCC oversight.
2. Limited regulation – require the ACCC to grant formal clearance of all acquisitions/divestments involving NBN Co and to consider NBN Co's non-discrimination and transparency obligations.
3. Quasi-regulation - include a requirement in NBN Co's constitution for NBN Co to seek approval from its shareholders before investing in a retail provider or selling any shares in a subsidiary.
4. Regulation - Broadening the current bill – include a definition of an NBN corporation to be a company in which NBN Co holds a controlling stake.
5. Legislated prohibition - prohibit NBN Co from investing in a retail provider, except for the purpose of acquiring its assets.

For the purpose of clarity, it should be noted that all suggested options, apart from Option A ('do nothing'), would be applied in addition to regulation which is existing or already proposed; they are not proposed to operate instead of existing or already proposed measures. Furthermore, Options B and C could be combined.

*Option A - Do nothing – rely on existing Commonwealth shareholder powers and ACCC oversight.*

Under Option A, there would be no legislative or regulatory change. NBN Co would be able to invest in and divest itself of assets, unless the transaction breached section 50 of the TPA.

*Option B - Limited regulation – require the ACCC to grant formal clearance of all acquisitions/divestments involving NBN Co and to consider NBN Co's non-discrimination and transparency obligations during the clearance process.*

Option B would build on Option A, so that, through an amendment to the TPA, the ACCC would be required to grant formal clearance of all mergers and acquisitions involving NBN Co, and in doing so, would also need to take into account the impact of the transaction on NBN Co's ability to meet its non-discrimination and transparency obligations. In other words, the ACCC would be required to grant formal clearance of a transaction through which NBN Co acquires a share in a corporation, or a corporation acquires a share in NBN Co, or purchases of assets by NBN Co. Furthermore, the ACCC would, in addition to the existing criteria under section 50 of the TPA, also need to take into consideration whether NBN Co's non-discrimination

and transparency obligations would be affected by a proposed transaction. These obligations were described in section 1.

*Option C – Quasi-regulation - include a requirement in NBN Co's constitution for NBN Co to seek approval from its shareholders before investing in a retail provider or selling any shares in a subsidiary.*

Under Option C, NBN Co would be required to seek approval from its shareholders prior to investing in a retail provider or selling any shares in a subsidiary. This mechanism would ensure that, while the Commonwealth owned NBN Co, any transaction is considered by the shareholder Ministers prior to it taking place to allow shareholder Ministers to determine if the transaction was acceptable.

Under the *Competition Principles Agreement 1995*, the Commonwealth must conduct a review prior to privatising a public monopoly. Such a review could assess whether this measure would be likely to guarantee NBN Co would meet the Commonwealth's objectives regarding retail ownership by NBN Co once the Commonwealth lost control of the company. If the measure was considered ineffective, the review could make further recommendations at that time.

*Option D – Regulation - Broadening the current bill – include a definition of an NBN corporation to be a company in which NBN Co holds a controlling stake.*

Under Option D, the definition of an NBN corporation would be broadened to include a company controlled by an NBN corporation. The provision would define 'control' in accordance with the CCS Bill (i.e., if NBN Co has 15 per cent or more of a company, or there are other informal controls on the company's Board, then NBN Co is considered to control it), to ensure consistency within telecommunications regulations.

If a company is defined as being controlled by NBN Co, and thus considered to be an NBN corporation, legislation would need to include appropriate transitional period arrangements to allow that company's Board to adjust to its new obligations. Otherwise, there is a risk that the company's status could be changed without the shareholders being given an opportunity to adjust.

*Option E – Legislated prohibition - prohibit NBN Co from investing in a retail provider, but provide a statutory power to the ACCC to grant formal clearance of a purchase by NBN Co of a retail provider on condition that it is solely for the purpose of acquiring that retail provider's physical assets. NBN Co would also be prohibited from selling any shares in a subsidiary company unless cleared by the ACCC.*

Under this option, NBN Co could not buy a single share in a carrier or service provider, but could, if it wanted to purchase a company for the purpose of acquiring its physical assets, seek formal clearance from the ACCC under a new mechanism inserted into the TPA, to purchase the company outright. As part of this process, NBN Co may need to submit undertakings to the ACCC to divest any retail operations. NBN Co would likewise be prohibited from selling any shares in a subsidiary company in the absence of clearance by the ACCC. The amendments to the TPA

would also require the ACCC to consider, under the clearance process, the effects of any transaction on NBN Co's non-discrimination and transparency obligations.

#### **4. Impact assessment**

This section discusses the advantages and disadvantages of the five options identified above in terms of the objectives discussed in section 2 and their impact on stakeholders, namely:

- NBN Co as the access provider;
- customers of NBN Co;
- competitors of NBN Co; and
- consumers as ultimate users and beneficiaries of telecommunications services.

##### *Privatisation:*

In considering the advantages and disadvantages of the options identified in section 3, it is important to note the different motivations that are likely to drive NBN Co Board decisions:

1. when it is controlled by the Commonwealth; and
2. when it is no longer controlled by the Commonwealth.

While NBN Co is still Commonwealth-owned, the risk of the company becoming vertically integrated or otherwise forming relationships with entities that may give rise to conflicts, and thereby recreating the problems that the telecommunications reform legislation is designed to address, is considered to be minimal. However, once the Commonwealth begins to sell down its stake in NBN Co, it will have less power to control NBN Co and there will be greater opportunity for such relationships to develop.

The following criteria are considered in analysing the five options provided in section 3:

- Action required (intrusive versus non-intrusive action)
- NBN Co's flexibility to invest in and divest itself of assets
- Effective application of NBN Co's obligations
- Cost to the tax payer
- Likely industry perception

The merits of each option against the identified criteria are presented in the table below.

Option	Action required	Retains existing flexibility for acquisitions in and divestment by NBN Co?	Effective application of NBN Co's obligations?	Represents value for money to the tax payer?	Likely industry perception
<p>(A) Rely on existing Commonwealth shareholder powers and ACCC oversight.</p>	<p>None</p>	<p>Yes.</p>	<p>Partial.</p> <p>Companies can seek clearance from the ACCC for acquisitions of shares in another company or its assets.</p> <p>Under section 50 of the TPA, the ACCC can grant formal clearance of an acquisition if it does not substantially lessen competition. However, in an acquisition involving NBN Co the ACCC is not required to consider NBN Co's non-discrimination and transparency obligations and therefore this option would not guarantee NBN Co remains a wholesale only business.</p> <p>This approach would need to be reviewed prior to the Commonwealth selling down</p>	<p>May allow NBN Co to purchase retail providers to reduce the overall cost of the NBN build. There remains a risk that a fundamental goal of the NBN policy and the Commonwealth's significant investment (non-conflicted, open and equivalent access) may be compromised.</p>	<p>Access seekers may consider that this option permits NBN Co to avoid its obligations and enter retail markets. Industry has indicated that it would like more action to be taken, to prevent NBN Co avoiding its obligations. Clarifying that section 50 of the TPA applies to NBN Co may allay some concerns.</p>

Option	Action required	Retains existing flexibility for acquisitions in and divestment by NBN Co?	Effective application of NBN Co's obligations?	Represents value for money to the tax payer?	Likely industry perception
			its stake in NBN Co.		
<p>(B) Require the ACCC to grant formal clearance of all acquisitions and divestments involving NBN Co and to consider NBN Co's non-discrimination and transparency obligations as part of the clearance process.</p>	<p>Regulation (limited amendment)</p>	<p>Yes, but subject to a new stricter process.</p>	<p>Partial.</p> <p>Option B would extend the safeguards in Option A, by requiring the ACCC to grant formal clearance of all transactions involving NBN Co, including consideration of whether any such transaction compromises NBN Co's non-discrimination and transparency obligations.</p> <p>The ACCC could still, however, grant formal clearance of a transaction, that placed NBN Co in control of another entity, with a risk that NBN Co could, in the long term, use that entity to circumvent its obligations.</p>	<p>Allows NBN Co to purchase retail providers to reduce the overall cost of the NBN build (provided the transaction is cleared by the ACCC).</p> <p>More numerous and wide ranging ACCC processes could be required at a cost to the Commonwealth. To the extent that the ACCC's costs are increased, these would be recovered from industry through carrier licence fees, and therefore ultimately passed on to end-</p>	<p>Likely to go some way to allaying industry concerns that NBN Co may be able to avoid its obligations.</p>



Option	Action required	Retains existing flexibility for acquisitions in and divestment by NBN Co?	Effective application of NBN Co's obligations?	Represents value for money to the tax payer?	Likely industry perception
				<p>users.</p> <p>There remains a risk that a fundamental goal of the NBN policy and the Commonwealth's significant investment (non-conflicted, open and equivalent access) may be compromised.</p>	
<p>(C) Include a requirement in NBN Co's constitution for NBN Co to seek approval from its shareholders before investing in a retail provider or selling any shares in a subsidiary.</p>	<p>Quasi-regulation</p>	<p>No. Shareholder Ministers would assume responsibility for determining if an acquisition or disposal should take place, rather than the Board.</p> <p>Removes flexibility from NBN Co and introduces additional (new) role for shareholder</p>	<p>Partial</p> <p>This option requires NBN Co to seek approval from shareholders prior to acquiring shares in a retail provider or selling shares in a subsidiary.</p> <p>This option would become ineffective as the Commonwealth sells down its shares, and possibly on a change in Shareholder</p>	<p>Allows NBN Co to purchase retail providers to reduce the overall cost of the NBN build (provided it is not disallowed by Shareholder Ministers or the ACCC).</p> <p>Additional processes would be required within Government, meaning there would</p>	<p>Approach likely to be seen as lacking transparency by industry, and also ineffective on privatisation (therefore, requiring some other mechanism).</p> <p>May provide an effective transition mechanism, until</p>

Option	Action required	Retains existing flexibility for acquisitions in and divestment by NBN Co?	Effective application of NBN Co's obligations?	Represents value for money to the tax payer?	Likely industry perception
		Ministers.	<p>Ministers (as shareholders have the power to change the company's Constitution)</p> <p>The effectiveness of this mechanism depends on the judgment of shareholders.</p>	<p>be a related cost to the Commonwealth. These costs are impossible to quantify, but would involve increased resourcing required to consider all NBN Co's transactions and provide advice (including legal and economic advice).</p> <p>Delays arising from the approval process could lead to NBN Co incurring increased costs, which would be passed on to access seekers and ultimately to end-users.</p>	Option D is implemented.
(D) Include, in the Companies Bill, a definition of an NBN	Regulation (broadening the current	Partial. NBN Co can invest and divest but any company that	Largely.  Option D would apply to	Allows NBN Co to purchase retail providers to reduce	Industry is likely to welcome this option as it ties NBN Co

<b>Option</b>	<b>Action required</b>	<b>Retains existing flexibility for acquisitions in and divestment by NBN Co?</b>	<b>Effective application of NBN Co's obligations?</b>	<b>Represents value for money to the tax payer?</b>	<b>Likely industry perception</b>
<p>corporation as a company in which NBN Co holds a controlling stake</p>	<p>bill).</p>	<p>will be deemed as "controlled" by NBN Co is subject to the NBN obligations. Any companies in which NBN Co has a non-controlling interest would not be covered by NBN Co obligations.</p>	<p>ownership scenarios in which NBN Co invests in retailers, or sells shares in its subsidiaries to other carriers or service providers. It would also cover joint ventures between NBN Co and another carrier or service provider. Under the draft NBN Companies Bill, NBN Co's obligations only flow through to wholly-owned subsidiaries of NBN Co. Industry commented that NBN Co could sell shares in a subsidiary to another carrier, thereby allowing that subsidiary to avoid the NBN Co obligations.</p> <p>Option D ensures that corporations that are controlled by NBN Co are subject to NBN Co's obligations.</p> <p>These are entities in which</p>	<p>the overall cost of the NBN build.</p> <p>Does not add to existing regulatory authorisation mechanisms and is efficient, and therefore would not add to costs for NBN Co, access seekers or end-users.</p> <p>Provides a strong mechanism to deliver a fundamental goal of the NBN policy and the Commonwealth's significant investment (non-conflicted, open and equivalent access).</p>	<p>more stringently to its obligations by ensuring entities that NBN Co controls are subject to NBN co's wider objectives.</p> <p>Transactions that resulted in NBN Co not having a controlling interest could also be monitored by Shareholder Ministers if necessary.</p>

<b>Option</b>	<b>Action required</b>	<b>Retains existing flexibility for acquisitions in and divestment by NBN Co?</b>	<b>Effective application of NBN Co's obligations?</b>	<b>Represents value for money to the tax payer?</b>	<b>Likely industry perception</b>
			<p>NBN Co is in a position to ensure its wider obligations can be applied. NBN Co would not be in a position to ensure its wider obligations are met by an entity it did not control.</p> <p>Option D provides a strong incentive to NBN Co to divest itself of any retail assets as soon as possible. Once NBN Co controlled a retail provider, if that provider continued to supply retail services NBN Co would be in breach of its obligations and subject to penalties for breach of its carrier licence conditions. A carrier is required to comply with conditions of a licence (section 68 of the Tel Act) and breach of this requirement constitutes a breach of a civil penalty provision. The pecuniary</p>		

Option	Action required	Retains existing flexibility for acquisitions in and divestment by NBN Co?	Effective application of NBN Co's obligations?	Represents value for money to the tax payer?	Likely industry perception
			<p>penalties for breach of civil penalty provisions are further set out in Part 31 of the TA and set a maximum pecuniary penalty on a body corporate of \$10 million for each contravention.</p> <p>Consequently, to avoid this, NBN Co is likely to structure any acquisitions so that retail activities are ring-fenced and divested before NBN Co purchases a controlling stake</p>		
<p>(E) Prohibit NBN Co from investing in a retail provider except for the purpose of acquiring a retail provider for the purpose of acquiring its assets, or selling any shares. Include a new process for clearance of potential acquisitions and divestments by the ACCC.</p>	<p>Regulation (legislated prohibition)</p>	<p>Limited. NBN Co would generally not be able to invest in retailers and other carriers or service providers or divest without direct clearance from the ACCC. This would limit NBN Co's flexibility to make purchases in a commercial market.</p>	<p>Yes. Option E would generally prevent NBN Co having an interest in another entity, thereby limiting situations in which it could breach its obligations or be subject to a conflict of interest. Any transactions would be subject to strict ACCC oversight.</p>	<p>NBN Co would have limited ability to purchase stakes in other companies, thus limiting this option as a means of rolling out its network in a cost effective manner.</p> <p>Option E adds a layer of complexity and uncertainty as the</p>	<p>This option was suggested by some stakeholders. However, it would also limit NBN Co's ability to engage with industry players interested in transactions.</p>

<b>Option</b>	<b>Action required</b>	<b>Retains existing flexibility for acquisitions in and divestment by NBN Co?</b>	<b>Effective application of NBN Co's obligations?</b>	<b>Represents value for money to the tax payer?</b>	<b>Likely industry perception</b>
				<p>ACCC could be required to consider an acquisition anyway under section 50. If a dual regulatory process was put in place, this would add to regulatory costs for the ACCC and create delays for NBN Co in being able to roll-out the NBN. To the extent that these delays create costs, these would be passed on to industry and end-users.</p>	

## **5. Consultation**

The Government announced on 7 April 2009 that it would introduce legislation covering NBN Co's governance and access arrangements. On 3 July, the Minister invited submissions on the National Broadband Network's legislative framework and by 30 July, more than 30 submissions had been received.

These submissions were used to inform the Government's approach to the NBN legislation and on 24 February 2010 the Minister issued exposure drafts of the National Broadband Network Companies Bill 2010 and the Telecommunications Legislation Amendment (National Broadband Network Measures – Access Arrangements) Bill 2011.

Submissions in response to the exposure drafts closed on 15 March 2010 and more than 20 submissions were received.

On 6 May 2010, the Government called for submissions on the NBN Implementation Study. More than 50 submissions were received.

Industry response is largely in favour of prohibiting NBN Co from any investment in retail service providers, believing it to be inconsistent with the Government's stated objectives for NBN Co.

Some stakeholders conceded that NBN Co's investment in retail providers may be necessary, but wanted strict ring-fencing provisions to apply during a set divestment period.

The Competitive Carriers Coalition (CCC) was the only stakeholder to acknowledge the ACCC's existing powers under section 50 of the TPA. However, it did not consider these powers to be sufficient. The CCC called for strict ring-fencing measures to be introduced, along with an obligation for the ACCC to consider all of NBN Co's proposed acquisitions of retail providers - including whether an acquisition will adversely impact on NBN Co's obligations.

## **6. Conclusion**

Option A would deliver NBN Co the flexibility to acquire shares in the capital of a corporation or divest itself of shares in a subsidiary, but the TPA only requires a decision maker to consider whether the transaction results in a substantial lessening of competition, and not whether a transaction would allow NBN Co to avoid its non-discrimination and transparency obligations.

Option B seeks to fill the gap in Option A by requiring the ACCC to consider all transactions involving NBN Co and to include matters impacting on NBN Co's equivalence obligations as part of its considerations.

Option C delivers the outcomes of Option A, but adds a formal process to ensure that shareholders are made aware of, and must approve, all share transactions. While NBN Co is owned by the Commonwealth, this is considered to be an effective mechanism

for ensuring NBN Co meets its obligations. The effectiveness of this mechanism depends, however, on the judgment of shareholders.

Option D restricts NBN Co's flexibility to acquire shares in the capital of a corporation or divest itself of shares in a subsidiary to a degree, by ensuring that any subsidiary that it does not wholly own, but controls, will be subject to NBN Co's obligations.

Option E tightly confines NBN Co to its obligations but may limit its opportunities and flexibility in acquiring necessary assets in commercial markets. It would also involve additional clearance processes. This would lead to duplicative processes if the ACCC was required to consider both a section 50 assessment and a separate assessment in relation to NBN Co's obligations.

On balance Option D is the preferred approach, noting that shareholder ministers would also be able to monitor smaller transactions that did not result in NBN Co having control of an entity.

## **7. Implementation and review of the preferred option**

Options D will be implemented through the Companies Bill.

Operation of the proposed arrangements will be subject to ongoing review. The Government is also considering Recommendation 78 of the Implementation Study that an independent review of the telecommunications market and the regulatory framework for the NBN be undertaken following completion of the network and prior to its proposed privatisation. Such a review, which could be undertaken by the Productivity Commission, would also be expected to look at the matters covered in this RIS.

### **Regulation Impact Statement 2.**

#### **Applying and extending the obligations under Part XIC**

##### **1. Issues which give rise to the need for action**

The key issue to be addressed here is why specific Standard Access Obligations (SAOs) are being created for NBN Co, and why it is not sufficient to rely on competitive markets or the existing telecommunications access regime. This Regulatory Impact Statement also addresses the equivalence obligation to be placed on NBN Co.

##### ***Background***

The Government's 7 April National Broadband Network (NBN) announcement set out the key parameters to apply to NBN Co. The Government announced that NBN Co would be subject to ACCC oversight, would operate on a wholesale-only basis and would offer open and equivalent access to all telecommunications providers.

In Australia, access to bottleneck infrastructure or services is regulated under a number of mechanisms, including:



- the national access regime, established under Part IIIA of the *Trade Practices Act 1974* (the TPA), which does not apply to telecommunications access;
- the telecommunications access regime under Part XIC of the TPA; and
- the facilities access regime under the *Telecommunications Act 1997*, which established rights of access to key telecommunications facilities.

Access regimes reflect Government policy that owners of bottleneck infrastructure can prohibit efficient competition by creating uncompetitive market structures.

A number of submissions on the legislative framework for the NBN claimed that NBN Co will own a network which will have significant bottleneck characteristics, giving NBN Co incentives to restrict supply and extract monopoly rents and also favour its investors and larger customers. They also noted that telecommunications providers who wish to provide high speed fixed-line broadband on a national scale will inevitably require access to the NBN. The majority of submissions therefore argued that access to the NBN should be regulated.

## **2. Objective**

The Government's broad objective in telecommunications policy is to promote the long-term interests of end-users of carriage services or of services provided by means of carriage services.

The Government's objectives for access to the NBN is that carriers and service providers are granted open and equivalent access, with the terms and conditions of services subject to ACCC oversight.

## **3. Options (regulatory and/or non-regulatory) that may constitute viable means for achieving the desired objective(s)**

Four alternative options (regulatory and non-regulatory) have been identified to address the Government's objectives. These are:

1. No regulation – allow the marketplace to determine the prices and non-price terms and conditions of NBN Co's services.
2. Regulate access to NBN Co's services through the existing telecommunications access regime under Part XIC of the TPA.
3. Regulate access to NBN Co's services through specific amendments to the existing access regime.
4. Regulate access to NBN Co's services through a specific NBN access regime in the TPA.

*Option A - No regulation – allow the marketplace to determine the prices and non-price terms and conditions of services*

Option A would involve some legislation, as the Commonwealth would need to amend Part XIC of the TPA to make it clear that it does not apply to NBN Co.

Under this option, the prices and non-price terms and conditions of services would be set through negotiations between NBN Co and its customers. As NBN Co is wholesale-only, it would not be expected to have incentives to unfairly discriminate against any of its customers, and the prices those customers pay, and the terms and conditions they receive, would be market-based.

One submission on the legislative framework for the NBN Co, from RBB Economics, argued that it was not clear that the NBN would be a natural monopoly, as it would be subject to competition from alternative fixed line networks. RBB Economics argued that the company should be subject to general competition policy rather than existing or new sector-specific rules.

*Option B – Regulate access to NBN Co’s services through the existing telecommunications access regime under Part XIC of the TPA*

This option represents the base case as it would reflect what action could occur if no new legislation is established.

Under this option, NBN Co would offer services to customers in accordance with the existing access regime, as it is intended to be amended. If the Australian Competition and Consumer Commission (ACCC) considered that it was in the long-term interests of end-users to declare particular NBN Co services, it could do so and, in accordance with the reforms to Part XIC introduced in the Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill, make an access determination setting the prices and terms and conditions of services up front. NBN Co could also submit a special access undertaking, and negotiate access agreements for declared services with access seekers.

*Option C – Regulate access to NBN Co’s services through specific amendments to the existing access regime*

Under this option, specific provisions would be established in Part XIC of the TPA covering NBN Co. The specific measures that would be included would be designed to ensure that NBN Co offers non-discriminatory access to its services.

If NBN Co is to be covered by Part XIC, specific SAOs would be imposed on NBN Co to underpin this non-discrimination objective including a specific obligation to offer services on an equivalent basis.

A number of submissions on the NBN legislative framework considered that NBN Co could be subject to an access regime similar to Part XIC, or based on Part XIC, but with specific obligations in relation to equivalence and transparency. For example, Optus suggested this overall approach, with regulation only applying to ‘key’ services, but with equivalence and transparency obligations applying to all services.

Equivalence and transparency

As the Discussion paper *National Broadband Network: Regulatory Reform for 21<sup>st</sup> Century Broadband* stated, there are two general approaches to equivalence in

telecommunications regulation. In Australia, the current operational separation arrangements that apply to Telstra are based on ‘equivalence of outcomes’. Under this model access seekers do not receive the same network inputs as Telstra’s retail units. In theory, equivalence of outcomes should allow efficient competitors to produce equally competitive outcomes.

The alternative approach has been introduced, in different forms, in the United Kingdom, New Zealand and Singapore and also underpins approaches to access regulation in the Netherlands. This requires an access provider to provide wholesale customers with the same price and non-price inputs as it provides its own retail units.

Submissions on the NBN legislative framework strongly supported an ‘equivalence of inputs’ obligation for NBN Co. Under this obligation, NBN Co would be required to offer the same services, on the same terms and conditions, processes and timeframes, and the same information about services, to all access seekers.

The broad consensus is that the alternative equivalence of outcomes has ‘not promoted genuine equivalence of access or effective competition in the telecommunications sector’ (Explanatory Memorandum to the Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009, p 15). In its submission on the *Regulatory Reform for 21<sup>st</sup> Century Broadband*, the Australian Competition and Consumer Commission stated that in Australia the equivalence of outcomes arrangements applying to Telstra do not address Telstra’s incentive and ability to discriminate against its competitors. In relation to NBN Co, an equivalence of outcomes approach would allow NBN Co to provide different access seekers with different inputs. Not only would this not provide a level playing field for all access seekers, but NBN Co could develop incentives to favour specific access seekers.

An equivalence of inputs regime should establish a ‘safety net’, whereby all customers are able to access the same services on standard terms. However, NBN Co should be able to negotiate with access seekers to vary its standard terms and conditions. Some forms of price and service discrimination can be economically efficient, promote innovation and improve overall consumer welfare. In telecommunications, price discrimination is commonly applied through volume or term discounts. Submissions on the NBN legislative framework generally supported such discounts being permitted.

To preserve equivalence, all access seekers in like circumstances should have equal rights to benefit from any variations to standard terms and conditions.

One of the NBN-specific SAOs should be a requirement to publish all service offers, including a generic description of any discounts or other changes to standard terms made through an access agreement with an individual customer. Without this transparency access seekers will not know what variations have been made to the standard terms, and will not be able to judge whether they could also benefit from any variations.

NBN Co would also be required to lodge all agreements with variations to standard terms and conditions with the ACCC, who would have discretion to take action if an agreement is considered to have anti-competitive effects.

*Option D - Regulate access to NBN Co's services through a specific NBN access regime in the TPA*

This option is similar to option C, except that instead of making minor changes to Part XIC the Government would insert a new access regime specifically for NBN Co in the TPA (e.g., a new Part XIE of the TPA). This new access regime would include the NBN-specific SAOs but would also have to set out how services could be declared, undertakings submitted and the overall enforcement regime. The basic obligations and approach to equivalence would be the same as set out in option C, but more complex legislation would be required as much of Part XIC would need to be mirrored in Part XIE.

In its submission on the NBN legislative framework, the Australian Telecommunications Users' Group suggested that a specific access regime could be created for NBN Co.

#### **4. Impact assessment**

This section discusses the advantages and disadvantages of the four options identified above in terms of the criteria discussed in section 2 and their impact on stakeholders, namely:

- NBN Co as the access provider;
- customers of NBN Co; and
- consumers as ultimate users and beneficiaries of telecommunications services.

As opening observations, a number of factors should be taken to be given.

##### *Costs*

The Government considers that there is likely to be a high degree of consensus amongst access seekers and NBN Co on proposed systems and processes, and therefore there will be little compulsory cost imposition, if any, on customers of NBN Co. The Government notes that NBN Co has been working with the industry body, Communications Alliance, to develop an interconnection model.

Under Option D, there may be limited, one-off, compliance costs for customers as they may need to seek legal opinion on the differences between the NBN access regime and the generic telecommunications access regime.

Option A would impose the lowest compliance costs on access seekers as they would receive services from NBN Co through commercial negotiation.

Under all options NBN Co would itself face compliance costs in developing its services, systems and processes. These costs would be passed on to customers under all options.

Given the limited nature of these costs, they are not expected to contribute significantly to final prices to end-users.

The Department expects its administration costs would be no more than \$2.7 million over four years, including staffing. The ACCC expects its administration costs would be \$24 million over five years, including staffing.

When compared against the proposed investment of up to \$43 billion in the NBN and the expected economic benefits to the country from the level playing field the NBN will provide for carriers and service providers, the benefits clearly exceed the limited costs for the NBN company and access seekers.

#### *Competitive neutrality*

In relation to competitive neutrality it is recognised that Option D proposes a specific access regime for NBN Co. However, NBN Co will still be subject to other generic telecommunications and corporate regulation, and the specific access regime would take account of NBN Co's unique open access and equivalence obligations. Consequently, Option D does not breach the Competition Principles Agreement.

#### *Option A - No regulation – allow the marketplace to determine the prices and non-price terms and conditions of services*

##### *Advantages:*

- Prices, and non-price terms and conditions, of services will reflect negotiations between NBN Co and its customers. However, while a wholesale-only network provider would not be expected to have incentives to unfairly discriminate against any specific customers, in the absence of regulation providers might not have regulatory certainty for access seekers that they will receive open and equivalent access.
- NBN Co is free to develop customised services for particular customers, ensuring that innovation can take place in response to market needs.
- Compliance costs will be lowest.
- Administrative costs would be lower than under options B-D.

##### *Disadvantages:*

- Given limited competition, NBN Co may have incentives to limit supply and extract monopoly rents.
- While a wholesale-only network provider would not be expected to have incentives to unfairly discriminate against any specific customers, in the absence of regulation providers might not have regulatory certainty for access seekers that they will receive open and equivalent access.
- Option A does not promote competitive neutrality as NBN Co would be the only provider not subject to telecommunications access regulation.

#### *Option B – Regulate access to NBN Co's services through the existing telecommunications access regime under Part XIC of the TPA*

##### *Advantages:*

- The Part XIC access regime is well known and understood in the sector.
- Regulation would be focused on key bottleneck services, allowing NBN Co to develop innovative services in response to customers' needs.

- The recent reforms to Part XIC will promote greater certainty and fairness.

*Disadvantages:*

- This option does not cater for NBN Co's unique wholesale-only structure.
- This option would not ensure that NBN Co offers services to all customers on an equivalent basis.
- Part XIC does not require access providers to publish all service offers, meaning it does not provide transparency for access seekers.
- Part XIC does not impose an open access obligation on access providers.

*Option C – Regulate access to NBN Co's services through specific amendments to the existing access regime*

*Advantages:*

- The Part XIC access regime is well known and understood in the sector.
- The NBN-specific SAOs will establish equivalence, transparency and open access obligations, promoting a level playing field for customers, while preserving flexibility for customers to negotiate away from standard terms.
- The equivalence requirement will help smaller access seekers customise services for niche markets and will also help ensure that services delivered in regional Australia are based on the same inputs as services delivered in metropolitan Australia.
- This option provides regulatory certainty for NBN Co and its customers on the services that will be provided, the terms and conditions of services, and approaches to varying standard terms.
- Regulation would be focused on key bottleneck services, allowing NBN Co to develop innovative services in response to customers' needs.

*Disadvantages:*

- This option could be criticised as not going far enough – it treats NBN Co the same as other access providers, which could make it less clear that NBN Co has an open access obligation. This can be mitigated through the drafting of NBN Co's SAOs.

*Option D - Regulate access to NBN Co's services through a specific NBN access regime in the TPA*

*Advantages:*

- All of NBN Co's obligations and access regime will be clearly separated from the generic access regime, making NBN Co's open access obligation transparent.
- The NBN-specific SAOs will establish equivalence, transparency and open access obligations, ensuring that NBN Co must offer a level playing field for customers, while preserving flexibility for customers to negotiate away from standard terms.
- This option provides regulatory certainty for NBN Co and its customers on the services that will be provided, the terms and conditions of services, and approaches to varying standard terms.

*Disadvantages:*

- A separate regime for NBN Co could generate lobbying for change to one or both regimes.
- The differences between the NBN regime and the generic access regimes could create uncertainty. However, this can be mitigated as option D will be consistent with much of the Part XIC access regime.
- This option may be criticised as not being competitively neutral, although in practice this would not be the case as the specific NBN access regime reflects the unique position of NBN Co in the sector.

## **5. Consultation**

On 3 July the Government called for submissions on the legislative framework for the NBN company, including its access regime. In total, 37 submissions were received and the Government also held meetings with 17 organisations.

Overall, there was clear support in the submissions for an access regime which:

- ensured that the prices and non-price terms and conditions of offers could be determined by the regulator up-front, without lengthy delays or gaming;
- left flexibility for NBN Co to negotiate services under market conditions;
- required service offers to be available to all customers on an equivalent basis; and
- allowed the NBN company and customers to negotiate to vary terms and conditions, subject to notification to the ACCC.

Submissions offered varying perspectives on whether or not to use the existing regulatory framework. Telstra, BT, the Competitive Carriers' Coalition and Macquarie Telecom proposed that the current Part XIC access regime could cover the NBN company. Optus also suggested that the NBN company should offer 'key' services which were regulated, but could offer other services, subject to its being obliged under legislation to meet transparency requirements and offer all services on an equivalence of inputs basis. No party specifically raised the facilities access regime.

One submission, from RBB Economics, called for the NBN company not to be subject to specific access regulation, but to competitive market forces.

A few submissions called for the Government to release an Exposure Draft of the legislation for public comment.

The Government also considered advice from the Implementation Study on the NBN access regime. The regime proposed here is largely consistent with that advice, which itself was informed by submissions on the NBN legislative framework.

Within the Commonwealth, the Department has consulted with the Department of the Prime Minister and Cabinet, the Treasury, the Attorney-General's Department, the Department of Finance and Deregulation and the ACCC on the proposed access regime.

The main issue raised in these consultations was whether it would be preferable to use the existing regulatory arrangements or establish a specific NBN access regime.

## **6. Conclusion**

As noted above, any costs to NBN Co and access seekers are expected to be insignificant, one-off costs.

Option C, which provides for specific NBN SAOs to be incorporated into the existing access regime under Part XIC of the TPA, is the best option overall for meeting the Government's objectives. The option:

- avoids the confusion arising from different access regimes for carriage services and access to facilities;
- delivers equivalence and transparency across all NBN services, while preserving the ability for customers to negotiate away from standard terms; and
- best reflects the unique structure of the NBN company as a wholesale-only provider with a significant national access network.

Option A is not considered feasible because while a wholesale-only network provider would not be expected to have incentives to unfairly discriminate against any specific customers, in the absence of regulation providers might not have regulatory certainty for access seekers that they will receive open and equivalent access. This could preclude the Government from realising its key objective for the NBN access regime, which is to deliver a level playing field for carriers and service providers. Option A would also not meet competitive neutrality principles.

Option B would not deliver the equivalence and transparency outcomes the Government is seeking, and requires only marginally lower administrative costs to implement than option C. It is therefore not preferred.

Option D would deliver largely similar outcomes to option C, but would involve significant administrative costs arising from the duplication of much of Part XIC in a NBN-specific access regime. This option would also impose higher compliance costs on customers as they would need to prepare more detailed legal advice on the new regime. These costs could be mitigated by the fact that the new regime would be largely similar to Part XIC, but given the greater costs and the largely similar outcomes to option C, option D is not preferred.

## **7. Implementation and review of the preferred option**

Option C will be implemented by amending Part XIC of the TPA to introduce the NBN-specific SAOs. The new arrangements will operate in conjunction with an obligation on NBN Co to remain a wholesale-only provider, to be established in a separate National Broadband Network Companies Bill.

Operation of the proposed access regime will be subject to ongoing review.



### **Regulation impact statement 3.**

#### **Enhancing the non-discrimination provisions in the draft Telecommunications Legislation Amendment (National Broadband Network Measures – Access Arrangements) Bill.**

##### **1. Issues which give rise to the need for action**

###### ***Background***

On 24 February 2010 the Government released an exposure draft of the Telecommunications Legislation Amendment (National Broadband Network Measures – Access Arrangements) Bill. The bill covers access to NBN Co<sup>2</sup> services and transparency and non-discrimination measures and makes amendments to the *Trade Practices Act 1974* (TPA) and the *Telecommunications Act 1997* to this effect.

The non-discrimination measures in the draft bill recognise that, even though NBN Co is a wholesale-only provider, it may have incentives to favour certain access seekers. For example, it may focus on its largest and most remunerative customers, at the expense of smaller players.

In the bill, the proposed section 152AXC of the CCA requires NBN Co not to discriminate between access seekers. This means that the ‘base case’ scenario is that every access seeker would be offered the same terms and conditions. However, the bill recognises that price or service differentiation can increase efficiency and innovation, and therefore provides scope for access seekers to negotiate outside these standard terms. In this regard, the bill simply puts into statutory language something that is already common practice in the telecommunications industry.

The bill recognises that differentiation could, if not tightly controlled, deliver anti-competitive outcomes. The circumstances for allowable discrimination are confined to:

- discrimination in relation to creditworthiness;
- discrimination on grounds or in circumstances specified in a legislative instrument made by the Australian Competition and Consumer Commission (ACCC); or
- discrimination that aids efficiency, and that all access seekers with like circumstances have an equal opportunity to benefit from.

To ensure that access seekers are able to judge whether they have like circumstances, proposed sections 152BEBA, 152BEBB and 152BEBE require NBN Co to publish a statement about the differences between an access agreement it has made with an access seeker and its standard terms and conditions. NBN Co must publish the statement within seven days after the day the access agreement was entered into. This statement must:

- identify the parties to the access agreement;

---

<sup>2</sup> References to NBN Co in this Regulation Impact Statement should be taken to also apply to any wholly owned subsidiary, including NBN Tasmania Limited, and, consistent with other proposed amendments, any entity in which NBN Co has a controlling stake or which NBN Co otherwise controls.

- describe the differences between the terms and conditions set out in the access agreement and the terms and conditions set out in the standard form of access agreement; and
- if any or all those differences are said to aid efficiency, identify the circumstances that aid efficiency and describe what access seekers must do in order to have the like circumstances.

Similarly, if any differences are authorised by a legislative instrument made by the ACCC, NBN Co must identify the differences.

### *Comments on the draft bill*

More than 20 submissions were received on the draft bill. There was a general view amongst carriers that proposed section 152AXC would permit too much discrimination. Austar and Macquarie Telecom were concerned that the draft legislation did not provide sufficient guidance about the grounds on which NBN Co could discriminate, noting that discrimination could cover both price and non-price terms and conditions. The Competitive Carriers' Coalition and the Internet Industries Association suggested that discrimination should be restricted to discrimination based on the costs of providing access. AAPT, Optus and Primus Telecom considered that the draft provision could allow discounts to be made available to a single provider, or at best two providers, which could 'reinforce the incumbency of the current players'. Austar considered that volume discounting could further entrench service disparities between regional and metropolitan areas.

Telstra observed that the draft legislation could potentially prevent economically efficient discrimination. It noted that price discounts based on efficiency should be able to be made available to only one party where appropriate, and that these discounts should not be published.

The Implementation Study on the National Broadband Network proposes that discrimination should be allowed (for example, in relation to creditworthiness or if it aids efficiency) and also proposed that NBN Co should not offer differentiated terms in relation to scale (i.e., volume discounts) unless at least three access seekers could feasibly gain the terms (recommendation 70).

Macquarie Telecom and TransACT also suggested that discrimination in relation to creditworthiness could be misused to deny access or set unreasonable terms, and that clearer grounds for such discrimination should be set out.

The Senate Select Committee on the National Broadband Network recommended that the bill should be amended to provide guidance on what is meant by 'efficiency' for the purpose of the equivalence provisions. It recommended that the Bill should set out examples of efficiency criteria which might be considered by NBN Co for the purpose of determining whether an exemption is provided. The Committee also stated that amendments should also ensure that volume considerations cannot be counted as matters which 'aid-efficiency' (recommendation 21).

The Committee also recommended that the bill should be amended so that ACCC pre-approval is required of any agreement to which NBN Co is a party and under which

an access seeker is granted access on discriminatory terms on the basis of the 'efficiency' exemption (recommendation 22).

## **2. Objective**

The Government's objective is to ensure that obligations on NBN Co can effectively prohibit discrimination, while also promoting economically efficient outcomes that do not lessen competition. It also considers that industry should have certainty as to what sort of conduct is prohibited, and what sort of conduct is permitted.

It is understandable that access seekers are seeking greater clarity over what is allowable discrimination. Access seekers will be concerned that their competitors will be provided with an advantage that they themselves cannot receive. In practice, the main area of concern is in relation to volume discounting, as an access seeker which receives a discount could gain a clear competitive advantage over other firms in the sector.

This impact statement therefore considers options for providing greater certainty. In this regard, it is important to note that any agreements NBN Co may enter into are subject to section 45 of the TPA, which prohibits making, or giving effect to a provision of, a contract, arrangement or understanding that has the purpose, or has or is likely to have the effect, of substantially lessening competition. Section 45 would apply under all circumstances. However, there may be a role for the regulator to offer greater certainty in relation to volume discounts.

## **3. Options (regulatory and/or non-regulatory) that may constitute viable means for achieving the desired objective(s)**

There are three options for amending the draft legislation:

- A. Do nothing – leave the draft legislation as it is and rely on the regulator and the courts to deliver certainty over time.
- B. Clarify key terms in legislation (including allowable discrimination), prohibit volume discounts and require ACCC approval of any discrimination.
- C. Require the ACCC to publish principles on allowable discrimination, clarify discrimination in relation to creditworthiness in legislation and require the ACCC to approve volume discounts.

*Option A – Do nothing – leave the draft legislation as it is and rely on the regulator and the courts to deliver certainty over time*

Under this option the approach set out in the draft bill would stand. The Government indicated in the explanatory material with the draft bill that the ACCC would publish guidance for industry on its approach to enforcing the legislation. NBN Co could offer volume discounts, and if these substantially lessened competition sanctions would be imposed under the TPA.

*Option B - Clarify key terms in legislation (including allowable discrimination), prohibit volume discounts and require ACCC approval of any discrimination*

Under this option the bill would be amended to include definitions of key terms, such as ‘like circumstances’ and ‘aids efficiency’. The bill would also clarify discrimination in relation to creditworthiness, using the criteria already set out in section 152AR of the TPA. NBN Co would be required to follow a form approved by the ACCC in publishing a summary of any access agreement which contains different terms from the standard ones. NBN Co would not be permitted to offer volume discounts. The ACCC would also be required to approve any access agreement in which NBN Co offered different terms from its standard terms.

*Option C – Require the ACCC to publish principles on allowable discrimination, clarify discrimination in relation to creditworthiness in legislation and require the ACCC to approve volume discounts*

Under this option, the grounds on which NBN Co may discriminate in relation to creditworthiness would be clarified in legislation, using the criteria already set out in section 152AR of the TPA. The bill would also be amended to require the ACCC to publish principles on allowable discrimination to provide greater certainty to industry. NBN Co would be required to publish a summary of any access agreement which contains different terms from the standard ones in a form approved by the ACCC. Finally, the ACCC would not need to approve all access agreements with different terms, but if NBN Co wanted to offer a volume discount it would first need to have that discount approved by the ACCC.

#### **4. Impact assessment**

This section discusses the advantages and disadvantages of the three options identified above and their impact on stakeholders, namely:

- NBN Co as the access provider;
- customers of NBN Co; and
- consumers as ultimate users and beneficiaries of telecommunications services.

The criteria used in the assessment relate to the Government’s objective:

- ensuring that obligations on NBN Co can effectively prohibit discrimination;
- promoting economically efficient outcomes that do not lessen competition; and
- increasing industry certainty.

Under all three scenarios, direct costs to industry are low. Industry is under no obligation to seek differentiated terms, and NBN Co is under no obligation to offer them. There would be some cost of compliance for industry in adjusting to the regime. These are expected to be greater under Option B, as the ACCC would need to approve all access agreements. Option B would also lead to longer delays in commercial activity, which could increase costs for industry. Option C could lead to some delays, but these are likely to be minor.

*Option A – Do nothing – leave the draft legislation as it is and rely on the regulator and the courts to deliver certainty over time*

*Advantages*

- Provides a flexible approach which allows NBN Co to offer different terms to its customers when this aids efficiency, but restricts its ability to differentiate on other grounds (unless specified in an instrument made by the ACCC).
- End-users should benefit from the increased innovation that service and price differentiation can support.
- Relies on existing trade practices law to ensure that NBN Co cannot enter into a contract that substantially lessens competition.

*Disadvantages*

- Does not respond to industry's concerns about the draft legislation and could result in industry lacking sufficient certainty over allowable discrimination.
- Access seekers lack certainty over what is meant by terms such as 'aids efficiency' and 'like circumstances', and what boundaries may be placed on NBN Co's ability to discriminate in relation to creditworthiness. NBN Co itself would benefit from greater certainty over what is permissible, because this provides it with a clearer guide to its compliance responsibilities under the TPA.
- If NBN Co offers different terms that do substantially lessen competition, the only way to determine this would be for an access seeker to take NBN Co to court. Experience suggests there is a risk that a court case could be protracted, and would be expensive for access seekers. An access seeker that has benefited from an agreement with NBN Co in the meantime may have gained an irreversible competitive advantage.
- To the extent that industry lacks certainty over permissible differentiation, it may delay seeking agreements that promote efficiency and innovation, with corresponding delays to the benefits that those agreements would provide to end-users.

*Option B - Clarify key terms in legislation including allowable discrimination, prohibit volume discounts and require ACCC approval of any discrimination*

*Advantages:*

- The grounds and circumstances in which NBN Co may discriminate are tightly defined in legislation, providing certainty to industry.
- When NBN Co offers different terms consistent with the legislation, end-users should benefit from the increased innovation that service and price differentiation can support.
- Legislative certainty is available on discrimination in relation to creditworthiness.
- NBN Co cannot offer volume discounts, thereby removing a main possible source of discrimination by NBN Co.
- The ACCC provides an added check against potential discrimination that could lessen competition by approving all access agreements that contain different terms and conditions from the standard ones.

### *Disadvantages*

- Requiring the ACCC to approve all access agreements if they contain different terms would result in a lengthy and complex bureaucratic process which could needlessly shackle commercial activity, and increase costs to industry and the ACCC. These costs are impossible to quantify, but the ACCC would find that more of its resources are devoted to approving access agreements. The ACCC's costs eventually flow through to industry in the form of carrier licence fees. Currently, there is no requirement for ACCC approval of access agreements, even though access seekers frequently negotiate differentiated terms with access providers.
- Approval of access agreements could also result in delays to commercial activity and reduce commercial flexibility. If agreements are subject to a waiting period of several weeks or months, access seekers could lose short-term opportunities in particular markets.
- To the extent that these costs and delays impact on access seekers' ability to develop better services for end-users, those end-users could be denied the benefits of innovation.
- There is a danger in attempting to define the circumstances or grounds for allowable discrimination too tightly in legislation, and without considering the actual commercial practice of NBN Co. Legislation cannot cover all possible circumstances, and legislation that is too prescriptive could preclude commercial activity that is efficient and benefits competition. A more flexible approach, such as clear signalling from the ACCC, may provide sufficient certainty for industry.
- Banning volume discounts altogether may reduce the ability of NBN Co to engage in price discrimination that aids efficiency, which could limit access seekers' ability to innovate.

*Option C – Require the ACCC to publish principles on allowable discrimination, clarify discrimination in relation to creditworthiness in legislation and require the ACCC to approve volume discounts*

### *Advantages:*

- Greater legislative certainty is provided on discrimination in relation to creditworthiness.
- The ACCC can provide greater certainty for industry through published principles, but the law remains flexible enough to cover a variety of situations.
- The potential anti-competitive effects of volume discounting are controlled through prior approval by the ACCC.
- Delays and costs are reduced as the ACCC does not have to approve all access agreements with different terms.
- NBN Co must publish a summary of different terms in a form approved by the ACCC, meaning that industry will have greater transparency on NBN Co's conduct and greater certainty on the information that will be available.

### *Disadvantages*

- Requiring the ACCC to approve all volume discounts could tie up regulatory resources and delay some commercial agreements. The extent to which this is problematic would depend on whether NBN Co chose to offer volume discounts to begin with, and, if it did so, whether it proposed to offer them through a

standard schedule of rates or to negotiate individual discounts with different access seekers.

## **5. Consultation**

During July 2009 the Government sought submissions on the legislative framework for the National Broadband Network. More than 30 submissions were received. Submissions generally agreed that NBN Co should be able to offer differentiated terms to customers where it aids efficiency, but there was little agreement on exactly what sort of discrimination should be permitted. The Competitive Carriers' Coalition, for example, considered that differentiation should be tightly restricted to clear economies, where access seekers could make investments that reduced costs for NBN Co and then have those cost reductions returned through discounts. A number of submissions considered that volume discounts should not be allowed.

Following the release of the draft bill in February 2010, more than 20 submissions were received. The views in these submissions have already been summarised under section 1; as noted there, industry generally wanted clearer definition and certainty around arrangements for differentiation, and expressed concern that volume discounts could reinforce the power of the incumbent operators.

Within the Commonwealth, the Department has consulted with the Department of the Prime Minister and Cabinet, the Treasury, the Attorney-General's Department, the Department of Finance and Deregulation and the ACCC on the proposed measure.

## **6. Conclusion**

Under all three options, there is scope for differentiating standard terms, because such differentiation can promote efficiency and innovation. The key differences between the options are that Options B and C provide greater certainty and transparency, while Option B imposes a greater regulatory burden on industry.

Option A does not respond to industry's criticisms of the draft legislation and could produce uncertainty, although the Government indicated in the explanatory material with the draft bill that the ACCC would provide guidance on allowable discrimination. Although NBN Co could provide volume discounts, there are legislative sanctions already in place if access agreements substantially lessen competition.

Option B provides greater legislative certainty, but would restrict the law to a tight range of circumstances that may not be applicable to some forms of discrimination that may emerge over time. It also creates lengthy delays and costs for industry and reduces commercial flexibility.

Option C provides greater legislative certainty in relation to creditworthiness and ensures that the ACCC will publish principles on allowable discrimination, which should signal its approach to enforcement to the market. Volume discounting would be subject to greater regulatory scrutiny and transparency, but would not be prohibited, although this could lead to slightly higher costs and some minor delays for

industry. This option also provides greater commercial flexibility in relation to access agreements.

## **7. Implementation and review of the preferred option**

Option C is the preferred option. Although it does impose some compliance costs on industry, these are expected to be minor and the option provides greater transparency and certainty for industry.

Option C will be implemented through amendments to the Telecommunications Legislation Amendment (National Broadband Network Measures – Access Arrangements) Bill.

Operation of the proposed arrangements will be subject to ongoing review. The Government is also considering Recommendation 78 of the Implementation Study that an independent review of the telecommunications market and the regulatory framework for the NBN be undertaken following completion of the network and prior to its proposed privatisation. Such a review, which could be undertaken by the Productivity Commission, would also be expected to look at the matters covered in this RIS.

### **Regulation Impact Statement 4.**

#### **Measures to provide a level playing field for the provision of super fast broadband across Australia**

##### ***Telecommunications Act 1997 and Trade Practices Act 1974***

### **1. Issues which give rise to the need for action**

Australia has limited investment in next generation superfast broadband which is considered a fundamental enabling infrastructure for Australia's future economic prosperity. Broadband services, pricing and take-up in Australia also rate poorly relative to other OECD countries. A key driver of these poor outcomes has been the lack of incentive to invest and difficulties in competing given the structure of the telecommunications industry, particularly as Telstra was privatised without an effective competition framework being put in place. In 2008-09 the Government conducted a tender process to find a private sector entity prepared to roll-out high-speed broadband. None of the tenders received were found to offer value for money.

To address this situation, on 7 April 2009, the Government announced that it would establish a company, NBN Co, to build and operate a new national wholesale-only superfast broadband network.

The key issue to be addressed in this regulation impact statement (RIS) is whether regulatory requirements are needed to ensure that the Government's policy objectives for the provision of superfast broadband in Australia are effectively delivered by NBN Co and competing providers. The particular issue of concern is whether, in the absence of such regulation, market operations may mean that NBN Co is unable to deliver on objectives related to addressing the original situation, which gave rise to its creation.



In broad terms these policy objectives can be summarised as ensuring:

- consumers have access to high-quality superfast broadband services, preferably delivered by fibre-to-the-premises (FTTP) (the ‘speed and quality objective’);
- superfast broadband services<sup>3</sup> are available nationally (the ‘coverage objective’);
- there is national uniform wholesale pricing for such services (the ‘pricing objective’)<sup>4</sup>; and
- there is efficient and effective competition in the provision of superfast broadband infrastructure and services, that supports, by open and equivalent access to wholesale services on that infrastructure, a vibrant and competitive retail market (the ‘competition objective’).

By ensuring these four objectives are delivered nationally, the Government is also aiming to provide, as far as possible, equitable access to superfast broadband services to all Australians, whether in metropolitan, regional, rural or remote Australia (the ‘equity’ objective’).

As the key vehicle for delivering these objectives is NBN Co, the Commonwealth also has an objective of ensuring that NBN Co can operate on a commercially sustainable basis (the ‘sustainability’ objective).

While other options for delivering the Government’s objectives, particularly in relation to pricing, may be considered further, the measures proposed in this RIS seek to ensure that these objectives are supported by the provision of a level playing field, particularly one which prevents opportunistic cherry-picking.

Clearly, these objectives are inter-related. For example, if the pricing objective is to be delivered through NBN Co being required to implement an internal cross-subsidy, other fibre providers could select to roll-out fibre in low-cost, high-revenue markets and offer potentially cheaper wholesale prices – effectively cherry-picking NBN Co’s revenue streams. While such an outcome would be consistent with the Government’s competition objective, it would impact on NBN Co’s ability to deliver the coverage, equity and sustainability objectives.

Further, if equivalent regulatory obligations and technical specifications do not apply across all competing superfast broadband networks, these networks may fail to provide consumers with services that meet the Government’s speed and quality objective. In order to support a competitive retail market, it is important that there are appropriate services and interfaces across these competing networks.

The issue is essentially whether NBN Co and other providers of superfast broadband networks in Australia should operate on the same level regulatory playing field and, if so, what the rules of that playing field should be. The Government’s intention for

---

<sup>3</sup> Superfast broadband networks are defined as fixed networks offering download speeds of 25 Mbps or above. They include fibre-to-the-premises (FTTP), fibre-to-the-node and hybrid-fibre-coaxial networks (HFC).

<sup>4</sup> DBCDE understand that the Prime Minister has determined that the agreement entered into with the independents should be treated as an election commitment.

NBN Co is that it will provide national coverage of superfast broadband at uniform wholesale prices; however, the market will still be open to entry by other investors.

With the potential roll-out of multiple networks, there is a question of how to achieve outcomes for end-users which are consistent with the objectives of the NBN. To achieve this, the Government wants to ensure infrastructure that is installed provides high levels of services in terms of speed and quality and can support strong retail level competition.

### ***Background***

On 7 April 2009 the Government announced it would establish a new company, NBN Co, to build and operate a new superfast National Broadband Network (NBN). The new network will connect 93 per cent of Australian premises with FTTP and connect other premises in Australia with next generation wireless and satellite. The network is to operate on a wholesale-only, open and equivalent access basis, to promote fair and effective retail level competition. The Government has also decided that wholesale prices on the NBN should be uniform across Australia.

On 7 September 2010 the Prime Minister announced that broadband prices on the NBN will be the same for households and businesses regardless of where they are located – in the city, in regional Australia or in more remote parts of the country. This will be achieved by a new cross subsidy to ensure a uniform national wholesale price so that regional areas can pay the same price as people in the city.<sup>5</sup> This decision is further reflected in the agreement between the Australian Labor Party and Messrs Windsor and Oakeshott of the same date.<sup>6</sup>

The NBN will provide the vehicle for fundamental structural reform in the Australian telecommunications industry, requiring an appropriate policy footing so it can effectively play its role as part of the critical infrastructure for Australia's future.

To assist with the implementation of its announced policy, the Government commissioned McKinsey and KPMG to conduct a comprehensive study on the implementation of the NBN. The Government released the Implementation Study on the NBN on 6 May 2010.

Amongst other things, in section 10.2.3 the Implementation Study (pp.463-467) discusses the difficulties that could arise for the delivery of the Government's policy objectives as a result of NBN Co having to operate subject to strict regulatory requirements while competing against other providers of superfast broadband. In particular, the Study noted the scope for competing providers to:

- target high-income and low-cost, high-density areas, thereby undercutting NBN Co's ability to average its pricing (p.463);
- operate as vertically-integrated providers and advantage themselves over independent retail service providers (RSPs) on the NBN (p.464); and
- ignore technical standards applying to the NBN – this would mean consumers may not enjoy the benefits of the speed, quality and competition at which those

---

<sup>5</sup> Joint Press Conference with the Deputy Prime Minister, Wayne Swan, 7 September 2010, p.8.

<sup>6</sup> "The Australian Labor Party & the Independents (Mr Tony Windsor and Mr Rob Oakeshott) (the Parties) – Agreement, 7 September 2010, Annex B, p.6

standards are directed (p.464). For example, technical specifications can define the download and upload speeds, the grades of service offered, reliability, the number of retail service providers that can be supported by an optical network terminal (ONT), the functionality of the wholesale services available and the future scope for physical unbundling.

In this context, and bearing in mind the Government's overall policy objectives, the Implementation Study recommended that the Government look at measures to provide a level playing field for all superfast broadband networks.

The Implementation Study identified five broad options for levelling the playing field:

- requiring new FTTP networks to meet the technical standards applying to the NBN;
- requiring new superfast broadband networks to provide open and equivalent access to wholesale services, particularly to ensure any integrated retail operations could not be unfairly advantaged;
- regulating the pricing of services on superfast broadband networks so that they match the rate of return on the NBN;
- imposing a levy on new superfast broadband networks which would be directed at subsidising the provision of telecommunications in high-cost areas; and
- prohibiting the construction of competing superfast broadband networks.

The Implementation Study rejected the third and fifth options as creating very high or absolute barriers to investment. Such investment could be desirable, for example, to support innovation or maintain competitive pressure on NBN Co. The Study recommended, however, that consideration be given to the first, second and fourth options, noting that the fourth option, a levy, could discourage investment and should only be considered if cherry-picking were to become a clear problem for the achievement of the Government's objectives. The other options do not provide these high barriers. They provide for entry into the market and allow competitive pressure to be directed at NBN Co, but on terms comparable to those applying to NBN Co itself. This RIS considers these options, together with some variations, against the content of the objectives discussed above.

## **2. Objective**

The Government's objective is to ensure appropriate policy, regulatory or other measures are in place to ensure the objectives of its NBN policy (as indicated in section 1 - speed and quality, coverage, pricing, competition, equity and sustainability) are delivered by NBN Co and other superfast broadband networks. This requires an assessment of whether action is needed to provide a level playing field and if so, what the rules of this playing field should be.

## **3. Options (regulatory and/or non-regulatory) that may constitute viable means for achieving the desired objective(s)**

Noting the options that have already been ruled out above for the reasons given, five options (regulatory and non-regulatory) have been identified that might address the Government's objectives. These are:

- A. No further regulation – Require NBN Co to operate according to strict regulatory requirements while allowing other carriers to invest and compete with lighter regulation.
- B. Require NBN Co and other carriers installing FTTP infrastructure supply services to the public to meet the same or similar technical specifications.
- C. Require NBN Co and other carriers operating superfast networks to offer wholesale services on an open and equivalent access basis.
- D. Establish a mechanism by which a levy could be applied to the operators of superfast broadband networks, if warranted by circumstances, to support the provision of superfast broadband nationally, consistent with the Government’s policy objectives.
- E. Require all providers of superfast broadband to operate on a wholesale-only basis; that is, they would not only have to offer wholesale services, but would be limited to this line of business.

Option A is effectively a stand-alone option. Options B, C and D could operate singularly or in combination for fuller effect. Option E is effectively an extension of Option C. For convenience, the options are discussed individually and their interaction is discussed in the conclusion.

The option of removing the policy and regulatory constraints under which NBN Co must operate is considered unrealistic. This would mean there would be no effective vehicle to deliver the policy objectives it was established to address in the absence of the types of requirements that are otherwise being discussed in Options B, C, D and E.

*Option A – No further regulation – Require NBN Co to operate according to strict regulatory requirements while allowing other carriers to invest and compete with lighter regulation*

Under Option A, there would be no legislative or regulatory change. NBN Co would be required to meet the policy and regulatory requirements imposed on it, whether through the Commonwealth’s ownership of the company or regulation which is to be introduced. Other persons would be free to enter and invest in superfast broadband, targeting markets as they wished. This could include large national operators like Telstra or Optus, overseas operators looking to expand into new markets, or smaller regional or niche operators.

At present there are around ten small fibre providers in addition to Telstra. They would need to compete with NBN Co products and pricing in the markets they choose to service. Their willingness to do so would depend on a range of factors, including, in the case of Telstra, the Definitive Agreements it intends to conclude with NBN Co, the value of target markets and potential first mover advantages. They would not, however, be subject to additional regulation. They would not be subject to any coverage or pricing obligations. They would have full and equivalent access to NBN Co.

NBN Co would have access to the infrastructure of these carriers as would be available as a result of the operation of Part XIC of the *Trade Practices Act 1974* (TPA). They would only need to provide access, and at regulated prices, if the services they provided were declared. All providers would be subject to other protections against anti-competitive conduct applying under the TPA.

*Option B – Require NBN Co and other carriers installing FTTP infrastructure to supply services to the public to meet the same or similar technical specifications*

Under Option B, operators of superfast FTTP broadband networks that provide services to the public would need to meet the same or similar technical specifications to be met by the NBN. (Private networks would not be subject to such standards). The specifications would apply to new networks, that is the requirements would be prospective rather than retrospective. These standards would be based on NBN Co's technical specifications and would either be codified by the Communications Alliance and/or standardised by the Australian Communications and Media Authority (ACMA). It would be expected that the standard would be finalised over the next 6 - 12 months. As well as relating to network design, installation and products, the specifications would deal with architectural issues including the use of passive optical network (PON) or point-to-point or home-run architectures. Such specifications would ensure infrastructure and services of sufficient capability and quality were available to consumers to support Australia's needs well into the future.

They would also ensure infrastructure and services are configured to support service level competition (in combination with Option C or if access is declared) and potentially competition on the basis of fibre unbundling. Because they are inherently different technologies, the same specifications could not, however, be applied to decisions to upgrade hybrid fibre-coaxial (HFC) networks, or to upgrade the existing copper local loop to a fibre-to-the-node (FTTN).

While it is general industry practice to meet relevant technical standards, if there is no requirement for providers to meet these standards, there is always the risk that this will not occur.

*Option C – Require NBN Co and other carriers operating superfast broadband networks to offer wholesale services on an open and equivalent access basis.*

Under Option C, NBN Co would continue to provide wholesale services on an open and equivalent access basis as has always been proposed. It is intended to lock in these requirements in NBN Co-specific legislation as well as amendments to the TPA. In addition, other operators of superfast broadband networks would also be required to provide open and equivalent access to their wholesale services. This would generally require them to provide, at a minimum, a Layer 2 Ethernet service.

The obligation to provide access would be similar to that applying to the provision of access if those services were declared by the ACCC under Part XIC of the TPA, but would be decided in advance in statute. Moreover, the operators would need to provide access on an equivalent basis. That is, they would need to provide access to services to access seekers on the same basis on which they provide access to any retail

operation of their own or a related person. Generally other providers would be free to set their own wholesale prices, but they would be subject to oversight by the ACCC.

While there is a strong trend amongst fibre broadband operators to provide open access, and all services can be declared, if there is no requirement for providers to provide open access, access may be delayed.

*Option D – Establish a mechanism by which a levy could be applied to the operators of superfast broadband networks, if warranted by circumstances, to support the provision of superfast broadband nationally, consistent with the Government’s policy objectives.*

Under Option D, a mechanism would be established in statute under which financial contributions could be levied from operators of superfast broadband networks in high-value markets to off-set the cost of providing superfast broadband in high-cost, low-revenue markets. This option would provide a means of requiring operators who cherry-pick high-value markets, while ignoring low-return markets typically found in rural and remote areas, to contribute to the servicing of those markets.

The Implementation Study proposed that a levy could be imposed based upon the ratio of premises served in different zones (as defined under the current Unconditioned Local Loop Service declaration) and proportional to the total number of premises served. The Study was silent on what the actual levy should be; for example, whether it should be calculated as a percentage of revenues earned from the competitive investment, or simply imposed at a flat rate. The current universal service levy, which imposes a levy on carriers in proportion to their revenue, is one possible model. The Implementation Study proposed that any levy should be strictly limited through a sunset clause of no more than ten years and this option takes up that variation. The size of any levy would depend on the impact cherry-picking might have on NBN Co’s ability to service low-return markets. The potential size of the levy cannot be estimated but it could be considerable.

*Option E – Require all providers of superfast broadband to operate on a wholesale-only basis; that is, they would not only have to offer wholesale services, but would be limited to this line of business.*

Under Option E, providers of superfast broadband networks would not only be required to offer open and equivalent access (as under Option C) but they would also be restricted to the provision of wholesale services in the same way NBN Co is being restricted. That is, they would effectively be structurally separated and prevented from operating retail businesses. This would provide a structural means of removing any incentive or ability to favour a downstream retail operation to the disadvantage of another wholesale customer.

Basically the statute would prevent any person operating a superfast wholesale network from operating a wholesale network and offering retail services. Potential models for such arrangements can be found in the operational arrangements for NBN Co and the voluntary structural separation being progressed by Telstra. Some small fibre providers like Opticomm and OPENetwork are already operating on this basis.

#### **4. Impact assessment**

##### ***Stakeholders***

This section discusses the advantages and disadvantages of the five options identified above and their impact on key stakeholders, namely:

- consumers and the wider community, whether they be individuals, not-for-profit organisations or businesses, including small businesses;
- NBN Co as the access provider;
- customers of NBN Co; and
- other carriers interested in investing in superfast broadband (these may also be customers of NBN Co).

##### ***Considerations***

In assessing the impact of the five options on stakeholders, the key factors considered are:

- effectiveness in supporting the Government's substantive policy objectives, that is:
  - broadband of appropriate speed and quality,
  - national coverage,
  - uniform wholesale pricing,
  - competition;
- the extent to which the option supports the operation of NBN Co on a commercially sustainable basis;
- costs, including possible costs to tax payers;
- consistency with broader policies and international obligations; and
- administrative practicality and efficiency.

In relation to broader policies, of particular relevance are the changes being made through the Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2010 to ensure access to Telstra's declared services is provided on an open and equivalent basis. This includes the implementation of appropriate arrangements for the separation of relevant businesses, including functional separation or voluntary structural separation.

On 20 June 2010, the Government indicated that in new real estate developments NBN Co will be the infrastructure provider of last resort. Other providers may also provide fibre infrastructure in such developments, providing they comply with NBN technical specifications and operate on an open and equivalent access basis.

##### ***Assessment of options***

*Option A – No further regulation (base case) – Require NBN Co to operate according to strict regulatory requirements while allowing other carriers to invest and compete with lighter regulation*

##### ***Advantages:***

- The Government's policy objectives may be achieved through the combination of NBN Co's activities and those of other providers of superfast broadband.
- Some end-users in high-value markets may receive superfast broadband earlier than under NBN Co's roll-out schedule under this option, and, in the short-term at least, at a lower or comparable price. This approach is competitively neutral to

the extent it minimises additional regulation and compliance costs on private sector competitors.

- The arrangements would generally be practical to administer.
- Allows choice, innovation and all the benefits associated with infrastructure-based competition, but may inhibit the development of service-level competition.

*Disadvantages:*

- While NBN Co would set a competitive benchmark for other providers, there would be little or no certainty the Government's policy objectives would be achieved as intended.
  - There would be no mechanism to ensure relevant broadband investments meet appropriate levels of speed or quality or are readily able to support access. Although some investments in superfast fixed-line infrastructure have been made on an open access basis, these are of limited scale, and many investments do not support open access or only very limited access (for example, to a resale service which offers access seekers limited scope for service differentiation and innovation). Consequently, consumers could be 'locked in' to a provider which does not meet the Government's objectives.
  - For open access to be offered on these non-NBN Co networks, the ACCC would need to declare a service under Part XIC. However, currently Part XIC provides only a very limited assurance of equivalence of access, meaning that the Government's objective to promote retail competition may be curtailed in regions where alternative providers roll-out superfast broadband.
  - To the extent competing networks reduced NBN Co's revenues in high-value markets, they could either:
    - erode NBN Co's ability to provide national coverage and uniform national pricing, and may harm NBN Co's sustainability; or
    - charge consumers in those markets prices that simply shadow NBN Co's average pricing, while themselves facing lower costs. This may produce a windfall benefit for these providers, rather than these consumers, while harming NBN Co's ability to deliver the Government's objectives.
- The financial cost of delivering the Government's policy may be higher than under other options, as NBN Co may not be able to offset its roll-out costs through revenue streams from high-return low-cost markets.
- To the extent infrastructure is duplicated by investors not subject to equivalent obligations, this may be inefficient if it is driven by regulatory failure rather than market forces and may inhibit the delivery of national outcomes.
- Overall, while this option may support infrastructure-based competition, it would do so on an uneven basis and at the risk that all of the Government's objectives would not be delivered. Consequently, this option is not favoured as it is not cost effective.



*Option B – Require NBN Co and other carriers installing FTTP infrastructure to supply services to the public to meet the same or similar technical specifications*

*Advantages:*

- Clear technical specifications will provide greater certainty that infrastructure and services of the requisite speed and quality are available for consumers and deliver the necessary services and interfaces to support retail competition.
- These specifications would be particularly important in areas where a provider supplies services in advance of NBN Co (for example, in new developments) to ensure consumers receive levels of service comparable to those available on the NBN.
- The compliance costs are limited as there are already well developed specifications for FTTP infrastructure and services and well-established processes for standardisation. Relevant specifications include those developed by NBN Co, the Communications Alliance and international bodies like the Broadband Forum, International Telecommunication Union (ITU), Metro Ethernet Forum, Institute of Electrical and Electronic Engineers (IEEE), Internet Engineering Taskforce (IETF), and European Telecommunications Standards Institute (ETSI). The Communications Alliance already has practices for codifying specifications and the ACMA can make standards.
- Clear technical specifications could also enhance NBN Co's sustainability to the extent it would mean it would be operating on a more level regulatory playing field.
- Consumers would be able to receive services that are consistent with the Government's objectives and would also be able to choose alternative providers, as service providers could not lock end-users into their network.
- This option could reduce the cost to taxpayers when compared to Option A, by facilitating the roll-out of the NBN nationally in a way that minimises duplication and technical differences.

*Disadvantages:*

- Technical specifications would limit carriers' flexibility in the choice of technology, with potential implications for innovation and their ability to meet market demands at least cost. This could limit the service choices available to consumers.
- Technical specifications would only apply to competing FTTP investments, and not to upgrades to existing HFC networks or copper networks.
- While administratively practicable, the processes for developing specifications may be complex and time-consuming.
- Service providers may need to adjust their ongoing specifications and processes. Statements by relevant providers indicate industry practice is to generally follow established standards and any costs should therefore be negligible and transitional in nature.
- Non-NBN Co carriers may argue that this option is anti-competitive if the standards are based on NBN Co's technical specifications. They may consider that they are being denied the commercial flexibility to determine specifications that suit their own, and their customers', needs.

*Option C – Require NBN Co and other carriers operating superfast broadband networks to offer wholesale services on an open and equivalent access basis.*

*Advantages:*

- Upfront open and equivalent access obligations will ensure access seekers (who provide retail services) have ready access to new superfast broadband infrastructure with a view to providing retail services on a competitive basis. This will be particularly important where such infrastructure is deployed in advance of, but not in competition with, the NBN.
- Upfront obligations will provide certainty to investors as to their long term obligations and the implications for their business activities.
- Equivalent obligations will prevent vertically integrated carriers from favouring their retail businesses over other access seekers. This should bolster retail competition and thereby deliver better outcomes for end-users.
- Open and equivalent access obligations could also enhance NBN Co's sustainability to the extent it would mean it would be operating on a more level regulatory playing field.
- Where first-mover networks are compliant with the Government's policy objectives, the need for a roll-out by NBN Co may be negated. Where such networks compete with NBN Co, they still constitute a bottleneck facility for the premises to which they are connected and it is important that they be open access so consumers can enjoy the benefit of retail level competition.
- Statements by smaller fibre providers indicate they generally offer open and equivalent access and follow established standards so additional costs, if any, should therefore be negligible and transitional in nature. Telstra has also indicated it was developing a wholesale service for its fibre operation, Velocity, and Telstra has well developed compliance systems.
- This option could reduce the cost to taxpayers, when compared to Option A, by facilitating the roll-out of the NBN nationally in a way that minimises the impact on retail competition from market power in the wholesale market.

*Disadvantages:*

- Requiring carriers to provide open and equivalent access may impact on the business decisions and investments of vertically-integrated operators such as Telstra and Optus, because they would not be able to supply to their own retail operations on a preferential basis. ACCC regulation of access prices could limit their ability to earn the desired rate of return. This is unlikely to be a disadvantage for carriers that already operate on an open access basis.
- Open and equivalent access obligations could increase compliance costs for the carriers concerned and for the ACCC as regulator. Providers would need to meet the transparency measures being applied to NBN Co to ensure that customers have visibility of any differentiated deals. They would also need to comply with the ACCC's principles for allowable discrimination. The ACCC would need to invest resources in approving any volume discounts offered by these service providers, and in monitoring compliance with the requirements. It is impossible to quantify these compliance costs, but they are unlikely to be significant and largely one-off. As noted above, small fibre providers have indicated they are operating on an open access basis and Telstra has indicated it has been developing a wholesale product for fibre. Any costs would be passed on to end-users in the short term.

*Option D – Establish a mechanism by which a levy could be applied to the operators of superfast broadband networks, if warranted by circumstances, to support the provision of superfast broadband nationally, consistent with the Government’s policy objectives.*

*Advantages:*

- A levy would provide a mechanism by which higher returns from high-value markets could, if necessary, be used to facilitate national coverage and support uniform national wholesale pricing.
- A levy could enhance NBN Co’s sustainability to the extent it would mean it would be operating on a more level regulatory playing field.

*Disadvantages:*

- A levy could deter investment that could otherwise be beneficial by reducing the return from those investments. This could limit infrastructure and service choices for consumers and affect the efficient allocation of resources across the community. These impacts could potentially be mitigated by a sunset clause.
- Such a levy could affect incentives for NBN Co to expedite its network roll-out and operate efficiently as it may expect the levy to be directed at addressing shortfalls in its performance.
- Affected service providers may consider that a levy breaches the Government’s competitive neutrality commitments, although this would be subject to a consideration at the time any such levy was introduced of whether the benefits outweigh the costs.
- Depending on how a levy was designed, it could be anti-competitive and would need to be tested against the Commonwealth’s commitment to the Competition Principles Agreement, as even if it did deliver a net benefit, restricting competition may not be the only way to achieve the Government’s policy aims.
- While administratively practicable, experience with the universal service levy suggests it would be complex to design, implement and administer. If the universal service model was adopted, the Minister would ultimately have the discretion to set the size of the levy following advice from the Australian Communications and Media Authority. Detailed arrangements to model and cost the levy would be required. The Authority’s costs would be recovered from industry through carrier licence fees and ultimately passed on to end-users.
- There would be uncertainty about the quantum of a levy. The quantum cannot be estimated in the abstract and this may add to the uncertainty with impacts for investment decisions.
- A levy would obviously impose an additional cost on those to whom it was applied. The cost would be significant as it would be directed at offsetting the cost of superfast broadband in rural, regional and remote Australia.
- Compliance and administrative costs would be involved and could be relatively significant given the likely complexity of such a scheme.

*Option E - Require all providers of superfast broadband to operate on a wholesale-only basis; that is, they would not only have to offer wholesale services, but would be limited to this line of business.*

*Advantages:*

- Would provide a structural means of ensuring that network providers treated all their wholesale customers on an equivalent basis.
- Should reduce compliance and regulatory monitoring costs as compliance would be built into the very nature of the entity.
- Would further level the playing field between NBN Co and other superfast fibre networks.
- Should enhance NBN Co's sustainability and its ability to deliver on its policy objectives, particularly in low revenue areas, thereby reducing the need for further taxpayer support.

*Disadvantages:*

- Would restrict the freedom of investors to determine how they should structure their businesses to maximise their profit.
- May unnecessarily deter beneficial investment in broadband infrastructure and services.

## **5. Consultation**

Development of the Government's NBN policy has been a matter of extensive consultation since the Government was elected in November 2007. The issue of regulatory obligations on the providers of superfast broadband has been a factor in those consultations. Relevant processes include consultation on draft NBN Co legislation in February 2010. The Senate also established the Select Committee on the NBN. The policy has also been the subject of extensive media and public commentary, including during the 2010 election campaign.

Given the volume of feedback and the wide range of views and topics covered, it is difficult to generalise on stakeholder views. As a general observation, there seems to be broad acceptance as to the merits of the Government objectives for the NBN. There is clearly a range of views as to how these objectives are best achieved.

In general, industry feedback is opposed to the imposition of new regulatory requirements that may limit its operational flexibility. The telecommunications industry has had long standing concerns about the universal service levy and similar concerns would be expected to apply to Option D. A general exception to this is there is a general preference, from those who are predominantly access seekers, to have ready access to infrastructure, subject to ACCC oversight. That said, little specific comment has been provided on the issue of consistent regulatory requirements on NBN Co and other providers.

The NBN Implementation Study was based on extensive consultations with stakeholders by McKinsey and KPMG. Following the release of the Implementation Study on 6 May 2010, the Government also called for public submissions on the Study. Responses on measures to ensure a level playing field for all superfast broadband networks were limited and mixed. Only five carriers commented

specifically on recommendations 73 and 74. AAPT, Austar and TransACT did not support the recommendations. The Business Council of Australia and Telstra expressed concern that a proposed cherry-picking levy could breach competitive neutrality requirements and international obligations, as well as deter efficient investment and competition. Optus supported the measures, but noted that recommendations 73 and 74 should not extend to existing high-speed fixed-line networks; recommendation 73 should be extended to deployments in greenfield sites; and that technical specifications should be widened to include as many of the support systems, processes and other operating requirements as possible. Submissions did not comment on the possible compliance costs associated with the recommendations.

Within the Commonwealth, the Department of the Broadband, Communications and the Digital Economy has consulted with the Department of the Prime Minister and Cabinet, the Treasury, the Attorney-General's Department, the Department of Finance and Deregulation and the ACCC on the issues and options. The main issues raised in these discussions have been the need to balance achievement of the Government's objectives, including efficient investment, and freedom and flexibility for industry with the role of regulation. Of particular concern here was the need for, and potential impact of, a levy mechanism.

## **6. Conclusion**

Overall, while Option A (no further regulation) may support infrastructure-based competition, it would do so on an uneven basis and at the risk that all of the Government's objectives would not be delivered. Consequently this option is not favoured as it is not cost effective.

Option B (mandating technical specifications for FTTP) would ensure consistent speed and quality outcomes across multiple FTTP networks and support retail competition and unbundling outcomes. Clear technical specifications could also enhance NBN Co's sustainability to the extent it would mean it would be operating on a more level regulatory playing field. However, this option could not be applied to non-FTTP superfast broadband networks. This option could reduce costs by facilitating the roll-out of the NBN nationally. By itself, however, option B would not ensure the provision of open and equivalent access or uniform pricing objectives.

Similarly Option C (mandating open and equivalent access for superfast broadband) would ensure open and equivalent access, thereby providing retail services on a competitive basis. By providing open and equivalent access generally, such obligations should also promote more efficient investment as there would be ready access to infrastructure, reducing the need for duplication. Open and equivalent access obligations could also enhance NBN Co's sustainability to the extent it would mean it would be operating on a more level regulatory playing field. This option may also reduce the cost of roll-out of the NBN, as it negates the need for NBN Co to roll-out where first-mover networks are NBN consistent. This option is also considered to represent negligible cost to existing and future fibre providers.

On balance, the preferred approach is a combination of Options B and C. This would result in requiring any new FTTP infrastructure to meet the technical specifications for the NBN and all superfast broadband networks providing open and equivalent

access. Options B and C could also enhance NBN Co's sustainability to the extent they would mean it would be operating on a more level regulatory playing field.

There would be costs to industry under Options B and C, and while difficult to quantify it is expected these would be low because the arrangements concerned are commonly in operation in the industry. Moreover, the Government expects the benefits from fully delivering on the Government's policy objectives, including the establishment of an effective wholesale platform, would outweigh these costs. A combination of Options B and C would be complex but practicable to implement. The combination is unlikely to breach competitive neutrality requirements as they create a level playing field that does not favour NBN Co. Similarly, in relation to international obligations, the proposed approach would result in uniform, rather than asymmetric, regulation.

Option D (levy) could further underpin the delivery of the Government's NBN policy objectives, particularly in relation to coverage and pricing and thus equity. It would also enhance NBN Co's sustainability while potentially reducing the cost of the NBN roll-out. However the levy would be a major intrusion into the operation of industry, involve significant cost and be complex and potentially costly to design, implement and administer. Depending on how a levy was designed, it could be anti-competitive and would need to be tested against the Commonwealth's commitment to the Competition Principles Agreement, as even if it did deliver a net benefit, restricting competition may not be the only way to achieve the Government's policy aims. A levy could also deter beneficial investment, limiting infrastructure and service choices for consumers while potentially slowing the roll-out of the NBN. Given this, such a levy is not proposed at this time, however, it could be kept in reserve as a possible policy tool that can be brought into play should circumstances demonstrate it is warranted.

Option E (wholesale-only obligation) could further underpin the delivery of the Government's NBN policy objectives, particularly in relation to coverage, pricing, equity and competition. It also enhances NBN Co's sustainability. However this mechanism would be a major intrusion into the operation of industry and of individual private-sector firms (as opposed to the Government-owned NBN Co). It is possible that this option will deter beneficial investment in broadband infrastructure and services. Options B and C should provide sufficient surety that the Government's objectives will be achieved. Given this, a wholesale-only obligation is not proposed at this time.

## **7. Implementation and review of the preferred option**

To implement Option B the Communications Alliance will be asked to examine FTTP technical specifications developed by NBN Co with a view to endorsing them and codifying them for the industry. If necessary, the ACMA can be asked to adopt specifications as a binding standard. An amendment to Part 6 of the *Telecommunications Act 1997* is included in the Telecommunications Legislation Amendment (Competition and Consumer Safeguard) Bill to enable the Minister to direct the ACMA to make a standard under Part 6 should this required.

Option C, mandating open and equivalent access obligations on superfast broadband networks (fixed networks offering download speeds of 25 Mbps or greater) will be implemented through appropriate amendments to the *Telecommunications Act 1997* and Part XIC of the TPA.

As noted above, on 20 June 2010 the Government indicated that in new real estate developments NBN Co will be the infrastructure provider of last resort. It also indicated that other providers can install fibre infrastructure in such developments, providing they comply with NBN technical specifications and operate on an open and equivalent access basis. Given the need to provide early guidance to stakeholders in the sector (and dependent on timing considerations) the requirements concerned may be applied to superfast FTTP broadband networks in new real estate developments through the *Telecommunications (Fibre Deployment) Bill 2010*.

Operation of the proposed arrangements will be subject to ongoing review. The Government is also considering Recommendation 78 of the Implementation Study, that an independent review of the telecommunications market and the regulatory framework for the NBN be undertaken following completion of the network and prior to its proposed privatisation. Such a review could be undertaken by the Productivity Commission and would be expected to look at the matters covered in this RIS.

## ABBREVIATIONS

The following abbreviations are used in this explanatory memorandum:

ACCC:	Australian Competition and Consumer Commission
Access Bill:	Telecommunications Legislation Amendment (National Broadband Network Measures – Access Arrangements) Bill 2011
ACMA:	Australian Communications and Media Authority
AIA:	<i>Acts Interpretation Act 1901</i>
BSA:	<i>Broadcasting Services Act 1992</i>
CAC Act:	<i>Commonwealth Authorities and Companies Act 1997</i>
CCA:	<i>Competition and Consumer Act 2010</i> (formerly the <i>Trade Practices Act 1974</i> )
CCS Bill:	Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2010
Communications Minister:	The Minister who administers the Companies Bill once enacted (currently the Minister for Broadband, Communications, and the Digital Economy)
Companies Bill / Act:	National Broadband Network Companies Bill 2010 / that Bill once enacted
Corporations Act:	<i>Corporations Act 2001</i>
CSP:	Carriage service provider
Finance Minister:	The Minister who administers the FMA Act (currently the Minister for Finance and Deregulation)
FMA Act:	<i>Financial Management and Accountability Act 1997</i>
FOI Act:	<i>Freedom of Information Act 1982</i>
FTTP:	Fibre-to-the-premises
LIA:	<i>Legislative Instruments Act 2003</i>
Minister:	Minister for Broadband, Communications, and the Digital Economy



NBN:	National Broadband Network
PC Act:	<i>Productivity Commission Act 1998</i>
Productivity Minister:	The Minister who administers the PC Act (currently the Treasurer)
SAO:	Standard Access Obligation
SAU:	Special Access Undertaking
SFAA:	Standard Form of Access Agreement
Tel Act:	<i>Telecommunications Act 1997</i>

## NOTES ON CLAUSES

### NATIONAL BROADBAND NETWORK COMPANIES BILL 2010

#### **Part 1—Preliminary**

##### **Clause 1 – Short title**

Clause 1 provides that the Companies Bill, when enacted, may be cited as the *National Broadband Network Companies Act 2010*.

##### **Clause 2 – Commencement**

Clause 2 of the Companies Bill provides for the commencement of provisions of the Companies Bill.

Clauses 1 and 2 of the Companies Bill and any other provisions not covered in the table provided at subclause 2(1) will commence on the day on which the Bill receives the Royal Assent.

Clauses 3 to 101 and Schedules 1 and 2 to the Companies Bill will commence at the start of the day after the Companies Bill receives the Royal Assent, or immediately after the commencement of item 2 of Schedule 5 to the *Trade Practices Amendment (Australian Consumer Law) Act (No. 2) 2010*, whichever occurs later in time. The reason for this is several provisions in the Companies Bill refer to the CCA, rather than the name by which that Act is known at the time of the Companies Bill's introduction: the *Trade Practices Act 1974*. From 1 January 2011 the short title of the *Trade Practices Act 1974* will change to the *Competition and Consumer Act 2010* as a result of the *Trade Practices Amendment (Australian Consumer Law) Act (No. 2) 2010*. This commencement arrangement will ensure that the references in the Companies Bill to the CCA will be effective, by deferring the commencement of most of the provisions of the Companies Bill until the change of name of that Act takes effect.

As a result of section 10 of the AIA, a reference to the CCA in the Companies Bill will include a reference to that Act before its name was changed, ie. before 1 January 2011.

##### **Clause 3 – Objects**

Clause 3 sets out the objects of the Companies Bill, when read together with Part XIC of the CCA.

Subclause 3(1) sets out the main objects of the Companies Bill, when read together with Part XIC of the CCA (which sets out the telecommunications-specific access regime, and which is amended by the Access Bill to incorporate provisions that relate specifically to NBN corporations).

One of the main objects of the Companies Bill is to provide a regulatory framework for NBN corporations (see the definition of this term in clause 5, explained in detail in

the notes for that clause, below) that promotes the long-term interests of end-users of carriage services or of services provided by means of carriage services. This reflects the object of Part XIC of the CCA (see subsection 152AB(1) of that Act). For the purposes of the Companies Bill, the question of whether a thing promotes the long-term interests of end-users of those services is to be determined in the same manner as it is determined for the purposes of Part XIC of the CCA (see clause 94 of the Companies Bill and subsection 152AB(2) of the CCA).

A further main object of the Companies Bill is to ensure that NBN Co remains in full Commonwealth ownership until certain events have occurred. The Commonwealth may only sell down its stake in NBN Co after all of the following things have happened:

- the Communications Minister has declared that, in his or her opinion, the NBN should be treated as built and fully operational;
- the Productivity Commission has conducted an inquiry into certain specified matters relating to the NBN and NBN Co, and the Productivity Minister has tabled that report in both Houses of Parliament;
- the Parliamentary Joint Committee on the Ownership of NBN Co (established under Schedule 2 to the Companies Bill) has examined the Productivity Commission's report; and
- the Finance Minister has declared that, in his or her opinion, conditions are suitable for the entering into and carrying out of an NBN Co sale scheme, and the declaration has taken effect.

The last of the main objects of the Companies Bill is to provide a framework for restrictions on private ownership or control of NBN Co.

A list of other objects of the Companies Bill, when read together with Part XIC of the CCA, is set out in subclause 3(2). The Companies Bill is intended to work in close conjunction with the amendments to the CCA in the Access Bill to deliver on a range of key Government objectives for the NBN, particularly in relation to open access and non-discrimination in the supply of wholesale telecommunications services. The Companies Bill must be read in this context.

#### **Clause 4 – Simplified outline**

Clause 4 provides a simplified outline of the Companies Bill.

#### **Clause 5 – Definitions**

Clause 5 sets out definitions of key terms used in the Companies Bill. These terms are explained in more detail when the relevant clause in the Companies Bill is discussed.

The definition of an 'NBN corporation' is provided for under clause 1 of Schedule 1 to the Companies Bill (see below), which effectively provides that NBN Co, NBN Tasmania, and any company over which NBN Co is in a position to exercise control are all NBN corporations (determined in accordance with Schedule 1 of the BSA). This definition would potentially capture a wide group of companies, although at present there are only two NBN corporations, NBN Co and NBN Tasmania, and there are no current plans for further NBN corporations. However, should NBN Co

purchase a carriage service provider (in order to facilitate the rollout of the network), the definition ensures that once NBN Co controls the provider it will be an NBN corporation and subject to the obligations applying to NBN corporations under the Companies Bill and the Access Bill (the Companies Bill provides for transitional arrangements to deal with this circumstance).

The definition of NBN corporation provided for in the Companies Bill is explicitly different from the definition provided for under certain provisions of the Tel Act that are inserted by the CCS Bill. The definition used in those provisions states that NBN corporation means NBN Co, NBN Tasmania, or a company that is a related body corporate of NBN Co (in accordance with the meaning of that term in the *Corporations Act 2001*). This would potentially cover a narrower group of companies. The reason for the difference is that it is not appropriate for those provisions in the Tel Act to cover companies which NBN Co is in a position to control but that are not considered to be related bodies corporate of NBN Co. Consequently, companies controlled by NBN Co will not be covered by the proposed authorisation under section 51 of the CCA being established under the CCS Bill.

In contrast, a reference in the Companies Bill to ‘NBN Co’ is only a reference to NBN Co Limited (ACN 136 533 741).

‘National broadband network’ is defined to mean a national telecommunications network for the high speed carriage of communications, where an NBN corporation is involved in the creation or development of the network. For the avoidance of doubt, the definition clarifies that it is immaterial whether the NBN corporation’s creation or development of that network involved the acquisition of assets that were used as part of another telecommunications network, or the obtaining of access to assets that are also used as part of another telecommunications network. This is intended to acknowledge that NBN corporations may acquire or use existing telecommunications networks, or parts thereof, in the creation or development of the national broadband network.

The definition of ‘national broadband network’ in clause 5 of the Companies Bill is different in one respect from the definition of this term that is to be used in subsections 577BA(12) and 577BC(8) of the Tel Act, which are inserted into that Act by the CCS Bill. The definition in clause 5 includes the word ‘national’ before the words ‘telecommunications network’. This word is not included in the definition of the term in those sections of the Tel Act.

The reason for this difference is that in the context of the Companies Bill the term is used to describe the national broadband network *once completed*. For instance, clause 48 provides for the Communications Minister to declare that the national broadband network should be treated as built and fully operational, and clause 49 provides for the Productivity Commission to conduct an inquiry into various matters, once the Communications Minister has declared that it should be treated as built and fully operational. By contrast, in those provisions of the Tel Act inserted by the CCS Bill, the term is used to describe a network that may only be partly built. For example, section 577BA of the Tel Act uses the term ‘national broadband network’ in the context of the concept of a migration provision. In that context, the term is used to describe the network to which Telstra would be progressively migrating its customers

(see section 577BA of the Tel Act, inserted by the CCS Bill). The national broadband network will not be fully built during the migration process. Telstra may commence the migration of services in areas as the national broadband network is rolled out in those areas, well before the network achieves its full reach. For this reason, to ensure the reference to migration provisions operates effectively, the definition of the term that was included in those provisions of the Tel Act by the CCS Bill does not refer to the network as being a 'national' telecommunications network, whereas the definition of the term in the Companies Bill does.

Clause 5 includes a definition of the term 'Parliamentary Joint Committee on the Ownership of NBN Co'. The Joint Committee is to consist of five members of the Senate and five members of the House of Representatives, but would not include Ministers, the Speaker or the President of the Senate. The Joint Committee will have 180 days to consider the report of the Productivity Commission into certain matters relating to the NBN and NBN Co (see clause 49) and provide its report to the Parliament. The Joint Committee's examination is crucial to ensuring enhanced scrutiny of the potential transfer by the Commonwealth of its interest in NBN Co. The Finance Minister will not be able to declare that conditions are suitable for the entering into and carrying out of an NBN Co sale scheme unless and until the Joint Committee has reported. The full details of the membership, purpose and conduct of the Joint Committee is set out in Schedule 2 to the Companies Bill.

#### **Clause 6 – Crown to be bound**

Clause 6 ensures that the Crown in each of its capacities is bound by the Companies Bill.

#### **Clause 7 – Extension to external Territories**

Clause 7 ensures that the Companies Bill extends to all of the external Territories.

## **Part 2—Operations of NBN corporations**

Part 2 applies to NBN corporations, and therefore will apply to NBN Co, NBN Tasmania and a company over which NBN Co is in a position to exercise control (see clause 1 of Schedule 1 to the Companies Bill).

### **Division 1— Simplified outline**

#### **Clause 8 – Simplified outline**

Clause 8 provides a simplified outline of Part 2 to assist the reader.

### **Division 2—Rules about operations of NBN corporations**

Division 2 of Part 2 sets out rules to ensure NBN corporations operate in a manner consistent with their wholesale-only mandate by limiting them to, and focussing them on, wholesale-only telecommunications activities. This includes by specifying the types of persons to whom they can supply services and specifying the types of services and goods they can supply and the types of investments they can make.

#### **Subdivision A—Supply of eligible services on a wholesale-only basis**

Subdivision A of Division 2 sets out a general rule about the supply of eligible services by NBN corporations, which is that an NBN corporation must not supply an eligible service to another person unless the other person is a carrier or a service provider, and then sets out a number of exemptions from that general rule.

The exemptions to the general rule about the provision of eligible services are intended to permit NBN corporations to supply network management services to a number of utilities, including transport authorities, electricity supply bodies, gas supply bodies, water supply bodies, sewage service bodies, storm water drainage services bodies and State or Territory road authorities.

These entities may need to receive a network management service directly from an NBN corporation to assist in monitoring their networks, or, in the case of electricity supply bodies, to assist in the rollout and operation of smart metering and smart grids. Other entities, such as gas supply, water supply and sewerage supply bodies and road transport authorities, will also be able to receive a network management service directly from an NBN corporation to assist them in managing communications for the purpose of monitoring, for example sewage or traffic flows. A number of these entities have advised the Government that, for security reasons, they could not use a service provided by a reseller for these network management purposes and would need direct access to a Layer 2 bitstream service from an NBN corporation (it should be noted that these entities will still be required to acquire their regular communications services, for purposes other than network management, from a reseller). The ability for utilities to access services directly from an NBN corporation would also enable them to avoid any issues that could arise if they were required to deal with multiple intermediaries to cover their area of operation, making it difficult to coordinate an overall picture of their traffic flows. That said, nothing in the

Companies Bill prevents utilities from accessing services from an NBN corporation using intermediaries.

### **Clause 9 – Supply of eligible services to be on wholesale basis**

Clause 9 provides that an NBN corporation must not supply an eligible service to another person unless the other person is a carrier or a service provider. This section ensures that an NBN corporation will only supply services on a wholesale basis. ‘Eligible service’ is defined in section 5 of the Companies Bill as having the same meaning as in section 152AL of the CCA: an eligible service is a listed carriage service (within the meaning of section 16 of the Tel Act) or a service that facilitates the supply of a listed carriage service. ‘Carrier’ is defined in section 5 of the Tel Act as the holder of a carrier licence. ‘Service provider’ has the same meaning as in section 86 of the Tel Act, and means a carriage service provider or a content service provider (which terms are also defined in the Tel Act). Integral to the concepts of ‘carrier’ and ‘service’ provider is that their activities involve ‘supply to the public’ (see sections 44, 88 and 97 of the Tel Act); that is, they do not generally operate to produce services for their internal consumption, but for the supply of downstream end-users.

### **Clause 10 – Exemption—transport authorities**

Clause 10 sets out three exemptions to the general rule concerning the supply by NBN corporations of eligible services at clause 9, with each of those exemptions relating to the provision of eligible services to transport authorities.

Paragraph 10(1)(a) permits an NBN corporation to supply carriage services the sole use of which is for Airservices Australia to carry communications necessary or desirable for the workings of aviation services. This provision reflects the operation of subsection 47(1) of the Tel Act, which provides that the carrier licensing requirements under the Tel Act do not apply to Airservices Australia in relation to network units used solely by Airservices Australia for such communications. Subsection 92(1) of that Act contains a similar provision exempting carriage services used for such communications by Airservices Australia from the definition of ‘carriage service provider’. Paragraph 10(1)(b) permits an NBN corporation to supply to Airservices Australia an eligible service that is a service that facilitates the supply of a carriage service covered by paragraph 10(1)(a).

This provision will ensure that NBN corporations may supply eligible services to assist Airservices Australia to manage aviation services.

Subclause 10(2) operates in a similar way to subclause 10(1), and permits an NBN corporation to supply carriage services the sole use of which is for a State or Territory transport authority to carry communications necessary or desirable for the workings of train services, bus or other road services, or tram services, of a kind that is provided by the particular authority, and to supply eligible services that facilitate the supply of such carriage services. This provision reflects the operation of subsection 47(3) of the Tel Act, which provides that the carrier licensing requirements under the Tel Act do not apply to State or Territory transport authorities in relation to network units used solely by them for such communications. Subsection 92(3) of that Act contains a

similar provision exempting carriage services used for such communications by State and Territory transport authorities from the definition of ‘carriage service provider’.

This provision will ensure that NBN corporations may supply eligible services to assist State and Territory transport authorities to manage transport services.

Subclause 10(3) similarly permits an NBN corporation to supply carriage services the sole use of which is for a rail corporation to carry communications necessary or desirable for the workings of train services, and to supply eligible services that facilitate the supply of such carriage services. This provision reflects the operation of subsection 47(4) of the Tel Act, which provides that the carrier licensing requirements under the Tel Act do not apply to rail corporations in relation to network units used solely by them for such communications. Subsection 92(4) of the Tel Act contains a similar provision exempting carriage services used for such communications by rail corporations from the definition of ‘carriage service provider’.

This provision will ensure that NBN corporations may supply eligible services to assist rail corporations to manage train services. Clause 5 provides a definition of ‘rail corporation’ for this purpose, which is the same as the definition used in the Tel Act.

Clause 10 must be considered in the context of proposed section 152CJA(1) of the CCA, inserted by the Access Bill, which restricts NBN corporations from supplying an eligible service unless the service is a declared service under proposed subsection 152AL(8A), or has been published in a SFAA or a SAU. Consequently, if an NBN corporation wished to supply a service to a transport authority, it would need to formulate an SFAA in relation to that service and publish the SFAA on its website, or set out terms and conditions for the service in an SAU it gives to the ACCC, or the ACCC would need to declare the service under proposed subsection 152AL(8A) in relation to that NBN corporation and make an access determination in relation to the service.

### **Clause 11 – Exemption—electricity supply bodies**

Subclause 11 permits an NBN corporation to supply carriage services the sole use of which is for an electricity supply body to carry communications necessary or desirable for managing the generation, transmission, distribution or supply of electricity, and charging for the supply of electricity. It also provides that NBN corporations may supply eligible services that facilitate the supply of such carriage services. This provision reflects the operation of subsection 49(1) of the Tel Act, which provides that the carrier licensing requirements under the Tel Act do not apply to electricity supply bodies in relation to network units used solely by them for such communications. Subsection 94(1) of the Tel Act contains a similar provision exempting carriage services used for such communications by electricity supply bodies from the definition of ‘carriage service provider’.

This provision will ensure that NBN corporations may supply eligible services to assist electricity supply bodies to manage the provision of electricity. Clause 5 provides a definition of ‘electricity supply body’ for this purpose, which is the same as the definition used in the Tel Act. Electricity supply bodies have advised the Government that they would prefer to have the option of receiving a network



management service directly from an NBN corporation to facilitate the rollout of smart grids and smart metering.

Clause 11 must be considered in the context of proposed section 152CJA(1) of the CCA, inserted by the Access Bill, which restricts NBN corporations from supplying an eligible service unless the service is a declared service under proposed subsection 152AL(8A), or has been published in a SFAA or a SAU. Consequently, if an NBN corporation wished to supply a service to an electricity supply body, it would need to formulate a SFAA in relation to that service and publish the SFAA on its website, or set out terms and conditions for the service in a SAU it gives to the ACCC, or the ACCC would need to declare the service under proposed subsection 152AL(8A) in relation to that NBN corporation and make an access determination in relation to the service.

**Clause 12 – Exemption—gas supply bodies**

**Clause 13 – Exemption—water supply bodies**

**Clause 14 – Exemption—sewerage services bodies**

**Clause 15 – Exemption—storm water drainage services bodies**

**Clause 16 – Exemption—State or Territory road authorities**

Each of clauses 12-16 contains an exemption that operates in a similar way to the exemptions in clauses 10 and 11. These exemptions operate in favour of gas supply bodies, water supply bodies, sewerage services bodies, storm water drainage services bodies, and State or Territory road authorities, in relation to relevant services supplied or activities conducted by those bodies. For example, an NBN corporation is permitted to provide carriage services to a gas supply body to assist that body in managing the transmission of, or charging for the supply of, gas distributed in a pipeline—this is intended to allow NBN corporations to supply services to gas supply bodies for the possibility of remote monitoring of gas supply, for example. An NBN corporation is also permitted to provide services to a State or Territory road authority for the possibility of assisting that body in managing or controlling road traffic—this is intended to permit NBN corporations to provide carriage services to bodies such as the Roads and Traffic Authority in NSW, and equivalents in other states, in connection with the operation of traffic lights, for example. Such bodies may continue to purchase services from intermediary service providers, and there is no requirement for them to purchase them from an NBN corporation, but the exemptions provide for the economically efficient supply of these services, given that the national broadband network will be the major fixed-line telecommunications network in Australia. By covering this wide range of utilities the potential is created for the NBN to support well integrated trans-sectoral approaches to monitoring and management of infrastructure and resources.

Unlike clauses 10 and 12, there are no equivalents to the exemptions provided by these clauses in the provision of the Tel Act that relate to carrier licensing exemptions or the definition of carriage service provider. The reason for these exemptions being included is noted above in the notes at the beginning of Subdivision A of Division 2 of Part 2 of the Companies Bill.

Relevant definitions for terms used in clauses 12-16 are provided at clause 5.

Clauses 12-16 need to be considered in the context of proposed section 152CJA(1) of the CCA, inserted by the Access Bill, meaning that if an NBN corporation wished to supply a service to one of the bodies covered by these clauses, the service would need to be a declared service.

### **Subdivision B—Supply of other goods and services**

#### **Clause 17 – Content services not to be supplied**

Clause 17 provides that an NBN corporation must not supply a content service. A content service is defined at section 15 of the Tel Act and covers services such as broadcasting services, on-line information services or on-line entertainment services. It is appropriate that NBN corporations be prevented from providing content services because such services are effectively retailed to end-users. Furthermore, prohibiting NBN corporations from supplying content services will ensure that they remain focussed on the wholesale provision of carriage services and do not become horizontally integrated in markets that rely on the supply of carriage services, thereby providing them with the incentive and ability to discriminate against competing suppliers of content services.

#### **Clause 18 – Non-communications services not to be supplied**

Clause 18 provides that an NBN corporation must not supply a non-communications service to another person. The provision is one of several intended to ensure that NBN corporations remain limited to, and focussed on, the wholesale provision of carriage services.

The term ‘non-communications service’ is defined in section 5 of the Companies Bill. The definition provides that a non-communications service means any service other than certain services listed in that definition. The effect of that definition is that clause 18 prevents an NBN corporation from supplying any services other than:

- an eligible service;
- a content service (although note that NBN corporations are separately prevented from providing content services under clause 17);
- a service that is ancillary or incidental to the supply by an NBN corporation of an eligible service; or
- an advisory or consulting service, or the provision of intellectual property rights, where these relate to:
  - o the supply of an eligible service;
  - o goods for use in connection with an eligible service; or
  - o facilities (within the meaning of the Tel Act).

The effect of this definition is that, broadly speaking, non-communications services include all services that do not involve the supply of wholesale carriage services, or services that are incidental to the supply of a wholesale carriage service. The reference in the definition of non-communications services to ancillary or incidental services is intended to clarify that an NBN corporation may supply a range of supplementary services to customers that enable the customer to supply services to end-users. Examples of this are facilities access services (such as leasing of duct or conduit space) or access to an NBN corporation’s operational and business support

systems (to facilitate service ordering, provisioning and billing). The reference to ancillary or incidental services is also intended to permit NBN corporations to engage in the provision of minor services necessary in the conduct of a business, such as sub-leasing of surplus office space.

Under this provision, an NBN corporation will also be able to enter into an arrangement which involves the provision of intellectual property under a licence agreement, or commercial or technical advice provided under a commercial agreement, where the provision of that intellectual property or of that advice is in connection with the supply of eligible services, goods in connection with such services, or facilities. In this context, the term ‘intellectual property rights’ is defined in clause 5 of the Companies Bill and includes rights associated with a patent, copyright, design, trade secret or know-how. This provision is intended to ensure that NBN corporations have scope to exploit opportunities, both in Australia and overseas, to provide intellectual property or advice that they may develop from their innovative research, development and operational activities.

### **Clause 19 – Non-communications goods not to be supplied**

Clause 19 provides that an NBN corporation must not supply goods to another person unless the goods are for use in connection with the supply, or prospective supply, of an eligible service by the NBN corporation. This would include goods supplied by NBN corporations for marketing purposes and goods required to build and operate the NBN. Consequently, an NBN corporation could, for example, supply promotional material to customers, or prospective customers, and could supply an Optical Network Termination Unit or customer premises equipment to an end-user’s premises, as this is in connection with the supply of eligible services. The provision is one of several intended to ensure that NBN corporations remain limited to, and focussed on, the wholesale provision of carriage services.

### **Subdivision C—Investment activities**

#### **Clause 20 – Restriction on investment activities**

Clause 20 places restrictions on the investment of money by an NBN corporation. An NBN corporation may only invest its money under the following circumstances:

- where the investment is relation to the supply, or prospective supply, of eligible services by the NBN corporation;
- where the investment is related to the supply, or prospective supply, of goods that are for use in connection with the supply, or prospective supply, of an eligible service by the NBN corporation;
- the investment is in shares in a company which is carrying on business as a carriage service provider; or
- the investment is an investment in securities of the Commonwealth or of a State or Territory, or securities guaranteed by the Commonwealth, or by a State or Territory; a deposit with a bank; or any other form of investment prescribed by regulation under subparagraph (a)(iv) of the definition of ‘authorised investment’ in subsection 39(10) of the FMA Act.

The provision is one of several intended to ensure that NBN corporations remain limited to, and focussed on, the wholesale provision of carriage services.

As the Commonwealth has determined that NBN corporations should be able to purchase other carriage service providers for the purposes of assisting with the roll-out of the NBN, clause 20 allows NBN corporations to purchase shares in such companies. As NBN corporations will operate on a commercial basis, they should also be free to undertake such prudent investments as are consistent with normal commercial behaviour, and with the restrictions already in place under the FMA Act.

### **Subdivision D—Transitional**

#### **Clause 21 – Transitional—pre-commencement contractual obligations**

Clause 21 provides a transitional arrangement to deal with contracts that are in force at the time that the rules in Subdivision C take effect. It provides that the restrictions on an NBN corporation under clauses 18 (supply of non-communications services), 19 (supply of non-communications goods) and 20 (restriction on investment activities) do not apply to a supply of goods or services, or to an investment, if the supply or investment is in fulfilment of a pre-existing contractual obligation.

‘Pre-existing obligation’ is defined under subclause 21(1) to mean an obligation NBN corporation has under a contract to supply goods or services or to invest money that was in existence immediately before the clause commences. For this purpose, it is immaterial whether the obligation is a contingent obligation or otherwise.

This clause is required to deal with any existing contracts that may have been entered into by an NBN corporation before the commencement of this part of the Companies Bill. It is appropriate that, if a party has entered into a contract with an NBN corporation prior to the rules in clauses 18, 19 and 20 coming into force, the validity of that contract should be ensured.

#### **Clause 22 – Transitional—pre-acquisition contractual obligations**

Clause 22 provides a transitional arrangement, with the effect that the restrictions on an NBN corporation under clauses 18 (supply of non-communications services), 19 (supply of non-communications goods) and 20 (restriction on investment activities) do not *apply* where immediately before a company other than NBN Co becomes an NBN corporation, the company had an obligation (the pre-existing obligation) under a contract to supply goods or service, or invest money.

This clause is required to cover any existing contracts that may have been entered into by a company that subsequently becomes an NBN corporation. It is appropriate that, if a party has entered into a contract with a company that later becomes an NBN corporation, the validity of that contract should be ensured.

### **Division 3—Functional separation of NBN corporations**

Division 3 of Part 2 of the Companies Bill contains provisions dealing with the potential functional separation of NBN corporations. Functional separation

requirements may be imposed on one or more NBN corporations in future, if necessary to improve transparency or promote competition. The provisions in Division 3 provide a mechanism for the future imposition of functional separation arrangements.

If and when imposed, the precise form of functional separation will be determined under an instrument to be made by the Communications Minister and Finance Minister (see clause 25), which may, among other things, deal with the way in which certain functional separation principles (clause 24) are to be implemented. As a result of this flexibility, functional separation of NBN corporations, if imposed, could be reasonably extensive (for instance, requiring full operational separation of all of the business units of any NBN corporation), or could be reasonably 'light touch' (such as requiring separate financial statements and asset registers for different business units).

The structure and operation of the functional separation provisions in Division 3 is based on the provisions dealing with the functional separation of Telstra that are inserted into the Tel Act by the CCS Bill, with some key differences. If functional separation is imposed on an NBN corporation, it will involve the following steps:

- the Communications Minister would make an instrument setting out certain principles, which would be the 'functional separation principles' (clause 24);
- the Communications Minister and the Finance Minister (together, 'the Ministers') would jointly make an instrument setting out requirements to be complied with by a draft functional separation undertaking given to them by a particular NBN corporation ('the functional separation requirements determination' – clause 25);
- that NBN corporation would then be required to give the Ministers a draft functional separation requirements undertaking (clause 26);
- the Ministers may then:
  - o approve the original draft undertaking given to them by the NBN corporation;
  - o vary that original draft undertaking and approve it as varied; or
  - o replace that original draft undertaking with another draft functional separation undertaking and approve the replacement undertaking (clause 27).

Once approved, a draft functional separation undertaking becomes a final functional separation undertaking. Compliance with a final functional separation undertaking is a condition of the carrier licence of the NBN corporation to which it relates, and is also a service provider rule for that NBN corporation (see clause 37 of the Companies Bill, and proposed section 62E of the Tel Act, to be inserted by the Access Bill).

### **Clause 23 – Contents of draft or final functional separation undertaking**

Subclause 23(1) specifies matters that must be included in a draft or final functional separation undertaking. A draft or final functional separation undertaking must comply with both the functional separation principles (which will be set out in an instrument made by the Communications Minister under clause 24, and must include the matters listed at subclause 24(2)) and such requirements as are specified in a functional separation requirements determination (set out in clause 25).

Subclause 23(2) provides that a functional separation undertaking may provide for the ACCC to perform functions or to exercise powers in relation to the undertaking. This is intended to permit the undertaking to operate flexibly, by ensuring that the undertaking can provide for the ACCC to make decisions on particular matters at a future point.

#### **Clause 24 – Functional separation principles**

Clause 24 provides that the Communications Minister may, in writing, set out the functional separation principles that apply in regard to the manner in which the functional separation of an NBN corporation is to be achieved and maintained. Under paragraph 23(1)(a) any draft or final functional separation undertaking must comply with the functional separation principles. When considering whether or not to approve a draft functional separation undertaking, it is intended that the Ministers would have regard to the degree to which the draft undertaking complies with the functional separation principles.

Subclause 24(2) provides specified principles that must be included by the Communications Minister in a determination setting out the functional separation principles, and these are described in detail below. The Communications Minister may add other principles to this list (see subclause 24(3)).

Before making a determination setting out the functional separation principles, the Minister must consult the Finance Minister. The Finance Minister is directly involved later in the process of imposing functional separation on NBN corporations (see clause 25) and so it is appropriate that the Finance Minister be consulted by the Communications Minister at this step.

A determination made by the Minister setting out the functional separation principles is not a legislative instrument. This instrument defines one aspect of the required content of a functional separation requirements determination. As such, this is a substantive exemption from the LIA. The reason that this instrument has been exempted from the LIA is that it is important that industry has certainty that the principles set out in legislation and in the determination will apply and will not be overturned, or modified, by the Parliament. This certainty would not be provided if the Communications Minister's determination were a legislative instrument and therefore subject to disallowance.

#### *The principle that an NBN corporation should maintain separate business units – paragraph 24(2)(a)*

The first principle is that an NBN corporation should maintain two or more specified business units.

A business unit is defined under clause 5 as a part of an NBN corporation. This recognises that in managing its business, an NBN corporation may organise itself into different roles and parts of the company into individual business units. For example, NBN Co may establish separate business units to deal with its satellite, wireless and fibre operations, or to deal with its passive and active network assets. This principle

is included since a fundamental concept in functional separation is the separation of different parts of a business into different business units.

*The principle of arm's length functional separation between specified business units – paragraph 24(2)(b)*

The second principle is that the NBN corporations should maintain arm's length functional separation between its business units. The principle is directed towards ensuring that an NBN corporation does not favour its business units in the provision of regulated services.

*The principle that the NBN corporation should have systems, procedures and practices relating to compliance – paragraph 24(2)(c)*

The third principle is directed towards ensuring that an NBN corporation has sufficient systems, procedures and practices in place which support and facilitate compliance with a final functional separation undertaking, monitoring and audit of that compliance, as well as development of performance measures to measure that compliance.

#### **Clause 25 – Functional separation requirements determination**

Subclause 25(1) allows the Ministers to make a determination (a functional separation requirements determination) specifying requirements to be complied with by a draft or final functional separation undertaking given by a specified NBN corporation. Matters that may be dealt with in a functional separation requirements determination may include the manner in which the functional separation principles are to be implemented (proposed subclause 25(2)). Subclause 25(3) makes it clear that proposed subclause 25(2) does not limit the matters that may be specified by the Ministers in a functional separation requirements determination.

Under proposed subclause 25(4), the Ministers must ensure that a functional separation requirements determination comes into force within 90 days of the commencement of the first or only determination made under subclause 24(1). For this purpose, the determination made under subclause 24(1) will come into force when it is made.

Subclause 25(6) provides that a functional separation requirements determination is not a legislative instrument (this operates as an exemption to the LIA). This reflects the fact that a direction from the Ministers to any person is not subject to disallowance (see section 44 of the LIA) and the fact that the instrument made by the Ministers under subclause 25(1) operates as a direction to an NBN corporation to include certain requirements in its draft undertaking.

Clause 25 is based on section 75 of the *Telecommunications Act 1997* (TA), which was inserted by the *Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Act 2010*. It is expected that a determination which sets out requirements for separation to improve market outcomes would not be made available to the public by the ACCC, for example, through publication on the ACCC's website.

## **Clause 26 – Draft functional separation undertaking to be given to the Communications Minister and Finance Minister**

Subclause 26(1) provides that an NBN corporation must give the Ministers a draft functional separation undertaking within 90 days after the first functional separation requirements determination in relation to the NBN corporation comes into force or a longer period, if specified in accordance with subclause 26(2). For this purpose, the functional separation requirements determination will come into force when it is made.

Subclause 26(3) allows the Ministers to vary an instrument under proposed subclause 26(2). This allows the Ministers to increase or decrease the relevant extension period where it is considered necessary or desirable to do so. Subclause 26(4) provides that a period specified in subclause 26(2) may be ascertained wholly or partly by reference to the occurrence of a specified event. For example, the Ministers may need to make an instrument in relation to the report of the Productivity Commission under clause 49, or an outcome arising from that report. This provision would permit the Ministers to set a date with reference to that event.

Subclause 26(5) makes it clear that the Ministers do not have a duty to consider whether to make or vary an instrument under proposed subclause 26(2). For example, if an NBN corporation or some other person requested that the Ministers consider exercising their power under proposed subclause 26(2) to extend the period, the Ministers would have no duty to consider that request.

The Ministers are not required to observe the requirement of procedural fairness in relation to the making of an instrument under subclause 26(2) extending the 90-day time period. Furthermore, an instrument under proposed subclause 26(2) extending the period for a functional separation requirements undertaking to be given to the Ministers must be published on the Department's website, as must a variation to such an instrument (in this context, the Department is the Department administered by the Communications Minister (being the Minister who administers the Companies Bill once enacted; see subsection 19A(3) of the AIA)). This will reduce the opportunity for the use of legal proceedings to disrupt these procedural steps if functional separation is to be imposed on an NBN corporation at some point in the future.

Subclause 26(7) provides, for the avoidance of doubt, that an instrument under subclause 26(2) or (3) is not a legislative instrument. As the instrument functions as a direction from the Ministers to an NBN corporation, it would not be subject to disallowance under item 41 of the table in subsection 44(2) of the LIA. Furthermore, as the undertaking must include requirements specified by the Ministers, industry will require certainty that the requirements set out in legislation and in the determination will apply and will not be overturned, or modified, by the Parliament.



## **Clause 27 – Approval of draft functional separation undertaking by the Communications Minister and the Finance Minister**

Clause 27 sets out the manner in which a draft functional separation undertaking may be approved, varied or replaced and includes publication and consultation provisions, and is modelled on clause 77 of Schedule 1 to the Tel Act, inserted by the CCS Bill.

After receiving a draft functional separation undertaking (original undertaking), the Communications Minister and the Finance Minister must approve the original undertaking; vary the original undertaking and approve the original undertaking as varied; or replace the original undertaking with another draft functional separation undertaking (replacement undertaking) and approve the replacement undertaking (proposed subclause 27(2)). It is envisaged the Ministers would exercise their power to vary or replace the draft functional separation undertaking if the draft functional separation undertaking was considered deficient with regard to compliance with the functional separation principles or any requirements specified in the functional separation requirements determination. The Ministers would be able to add or change measures in the draft functional separation undertaking to address any shortcomings in the draft functional separation undertaking, or replace the draft functional separation undertaking altogether if considered necessary or desirable. In particular, it is intended that if the Ministers considered that the draft functional separation undertaking complied with a functional separation principle to a minimal degree, the Ministers might decide to vary or replace the draft undertaking in a way that would require the NBN corporation to meet the principle to a significantly higher degree.

Subclause 27(3) provides that before making a decision under proposed subclause 27(2), the Ministers must publish a notice on the Department's website setting out the original undertaking and inviting submissions about the original undertaking, with submissions to be provided within 14 days after publication of the original undertaking. (In this context, 'the Department' is the Department administered by the Communications Minister – see subsection 19A(3) of the AIA). The Ministers are required to give the ACCC a copy of the notice and consider any advice about the original undertaking given to them by the ACCC within the 14 days after the notice is published. The Ministers must have regard to any advice given by the ACCC. It is expected that the ACCC would consider the submissions provided to the Ministers before giving its advice to the Ministers.

Subclause 27(4) requires the Ministers, before approving an original undertaking as varied under paragraph 27(2)(b), to give the NBN corporation in question a notice setting out the original undertaking as proposed to be varied and inviting the NBN corporation to make submissions to the Ministers regarding the original undertaking as proposed to be varied within 14 days after receiving the notice. The Ministers are further required to consider any submissions received from the NBN corporation within that 14-day time period.

Subclause 27(5) requires the Ministers, before approving a replacement undertaking under paragraph 27(2)(c), to give the NBN corporation in question a notice setting out the proposed replacement undertaking and inviting the NBN corporation to make submissions to the Ministers regarding the proposed replacement undertaking within

14 days after receiving the notice. The Ministers are further required to consider any submissions received from the NBN corporation within that 14-day time period.

The consultation provisions in subclauses 27(3)-(5) provide the NBN corporation, the ACCC and the public with an opportunity to make submissions which the Ministers must consider before approving an original undertaking, and provide for additional consultation with the NBN corporation before the Minister approves an original undertaking as varied or a replacement undertaking. These provisions are aimed at ensuring the measures set out in the final functional separation undertaking are robust whilst ensuring the consultation process is undertaken in a timely and efficient manner.

Subclause 27(6) confirms that the Ministers may ask the ACCC to give the Ministers advice, which is additional to any advice received from the ACCC after a request for advice under proposed paragraph 27(3)(e), about a matter arising under proposed clause 27.

Subclause 27(7) requires the Minister to notify the NBN corporation in writing of a decision under subclause 27(2) as soon as practicable.

Subclause 27(8) provides, for avoidance of doubt, that an instrument under subclause 27(2) is not a legislative instrument. As the instrument to approve or vary an undertaking functions as a direction from the Ministers to an NBN corporation, it would not be subject to disallowance under item 41 of the table in subsection 44(2) of the LIA. Furthermore, industry will require certainty that the Ministers' approval, variation or determination that an NBN corporation is taken to have given a replacement undertaking will apply and will not be overturned, or modified, by the Parliament, especially in terms that may be inconsistent with either the NBN corporation's undertaking or with the requirements determination or functional separation principles.

Clauses 27 is based on section 76 of the Act, and consistent with those sections, the undertaking or a variation are not legislative in character, and as such would not be a legislative instrument for the purposes of the LIA,

### **Clause 28 – Time limit for making an approval decision**

Subclause 28(2) requires the Ministers to use their best endeavours to make a decision under subclause 27(2) in relation to a draft functional separation undertaking within six months after the draft undertaking was given to them. This subclause recognises the importance of ensuring that the functional separation of an NBN corporation is achieved in a timely manner, but also appreciates that the Ministers will need adequate time to:

- consider the draft functional separation undertaking and check that it complies with clause 23;
- possibly make changes to a draft functional separation undertaking, which may be influenced by submissions received or advice received from the ACCC;
- consult with an NBN corporation before making changes to a draft functional separation undertaking; and

- seek additional advice from the ACCC concerning a draft functional separation undertaking, and consider that advice.

### **Clause 29 – Effect of approval**

Subclause 29(1) confirms that once a draft functional separation undertaking is approved by the Ministers under subclause 27(2) it becomes a final functional separation undertaking.

Subclause 29(2) confirms that a final functional separation undertaking comes into force on the day after the notice of the Ministers' decision is given to the relevant NBN corporation in accordance with subclause 27(7).

Subclause 29(3) provides that a final functional separation undertaking may not be withdrawn. Given that the implementation of the functional separation of an NBN corporation could have a significant impact on the telecommunications industry and the approval of a draft functional separation undertaking (resulting in the undertaking becoming a final functional separation undertaking) would have the effect of triggering the operation of a number of provisions proposed under this Bill there is a need for certainty and therefore it is important that a final functional separation undertaking cannot be withdrawn.

For the avoidance of doubt, subclause 29(4) confirms that a final functional separation undertaking is not a legislative instrument. As the approval of a draft functional separation undertaking functions as a direction from the Ministers to an NBN corporation, it would not be subject to disallowance under item 41 of the table in subsection 44(2) of the LIA. Should the Communications Minister and the Finance Minister decide to approve a draft functional separation undertaking, this would be in the context that such approval provided certainty of the regulatory arrangements for implementing functional separation of one or more NBN corporations. The Government and NBN corporations will require certainty that these regulatory arrangements will not be overturned.

### **Clause 30 – Variation of final functional separation undertaking**

Clause 30 describes the manner in which a variation to a final functional separation undertaking may be made. A final functional separation undertaking may be made by the Ministers, in writing, where the relevant NBN corporation or another person has requested the variation, or on the Ministers' own initiative (subclause 30(2)).

Subclause 30(3) confirms that the Ministers do not have a duty to consider whether to make a variation under subclause 30(2), whether or not the Ministers have received a request from an NBN corporation or by any other person, or in any other circumstances.

The publication, consultation and notice requirements relating to a proposed variation (subclauses 30(4) and (8)), except in relation to minor variations, are the same as those outlined in proposed clause 27 in relation to the Ministers' decision to approve the draft functional separation undertaking.

Subclause 30(5) indicates that the publication, consultation and notice requirements under subclause 30(4) do not apply in respect of variations to a final functional separation undertaking that are of a minor nature.

Where a proposed variation is of a minor nature and is not made at the request of the NBN corporation, under subclause 30(6) the Ministers are required to give the NBN corporation a notice setting out the proposed variation and inviting the NBN corporation to make submissions to them about the proposed variation within 14 days after the notice is given. The Ministers must then consider any submission received within that 14-day period.

Subclause 30(7) confirms that the Ministers may ask the ACCC to give them advice, which is additional to any advice received from the ACCC after a request for advice under subclause 30(4).

Subclause 30(9) confirms that a variation of a final functional separation undertaking comes into force the day after notice of the variation is given to an NBN corporation.

For the avoidance of doubt, subclause 30(10) confirms that a variation of a final functional separation undertaking is not a legislative instrument. As the variation instrument functions as a direction from the Ministers to an NBN corporation, it would not be subject to disallowance under item 41 of the table in subsection 44(2) of the LIA. Furthermore, the power to vary a final functional separation undertaking is critical to ensuring that the functional separation arrangements can be adjusted to recognise changes in circumstances or events. If the variation were to be a legislative instrument, any disallowance could derail the implementation of the new arrangements and deny certainty to the industry.

Clause 30 is based on section 80 of the Act, and consistent with that section, the undertaking or a variation are not legislative in character, and as such would not be a legislative instrument for the purposes of the LIA,

### **Clause 31 – Publication of final functional separation undertaking**

Subclause 31(1) provides that an NBN corporation must publish a copy of a final functional separation undertaking on its website as soon as practicable after it comes into force.

Similarly, under subclause 31(2), an NBN corporation is required to publish a variation of a final functional separation undertaking on its website as soon as practicable after it comes into force.

### **Clause 32 – Compliance with final functional separation undertaking**

Clause 32 provides that if a final functional separation undertaking is in force, the NBN corporation must comply with the undertaking. Clause 37 of the Companies Bill makes compliance with clause 32 a carrier licence condition, and clause 38 makes compliance with that provision a service provider rule (see also section 62E and subsection 98(7) of the Tel Act, inserted by the Access Bill). A breach of a final functional separation undertaking by an NBN corporation would therefore be a breach

of its carrier licence conditions (if the NBN corporation is a carrier) and of a service provider rule (if the NBN corporation is a service provider). Compliance with carrier licence conditions and service provider rules are civil penalty provisions under sections 68 and 101 of the Tel Act. Together, therefore, these clauses would have the effect of making an NBN corporation subject to the penalties outlined in Part 31 of the Tel Act for breach of civil penalty provisions.

#### **Division 4—Divestiture of assets by NBN corporations**

##### **Clause 33 – Directions about disposal of assets**

Proposed subclause 33(1) provides that the Ministers may by written notice direct an NBN corporation to dispose of (within a specified time) one or more specified assets of the NBN corporation (otherwise than by transferring the asset to another NBN corporation, which is dealt with under clause 34). The Ministers are conferred with the ability to give any other directions to the NBN corporations they consider necessary for securing the disposal.

Clause 33 is included in response to recommendations made by the Implementation Study for the NBN. These powers provide a further mechanism prior to privatisation to facilitate greater transparency in NBN Co's operations and equivalence of treatment and could be used to structure the eventual privatisation of NBN Co to maximise its appeal to different investors. Post-sale, they provide a strong mechanism to address competition or other concerns that may arise from the integration of passive and active businesses, notwithstanding NBN Co's wholesale-only mandate. As such they arm the Commonwealth with the powers it needs to tackle issues of integration that have been of concern in the past with Telstra and forewarn NBN Co that the Commonwealth reserves this right for the future in regard to it.

In the event that in the future competition is impeded by structural features of the telecommunications market, and the divestment of an asset could promote competition, this power provides the Ministers with a means to deliver better competitive outcomes. A significant historical feature of the Australian telecommunications market has been that the structure of the industry, with a concentration of assets in the hands of a single provider, has impeded the development of competition.

The Ministers may issue directions to NBN corporations under clause 33 at any time – whether at a point in time that NBN Co is fully owned by the Commonwealth, or at a time when the Commonwealth owns only a partial interest in NBN Co, or after the Commonwealth has fully transferred its interests in NBN Co. By contrast, the power under clause 34 (for the Ministers to direct an NBN corporation to transfer a specified asset to another specified NBN corporation) only operates until the Finance Minister declares that conditions are suitable for the Commonwealth to commence transferring its interest in NBN Co. Clause 34 is explained in detail below.

Proposed subclause 33(3) provides that the Communications Minister and the Finance Minister must not give a direction to an NBN corporation under subclause 33(1) unless the NBN corporation is a constitutional corporation. A 'constitutional corporation' is defined in clause 5 of the Companies Bill to mean a corporation to which paragraph 51(xx) of the Constitution applies. This provision has been inserted to ensure that NBN corporations that are constitutional corporations (that is, foreign

corporations, or trading or financial corporations, within the meaning of s 51(xx) of the Constitution) will be capable of being subject to a direction, and to ensure that this provision is supported by the corporations power in the Constitution.

Proposed subclause 33(5) provides that the direction is not a legislative instrument. The NBN corporation is obliged to comply with the direction (refer proposed subclause 33(4), and clauses 37 and 38). As the instrument functions as a direction from the Ministers to an NBN corporation (being a Commonwealth company within the meaning of section 34 of the *Commonwealth Authorities and Companies Act 1997*), they would not be legislative instruments for the purposes of the LIA, as provided for item 5(a) of the table to section 7 of the LIA. Therefore, proposed subsection (5) is merely declaratory.

Furthermore, the Government and industry will require certainty that a direction to dispose of assets will not be subject to challenge or disallowance. This certainty would not be available if the direction was a legislative instrument.

Subclause 33(2) sets out the matters to which the Ministers must have regard in deciding whether to give a divestiture direction in accordance with proposed subclause 33(1). Although the long-term interests of end users (a term defined in clause 94 of the Companies Bill) is an important factor, the Ministers will be able to have regard to other relevant factors. These could include NBN Co's business interests and any policy to require stronger separation of NBN Co's business units. In addition, the Ministers must consider advice received from the ACCC, if that is sought under clause 35.

#### **Clause 34 – Directions about transfer of assets to another NBN corporation**

As noted above under clause 33, further divestiture directional powers are conferred on the Communications Minister and the Finance Minister under clause 34.

Subclause 34(1) provides that the Ministers may, by written notice, direct an NBN corporation (the transferor) to transfer one or more specified assets to another NBN corporation (the transferee) specified in the notice within a specified period. The Ministers are also given the power to give such other directions to the transferor or transferee as they consider necessary for the purposes of securing the transfer (for instance, this could include requiring a transferee to execute an instrument of transfer).

The Ministers may only issue a direction under subclause 34(1) while the Commonwealth ownership provisions are in effect. The Commonwealth ownership provisions, which appear in Subdivision A of Division 2 of Part 3 of the Companies Bill, require the Commonwealth to retain full ownership of NBN Co. They cease to have effect when the Finance Minister makes a declaration that, in his or her opinion, conditions are suitable for the entering into and carrying out of an NBN Co sale scheme, and that declaration has not been disallowed by the Parliament (see clauses 50 and 51). The Finance Minister's ability to make such a declaration is subject to the Parliamentary Joint Committee on the Ownership of NBN Co having examined the report of the Productivity Commission inquiry into certain matters relating to the

NBN and NBN Co (see clause 49) and tabled its examination report in both Houses of Parliament.

The combined effect of these provisions is that the Ministers may not issue a direction under subclause 34(1) after the Finance Minister has declared that conditions are suitable for the Commonwealth to commence transferring its ownership of NBN Co, and that declaration has not been disallowed by the Parliament. The reason for this is that from that point it is considered it would no longer be appropriate for the Ministers to intervene in this way in the structuring of NBN corporations, under a direction under clause 34. However, if it is necessary for the purposes of structural reform to promote greater competition to direct an NBN corporation to divest an asset, the general divestiture power at clause 33 must be used.

Subclause 34(3) sets out the matters to which the Ministers must have regard in deciding whether to give a direction in accordance with proposed subclause 34(1), and operates in the same way as subclause 33(2).

Subclause 34(4) provides that the Ministers must not give a direction under subclause 34(1) to an NBN corporation unless the NBN corporation is a constitutional corporation. This provision mirrors subclause 33(3), which is explained above, except that the requirement applies to directions issued to either the transferor or the transferee.

Subclause 34(6) provides that a direction under subclause 34(1) is not a legislative instrument. As the direction would be to a Commonwealth company (within the meaning of section 34 of the *Commonwealth Authorities and Companies Act 1997*), they would not be legislative instruments for the purposes of the LIA, as provided for item 5(a) of the table to section 7 of the LIA. Therefore, subclause (6) is merely declaratory.

The NBN corporation is obliged to comply with the direction (refer proposed subclause 34(5), and clauses 37 and 38). As the instrument functions as a direction from the Ministers to an NBN corporation, it would not be subject to disallowance under item 41 of the table in subsection 44(2) of the LIA. Furthermore, the Government and industry will require certainty that a direction to transfer assets will not be subject to challenge or disallowance. This certainty would not be available if the direction was a legislative instrument.

### **Clause 35 – Advice from ACCC about disposal or transfer directions**

Subclause 35(1) provides that the Communications Minister and the Finance Minister may, by written notice given to the ACCC, require the ACCC to give them advice, within the period specified in the notice, about whether one or more directions under subclause 33(1) or 34(1) should be given to an NBN corporation. This reflects the fact that divestiture or transfers of assets would generally be aimed at advancing competition objectives and the ACCC as the competition regulator could provide valuable advice in this regard. The ACCC is required to comply with the requirement. The notice under subclause 35(1) is not a legislative instrument (refer proposed subclause 35(7) – this provisions is included for the avoidance of doubt).

Section 496 of the Tel Act allows the Minister to direct the ACCC to hold a public inquiry under Part 25 about a specified matter concerning the telecommunications industry. A note is included in relation to subclause 35(2) to alert the reader that under section 497 of the Tel Act, the ACCC can hold a public inquiry under Part 25 about a matter relating to the performance of this function.

Subclause 35(3) clarifies that, for the purposes of section 496 of the Tel Act, the giving of advice by the ACCC in compliance with a requirement under subclause 35(1) is taken to be a matter concerning the telecommunications industry. Subclause 35(3) is enacted for the avoidance of doubt (see subclause 35(4)).

Where the ACCC holds a public inquiry under Part 25 in compliance with a request under subclause 35(1)), the ACCC must, in holding the inquiry and preparing its report on the inquiry, have regard to whether giving the relevant direction(s) would promote the long-term interests of end-users of carriage services or of services provided by means of carriage services, and such other matters (if any) as the ACCC considers relevant.

Subclause 35(6) clarifies that this clause does not prevent the Ministers from seeking advice from the ACCC on a matter arising under Division 4.

Subclause 35(7) clarifies, for the avoidance of doubt, that a request for advice under subclause 35(1) is not a legislative instrument.

### **Clause 36 – Exemption from stamp duty—transfer in compliance with transfer direction**

Proposed clause 36 provides an exemption to an NBN corporation from stamp duty or other tax payable under a law of a State or Territory. As any transfer of assets from one NBN corporation to another could be carried out for the purposes of restructuring the entities prior to sale, or with a view to promoting competition and the long-term interests of end-users, it would effectively be a transfer of assets within the Commonwealth sphere to achieve policy objectives. As such it would not be appropriate for the Commonwealth to be inhibited in the use of this policy lever due to the need to pay stamp duty to the States or Territories, particularly when such stamp duty would be an unanticipated windfall (while some of these considerations also apply to the divestiture of assets to entities other than NBN corporations pursuant to proposed clause 33, given external non-Commonwealth entities are involved, on balance it is considered appropriate that normal stamp duty arrangements should apply as they would in the normal course of business).

The exemption applies in respect of:

- asset transfers in compliance with a direction under subclause 34(1);
- an agreement relating to such a transfer;
- the receipt of money by an NBN corporation, or by a person acting on behalf of an NBN corporation, in respect of such a transfer;
- anything done (including a transaction entered into or an instrument or document made, executed, lodged or given) because of, or for a purpose connected with or arising out of, any of the preceding three matters.



However, the exemption does not apply in the following cases:

- in circumstances specified in the regulations; or
- in relation to stamp duty, or other tax, of a kind specified in the regulations; or
- in relation to stamp duty, or other tax, of a kind specified in the regulations, in such circumstances as are specified in the regulations.

## **Division 5 – Carrier licence conditions etc.**

### **Clause 37 – Carrier licence condition**

The effect of clause 37, together with section 62E of the Tel Act, inserted by item 3 of Schedule 1 to the Access Bill, is that a carrier licence held by an NBN corporation is subject to a condition that the NBN corporation must comply with any applicable rules in clauses 9, 17, 18, 19, 20, 26, 32, 33 or 34 of the Companies Bill. Each of those provisions is described in the notes on clauses above. Any breach by an NBN corporation of the rules in those provisions, where applicable to that NBN corporation, would be dealt with as a breach of a carrier licence, and the enforcement mechanisms under the Tel Act would apply.

### **Clause 38 – Service provider rule**

The effect of clause 38, together with subsection 98(7) of the Tel Act, inserted by item 3 of Schedule 1 to the Access Bill is that, if an NBN corporation is a service provider, the NBN corporation must comply with any applicable rules in clauses 9, 17, 18, 19, 20, 26, 32, 33 or 34 of the Companies Bill, which are described in detail above.

### **Clause 39 – Power to declare carrier licence conditions not limited**

Clause 39 provides that any applicable rules in clauses 9, 17, 18, 19, 20, 26, 32, 33 or 34 of the Companies Bill do not limit any carrier licence conditions that may be declared under section 63 of the Tel Act. Section 63 of the Tel Act provides that the Minister may, by written instrument, impose conditions applying to carrier licences.

### **Clause 40 – Power to determine service provider rules not limited**

Clause 40 provides that any applicable rules in clauses 9, 17, 18, 19, 20, 26, 32, 33 or 34 of the Companies Bill do not limit the rules that may be set out under section 99 of the Tel Act. Section 99 of the Tel Act allows the ACMA, after consulting the ACCC, to make a written determination setting out rules that apply to service providers in relation to the supply of specified carriage services or specified content services.

## **Division 6—Special carrier licence conditions**

### **Clause 41 – Conditions about supply of carriage services by NBN corporations**

Clause 41 provides that that the Communications Minister has the power, under section 63 of the Tel Act, to require an NBN corporation as a condition of its carrier

licence to either supply a specified eligible service (mandatory service) or not to supply a service (prohibited service).

#### *Mandatory services*

Subclause 41(1) provides that a condition of an NBN corporation's carrier licence may require the NBN corporation to comply with section 152CJB of the CCA in relation to a specified eligible service that is supplied, or is capable of being supplied, by an NBN corporation. Such a service would be a mandatory service.

Section 152CJB of the CCA (to be inserted by the Access Bill) would require the NBN corporation to either lodge a SAU or to publish a SFAA in relation to the service specified in the NBN corporation's carrier licence. This would also mean that a mandatory service under this clause would be treated as a declared service and therefore subject to the SAOs under section 152AXB of the CCA. Under subclause 41(2), a condition covered under subclause 41(1) will not have any effect if immediately before it comes into force, the service becomes a declared service.

#### *Prohibited services*

Subclause 41(3) makes it clear that a condition of a carrier licence held by an NBN corporation may prohibit an NBN corporation from supplying a specified carriage service to carriers or service providers. Should the Minister make a condition of an NBN corporation's carrier licence prohibiting the supply of a specified service, the ACCC would not be able to declare the service under section 152AL of the CCA. Section 152CJG of the CCA (to be inserted by the Access Bill) makes it clear that, if a prohibition is in place, the NBN corporation is taken to not be capable of supplying that service.

Any licence condition made by the Minister concerning mandatory or prohibited services may declare that the carrier licence condition applies in the circumstances or for the duration specified in the instrument.

Subclause 41(4) makes it clear that subclauses 41(1) and (3) do not limit the conditions that may be declared under section 63 of the Tel Act. This is to clarify that the Minister may make a broad range of licence conditions applying to carrier licences held by NBN corporations, as with other carriers.

Section 64 of the Tel Act sets out a consultation process that must be followed by the Minister prior to making a carrier licence condition determination – this would apply to any licence condition concerning mandatory or prohibited services.

#### **Clause 42 – Consultation with ACCC**

Clause 42 provides that if the Minister is required under section 64 of the Tel Act to give an NBN corporation a notice in relation to a condition covered by subclauses 41(1) or (3) of the Companies Bill, the Minister must consult the ACCC before the notice is given. This is intended to ensure that the Minister obtains and considers the ACCC's views about competition matters before declaring any specified eligible services to be mandatory services or prohibited services under clause 41. It is

appropriate that the ACCC be consulted about the making of any such licence conditions due to their potential impact both on competition and consumers, as well as the NBN corporation concerned and the industry as a whole.

The requirement under clause 42 for the Minister to consult with the ACCC prior to consulting with an NBN corporation about a draft licence condition determination only applies in relation to licence conditions dealing with mandatory or prohibited services under clause 41. It does not apply to other types of licence conditions that the Minister may consider imposing on an NBN corporation. That said, there would be nothing to prevent the Minister from consulting the ACCC about any such other licence conditions prior to conducting the mandatory consultation with the affected NBN corporation, just as there would be nothing to prevent the Minister from consulting with the ACCC about any licence condition proposed to be imposed on any carrier's licence.

## **Part 3—Ownership and control of NBN Co**

Part 3 of the Companies Bill contains rules governing the ownership of NBN Co, including the Commonwealth ownership provisions (which require the Commonwealth to retain full ownership of NBN Co until certain specified events take place) and provisions regarding the process for the Commonwealth to transfer its ownership of NBN Co.

Part 3 applies only to NBN Co, and not to other NBN corporations, because other NBN corporations will be subsidiaries of NBN Co, or companies controlled by NBN Co, and would therefore be dealt with as part of any privatisation of NBN Co. NBN Co is defined in clause 5 of the Companies Bill as meaning NBN Co Limited (ACN 136 533 741), as the company exists from time to time, even if it should change its name at some future point.

### **Division 1—Simplified outline**

#### **Clause 43 – Simplified outline**

Clause 43 provides a simplified outline of Part 3 to assist the reader.

### **Division 2—Commonwealth ownership and control of NBN Co**

#### **Subdivision A—Commonwealth ownership provisions**

#### **Clause 44 – Commonwealth ownership provisions**

Clause 44 provides that the Commonwealth ownership provisions are set out in clauses 45 and 46 of the Companies Bill. Under these provisions, the Commonwealth must retain full ownership of NBN Co. Subdivision B of Division 2 of Part 3 sets out when the Commonwealth ownership provisions will cease to have effect. The Commonwealth ownership provisions continue in operation until such time as: a declaration is made by the Communications Minister that the NBN should be treated as built and fully operational, the Productivity Commission conducts an inquiry into certain matters relating to the NBN and NBN Co including the regulatory framework for the NBN, the report of that inquiry is tabled in Parliament, the Parliamentary Joint Committee on the Ownership of NBN Co has examined the Productivity Commission report and reported to Parliament on its examination, and the Finance Minister makes a declaration that conditions are suitable for entering into and carrying out of an NBN Co sale scheme. The Finance Minister's declaration in this regard is subject to Parliamentary scrutiny and disallowance.

#### **Clause 45 – Commonwealth to retain ownership of NBN Co**

Clause 45 provides that the Commonwealth must not transfer any of its shares in NBN Co if the transfer results in a breach of any of the outcomes in subclause 45(2). Subclause 45(2) lists a number of outcomes that describe the situation in which NBN Co would no longer be fully owned by the Commonwealth. These are:

- that the Commonwealth no longer holds shares in NBN Co that carry the rights to exercise all of the voting rights attached to the voting shares of NBN Co;

- that the Commonwealth no longer controls the exercise of all of the voting rights attached to the voting shares of NBN Co;
- that the Commonwealth no longer holds all of the paid-up share capital of NBN Co;
- that the Commonwealth is no longer entitled to hold all of the rights to any distribution of capital or profits of NBN Co on winding up; and
- that the Commonwealth is no longer entitled to hold all of the rights to any distribution of capital or profits of NBN Co; otherwise than on winding up.

Neither the Commonwealth nor NBN Co may do anything to cause or contribute to any of the above results occurring.

Clause 45 will cease to have effect at the time worked out under clause 51 of the Companies Bill.

Commonwealth ownership of NBN Co until the NBN is built and fully operational will give the Commonwealth greater flexibility to pursue its objectives during the rollout of the network.

#### **Clause 46 – Compliance by NBN Co**

Subclause 46(1) provides that NBN Co must take all reasonable steps to ensure that the situations described in subclause 45(2) do not exist. If NBN Co engages in conduct that contravenes the rule in subclause 46(1), that is an offence, the penalty for which is 500 penalty units (subclause 46(2)). Under the *Crimes Act 1914* a penalty unit is valued at \$110 unless a law says otherwise. Furthermore, under the *Criminal Code Act 1995*, where a law creating an offence does not specify a fault element for a physical element that consists only of conduct, intention is the fault element for that physical element. Therefore, NBN Co would need to have intentionally engaged in conduct in contravention of the rule in subclause 46(1), in order to have committed an offence.

### **Subdivision B—Termination of Commonwealth ownership provisions**

#### **Clause 47 – Object of this Subdivision**

Clause 47 provides that the object of Subdivision B of Division 2 of Part 3 of the Companies Bill is to provide that the Commonwealth ownership provisions cease to have effect when:

- the Communications Minister makes a declaration under clause 48 that the NBN should be treated as built and fully operational;
- the Productivity Minister has caused to be tabled in both Houses of Parliament a report of an inquiry by the Productivity Commission into certain specified matters relating to the NBN and NBN Co (clause 49);
- the Parliamentary Joint Committee on the Ownership of NBN Co has examined the Productivity Commission’s report and has reported to Parliament on that examination (see Schedule 2); and
- the Finance Minister has declared under clause 50 that, in his or her opinion, conditions are suitable for entering into and carrying out of an NBN Co sale scheme.

Termination of the Commonwealth ownership provisions will enable the Commonwealth to transfer all or part of its shares in NBN Co. The effect of the provisions in this subdivision is that the Commonwealth ownership provisions continue until it is appropriate that the Commonwealth commence to transfer those shares.

**Clause 48 – Declaration by Communications Minister—whether national broadband network should be treated as built and fully operational**

Clause 48 provides that the Communications Minister must initially declare in writing, by 30 June 2018, either that, in his or her opinion, the NBN should be treated as built and fully operational or that a specified period of no more than 12 months is a ‘declared pre-termination period’. By declaring a pre-termination period, the Communications Minister can extend the time to make a declaration that the NBN should be treated as built and fully operational. If the Communications Minister declares a pre-termination period, the Communications Minister must, during that period, declare in writing either that the NBN should be treated as built and fully operational, or make a subsequent declaration that a specified period of no more than 12 months is a further declared pre-termination period. The Communications Minister may continue to declare a declared pre-termination period (with each period being no more than 12 months) until he or she can declare that the NBN should be treated as built and fully operational. Any declaration made by the Communications Minister under this clause must be tabled in each House of Parliament within 15 sitting days of being made (subclause 48(6)). Further, under subclause 48(7), if the Minister declares a declared pre-termination period, the Communications Minister must also table a statement which notifies that the Commonwealth ownership provisions continue to operate.

In deciding whether to make a declaration under this clause, the Communications Minister must have regard to the extent to which the NBN has been built and is operational, matters relating to the security of the NBN and such other matters (if any) as the Communications Minister considers relevant (subclause 48(5)).

Subclause 48(8) confirms, for the avoidance of doubt, that a declaration by the Communications Minister under this clause is not a legislative instrument. The Minister’s instrument will trigger provisions that require a Productivity Commission inquiry, which then in turn permits the Finance Minister to declare that conditions are suitable for the Government to commence an NBN Co sale scheme, which will be a disallowable declaration.

**Clause 49 – Productivity Commission inquiry**

Clause 49 applies if the Communications Minister has made a declaration under clause 48 that, in his or her opinion, the NBN should be treated as built and fully operational.

The effect of subclause 49(2) together with subclause 49(1) is that, at any time after a declaration is made by the Communications Minister that the NBN should be treated as built and fully operational, the Productivity Minister may refer to the Productivity

Commission for inquiry, under paragraph 6(1)(a) of the PC Act, the following matters:

- the regulatory framework for the NBN,
- the impact on future annual Commonwealth budgets of the sale of NBN Co,
- the impact of a sale of the Commonwealth's equity in NBN Co on the:
  - o supply of affordable broadband carriage services;
  - o supply of non-broadband carriage services;
  - o equity and social inclusion; and
- the impact on competition in telecommunications markets of a sale of the Commonwealth's equity in NBN Co.

The Productivity Commission is an independent advisory body set up by the PC Act. Paragraph 6(1)(a) of the PC Act provides that one of the functions of the Productivity Commission is to hold inquiries and report to the Productivity Minister about matters relating to industry, industry development and productivity that are referred to it by the Minister (references to the Productivity Minister are to the Minister who administers that Act – see clause 5. The current Productivity Minister is the Treasurer).

Subclause 49(3) provides that, when referring these matters to the Productivity Commission for inquiry, the Productivity Minister must set a timeframe of 12 months for the Productivity Commission to submit its report on the inquiry to the Productivity Minister. This provision reflects paragraph 11(1)(c) of the PC Act which enables the Minister to specify a period within which the Productivity Commission must submit to the Productivity Minister its report on its inquiry of a matter referred to it by that Minister. Under section 12 of the PC Act, the Productivity Minister must cause a copy of the Productivity Commission's report on an inquiry to be tabled in each House of the Parliament:

- (a) within 25 sitting days of that House after the day on which the Productivity Minister receives it; or
- (b) if the Productivity Commission recommends that the tabling of the report, or part of the report, be delayed for a specified period—within 25 sitting days of that House after the end of that period.

In holding the inquiry and preparing its report, the Productivity Commission must have regard to certain matters listed at subclause 49(4). These include matters relating to the equity of access to broadband carriage services in various types of areas; competition and other issues relating to the telecommunications industry; the retail prices of services supplied using the NBN; ownership and control of NBN corporations; the structural organisation of NBN corporations (which is intended to refer to the organisation of business units of NBN corporations and not to management of NBN corporations); the supply of services by NBN corporations; the coverage of the NBN; the technology used in connection with the NBN, and the need for maintenance, replacement and upgrading of that technology; and any matters specified by the Productivity Minister or any matters that the Productivity Commission considers relevant.

A key objective of the Productivity Commission inquiry is to determine what would be the optimal structural and regulatory setting for fostering competition and delivering consumer outcomes in the telecommunications industry where NBN Co

was being privatised. Key issues therefore would be the structure of the industry that had evolved, the structure of NBN corporations and their interactions, the scope for NBN Co to take advantage of those arrangements—particularly to favour aspects of its business that may be in competition with other industry players, and the risks to competition of retail service providers having an interest in an NBN corporation or an NBN corporation being able to have an interest in a retail service provider. In considering the regulatory issues, the Productivity Commission inquiry must also consider the impact on future annual Commonwealth budgets of a sale of the Commonwealth's equity in NBN Co. This would include consideration of current and expected dividends and likely sale proceeds.

Subclause 49(5) clarifies that the matters listed in subclause 49(4) do not limit, but add to, the general policy guidelines for the Productivity Commission provided for in section 8 of the PC Act.

Paragraph 49(4)(1) provides that the Productivity Minister can, by written determination, specify other matters for which the Productivity Commission must have regard to in holding the inquiry and making the report. Following this, subclause 49(6) provides that before the Productivity Minister makes a declaration specifying any such matters, he or she must consult with both the Minister and the Finance Minister. This will enable both Ministers to advise the Productivity Minister on any other relevant matters that are not listed in subclause 49(4). This clause provides flexibility for other matters to be considered which, given the long period of time that will elapse before the Productivity Commission inquiry will commence, cannot possibly be foreseen at this point in time.

Subclause 49(7) states that a determination made under paragraph 49(4)(1) is a legislative instrument, but section 42 (disallowance) of the LIA does not apply to the determination. As the determination functions as a direction from the Productivity Minister to the Productivity Commission, it would not be disallowable under item 41 of subsection 44(2) of the LIA.

Paragraph 49(8)(a) ensures that the Productivity Commission identifies assumptions it makes in arriving at conclusions in the report. Paragraph 49(8)(b) also ensures that the Productivity Commission considers plausible alternative assumptions that may have had an effect on a conclusion reached. The Productivity Commission must also detail in its report the effect such an alternative plausible assumption would have had on the particular conclusion. The Productivity Commission would exercise its own professional judgment as to what alternative assumptions are plausible in this regard. Subclause 49(8) will promote transparency of analysis.

Subclause 49(9) clarifies that for the purposes of the clause, the principles under Part XIB of the CCA are to be used to determine whether an NBN corporation has a substantial degree of power in a telecommunications market.

One of the Productivity Commission's functions under paragraph 6(1)(a) of the PC Act is to hold inquiries and report to the Minister about matters relating to industry, industry development and productivity that are referred to it by the relevant Minister.



Subclause 49(10) makes it clear that each matter mentioned in subclause 49(2) is taken to be a matter relating to industry, industry development and productivity, for the purposes of paragraph 6(1)(a) of the PC Act.

### **Clause 50 – Declaration by Finance Minister—whether conditions suitable for an NBN Co sale scheme**

Under subclause 50(2), the Finance Minister may, at his or her discretion, declare in writing that, in his or her opinion, conditions are suitable for entering into and carrying out an NBN Co sale scheme. However, the Finance Minister's discretionary power under subclause 50(2) is conditioned. Under subclause 50(1), it only applies if the Parliamentary Joint Committee on the Ownership of NBN Co has reported to the Parliament, under proposed paragraph 3(1)(b) of Schedule 2 to the Companies Bill, on the Committee's examination of the report of the Productivity Commission inquiry into certain matters relating to the NBN and NBN Co (as required by clause 49).

In deciding whether to make a declaration, the Finance Minister must have regard to NBN Co's governance arrangements, NBN Co's business record, market conditions and such other matters (if any) as the Finance Minister considers relevant (subclause 50(3)).

Any declaration made by the Finance Minister under this clause must be tabled in each House of Parliament within 15 sitting days of being made (subclause 50(4)) and published on the website of the Department of Finance (subclause 50(8)).

Subclause 50(9) provides that a declaration made under this clause is not a legislative instrument. However, the effect of subclauses 50(4)-(6) is that either House of Parliament may disallow a declaration by the Finance Minister that conditions are suitable for entering into and carrying out an NBN Co sale scheme. Such a declaration made by the Finance Minister will only take effect if neither House of Parliament passes a motion disallowing the declaration within the 15 sitting days following the tabling of the declaration in that House.

If either House of Parliament passes a resolution under subclause 50(5) disallowing a declaration made by the Finance Minister that conditions are suitable for an NBN Co sale scheme, then at any point after that, the Finance Minister may make such a declaration again, in which case that later declaration would again be subject to Parliamentary scrutiny and disallowance, and would only take effect if not disallowed by either House of Parliament (see subclause 50(7)).

These provisions are intended to provide appropriate Parliamentary oversight of the termination of the Commonwealth ownership provisions.

A declaration made by the Finance Minister under subclause 50(2) is not a legislative instrument (subclause 50(9)). Given the specific disallowance and publication requirements that apply to such a declaration, it is not appropriate to also make those instruments subject to the LIA.

### **Clause 51 – Termination of Commonwealth ownership provisions**

Clause 51 determines when the Commonwealth ownership provisions cease. Subclause 51(1) provides that this clause applies if the Finance Minister makes a declaration under subclause 50(2) that, in his or her opinion, conditions are suitable for the entering into and carrying out of an NBN Co sale scheme, and if that declaration takes effect (i.e. if neither House of Parliament disallows the declaration within 15 sitting days of it being tabled in that House). When the declaration takes effect, the Commonwealth ownership provisions cease to have effect. The effect of this provision is that an NBN Co sale scheme may be entered into and carried out (see clause 54), and the Commonwealth can transfer its shares in NBN Co.

### **Subdivision C—Sale by the Commonwealth of its shares in NBN Co**

Subdivision C of Division 2 of Part 3 sets out rules governing the sale by the Commonwealth of its shares in NBN Co.

These provisions are supported by the executive power of the Commonwealth.

### **Clause 52 – Simplified outline**

Clause 52 provides a simplified outline of Subdivision C of Division 2 of Part 3.

### **Clause 53 – When NBN Co sale scheme may be entered into and carried out**

Subclause 52(1) provides that an NBN Co sale scheme must not be entered into and carried out until the Commonwealth ownership provisions cease under clause 51. ‘NBN Co sale scheme’ has the meaning given by clause 54 (see below).

## **Clause 54 – NBN Co sale scheme**

The object of clause 54 is to define ‘NBN Co sale scheme’ and other expressions used as part of the NBN Co sale scheme.

Subclause 54(2) defines an NBN Co sale scheme as a scheme the object of which is to transfer the whole or a part of the Commonwealth’s equity in NBN Co to other persons. This definition also provides for progressive transfer. It has a very broad and flexible meaning, encompassing the actions listed in subclause 54(5), that will be necessary or desirable to carry out the sale of the Commonwealth’s equity in NBN Co. This broad meaning is further emphasised by:

- subclause 54(7) which provides that subclauses 54(5) and (6) (which list specific matters that an NBN Co sale scheme may involve) do not limit the broad meaning of the expression; and
- subclause 54(6) which provides that in deciding whether a scheme is an NBN Co sale scheme, the economic and commercial substance of the scheme must be considered.

Subclause 54(5) sets out a number of detailed matters that may be involved in an NBN Co sale scheme. Some of the detailed matters include:

- the issue of securities in NBN Co, share transfers, cancellations and buybacks and redemptions of redeemable preference shares held by the Commonwealth;
- payment by NBN Co of a dividend, reducing NBN Co’s share capital or the return of capital by NBN Co;
- the use of sale-scheme hybrid securities by designated companies, and Commonwealth guarantees in relation to those securities;
- securities lending arrangements; and
- modifying NBN Co’s constitution.

Subclause 54(4) enables the Finance Minister to make a written determination setting out rules that are to be complied with by an NBN Co sale scheme. Subclause 54(4) should be read together with subclause 54(9), which provides that a determination under subclause 54(4) is a legislative instrument, but is not disallowable. For commercial reasons, it is not appropriate that an instrument made by the Finance Minister setting out rules that are to be complied with by an NBN Co sale scheme should be disallowable. It will be important to ensure commercial certainty in connection with the NBN Co sale scheme. It may be necessary, depending on market conditions operating at the time of the sale, for additional rules governing an NBN Co sale scheme to be established which operate with the force of law. A ministerial determination would provide this force of law, and commercial certainty. This certainty would not be available if the determination were subject to disallowance.

In addition, the direction operates like a ministerial direction to NBN Co. Ministerial directions are not subject to disallowance (see item 41 of the table in subsection 44(2) of the LIA).

Subclause 54(8) defines a ‘designated company’ as either a wholly-owned Commonwealth company, or a body corporate specified in a written declaration made by the Finance Minister under subclause 54(4)).

A ‘wholly-owned Commonwealth company’ is defined at section 34 of the CAC Act. Section 34 of the CAC Act provides that for the purposes of that Act a ‘wholly-owned Commonwealth company’ means any Commonwealth company, other than a company in which any of the shares are beneficially owned by a person other than the Commonwealth. A ‘Commonwealth company’ is a Corporations Act company in which the Commonwealth has a controlling interest. However, it does not include a company in which the Commonwealth has a controlling interest through one or more interposed Commonwealth authorities or Commonwealth companies.

Subclause 54(10) clarifies, for the avoidance of doubt, that a declaration of a designated company under paragraph 54(8)(b) is not a legislative instrument. A declaration by the Finance Minister of a designated company will be administrative in character and therefore not a legislative instrument for the purposes of the LIA.

The effect of paragraph 54(5)(m) and subclause 54(8) is that an arrangement under which one or more designated companies (each of which is called a ‘hybrid-security issuer company’) issues sale-scheme hybrid securities can form a part of an NBN Co sale scheme.

Subclause 54(11) clarifies that, to the extent that an NBN Co sale scheme is in writing, it is not a legislative instrument. An NBN Co sale scheme is any scheme that has the object of transferring Commonwealth ownership in NBN Co. As such, an NBN Co sale scheme may not be fully in writing. The clause promotes clarity and certainty in the conduct of the NBN Co sale scheme.

If an NBN Co sale scheme, to the extent that it is in writing, were to be regarded as a legislative instrument, it would be subject to registration and disallowance. The Government of the day will require certainty that the sale scheme can be entered into and carried out. This certainty would not be available if the sale scheme were a legislative instrument and subject to disallowance. In addition, it is not appropriate that the sale scheme be published and be publicly available: it will contain commercially sensitive information. The Parliament has the opportunity to scrutinise the Finance Minister’s decision to proceed with the sale of NBN Co when he or she tables the declaration that conditions are suitable for an NBN Co sale scheme under clause 50. That declaration is disallowable.

### **Clause 55 – Sale-scheme hybrid securities**

The ability to issue hybrid securities as part of the NBN Co sale scheme will provide additional flexibility in the structuring of such a scheme. Hybrid securities are a broad classification for a group of securities that combine both debt and equity characteristics. The additional characteristics, compared to ordinary equity, make these securities attractive to additional groups of investors. Accessing all relevant investor groups will be an important consideration for the successful conduct of an NBN Co sale scheme.

For the purposes of this Bill, a ‘sale-scheme hybrid security’ will be broadly defined in subclause 55(1).

The term ‘security’, used in the definition of sale-scheme hybrid security, is defined in subclause 55(8) to have the same meaning as in Chapter 7 of the Corporations Act (see section 761A of that Act).

The term ‘financial product’, used in the definition of sale-scheme hybrid security, is defined in clause 5 of the Companies Bill to have the same meaning as Chapter 7 of the Corporations Act. Division 3 of Part 7.1 of the Corporations Act defines a financial product. In general, a financial product includes an arrangement through which, or through the acquisition of which, a person makes a financial investment, manages financial risk or makes non-cash payments.

The references in the definition of sale-scheme hybrid security to a security, share or financial product that ‘will be redeemed in exchange for’ a share or shares in NBN Co, ‘will be converted to’ or ‘will be exchanged for’ a share in NBN Co are references to an issue of the security, share or financial product on the basis that redemption, conversion or exchange will be mandatory (by either the holder or the issuer) after a specified period.

The references to a security, share or financial product that ‘may be redeemed in exchange for’ a share or shares in NBN Co, ‘may be converted to’ or ‘may be exchanged for’ a share in NBN Co are references to an issue of the security, share or financial product on the basis that redemption or conversion will be optional (by either the holder or issuer) after a specified period.

A security or financial product covered by subclause 55(1) may, but need not, include a charge, lien or pledge (subclause 55(2)). The term ‘charge’ is defined in clause 5 to have the same meaning as in the Corporations Act. Section 9 of the Corporations Act provides that ‘charge’ means a charge created in any way and includes a mortgage and an agreement to give or execute a charge or mortgage, whether on demand or otherwise.

An interest-bearing security that is issued on the basis that it will or may be redeemed in exchange for, or converted to, or will or may be exchanged for, a share or shares in NBN Co, may be issued in Australia or overseas and may be denominated in Australian or foreign currency (subclause 55(3)).

A share that is redeemable in exchange for a share or shares in NBN Co may be issued in Australia or overseas and any rights or obligations in relation to the share may be denominated in Australian or foreign currency (subclause 55(4)). Similarly, a non-interest bearing security or financial product that is redeemable in exchange for, or may be exchanged for, or is convertible to, a share or shares in NBN Co, or a security or financial product specified in a ministerial declaration, may be issued in Australia or overseas and may be denominated in Australian or foreign currency (subclause 55(5)).

An option to acquire a share or shares in NBN Co may be issued in Australia or overseas and the exercise price may be denominated in Australian or foreign currency (subclause 55(6)).

Subclause 55(7) provides that a declaration by the Finance Minister of a security or financial product under subparagraph 55(1)(i)(i) is a legislative instrument, but section 42 (disallowance) of the LIA does not apply to the declaration. Such an instrument is legislative in character and should therefore be a legislative instrument for the purposes of the LIA, but, in the interests of ensuring commercial certainty in connection with an NBN Co sale scheme, the Finance Minister's declaration will not be subject to Parliamentary disallowance.

**Clause 56 – Exemption from stamp duty—transfer by the Commonwealth of its shares in NBN Co etc.**

Clause 56 provides that stamp duty or other tax is not payable under a law of a State or Territory in respect of certain designated matters relating to entering into or carrying out an NBN Co sale scheme.

A list of designated matters are specified in subclause 56(1), where the matter relates to the entering into or carrying out of an NBN Co sale scheme, and include:

- the issue of sale-scheme hybrid securities;
- the receipt of money by the Commonwealth, or its agent, in respect of the issue of sale-scheme hybrid securities;
- the receipt of money by a hybrid-security issuer company, or its agent, in respect of the issue of sale-scheme hybrid securities;
- the redemption, exchange or conversion of sale-scheme hybrid securities;
- the transfer by a hybrid-security issuer company of a share in NBN Co held by the company;
- the grant of a charge, lien or pledge (whether in connection with sale-scheme hybrid securities or otherwise);
- an agreement relating to certain matters covered by specified paragraphs of subclause 56(1); and
- a securities lending arrangement.

Subclause 56(3) does however note that stamp duty or other State and Territory taxes will be payable, even where the matter comes under a designated matter, in such circumstances as are specified in the regulations, or if the stamp duty or tax in question is of a kind specified in the regulations.

**Clause 57 – Authorisation of borrowing—issue of sale-scheme hybrid securities**

Section 37 of the FMA Act provides that an agreement for the borrowing of money by the Commonwealth is of no effect unless the borrowing is authorised by an Act. The use of sale-scheme hybrid securities in a NBN Co sale scheme may involve the Commonwealth (as selling shareholder) entering into borrowing arrangements. This clause provides the necessary legislative authority for such a borrowing.

**Clause 58 – Appropriation—costs incurred in connection with an NBN Co sale scheme**

Clause 58 provides an appropriation to the extent necessary for the purpose of the payment or discharge of the costs, expenses and other obligations incurred by the Commonwealth in connection with the formulation, entering into, or carrying out, of

an NBN Co sale scheme. Subclause 58(2) provides an indicative list of those expenses.

### **Clause 59 – Assistance given by NBN Co or the Board in connection with an NBN Co sale scheme**

Subclauses 59(1) and (2) provide that NBN Co, or a member of the Board of NBN Co, may, on their own initiative, assist the Commonwealth in connection with formulating, entering into or carrying out an NBN Co sale scheme. These are standard provisions which are generally included in legislation relating to the sale of Commonwealth assets.

Subclauses 59(3) and (4) provide that the Communications Minister and Finance Minister may request specific assistance from NBN Co or a Board member of NBN Co, in connection with formulating, entering into, or carrying out, an NBN Co sale scheme. The assistance must be given as requested.

Subclauses 59(5) and (6) confer power on the Communications Minister and the Finance Minister to issue directions about this assistance and provide a mechanism to manage the application of immunities.

Assistance may be provided under clause 59 in connection with the formulation, entering into, or carrying out, of an NBN Co sale scheme. The words ‘in connection with’ is intended to have a wide interpretation: it is intended that subclauses 59(1)-(4) include the giving of assistance in relation to matters that are preparatory for, and incidental to, an NBN Co sale scheme as well as matters more directly related to an NBN Co sale scheme.

Subclause 59(7) provides various immunities where assistance is provided by a director of NBN Co, or by the company itself (including through employees) under subclauses 59(1)-(4), where a direction is issued under subclause 59(5) or (6) or where a request is made under subclause 59(3) or (4). To give appropriate protection to NBN Co and the Board from liability for the making of a request, the giving of assistance or compliance with a direction under clause 59, subclause 59(7) gives immunity from breaches of the Corporations Act, the listing rules, and rules of common law or equity (other than rules of administrative law). This reflects similar provisions that have been included in legislation relating to the sale of Commonwealth assets, notably the *Medibank Private Sale Act 2006* and the *Telstra (Transition to Full Private Ownership) Act 2005*.

Subclause 59(8) makes clear that a breach of one of the mandatory provisions in clause 59 is not an offence; however, it will be a ground to obtain an injunction in the Federal Court under Part 6 (see below).

### **Clause 60 – Giving of assistance—ancillary provisions**

Subclause 60(1) makes it clear that assistance given by NBN Co under subclauses 59(1)-(4) can take a number of forms, including giving information, giving financial assistance, giving a financial benefit to a related party, or providing information, facilities and other assistance in connection with due diligence procedure

or similar processes or marketing briefings (including through employees of NBN Co).

The use of the singular ‘market briefing’, ‘procedure’ and ‘process’ in paragraph 60(1)(d) will not restrict the Commonwealth to only one briefing, procedure or process (see paragraph 23(b) of the AIA).

This list does not limit the forms of assistance that may be given (subclause 60(2)). Requirements to give assistance, however, must not amount to imposing taxation (subclause 60(4)).

Subclause 60(5) does not limit the executive power of the Commonwealth to enter into an agreement or the capacity of NBN Co, or of a member of the Board, to enter into an agreement with the Commonwealth.

### **Clause 61 – Reimbursement of expenses incurred in giving assistance**

Clause 61 provides that the Finance Minister may authorise payment by the Commonwealth to NBN Co, or to a Board member, to reimburse expenses the Finance Minister considers reasonably incurred in giving assistance under clause 59. Subclause 61(4) makes it clear that clause 61 does not otherwise limit the executive power of the Commonwealth to make such payments. The Consolidated Revenue Fund is appropriated for the purposes of making payments under subclause 61(3).

### **Clause 62 – Commonwealth to be bound by Chapters 6CA, 6D and 7 of the Corporations Act 2001**

Clause 62 provides that the continuous disclosure provisions in Chapter 6CA, the fundraising provisions in Chapter 6D and the financial services and markets provisions in Chapter 7 of the Corporations Act bind the Crown in right of the Commonwealth to the extent that those Chapters deal with the formulation, entering into, or carrying out of an NBN Co sale scheme (subclause 62(1)). This is to be the case despite subsection 5A(4) of the Corporations Act.

Division 3 of Part 7.10 of the Corporations Act contains insider trading prohibitions. Subsection 1043A(1) of the Corporations Act prohibits a person who possesses inside information from buying or selling shares or other financial products. ‘Inside information’ is information that is not generally available but that, if it were generally available, a reasonable person would expect to have a material effect on the price or value of particular shares or other financial products. Section 1043F of the Corporations Act provides a ‘Chinese walls’ exemption from the insider trading prohibitions for bodies corporate.

Subclauses 62(4) and (5) make it clear that certain conduct of the Commonwealth will not be taken to breach the insider trading prohibitions in the Corporations Act. Subclause 62(4) provides that the Commonwealth does not contravene the insider trading prohibition in subsection 1043A(1) of the Corporations Act by entering into a transaction or agreement in relation to shares in NBN Co, sale-scheme hybrid securities or an NBN Co sale scheme merely because of information in the possession



of a Commonwealth employee or a Commonwealth office holder, in the circumstances specified in paragraphs 62(4)(d)-(f).

### **Clause 63 – Reduction of NBN Co’s share capital**

This clause applies where there is a reduction of NBN Co’s share capital as part of an NBN Co sale scheme, if the reduction involves the replacement of a particular kind of share with another kind of share and the replacement of the reduced capital.

Section 256B of the Corporations Act requires that a reduction in the share capital of a company be fair and reasonable to the company’s shareholders as a whole, not materially prejudice the company’s ability to pay its creditors and be approved by shareholders under section 256C.

It is possible that one element of an NBN Co sale scheme could involve a conversion of shares and re-structuring of share capital. If such an NBN Co sale scheme results in the replacement of the reduced share capital, it would not affect the capital reserves of NBN Co, the solvency of the company or the interests of creditors.

However, to avoid doubt, subclause 63(2) provides that, if the reduction of capital as part of an NBN Co sale conforms to clause 63, NBN Co would not be required to give creditors notice of a proposed share capital reduction relating to an NBN Co sale scheme. Also, creditors would not be entitled to object to the reduction (subclause 63(3)) and the reduction would not need to be confirmed by the Court (subclause 63(4)).

### **Clause 64 – Alterations of NBN Co’s constitution—notice to debenture holders**

Clause 64 applies if there is an alteration of NBN Co’s constitution which relates to the formulation, entering into, or carrying out of an NBN Co sale scheme. Subclause 64(2) provides that, if an alteration of NBN Co’s constitution conforms to clause 64, NBN Co would not be required to give trustees for debenture holders or debenture holders notice of a general meeting specifying an intention to propose a resolution for the alteration. Further, a court is not empowered to cancel the alteration. This is to be the case despite anything in the Corporations Act.

### **Clause 65 – Alteration of NBN Co’s constitution—ministerial instrument**

Clause 65 provides a simple mechanism to remove special rights and privileges of the Commonwealth that are included in NBN Co’s constitution, once the Commonwealth no longer controls NBN Co. In the absence of such a provision, the company may be put to the expense of holding a general meeting to make the necessary changes to its constitution.

Subclause 65(1) enables the Communications Minister and the Finance Minister to alter NBN Co’s constitution if:

- the alteration relates to an NBN Co sale scheme; and
- the effect is to remove, restrict or limit any rights, privileges or immunities of the Commonwealth or remove any requirements for the Commonwealth, the Communications Minister or the Finance Minister or ministerial consent or direction.

Subclause 65(2) requires the Communications Minister and the Finance Minister to consult the members of the Board of NBN Co before making such an instrument.

Subclause 65(3) makes it clear that the making of such an instrument does not contravene the Corporations Act, a listing rule or a rule of common law or equity.

This clause reflects similar provisions that have been included in legislation relating to the sale of Commonwealth assets, notably the *Telstra (Transition to Full Private Ownership) Act 2005*.

#### **Clause 66 – Use by the Commonwealth of information obtained from NBN Co or the Board**

Clause 66 is intended to ensure that the Commonwealth, or an associated person, are able to use and disclose information provided by NBN Co under clause 59 for the purposes of an NBN Co sale scheme.

It also provides that the Commonwealth or an associated person may use or disclose such information for a purpose other than an NBN Co sale scheme, such as for the purposes of shareholder oversight of NBN Co, so long as that use or disclosure does not involve giving the information to a person who is not an associated person (subclause 66(4)).

An ‘associated person’ is defined in subclause 66(6) as a Minister, a Commonwealth officer, a person engaged under the *Public Service Act 1999*, or a person who performs services for or on behalf of the Commonwealth in connection with the NBN Co sale scheme or the Commonwealth’s capacity as a shareholder in NBN Co.

To avoid any doubt, subclause 66(5) ensures that use and disclosure of information in accordance with this clause will not result in a contravention of, or give rise to a liability or remedy under, the Corporations Act, the listing rules or rules of common law or equity.

#### **Clause 67 – Agreements relating to the protection of information obtained from NBN Co or the Board**

Clause 67 allows the Commonwealth to enter into an agreement with NBN Co to protect information provided to the Commonwealth under clause 59 that might reasonably be expected to prejudice the commercial interests of NBN Co. Such an agreement is enforceable as a contract. Subclause 67(3) makes it clear that this clause does not limit the general executive power of the Commonwealth to enter into agreements.

#### **Clause 68 – NBN Co’s obligations to disclose information**

Clause 68 removes any doubt that the mere provision of information by NBN Co to the Commonwealth under clause 59 will not, of itself, trigger any obligation by that company to disclose that information under the listing rules of a securities exchange

(such as the continuous disclosure requirements of the Australian Stock Exchange Listing Rules), or the Corporations Act.

### **Division 3—Private ownership and control of NBN Co**

Division 3 of Part 3 creates a head of power for the making of regulations in relation to an ‘unacceptable private ownership or control situation’ in relation to NBN Co. The ACCC will be responsible for the oversight of Division 3 of Part 3.

#### **Clause 69 – Unacceptable private ownership or control situation**

Restriction on private ownership or control of NBN Co is to be achieved through prohibiting transactions that result in an ‘unacceptable private ownership or control situation’ (clause 69). An ‘unacceptable private ownership or control situation’ is to be defined in regulations to be made by the Governor-General. Such regulations could cover, for example, caps on the stake that may be held by a person in NBN Co, or by a retail carriage service provider or content service provider in NBN Co. Subclause 69(2) provides that the regulations may confer power on the ACCC to make decisions. Subclause 69(3) provides that before the Governor-General makes a regulation the Communications Minister must consult the ACCC.

Until the NBN is built and fully operational, concerns that retail service providers could invest in NBN Co with a view to gaining control of it and favouring their downstream operations, contrary to the intention of NBN Co’s wholesale-only mandate, are addressed by the Commonwealth’s full ownership. After the Commonwealth has commenced to sell down its stake in NBN Co, such a situation could arise. These concerns could be addressed through the regulation-making power described.

As indicated in the notes on clause 49, the Productivity Commission will consider ownership and control issues as part of its inquiry into the regulatory framework for the NBN.

#### **Clause 70 – Prohibition of unacceptable private ownership or control situation**

Clause 70 requires NBN Co to take all reasonable steps to ensure that an unacceptable private ownership or control situation does not exist in relation to the company. A contravention of this clause is an offence, for which the penalty is 500 penalty units.

#### **Clause 71 – Remedial orders**

If an unacceptable private ownership or control situation exists in relation to NBN Co, subclause 71(1) enables the Federal Court, upon application from the Communications Minister or the ACCC or NBN Co, to make such orders as it considers appropriate for the purpose of ensuring that the situation ceases to exist.

Subclause 71(2) sets out specific matters that could be covered by Federal Court orders (for example, an order directing disposal of shares or restraining the exercise of rights attaching to shares), while subclause 71(3) would allow other kinds of orders to be made.

Subclause 71(4) enables the Federal Court to make ancillary or consequential orders, including an order directing a person to do or refrain from doing a specified act or thing.

Subclause 71(5) enables the Federal Court, before making an order, to direct that notice of the application be given to such persons, or be published in such manner as it thinks fit, or both.

Subclause 71(6) empowers the Federal Court to rescind, vary, discharge or suspend the operation of orders under this clause.

### **Clause 72 – Record-keeping and giving of information**

Subclause 72(1) enables regulations to be made to require a person to keep and retain records relevant to an NBN Co ownership or control matter (defined in subclause 72(6), see below). The regulations may also require information relevant to an NBN Co ownership or control matter to be given to the Communications Minister, or the ACCC, or to NBN Co. This provision may be necessary to enable decisions to be made about enforcing the ownership limits.

The regulations may require this information to be verified by statutory declaration (subclause 72(2)), but will not compel an individual to give information that might tend to incriminate the individual, or expose him or her to a penalty (subclause 72(3)).

Subclause 72(4) provides that a person must comply with regulations made for the purposes of subclause 72(1). A failure to do so is an offence, with a penalty of 50 penalty units. Under section 4B of the *Crimes Act 1914*, a court may impose a penalty of up to five times this amount when an offence is committed under subclause 72(4) by a body corporate.

Subclause 72(5) enables regulations made under this clause to confer discretionary powers on the Communications Minister or the ACCC and gives an example of such a provision (the example concerns the Communications Minister calling for information from NBN Co).

Subclause 72(6) defines an ‘NBN Co ownership or control matter’ as a matter relating to an unacceptable private ownership or control situation or the question whether an unacceptable private ownership or control situation is in existence or will exist.

Subclause 72(7) makes it clear that this clause does not limit either Division 6 of Part XIB, or section 155 of the CCA. The provisions provide information-gathering powers for the ACCC and permit record-keeping rules to be made by the ACCC.

### **Clause 73 – Validity of acts done in contravention of this Division**

Clause 73 makes it clear that even if an act is done which constitutes an offence against this Division, it does not invalidate the act.

### **Clause 74 – Acquisition of property**

This clause prevents the Federal Court from making an order under Division 3 if it would result in an acquisition of property from a person other than on just terms or if it would be invalid due to paragraph 51(xxxi) of the Constitution. Subclause 74(2) defines ‘acquisition of property’ and ‘just terms’ to have their meanings under the Constitution.

#### **Division 4—General provisions**

##### **Clause 75 – Interest in a share**

Clause 75 specifies the circumstances in which a person is taken to hold an ‘interest in a share’ for the purposes of Part 3 of the Companies Bill, which is a term used in clause 56. Subclause 75(1) provides that any kind of legal or equitable interest in the share results in the holder holding an interest in the share and also provides a number of specific situations in which a person is taken to hold an interest in a share (subclause 75(2)). These are (in summary):

- where the person has entered into a contract to purchase the share;
- where the person has a right to have the share transferred to the person or to the person’s order;
- where the person has a right to acquire the share, or an interest in the share, under an option;
- where the person is otherwise entitled to acquire the share or an interest in the share; and
- where the person is entitled to exercise or control the exercise of a right attached to the share.

Subclause 75(3) clarifies that the specific cases listed in subclause 75(2) do not limit subclause 75(1).

Under subclause 75(6), it is made clear that remoteness, the way in which the interest arose and conditionality of an interest does not prevent an interest being an interest in a share for the purposes of Part 3.

##### **Clause 76 – Extra-territorial application**

Clause 76 makes it clear that Part 3 applies both within and outside Australia.

## **Part 4—NBN Co’s reporting obligations**

Part 4 imposes reporting obligations on NBN Co and on the Board (a term defined in clause 5 to mean the board of directors of NBN Co). The reporting obligations relate to both the activities of NBN Co and of other NBN corporations.

### **Clause 77 – Simplified outline**

Clause 77 provides a simplified outline of Part 4 to assist the reader.

### **Clause 78 – Application of this Part**

The effect of clause 78 is that Part 4 only applies if NBN Co is not a wholly-owned Commonwealth company within the meaning of the CAC Act (i.e. after the Commonwealth has started to transfer its ownership of NBN Co).

This provision is necessary as the reporting obligations for Commonwealth companies set out in the CAC Act only apply to wholly-owned Commonwealth companies. As a result, after the Commonwealth transfers any part of its stake in NBN Co, the CAC Act would cease to apply. The Commonwealth would nevertheless continue to have a vital interest in NBN Co’s operations. Part 4 has therefore been included to ensure reporting obligations would apply to NBN Co, and members of the Board during the time when NBN Co ceases to be a wholly-owned Commonwealth company but the Commonwealth still holds majority ownership of NBN Co. Part 4 will cease to operate when the Commonwealth ceases to own a majority stake in NBN Co (see clause 85).

### **Clause 79 – Financial statements**

Clause 79 provides that the Minister and the Finance Minister can direct NBN Co to give them a specified financial statement or statements for a specified period. Clause 79 is based on a similar provision in Division 3 of Part 2 of the *Telstra Corporation Act 1991* and sections 38 and 40 of the *Commonwealth Authorities and Companies Act 1997*.

Subclause 79(3) provides example of periods that may be specified by the Ministers under subclause 79(1). A ‘financial statement’ includes financial statements for the group consisting of NBN corporations.

Subclause 79(4) provides that a member of the Board must prepare each financial statement in accordance with any written guidelines given to the Board from the Ministers and provide the financial statements within two months after the end of the period to which the statement relates. Subclause 79(5) provides the Ministers with the ability to grant extensions of time to the Board under special circumstances. Subclause 79(6) clarifies that any guidelines provided by the Ministers will not be legislative instruments. The guidelines would function as directions to the Board of an NBN corporation and would therefore not be disallowable under item 41 of the table in subsection 44(2) in the LIA.

### **Clause 80 – Communications Minister and Finance Minister to be notified of significant events**

Under clause 80, members of the Board must immediately give the Ministers written particulars of significant events proposed to be undertaken by an NBN corporation.

Subclause 80(1) provides a list of the events that must be notified. Subclause 80(3) also provides that the Ministers may give written guidelines to the Board in order to assist the Board in determining whether a proposal is covered under the listed significant events in subclause 80(1). A guideline provided under subclause 80(3) is not a legislative instrument (subclause 80(4)). The guidelines would function as directions to the Board of an NBN corporation and would therefore not be disallowable under item 41 of the table in subsection 44(2) in the LIA.

Clause 80 is based on a similar provision in Division 3 of Part 2 of the *Telstra Corporation Act 1991* and sections 38 and 40 of the CAC Act. As the directions would be to a Commonwealth company (within the meaning of section 34 of the *Commonwealth Authorities and Companies Act 1997*), they would not be legislative instruments for the purposes of the LIA, as provided for item 5(a) of the table to section 7 of the LIA.

Subclause 80(2) also provides the Ministers with the ability to exempt the Board from the requirement under subclause 80(1). This exemption can be provided subject to conditions.

### **Clause 81 – Keeping the Communications Minister and the Finance Minister informed**

Clause 81 places an obligation on the Board to keep the Ministers informed of the operations of NBN corporations, and to give the Ministers such reports, documents and information in relation to those operations as the Ministers individually require, within such time limits set by those Ministers.

### **Clause 82 – Corporate plan for NBN Co**

The members of the NBN Co Board will be required to prepare a corporate plan at least once a year and provide it to the Ministers (subclause 55(1)). The plan will be required to cover a period of at least three years and not more than five years (subclause 82(2)). The plan must cover each NBN corporation (subclause 82(3)). The members of the Board will be required to keep the Ministers informed about changes to the plan and matters that might significantly affect the achievement of the objectives set out in the plan (subclauses 82(4) and (5)).

The plan will be required to include the matters listed at subclauses 82(6) and (7): these include, for each NBN corporation, details of the company's objectives, the strategies and policies that are to be followed by the company in order to achieve those objectives and such other matters as the Ministers require.

### **Clause 83 – Consequences of contraventions of this Part**

Clause 83 provides while a contravention of this Part is not an offence, it is a ground for obtaining an injunction under Part 6 (see below).

### **Clause 84 – This Part has effect despite the Corporations Act 2001 etc.**

Clause 84 makes it clear that the operation of Part 4 of the Companies Bill does not contravene, or give rise to a liability or remedy under, a provision of the Corporations Act, or a rule of common law or equity (other than a rule of administrative law).

### **Clause 85 – When this Part ceases to have effect**

Clause 85 provides that Part 4 of the Companies Bill, regarding NBN Co's reporting obligations, will cease to have effect at the end of the 'majority interest sale day' for NBN Co.

Subclause 85(2) provides that the Minister must by written instrument declare the first day in which a majority of the voting shares in NBN Co are held by person(s) other than the Commonwealth to be the 'majority interest sale day' for NBN Co.

Subclause 85(3) clarifies that the declaration is a legislative instrument but section 42 of the LIA, concerning disallowance, does not apply. The Minister's declaration will be legislative in character and therefore a legislative instrument for the purposes of the LIA. The Minister will need to determine when the majority interest sale day occurs, based on advice from NBN Co and others. Therefore, the Minister will be in the best position to determine the day, and could be under limited time to make that opinion. The declaration will also be a statement of fact that will trigger the cessation of a number of clauses in the Companies Bill. Accordingly, it is not appropriate that the Minister's declaration be subject to Parliamentary disallowance. This provision corresponds to similar provisions under sections 3 and 4 of the *Telstra (Transition to Full Private Ownership) Act 2005*.

Subclause 85(4) provides that the majority interest sale day may be earlier than the day on which the declaration is registered under the LIA. This is intended to displace the general rule about the commencement of legislative instruments at section 12 of the LIA. The date of the majority interest sale day will be specified in the instrument.

Subclause 85(5) provides a process to use to identify whether, in a securities lending arrangement, a share is taken to be held by the Commonwealth for the purposes of this clause.

For the purpose of this clause, a 'hybrid-security issuer company' which is specifically mentioned in a written declaration by the Finance Minister would be included in any references to the Commonwealth. A written declaration for this purpose will not be a legislative instrument. The Finance Minister's declaration would be administrative in character and therefore not a legislative instrument. Furthermore, should the Finance Minister decide to designate a company, this would be in the context that such designation was critical to the conduct of an NBN Co sale scheme. The Government will require certainty that the decision to designate a company will



not be overturned. This certainty would not be available if the declaration were a legislative instrument and subject to disallowance.

This provision corresponds to similar arrangements applying to the sale of Telstra under the *Telstra (Transition to Full Private Ownership) Act 2005*.

## **Part 5—Anti-avoidance**

### **Clause 86 – Anti-avoidance**

Subclause 86(1) provides that an NBN corporation must not, either alone or with one or more persons, enter into, or begin to carry out, a scheme if it would be concluded that this was done for the sole or dominant purpose of avoiding the application of any provisions of this Act relating to that NBN corporation or any other NBN corporation. ‘Scheme’ is provided with a wide ranging definition in subclause 86(4).

A contravention of subclause 86(1) is not an offence, but is a ground upon which the Communications Minister or the Finance Minister can obtain an injunction in the Federal Court under Part 6.

A contravention of subclause 86(1) does not affect the validity of any transaction.

## **Part 6—Injunctions**

### **Clause 87 – Simplified outline**

Clause 87 provides a simplified outline of Part 6 of the Companies Bill.

### **Clause 88 – Injunctions**

Part 6 confers on the Federal Court power to grant an injunction to enforce compliance with the provisions of the Companies Bill, once enacted. An injunction can restrain a person from acting in a particular way or require the person to do a particular thing.

Subclauses 88(1) and (2) provide that the Minister or the Finance Minister can be the applicant for an injunction.

### **Clause 89 – Interim injunctions**

Subclause 89(1) provides that an injunction restraining a person from acting in a particular way under subclause 88(2) may be granted by the Federal Court on an interim basis. In that case, subclause 89(2) provides that the applicant (the Minister or the Finance Minister) does not have to give an undertaking to meet any loss that the person may incur if the interim injunction is granted but, in the event, the final injunction is refused.

### **Clause 90 – Discharge etc. of injunctions**

Clause 90 provides the power on the Federal Court to discharge or vary an injunction that is granted under Part 6.

### **Clause 91 – Certain limits on granting injunctions not to apply**

Clause 91 removes certain other restrictions on the granting of an injunction, whether restraining or performance injunctions, permitting the Federal Court to grant an injunction whether or not the relevant conduct (or refusal to act) will be repeated, or whether or not it has already taken place.

### **Clause 92 – Other powers of the Federal Court unaffected**

This clause provides that the powers conferred on the Federal Court under Part 6 are in addition to the Federal Court's other powers.

## **Part 7—Miscellaneous**

### **Clause 93 – Severability**

The effect of clause 93 is to ensure that the Companies Bill will operate effectively with respect to NBN corporations that are constitutional corporations, and with respect to NBN corporations the operation of which attracts the communications power in the Constitution, in the event that provisions of the Companies Bill were to be held to be partly beyond power.

Subclause 93(2) provides that the Companies Bill (other than Division 4 of Part 2, which relates to divestiture of assets by NBN corporations) has the effect it would have if subclause 93(3) had not been enacted and each reference in the Companies Bill to an NBN corporation were confined to an NBN corporation that is a constitutional corporation (see the definition of this term in clause 5).

Subclause 93(3) provides that the Companies Bill (other than Division 4 of Part 2) has the effect it would have if subclause 93(2) had not been enacted and each reference in the Companies Bill to an NBN corporation were confined to an NBN corporation that carries on, proposes to carry on, or has the object of carrying on, a business that consists of or includes the supply of a carriage service.

The special effect given to the provisions of the Companies Bill by the operation of clause 93 does not limit the general effect that the provisions of the Companies Bill have other than in reliance of the operation of clause 93 (subclause 93(1)).

### **Clause 94 – Promotion of the long-term interests of end-users of carriage services and of services supplied by means of carriage services**

This clause provides that for the purposes of the Companies Act, the question whether a particular thing promotes the long-term interests of end-users of carriage services or of services supplied by means of carriage services is to be determined in the same manner as it is determined for the purposes of Part XIC of the CCA (see subsection 152AB(2) of that Act).

### **Clause 95 – NBN Co is not a public authority**

Clause 95 provides that NBN Co is taken for the purposes of the laws of the Commonwealth, of a State or of a Territory, not to have been incorporated or established for a public purpose or for a purpose of the Commonwealth, not to be a public authority or an instrumentality or agency of the Crown, and not to be entitled to any immunity or privilege of the Commonwealth. The wording of this clause ensures that this provision has the widest possible operation to avoid NBN Co being found to be a public authority having regard to the variable language used by Commonwealth, State and Territory legislation when describing public entities, thereby ensuring it is not captured by that legislation on the grounds that it is a ‘public authority’.

For instance, this provision clarifies that the *Foreign Acquisitions and Takeovers Act 1975* (‘the FATA Act’) will apply to NBN Co. The FATA Act does not apply to a corporation constituted for a public purpose by a law of the Commonwealth (see

subsection 7(3) of that Act). Clause 95 ensures that NBN Co is not exempt from the FATA Act, because it is not to be considered as established for a public purpose.

#### **Clause 96 – Public Works Committee Act**

Clause 96 provides that the *Public Works Committee Act 1969* does not apply to an NBN corporation. NBN corporations will operate as commercial enterprises. Accordingly, the *Public Works Committee Act 1969* should not apply to NBN corporations. This is to ensure that NBN corporations have sufficient commercial flexibility to undertake the investments needed to roll out the NBN and is consistent with arrangements that apply to Australia Post and that previously applied to Commonwealth-owned carriers such as Telstra, the Overseas Telecommunications Corporation and Aussat.

#### **Clause 97 – Winding-up of NBN corporation not prevented by this Act**

As a company incorporated under the Corporations Act, NBN Co is liable to be wound up under relevant provisions of that Act, and so would other NBN corporations. The provisions in the Corporations Act provide an important protection to the creditors of any company. Clause 97 is intended to remove any implication that any provisions in the Companies Bill would prevent NBN Co, or other NBN corporations, from being wound up in accordance with the Corporations Act.

#### **Clause 98 – Rights of NBN corporation’s shareholders, debenture holders and creditors to be subject to this Act**

Clause 98 provides that the rights of the shareholders, debenture holders and creditors of NBN corporations are subject to the provisions in the Companies Bill.

#### **Clause 99 – Delegation**

Subclause 99(1) permits the Communications Minister to delegate his or her powers under the Companies Act, other than clause 48 (declaration that the NBN should be treated as built and fully operational) to the Secretary of the Department or a Senior Executive Service (SES) employee or acting SES employee in the Department.

Subclause 99(2) permits the Finance Minister to delegate his or her powers under the Companies Act, other than clause 50 (declaration that the conditions are suitable for an NBN Co sale scheme), to the Secretary of the Department of Finance or a Senior Executive Service (SES) employee or acting SES employee in the Department of Finance.

#### **Clause 100 – Compensation for acquisition of property**

Clause 100 has been included to provide that if, as a result of the operation of any provision of the Companies Bill, there is an acquisition of a person’s property other than on just terms, the Commonwealth is liable to pay a reasonable amount of compensation to the person. Subclause 100(2) further provides that if the Commonwealth and the person affected cannot agree on the amount of compensation, the person may institute proceedings in the Federal Court.

Subclause 100(5) defines ‘acquisition of property’ and ‘just terms’ to have their meanings under the Constitution.

Subclause 100(3) provides that if the operation of clause 34 in relation to the transfer of an asset to the transferee mentioned in that clause would result in an acquisition of property from a person otherwise than on just terms, the transferee is liable to pay a reasonable amount of compensation to the person. This clause has been inserted to clarify that the transferee bears the responsibility for any compensation payable in relation to a forced transfer of an asset under that provision.

Subclause 100(4) clarifies that if the transferee and the person do not agree on the amount of the compensation, the person may institute proceedings in the Federal Court for the recovery from the transferee of such reasonable amount of compensation as the Court determines. This is consistent with the approach adopted in other Commonwealth legislation (see for example section 531L of the Tel Act).

### **Clause 101 – Regulations**

Clause 101 provides that the Governor-General may make regulations prescribing matters required or permitted to be prescribed or necessary or convenient to be prescribed for carrying out or giving effect to the Companies Bill, once enacted.

## **Schedule 1—NBN corporations**

Schedule 1 provides for the definition of NBN corporations. Under clause 5, an ‘NBN corporation’ has the meaning given by clause 1 of Schedule 1 to the Companies Bill.

### **Clause 1 – NBN corporations**

Clause 1 of Schedule 1 to the Companies Bill provides for the definition of an ‘NBN corporation’. Each of the following is an NBN corporation: NBN Co and NBN Tasmania (which are both specifically defined in clause 5 of the Companies Bill) and a company over which NBN Co is in a position to exercise control.

Companies over which NBN Co is in a position to exercise control have been included within the definition of NBN corporation to ensure that, in the event that NBN Co enters into an arrangement whereby it obtains control of a company, the obligations that apply to NBN Co will also apply to that company. The main type of arrangements would be where NBN Co acquires a company, but it could also include joint ventures or other contractual arrangements. This is to ensure NBN Co has regard to its wholesale-only and other obligations prior to forming such arrangements, these obligations are given effect through such arrangements and such arrangements do not, by accident or intent, by-pass any of NBN Co’s obligations.

The concept of a ‘company over which NBN Co is in a position to exercise control’ is particularly relevant to the situation where NBN Co acquires a carrier or CSP, for example for the purpose of using its network assets to advance the rollout of the NBN, and that carrier or CSP offers retail services. For NBN Co to have an ongoing interest in a company with retail operations would be inconsistent with the objective that NBN Co should be wholesale-only. This in turn is designed to pre-empt any preferential treatment of downstream operations to the detriment of retail competition on the open access wholesale platform NBN Co has been tasked with building and operating. The obligations that apply to NBN Co will therefore also apply to any company that becomes controlled by NBN Co. Consequently, the company with retail operations would no longer be able to offer retail services, and would be subject to the access, non-discrimination and transparency obligations set out in the Access Bill.

However, in recognition that such acquisitions may help advance the rollout of the NBN, subitem 1(3) provides that a company that is a retail carriage service provider is taken not to be an NBN corporation during the first twelve months that NBN Co is in a position to exercise control of it (so long as any conditions specified in the regulations are satisfied). This mechanism provides a transitional exemption, by which NBN Co can acquire necessary assets held by carriers and CSPs with retail operations, while providing it with a reasonable time to dispose of those retail operations, particularly so it does not need to dispose of the assets hastily, to its commercial disadvantage. ‘Retail carriage service provider’ is defined in clause 5 of the Companies Bill.

This provision has been included to enable NBN Co to have some flexibility to purchase a retail carriage service provider without the company over which NBN Co has become in a position to exercise control breaching any obligations under the Companies Bill (such as only to provide eligible services to a carrier or a service

provider) for an initial period of 12 months, during which time it is expected that NBN Co and the other company would arrange for that company to make arrangements to ensure that that company complies with the provisions of the Companies Bill. The limit of 12 months ensures that this exception is properly constrained.

Given NBN Co's clear wholesale-only mandate, it should be understood that such arrangements are expected to be the exception, rather than the general rule. To the greatest extent possible, NBN Co would be expected to arrange any acquisition so that it would not need to acquire any retail operations along with the assets it wished to acquire.

Moreover, NBN Co will need to notify the Commonwealth of any proposed acquisitions, including acquisition of a significant shareholding, as part of its reporting obligations under the CAC Act and under Part 4 of the Companies Bill.

The ACCC could also, under section 50 of the CCA, assess such an acquisition to determine if it would have the effect, or be likely to have the effect, of substantially lessening competition in a market. The ACCC would be able to have regard to the impact of an acquisition on NBN Co's wholesale-only obligations, because one of the criteria for a section 50 assessment is the level of vertical integration in a market. As part of a section 50 assessment, NBN Co could submit undertakings under section 87B of the CCA to divest any retail activities associated with the acquisition. The Government would consider this to be a preferable course of action on the part of NBN Co to ensure the wider industry and community generally has confidence that NBN Co is committed to its wholesale-only mandate.

## **Clause 2 – Control of a company**

Clause 2 of Schedule 1 to the Companies Bill sets out that, for the purposes of the definition of NBN corporation, the question of whether a person is in a position to exercise control of a company is to be determined under Schedule 1 to the BSA. Determination under the BSA has been adopted for several reasons. First, the Schedule provides an expansive definition of control consistent with the Government's objective of ensuring NBN Co's wholesale-only and other obligations are widely applied and not easily by-passed. Second, Schedule 1 has been adopted in the CCS Bill in relation to the test for Telstra's control of a company. Adopting a different definition of control would have led to inconsistent approaches to the regulation of firms in the same market. Third, the control concepts used in Schedule 1 are relevant and familiar to the telecommunications sector because of commercial links and convergence between the telecommunications and broadcasting industries. For example, a service provider to whom an NBN corporation can supply services under clause 9 of the Companies Bill could be a content service provider who supplies content services as an Internet service provider using the NBN and could also be a broadcaster under the BSA.

The definition of 'associate' in clause 3 applies for this purpose, rather than the definition of 'associate' in subsection 6(1) of the BSA. This is also consistent with the approach taken in the CCS Bill.



The special provisions for authorised lenders set out under clause 4 of Schedule 1 to the BSA also apply to the determination of control under the Companies Bill. Amongst other things, these provisions set out the circumstances for deciding whether or not a lender or any controller of a lender is in a position to exercise control. Authorised lenders are defined in clause 4 to Schedule 1 to the BSA and include authorised deposit taking institutions, corporations formed under the law of a State or Territory to carry on the business of banking within Australia and a corporation whose sole or principal business is the provision of financial accommodation to other persons.

### **Clause 3 – Associate**

Clause 3 provides a definition for an ‘associate’ of NBN Co for the purposes of Schedule 1 to the Companies Bill. This definition has been modelled on the definition of associate in section 6 of the BSA.

Subclause 3(2) provides that persons are not associates of each other if the ACCC is satisfied that the persons do not act together in any relevant dealings relating to the company and neither of the persons is in a position to exert influence over the business dealings of the other in relation to the company. It is considered appropriate that the ACCC is given the discretion to ensure the definition of associate is not applied too widely. Again, the use of associate provides for an expansive definition of control consistent with the Government’s objective of ensuring NBN Co’s wholesale-only and other obligations are widely applied and not easily by-passed.

## **Schedule 2— Parliamentary Joint Committee on the Ownership of NBN Co**

Schedule 2 to the Companies Bill sets out the procedural aspects associated with membership, establishment and conduct of the Parliamentary Joint Committee on the Ownership of NBN Co (the Joint Committee). This is necessary as the Finance Minister's ability to declare conditions suitable for an NBN Co sale scheme is conditional on the Joint Committee having reported to Parliament on its examination of the report of the Productivity Commission inquiry into matters relating to the NBN and NBN Co (see clause 49). The definition of 'Parliamentary Joint Committee on the Ownership of NBN Co' under clause 5 of the Bill refers to the committee constituted under Schedule 2.

The proposed provisions in Schedule 2 which specify how the Joint Committee is to be established are closely modelled –with some modernisation- on those in Part 3 of the *Australian Crime Commission Act 2002* (which established the Parliamentary Joint Committee on the Australian Crime Commission) and Part 14 of the *Law Enforcement Integrity Commissioner Act 2006* (which established the Parliamentary Joint Committee on the Australian Commission for Law Enforcement Integrity).

### **Clause 1 – Parliamentary Joint Committee on the Ownership of NBN Co**

Clause 1 sets out the procedural aspects of how the Joint Committee is established and its membership. Any sale of the Commonwealth's stake in NBN Co will be a matter of considerable public interest, given that the NBN will be the platform for the provision of most fixed-line retail services. The Joint Committee is designed to provide a further level of Parliamentary scrutiny in respect of the future privatisation of NBN Co, and the findings of the Productivity Commission inquiry.

Subclauses 1(1) and (2) of Schedule 2 to the Companies Bill set out when the Joint Committee is to be established. The Joint Committee will be established if a report of the Productivity Commission inquiry mentioned in clause 49 is tabled in the House of Representatives. The Joint Committee is to be a joint committee of members of the Parliament, with members to be appointed according to the practice of the Parliament with reference to the appointment of members to serve on joint select committees of both Houses of the Parliament (paragraph 1(1)(a) of Schedule 2). The appointment of the members must occur within 15 sitting days of the House of Representatives after the tabling of the Productivity Commission's report (paragraph 1(1)(b) of Schedule 2).

In the event that the House of Representatives is dissolved in between the Productivity Commission report being tabled and the Joint Committee being established (i.e. if an election is called during this time), then the 15-sitting day period permitted for the appointment of the Joint Committee is to "carry over" into the new Parliament once established. That is, if the House of Representatives is dissolved after a period of four sitting days after the Productivity Commission report is tabled, then the Joint Committee will need to be appointed within 11 sitting days of the House of Representatives, once Parliament resumes.

The Joint Committee will have 180 days from its establishment to examine the Productivity Commission report and to report to Parliament on its examination (see paragraph 3(1)(b) of Schedule 2 to the Companies Bill). Subclause 1(2) deals with the situation in which the House of Representatives is dissolved during that period of 180 days, e.g. if an election is called after the Joint Committee is established under subclause 1(1) but before the Joint Committee has reported to Parliament on its examination of the Productivity Commission report. The effect of subclause 1(2) is to again require the establishment of the Joint Committee as soon as possible after the next Parliament commences. If this circumstance eventuates, the Joint Committee will then have 180 days from its appointment under this provision to report to the Parliament on its examination of the Productivity Commission report: that is, where a dissolution of the House of Representatives intervenes, whatever period of time the Joint Committee first existed prior to the dissolution of the House of Representatives is not counted for the purposes of the time the Joint Committee is given to complete its examination of the Productivity Commission report after the Joint Committee is re-established when the Parliament resumes.

Subclause 1(3) of Schedule 2 to the Companies Bill provides that the Joint Committee is to consist of 10 members (five Senators appointed by the Senate and five members of the House of Representatives appointed by that House). However, the following persons are expressly excluded from being eligible to be members of the Joint Committee:

- any Minister (this is not limited to the Communications or Finance Ministers); or
- the President of the Senate; or
- the Speaker of the House of Representatives; or
- the Deputy-President and Chair of Committees of the Senate; or
- the Deputy Speaker of the House of Representatives.

Subclause 1(5) of Schedule 2 to the Companies Bill sets out the five circumstances when a member of the Joint Committee will cease to hold office.

One of the circumstances in which a member of the Joint Committee may cease to be a member is when they resign his or her office. Subclauses 1(6) and (7) provide for how and when this resignation is to occur, namely, a written notice of resignation which is signed by the member will be required, and such a notice is to be delivered to

- in the case where the member is a senator—the President of the Senate; or
- in the case where the member is a Federal Member of the House of Representatives—the Speaker of the House of Representatives.

Subclause 1(8) of Schedule 2 to the Companies Bill provides that either House of the Parliament may appoint one of its members to fill a vacancy amongst the members of the Joint Committee appointed by the particular House.

## **Clause 2 – Powers and proceedings of the Parliamentary Joint Committee**

Clause 2 of Schedule 2 provides that the powers and proceedings of the Joint Committee are to be determined by resolution of both Houses of the Parliament. This approach will provide for greater flexibility for Parliament in determining these matters at a future time.

### **Clause 3 – Duties of the Parliamentary Joint Committee**

Subclause 3(1) of Schedule 2 sets out the duties of the Joint Committee. The Joint Committee has three duties, namely:

- the assessment and scrutiny of the report of the Productivity Commission inquiry mentioned in clause 49;
- reporting on its examination of the Productivity Commission's report to both Houses of the Parliament within 180 days after the Joint Committee was established; and
- if either House of Parliament refers any question to it that is in connection with the Joint Committee's duties, the Joint Committee is to inquire into that question and report to that House on that question.

Subclause 3(2) clarifies that for the purposes of the Joint Committee's examination of the Productivity Commission report, the Joint Committee can consider any matter appearing in, or arising out of, the report of the Productivity Commission inquiry.

### **Clause 4 – Winding up of the Parliamentary Joint Committee**

As the Joint Committee will be established for the specific purpose of examining the Productivity Commission's report of its inquiry into the various matters set out in clause 49 of the Companies Bill, it will have no reason to continue to exist after that examination has been completed and the report tabled. Therefore, clause 4 of Schedule 2 to the Companies Bill provides that the Joint Committee will cease to exist immediately after it has reported to both Houses of the Parliament on its examination of the Productivity Commission report.

**TELECOMMUNICATIONS LEGISLATION AMENDMENT (NATIONAL  
BROADBAND NETWORK MEASURES — ACCESS ARRANGEMENTS)  
BILL 2011**

**Clause 1 – Short title**

Clause 1 provides that the Access Bill, when enacted, may be cited as the *Telecommunications Legislation Amendment (National Broadband Network Measures — Access Arrangements) Act 2011*.

**Clause 2 – Commencement**

Clause 2 of the Access Bill provides for the commencement of the Access Bill.

Clauses 1-3 of the Access Bill and any other provisions not covered in the table provided at subclause 2(1), will commence on the day on which the Access Bill receives the Royal Assent.

Item 5 of Clause 2 of the Access Bill provides that new Part 4 of Schedule 1 to the Access Bill will commence the day after the end of the period of 60 days beginning on the day the Bill receives the Royal Assent. New Part 4 deals with changes to the FOI Act. The delayed commencement period is necessary to enable NBN Co to put all its FOI arrangements in place, such as reporting structures and systems, which are required to properly respond to requests received under the FOI Act.

Part 1 of Schedule 1 will commence on the day which is the latest of:

- the start of the day after this Act receives the Royal Assent; or
- immediately after the commencement of section 3 of the *National Broadband Network Companies Act 2010*; or
- immediately after the commencement of Part 2 of Schedule 1 to the *Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Act 2010*.

There are two reasons for this. Several provisions in the Access Bill refer to the CCA, rather than the name by which that Act is known at the time of the Access Bill's introduction: *the Trade Practices Act 1974*. From 1 January 2011 the short title of the *Trade Practices Act 1974* will change to the *Competition and Consumer Act 2010* as a result of the *Trade Practices Amendment (Australian Consumer Law) Act (No. 2) 2010*. Further, several provisions in Part 1 of the Access Bill rely on, or refer to, provisions in proposed Parts 2 of Schedule 1 to the CCS Bill. The commencement arrangement outlined above will ensure that the references in the Access Bill to the CCA and the CCS Bill will be effective, by deferring the commencement of the relevant provisions in the Access Bill until (as applicable) when the change of name of that Act takes effect or when Part 2 of Schedule 1 to the CCS Act comes into effect, or on the later of the start of the day after the Access Bill receives the Royal Assent.

As a result of section 10 of the AIA, a reference to the CCA in the Access Bill will include a reference to that Act before its name was changed, i.e. before 1 January 2011.

Part 2 of Schedule 1 will commence on the day which is the latest of:

- the start of the day after the Access Bill receives the Royal Assent; or
- immediately after the commencement of section 3 of the *National Broadband Network Companies Act 2010* ('the Companies Act'); or
- immediately after Part 7 of Schedule 1 to the *Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Act 2010*.

The operation of certain provisions in Part 2 of the Access Bill is contingent on the commencement of Part 7 of Schedule 1 to the CCS Bill. Other provisions in Part 2 of the Access Bill are contingent on the commencement of section 3 of the Companies Act (refer clause 3 of the Companies Bill).

Part 3 of Schedule 1 will commence on a day to be fixed by proclamation.

For certainty, Part 3 will commence immediately after the 12 months from the day on which the Access Act receives the Royal Assent, if a date is not proclaimed before then.

This approach to the commencement of Part 3 has been adopted to provide affected carriers and carriage services providers as well as the ACCC and the ACMA with advance notice of the level playing field arrangements in Part 3 and a transitional period in which to adjust. Amongst other things, it is envisaged that during the transitional period carriers, including in new developments, could supply a range of wholesale services, but ultimately would need to supply a wholesale Layer 2 bitstream service on their networks, once Part 3 commences. It should be noted, however, that amendments to simplify the making of codes and standards in relation to fibre infrastructure and services under Part 6 of the Tel Act to ensure new FTTP networks are consistent with NBN specifications as part of the level playing field requirements are included in Part 1 of Schedule 1 and will commence on the Royal Assent, to allow necessary code and standards development work to proceed quickly.

### **Clause 3 – Schedule(s)**

Clause 3 provides that each Act that is specified in a Schedule to the Access Bill is amended or repealed as set out in that Schedule and any other item in a Schedule has effect according to its terms. There is one Schedule to the Access Bill which amends the Tel Act and the CCA.

## **Schedule 1—Amendments**

### **Part 1—General amendments**

Part 1 of Schedule 1 to the Access Bill makes a number of amendments to the Tel Act and the CCA to:

- support the arrangements to provide a level regulatory playing field for superfast telecommunications networks - these provisions will also support the rollout of NBN-consistent FTTP networks in new real estate developments; and
- introduce new access, transparency and non-discrimination obligations relating to the supply of wholesale services by an NBN corporation.

The amendments made to the CCA should be read alongside the amendments made to that Act by the CCS Bill. The amendments made by the Access Bill assume that the amendments made by the CCS Bill have taken effect (see the explanatory note for clause 2 of the Access Bill).

### ***Telecommunications Act 1997***

#### **Item 1 – Section 7 (after paragraph (b) of the definition of ACCC’s telecommunications functions and powers)**

Item 1 amends section 7 of the Tel Act by inserting proposed paragraph (ba) into the definition of the ACCC’s telecommunications functions and powers. This amendment will ensure that the ACCC will have powers conferred on it under the Companies Act.

#### **Item 2 – Section 7**

Item 2 inserts a proposed definition of ‘NBN corporation’ into section 7. ‘NBN corporation’ is defined as having the same meaning as in the Companies Act. An ‘NBN corporation’ is defined in section 5 of that Act as meaning: NBN Co Limited; or NBN Tasmania Limited; or a company over which NBN Co Limited is in a position to exercise control. The definition also clarifies that this definition does not apply to sections 577BA, 577BC, clause 17 of Schedule 1 or Part 5 of Schedule 1.

#### **Item 3 – Section 7**

Item 3 inserts a definition of ‘optical fibre line’ into section 7 of the Tel Act. The reference to ‘encloses optical fibre’ in the definition is intended to refer to the immediate casing surrounding the fibre, not clearly separate facilities like ducting. The definition recognises that fibres are generally sheathed in plastic tubes which in turn are bundled together and further sheathed to form a cable.

#### **Item 4 – After section 62C**

Item 4 amends the Tel Act by inserting proposed sections 62D and 62E. These amendments specify that obligations to be placed on NBN corporations through the Access Bill and proposed section 37 of the Companies Act (refer clause 37 of the

Companies Bill) are additional carrier licence conditions specific to NBN corporations.

**Proposed section 62D Condition of carrier licence set out in section 152CJC of the *Competition and Consumer Act 2010*.**

Proposed section 62D of the Tel Act provides that a carrier licence is subject to any conditions set out in proposed section 152CJC of the CCA. This provision is to be inserted as part of proposed Division 6A of Part XIC of the CCA (see item 79 below).

Proposed section 152CJC of the CCA sets out a carrier licence condition requiring an NBN corporation to comply with any applicable rules in proposed section 152CJA. Proposed section 152CJA of the CCA relates to the supply of services by NBN corporations.

**Proposed section 62E Condition of carrier licence set out in section 37 of the *National Broadband Network Companies Act 2010***

Proposed section 62E of the Tel Act provides that a carrier licence is subject to the conditions set out in section 37 of the Companies Act. Section 37 of the Companies Act provides that a carrier licence held by an NBN corporation is subject to a condition that the NBN corporation complies with any rules in sections 9 or 17 of the Companies Act (see clauses 9 and 17 of the Companies Bill), about the supply of services and goods by NBN corporations, investment of money, functional separation of and divestment of assets by NBN corporations that are applicable.

The effect of proposed sections 62D and 62E of the Tel Act, together with proposed section 152CJC of the CCA and section 37 of the Companies Act, is that an NBN corporation must comply with any conditions set out in these provisions, and that failure to do so would render the NBN corporation subject to the enforcement provisions in the Tel Act relating to breach of carrier licence conditions.

**Item 5 – After subsection 69(7C)**

Item 5 inserts proposed subsections 69(7D), (7E) and (7F) into the Tel Act. Section 69 of the Tel Act authorises the ACMA to issue a remedial direction to a carrier that is contravening, or has contravened, a condition of its carrier licence. The effect of proposed subsections 69(7D), (7E) and (7F) is that the ACMA would not be authorised to issue a remedial direction to a carrier that is breaching or has breached a licence condition under proposed section 152CJC of the CCA, or sections 37 and 41 of the Companies Act. The reason for this restriction is that it is intended that only the ACCC and the Minister will have authority to take action against a carrier for breach of a licence condition under proposed section 152CJC of the CCA, or sections 37 and 41 of the Companies Act.

The identified licence conditions are specific to the telecommunications access regime under Part XIC of the CCA, for which the ACCC has regulatory responsibility. It is therefore appropriate that the ACCC, and not the ACMA, has powers to take action against carriers for breach of those licence conditions.



### **Item 6 – After subsection 70(4C)**

Item 6 inserts proposed subsections 70(4D), (4E) and (4F) into the Tel Act.

Subsection 70(1) of the Tel Act authorises the ACMA to issue formal warnings to carriers that contravene a condition of their carrier licence. The effect of proposed subsections 70(4D), (4E) and (4F) is that the ACMA would not be authorised to issue a formal warning to a carrier that has contravened a carrier licence condition set out in proposed sections 152CJC of the CCA, or proposed sections 37 and 41 of the Companies Act (see clauses 37 and 41 of the Companies Bill). The reason for this restriction is the same as that outlined in the explanatory note under items 5 above.

This item also adds accompanying notes to proposed subsections 70(4D), (4E) and (4F) to assist the reader.

### **Item 7 – At the end of subsection 70(5)**

Item 7 inserts proposed paragraphs 70(5)(g), (h) and (i) into the Tel Act.

Subsection 70(5) of the Tel Act confers power on the ACCC to issue a formal warning if a carrier contravenes specified carrier licence conditions. As the conditions to be included by proposed section 152CJC of the CCA and sections 37 and 41 of the Companies Act are specific to the telecommunications access regime under section Part XIC of the CCA, it is appropriate that the ACCC be given a power under subsection 70(5) to issue a formal warning in relation to those licence conditions.

### **Item 8 – At the end of section 98**

This item inserts proposed subsections 98(6) and (7) into the Tel Act.

Section 98 of the Tel Act sets out service provider rules. Service providers are required to comply with all applicable service provider rules (subsection 101(1)).

The insertion of proposed subsections 98(6) and (7) is required to ensure that the rules set out in proposed subsection 152CJD(2) of the CCA and subsection 38(2) of the Companies Act are included as service provider rules. The effect of item 8 is that any NBN corporation that is a service provider will be required to comply with all applicable rules about the supply of services by NBN corporations.

Proposed subsection 152CJD(2) is inserted into proposed Division 6 of Part XIC of the CCA by item 79.

As the failure to comply with a relevant service provider rule gives rise to a civil penalty, proposed subsections 98(6) and (7) will have the effect of making the rules set out in proposed subsection 152CJD(2) of the CCA and subsection 38(2) of the Companies Act subject to the civil penalty provisions and other provisions under the Tel Act dealing with service provider rules, including provisions relating to enforcement.

### **Item 9 – After subsection 102(6C)**

This item inserts proposed subsections 102(6D) and (6E) into the Tel Act. These provisions specify that subsection 102(1) does not apply to the rules set out in proposed subsection 152CJD(2) of the CCA or subsection 38(2) of the Companies Act.

Section 102 of the Tel Act authorises the ACMA to issue a remedial direction to a service provider that is contravening, or has contravened, a service provider rule. The proposed new service provider rules, which will come into effect as a result of the amendments proposed by item 8, are specific to the telecommunications access regime under Part XIC of the CCA, for which the ACCC has regulatory responsibility. Accordingly, it is considered that only the ACCC and the Minister, as opposed to the ACMA, ought to have powers to take action against service providers for breach of those service provider rules. Proposed subsections 102(6D) and (6E) will therefore make it clear that the ACMA would not be authorised to issue a remedial direction to a service provider that is contravening or has contravened service provider rules under proposed subsection 152CJD(2) of the CCA or subsection 38(2) of the Companies Act.

### **Item 10 – After subsection 103(3C)**

This item inserts proposed subsections 103(3D) and (3E) into the Tel Act. Subsection 103(1) of the Tel Act authorises the ACMA to issue a formal warning to a person that breaches a service provider rule. The effect of proposed subsections 103(3D) and (3E) is that the ACMA would not be authorised to issue a formal warning to a person that breaches a service provider rule set out in proposed subsection 152CJD(2) of the CCA or subsection 38(2) of the Companies Act. The reason for this restriction is the same as that outlined in the explanatory note under item 8 above.

### **Item 11 – After subsection 103(4C)**

This item inserts proposed subsections 103(4D) and (4E) into the Tel Act.

Subsection 103 of the Tel Act confers power on the ACCC to issue a formal warning if a person contravenes the service provider rule set out in subsection 152BA(2) of the CCA.

As the new service provider rules to be inserted by item 8 (under proposed subsection 152CJD(2) of the CCA and subsection 38(2) of the Companies Act) are specific to the telecommunications access regime under Part XIC of the CCA, it is appropriate that the ACCC be given a formal warning power under the Tel Act to issue a formal warning, where an NBN corporation has contravened a service provider rule.

This item represents a consequential amendment as a result of item 8.

## **Item 12 – At the end of subsection 110(2)**

Part 6 of the Tel Act enables industry codes to be developed by telecommunications industry bodies on any matter which relates to a telecommunications activity, which is defined widely in section 109 of the Act (telecommunications activity).

Codes can be submitted to the ACMA by industry bodies for registration and, where the ACMA is satisfied that the code meets stipulated criteria and that certain conditions are met, the ACMA is obliged to include the code on a codes register. In particular, before registering a code that is given to it by a body or association representing a particular section of the telecommunications industry, in a case where the code does not deal with matters of substantial relevance to the community, in accordance with subparagraph 117(1)(d)(ii), the ACMA must be satisfied that the code deals with the matters covered by the code in an appropriate manner. In assessing any codes it is expected that this would include the ACMA having regard to the efficacy of the content of the codes in achieving their intended purpose.

Where the ACMA considers a code to be necessary or convenient to provide appropriate community safeguards, or otherwise deal with the performance or conduct of the telecommunications industry, it may request that a representative industry body develop a code and present it to the ACMA for registration. In the event that the code is not developed, or does not meet the registration criteria, the ACMA may develop an industry standard, compliance with which is mandatory (see Division 5 of Part 6 of the Tel Act).

Section 110 specifies groups that are held to be ‘sections of the telecommunications industry’. Item 12 adds proposed paragraph 110(2)(j) which clarifies that persons who install optical fibre lines or facilities used, or for use, in or in connection with such lines represent a section of the telecommunications industry for the purposes of Part 6 of the Tel Act.

This would capture persons, who, for example, dig trenches or install pits, ducts or other conduit. The effect of this proposed amendment is that the provisions in Part 6 of the Act, which relate to industry codes and standards, would apply to the persons identified by proposed paragraph 110(2)(j). Specifically, the ACMA could register an industry code prepared by a body or association representing this section of the telecommunications industry (subsection 117(1)). The ACMA could also determine an industry standard if it is satisfied that there is no representative body or association for this section of the telecommunications industry (subsection 124(1)).

This item represents a consequential amendment as a result of item 13.

The purpose of items 12-16 is to facilitate the development of industry codes and standards relating to fibre optic lines and related facilities and carriage services provided by such fibre optic facilities, and to give further examples of the types of topics which industry codes or standards might cover. In addition to providing necessary guidance on relevant technical matters and to help provide a level regulatory playing field for superfast FTTP telecommunications networks, these measures respond to calls from stakeholders for such guidance to promote nationally

consistent network and service outcomes, in line with the NBN, including in new real estate developments.

### **Item 13 – After paragraph 113(3)(p)**

Section 113 of the Tel Act sets out examples of matters that may be dealt with by industry codes and industry standards. The list is not exhaustive. However, for the avoidance of doubt, item 13 adds four new examples of matters in section 113 that may be dealt with by industry codes and industry standards.

### **Item 14 – At the end of section 115**

Item 14 amends section 115 of the Tel Act by adding proposed subsection 115(5). Proposed subsection 115(5) provides a limited exception to the application of the rule in subsection 115(1). The rule states that an industry code or standard has no effect to the extent it requires customer equipment, customer cabling, a telecommunications network or a facility to have particular design features, or to meet particular performance requirements, or to the extent to which it deals with the content of content services. This rule can already be set aside by regulations (see subparagraphs 115(2)(a)(iii) and 115(2)(b)(iii)). However, item 14 amends section 115 to provide a statutory exemption to the rule for the purposes of setting technical specifications for optical fibre facilities and services.

Proposed subsection 115(5) provides that the rule in subsection 115(1) does not apply to an industry code or an industry standard to the extent (if any) to which compliance with the code or standard is likely to have the effect (whether direct or indirect) of requiring optical fibre lines, or facilities used, or for use, in or in connection with optical fibre lines, to have particular design features; or meet particular performance requirements. The term ‘facility’ is defined already in section 7 of the Tel Act, and ‘optical fibre line’ is to be defined in section 7 of the Act (refer item 3 above).

In effect, the proposed provision facilitates the development of industry codes and standards covering optical fibre lines and related facilities, and ensures that this activity is not limited by preventing industry codes or industry standards from having the effect of requiring particular design features or particular performance requirements. For codes and standards of the kind envisaged to be useful, they need to be able to deal with design features or particular performance requirements. Moreover, these design features or particular performance requirements may need to have effect within the NBN footprint. This recognises that the rollout of optical fibre requirements may also have implications for network design features and performance requirements in other parts of the network.

### **Item 15 – After subsection 118(4)**

Item 15 amends section 118 of the Tel Act by adding proposed subsection 118(4AA). Proposed subsection 118(4AA) provides a limited exception to the application of the rule in subsection 118(4), which states that the ACMA must not make a request under subsection 118(1) for a body or association in the telecommunications industry (or the telemarketing industry or the e-marketing industry) to develop an industry code, if the code would deal with a matter referred to in paragraph 113(3)(f) (relating to privacy),

and compliance with the code would be likely to have the effect of requiring customer equipment, customer cabling, a telecommunications network or a facility to have particular design features or to meet particular performance requirements. The rule in subsection 118(4) does not apply if the ACMA is satisfied that the benefits to the community from the operation of the code would outweigh the costs of compliance with the code.

Item 15 amends section 118 to provide a specific exception to the rule in subsection 118(4) dealing with a situation where a new industry code is registered under Part 6 and replaces another industry code. It should be noted that item 15 does not alter the provision under subsection 118(4) relating to privacy.

Proposed subsection 118(4AA) provides that the rule in subsection 118(4) does not apply to an industry code to the extent (if any) to which compliance with the code is likely to have the effect (whether direct or indirect) of requiring optical fibre lines or facilities used, or for use, in or in connection with optical fibre lines to have particular design features or meet particular performance requirements. As noted above, the terms ‘facility’ and ‘optical fibre line’ are to be defined in section 7 of the CCA.

The effect of the proposed provision is similar to the effect of proposed subsection 115(5) (see the explanatory notes for item 14, above). By facilitating the development of this kind of industry code by clarifying the ability of the ACMA to request such codes to be developed, the measure will help provide necessary guidance on relevant technical matters and help respond to calls from stakeholders for such guidance to promote nationally consistent broadband network and service outcomes.

#### **Item 16 – Subsection 125AA(4)**

This item repeals the current subsection 152AA(4) of the Tel Act and replaces it. Section 125AA of the Tel Act is inserted by the CCS Bill, and permits the Minister to direct the ACMA to determine an industry standard. The proposed subsection 125AA(4) to be inserted by item 16 provides that the Minister may, in writing, direct the ACMA to determine a standard, *within a set period of time*, under subsection 125AA(1) that applies to participants in a specified section of the telecommunications industry and deals with one or more specified matters relating to the telecommunications activities of those participants. This amendment has been made to enable the Minister to specify a time by which the ACMA must make a standard.

#### **Item 17 – Subsection 384(1) (note)**

This item amends the note in subsection 384(1) to include sections 152AR and 152AXB. This is a consequential amendment as a result of item 50.

#### **Item 18 – At the end of subsection 564(3) (before the notes)**

Item 18 inserts proposed paragraphs 564(3)(l)-(p) into the Tel Act.

Section 564 of the Tel Act permits the Minister, the ACMA or the ACCC to apply to the Federal Court for an injunction concerning a person’s contravention of the Tel

Act. Under current subsection 564(3), the ACMA is not entitled to apply for an injunction in relation to a contravention of certain carrier licence conditions and service provider rules that are listed under that subsection. The proposed paragraphs add the licence conditions in section 152CJC of the CCA and sections 37 and 41 of the Companies Act and the service provider rules in subsections 152CJD(2) of the CCA and subsection 38(2) of the Companies Act to the list of licence conditions and service provider rules in subsection 564(3).

This means the ACMA would not be entitled to apply for an injunction in relation to a contravention of a carrier licence condition in proposed section 152CJC of the CCA and sections 37 and 41 of the Companies Act or a service provider rule in proposed subsection 152CJD(2) of the CCA and subsection 38(2) of the Companies Act. The Minister and the ACCC would, however, be entitled to apply for an injunction in relation to a contravention of these carrier licence conditions and service provider rules. The reason for this restriction is outlined in the explanatory notes under items 5 and 9 above.

**Item 19 – At the end of subsection 564(3) (after the notes)**

This item adds notes to section 564 in relation to proposed paragraphs 564(3)(l)-(p) (under item 18 above) to assist the reader.

**Item 20 – At the end of subsection 571(3) (before the notes)**

This item inserts paragraphs 571(3)(l)-(p) into the Tel Act.

Section 571 of the Tel Act permits the Minister, the ACMA or the ACCC to institute proceedings in the Federal Court for the recovery on behalf of the Commonwealth of a pecuniary penalty for breach of a civil penalty provision. Under current subsection 571(3) the ACMA is not entitled to institute a proceeding for recovery of a pecuniary penalty in relation to a contravention of a carrier licence condition or service provider rule listed under that subsection. The effect of proposed item 14 is that the ACMA would not be entitled to institute a proceeding for recovery of a pecuniary penalty in relation to a contravention of a carrier licence condition in proposed section 152CJC of the CCA and sections 37 and 41 of the Companies Act or a service provider rule in proposed subsection 152CJD(2) of the CCA and subsection 38(2) of the Companies Act.

The reason for this restriction is outlined in the explanatory notes under items 5 and 9 above.

**Item 21 – At the end of subsection 571(3) (after the notes)**

This item adds notes to section 571 in relation to proposed paragraphs 571(3)(l)-(p) (under item 20 above) to assist the reader.

**Item 22 – Subsection 577BA(12) (at the end of the definition of *national broadband network*)**

Item 22 adds additional text to the definition of ‘national broadband network’ proposed to be inserted by item 30 of Schedule 1 to the CCS Bill into subsection 577BA(12) of the Tel Act. The definition of ‘national broadband network’ that has been proposed under the CCS Bill makes reference to a telecommunications network where an NBN corporation has been, is or is to be, involved in the creation or development of the network.

It is expected that in addition to acquiring or creating their own telecommunications assets, NBN corporations will separately purchase or secure rights to access telecommunication assets from other telecommunications providers. Accordingly, item 22 inserts additional text into the definition of ‘national broadband network’ to make it abundantly clear that the development or creation of the network could arise from an NBN corporation acquiring or gaining access to assets that were actually used (or intended for use) in another telecommunications network. This amendment is made for the avoidance of doubt, and to bring this provision in line with the definition of ‘national broadband network’ at clause 5 of the Companies Bill (although a key difference between the definitions of that term that are used in the Tel Act and the Companies Bill is noted in the explanatory note for clause 5 of the Companies Bill, above).

**Item 23 – Subsection 577BC(8) (at the end of the definition of *national broadband network*)**

Item 23 amends the definition of ‘national broadband network’ which is proposed to be inserted into subsection 577BC(8) of the Tel Act by item 30 of Schedule 1 to the CCS Bill. The amendment is in exact terms to that proposed by item 22 (see the above commentary for item 22).

**Item 24 – Clause 45 of Schedule 1 (definition of *active declared service*)**

Item 24 amends the definition of ‘active declared service’ in clause 45 of Schedule 1 to the Tel Act. Currently, that term is defined to have the same meaning as in section 152AR of the CCA.

Item 24 amends the definition by including reference to a declared service within the meanings of proposed subsections 152AL(8A), (8D) and (8E) of the CCA, inserted by item 41 of Schedule 1 to the Access Bill (see the explanatory note for that item, below).

***Competition and Consumer Act 2010***

**Item 25 – Subsection 25(1)**

Item 25 inserts a reference to the Companies Act and any regulations under that Act into subsection 25(1) of the CCA. Subsection 25(1) of the CCA provides that the ACCC can delegate to a member of the Commission powers provided under the listed Acts. The effect of this amendment will mean the ACCC can delegate powers

provided to it under the Companies Act or regulations under that Act to a member of the Commission.

**Item 26 – After paragraph 151BU(4)(d)**

Item 26 inserts proposed paragraph 151BU(4)(da), in Part XIB of the CCA, which sets out an anti-competitive conduct regime specific to the telecommunications industry and provides for the ACCC to make record-keeping rules.

Subsection 151BU(4) restricts the ACCC from exercising its power to require the keeping and retaining of records under section 151BU, unless the records contain, or will contain, information relevant to one of the listed matters. The proposed paragraph will add the operations of the Companies Act or regulations made under that Act to the listed matters. This means that the ACCC will be able to make rules requiring the keeping of records relating to the operations of the Companies Act or regulations made under that Act.

The ACCC could use its record-keeping rules powers under section 151BU to require an NBN corporation to keep and retain records and to prepare and submit reports to the ACCC consisting of information contained in those records, for example in relation to the non-discrimination obligation (see proposed section 152AXC of this Bill, to be inserted by item 50), or in relation to private ownership and control of NBN Co or the functional separation of NBN corporations.

**Item 27 – After subparagraph 151BUA(2)(b)(ii)**

Item 27 inserts proposed subparagraph 151BUA(2)(b)(iia) in Part XIB of the CCA.

Subsection 151BUA(2) enables the ACCC to make available reports provided in accordance with record-keeping rules if the disclosure would be likely to facilitate the operation of a listed legislation. The proposed subparagraph will add the operations of the Companies Act or regulations made under that Act to the listed legislation. This means that the ACCC will be able to provide access to reports provided in accordance with record-keeping rules if the disclosure would be likely to facilitate the operation of the Companies Act or regulations made under that Act.

**Item 28 – After subparagraph 151BUB(2)(b)(ii)**

Item 28 inserts proposed subparagraph 151BUB(2)(b)(iia) in Part XIB of the CCA. Subsection 151BUB(2) enables the ACCC to request a carrier or CSP to provide access to a report prepared in accordance with record-keeping rules if the disclosure would be likely to facilitate the operation of a listed legislation. The proposed subparagraph will add the operations of the Companies Act or regulations made under that Act to the listed legislation. This means that the ACCC will be able to request a carrier or CSP to provide access to the report it prepared if the disclosure would be likely to facilitate the operation of the Companies Act or regulations made under that Act.



**Item 29 – After subparagraph 151BUC(2)(b)(ii)**

Item 29 inserts proposed subparagraph 151BUC(2)(b)(iia) in Part XIB of the CCA. Subsection 151BUC(2) enables the ACCC to request a carrier or CSP to provide access to a periodic report prepared in accordance with record-keeping rules if the disclosure would be likely to facilitate the operation of a listed legislation. The proposed subparagraph will add the operations of the Companies Act or regulations made under that Act to the listed legislation. This means that the ACCC will be able to request a carrier or CSP to provide access to the periodic report it prepared if the disclosure would be likely to facilitate the operation of the Companies Act or regulations made under that Act.

**Item 30 – Section 152AA**

Item 30 amends the outline of Part XIC of the CCA at section 152AA to take account of the changes to that Part made by the items 30-84 of Schedule 1 to the Access Bill. Part XIC of the CCA sets out the telecommunications-specific access regime.

**Item 31 – Section 152AC**

**Item 32 – Section 152AC**

**Item 33 – Section 152AC**

**Item 34 – Section 152AC**

Item 31 includes in section 152AC in Part XIC of the CCA a definition of the term ‘category A standard access obligation’, and provides that it has the meaning given by section 152AR (see item 47).

Item 32 includes in section 152AC of the CCA a definition of the term ‘category B standard access obligation’, and provides that it has the meaning given by proposed section 152AXB (see item 40).

Item 33 includes in section 152AC of the CCA a definition of the term ‘NBN Co’. ‘NBN Co’ has the same meaning as in the Companies Act.

Item 34 includes in section 152AC of the CCA a definition of the term ‘NBN corporation’. ‘NBN corporation’ has the same meaning as in the Companies Act.

**Item 35 – Section 152AC (definition of *standard access obligation*)**

Item 35 amends the definition of ‘standard access obligation’ in section 152AC of the CCA to include both category A and B standard access obligations. Category A standard access obligations will not apply to NBN corporations and are those currently set out at section 152AR of the CCA. Category B standard access obligations are provided for in proposed section 152AXB inserted by item 50 and specifically apply to the supply of declared services by an NBN corporation.

**Item 36 – Subsection 152AG(2)**

**Item 37 – Subsection 152AG(2)**

Items 36 and 37 make consequential amendments to subsection 152AG(2), necessary as a result of the amendment to section 152AC by item 35.

**Item 38 – After subsection 152AL(3)**

Item 38 inserts proposed subsections 152AL(3A) and (3B) into Part XIC of the CCA.

Currently, subsection 152AL(3) provides that the ACCC may declare an eligible service if:

- the ACCC has held a public inquiry under Part 25 of the Tel Act;
- it has prepared a report about the inquiry under section 505 of the Tel Act;
- the report has been published; and
- the ACCC is satisfied that the making of the declaration would promote the long-term interests of end-users (a phrase which is given meaning by subsection 152AB(2)).

Proposed subsection 152AL(3A) will ensure that declarations made under subsection 152AL(3) do not apply to eligible services an NBN corporation supplies, or is capable of supplying to itself or to any other person. This change is necessary because of the amendments proposed by item 41 (which will provide for a separate route for the ACCC to make NBN corporation-specific service declarations which will cover services that are supplied, or capable of being supplied, by an NBN corporation).

The use of the phrase ‘capable of supplying’ in this new section is consistent with existing section 152AL. The phrase ‘capable of supplying’ does not imply that a service is actually being supplied; it is sufficient that the service in question is of a nature that the NBN corporation would be able to supply.

Proposed subsection 152AL(3B) has been inserted to require the ACCC, when conducting an inquiry into the possible declaration of a service under subsection 152AL(3), whether to make a determination under proposed subsection 152AL(8A) (see item 41, below) declaring that same service to be a declared service applicable to NBN corporations. This is included to ensure that the ACCC gives consideration to whether a service should be declared for both NBN corporations and other carriers/CSPs, with the result that the ACCC could hold a joint public inquiry covering both proposals if it saw fit.

A note also clarifies the operation of this provision by changing the heading to subsection 152AL(3) to ‘Declaration made after public inquiry—services not supplied by an NBN corporation’.

**Item 39 – Subsections 152AL(4) and (5)**

Item 39 makes a consequential amendment to these subsections to replace references to ‘this section’ with ‘subsection (3)’ as a result of amendments made under items 38 and 41.

#### **Item 40 – Paragraph 152AL(7)(a)**

Currently subsection 152AL(7) provides that a service covered by an SAU will be a declared service if the ACCC is given an SAU in relation to a service, and that undertaking is in operation and the person supplies the service.

Item 38 amends paragraph 152AL(7)(a) in Part XIC of the CCA to make it clear that this section does not apply to services supplied by an NBN corporation. This is because item 41 (refer below) sets out the mechanisms under which an NBN corporation can provide services.

A note also clarifies this point by changing the heading to subsection 152AL(7) to ‘Services covered by special access undertakings – services not supplied by an NBN corporation’.

#### **Item 41 – After subsection 152AL(8)**

Item 41 inserts subsections (8A)-(8F) into the CCA. The intention of these subsections is to provide alternative mechanisms under which eligible services to be provided by an NBN corporation can become declared, consistent with NBN Co’s wholesale-only, open access objectives.

Under the existing provisions in Part XIC of the CCA, the ACCC has the power to compel carriers/CSPs to supply a service if the ACCC declares that service. Carriers/CSPs providers may also give the ACCC an SAU setting out proposed services and the terms and conditions for access to those services: such services are then treated as declared services for the carrier/CSP that lodged the SAU with the ACCC (see subsection 152AL(7)). Otherwise, carriers/CSPs can make available a number of wholesale services that are not declared services, and that are therefore not subject to the SAOs in Part XIC. Service providers negotiate the terms and conditions of those services with their customers.

By contrast, NBN corporations will not be able to offer services that are not declared services. NBN corporations effectively have three mechanisms, established by item 41 and item 79 (refer proposed section 152CJA), by which they may supply services:

- an NBN corporation may publish a standard form of access agreement (SFAA) on its website, setting out terms and conditions for a service—the service covered by the SFAA is then treated as a declared service:
  - an SFAA in effect operates as a ‘standard offer’: it is open to any access seeker to require the relevant NBN corporation to supply it with the declared service on the terms set out in the SFAA;
  - although, as explained below, an SFAA may also supplement the terms and conditions of services set out in an SAU, or indeed in an access determination;
- an NBN corporation may give the ACCC an SAU for approval—as is currently the case under Part XIC of the CCA, the service covered by the SAU is treated as a declared service for the NBN corporation that lodged the SAU; or
- the ACCC may declare a service that an NBN corporation is capable of supplying.

The policy intention is that at all times NBN corporations are subject to the obligations under Part XIC – specifically, the Category B SAOs, the non-discrimination and transparency obligations and the enforcement regime. As a consequence, the supply of services by NBN corporations is always subject to oversight by the ACCC.

*Declaration made after public inquiry — services supplied by an NBN corporation*

Proposed subsection 152AL(8A) sets out the mechanism by which the ACCC may, by written instrument, declare a specified eligible service applicable to a specified NBN corporation. This mechanism involves a number of measures that are designed to ensure wide consultation is conducted and that the competition implications of the proposed declaration are carefully considered. These measures are modelled on those already required if the ACCC declares an eligible service under the CCA (see subsection 152AL(3)). The transparent process ensures that the ACCC’s deliberations on whether declaration would promote the long-term interests of end-users are appropriately placed on the public record and that the interests of industry and other affected parties are given due consideration. Under this provision, a declared service is taken to ‘relate to’ the NBN corporation/s specified in the declaration made by the ACCC.

A copy of any declaration made under proposed subsection 152AL(8A) will need to be publicised (by way of a Gazette notice, refer proposed subsection 152AL(8C)).

The requirement for the ACCC to identify in the declaration the specific NBN corporation/s to which the declaration relates is specific to a declaration made under proposed subsection 152AL(8A) in relation to services to be supplied by NBN corporations. There is no equivalent in subsection 152AL(3). This concept is included due to a difference in the way that the category B SAOs (applying to NBN corporations) and category A SAOs (applying to other carriers/CSPs) operate. The distinction is that, under the category A SAOs, a carrier/CSP is only compelled to supply a declared service on request if that carrier/CSP currently supplies that service (i.e. if the service is an ‘active declared service’ – see subsection 152AR(2)), whereas under the Category B SAOs, an NBN corporation is obliged to supply any declared service that relates to that NBN corporation (see proposed section 152AXB, inserted by item 50, below). There is no concept of an ‘active declared service’ in the context of the category B SAOs—instead the ACCC must identify upfront which NBN corporations are to be affected by which service declarations under proposed subsection 152AL(8A), and in addition NBN corporations may choose to apply the SAOs to additional services not covered by an ACCC declaration.

The effect of this is that an NBN corporation will be required to supply on request to access seekers any service that:

- has been declared by the ACCC under proposed subsection 152AL(8A) and that ‘relates to’ that NBN corporation;
- is the subject of a standard form of access agreement published by that NBN corporation on its website (see below); or

- is covered by an SAU that is in operation and was lodged with the ACCC by that NBN corporation and that is supplied by the NBN corporation (see below).

*Services supplied by an NBN corporation - standard form of access agreement*

Proposed subsection 152AL(8D) sets out the second mechanism by which a service supplied or capable of being supplied by a particular NBN corporation becomes a declared service. The trigger for the declaration of a service under this route is dependent upon self-directed action by a particular NBN corporation that is a carrier or CSP. Under this mechanism, all that is required is for the particular NBN corporation to formulate an SFAA that relates to access to that service, and then make that SFAA available on its website. The service covered by the SFAA is then treated as a declared service, and that declared service ‘relates to’ the NBN corporation that has published the SFAA: this is the effect of proposed paragraphs 152AL(8D)(e) and (f).

An SFAA is not defined in the CCA, however it provides a set of terms and conditions that are formulated by the NBN corporation (which is either a carrier or CSP), in relation to the supply of a service. It is envisaged that SFAAs will be comprehensive model terms and conditions that the particular NBN corporation offers to all access seekers.

The effect of an SFAA, as noted above, is that once an SFAA is published on the website of an NBN corporation, it is open to any access seeker to request access to the declared service covered by the SFAA from that NBN corporation (being the NBN corporation to which the declared service ‘relates’): the NBN corporation must then enter into an access agreement with that access seeker on the terms and conditions set out in that SFAA, and must provide that access seeker with access to that declared service on the terms and conditions in accordance with that access agreement (see proposed sections 152AXB (inserted by item 50) and 152CJA (inserted by item 79)).

*Services covered by special access undertakings—services supplied by an NBN corporation*

The third mechanism by which a service supplied or capable of being supplied by an NBN corporation may become a declared service is set out in proposed subsection 152AL(8E). The proposed subsection provides that a service will be a declared service if the ACCC is given an SAU by the NBN corporation in relation to a service, and that undertaking is in operation (i.e. is accepted by the ACCC) and the NBN corporation supplies the service. Section 152CBA of the CCA deals with SAUs, and provides that a person who is, or is expected to be, a carrier or CSP supplying either a listed carriage service or a service that facilitates the supply of such a service, may give a written undertaking to the ACCC in relation to access to the service, so long as the service is not an active declared service.

Proposed subsections 152AL(8D) and (8E) make it clear that any services *voluntarily* supplied, or capable of being supplied, by an NBN corporation through an SFAA (resulting in an access agreement) or an SAU are declared services. It is envisaged that the majority of services offered by an NBN corporation would be supplied

through these mechanisms. However, subsection 152AL(8A) is necessary because there may be services which an NBN corporation is capable of supplying, but has not indicated it will supply, and which the ACCC considers, after consultation, it would be in the long-term interests of end-users for specified NBN corporations to supply. As a result, proposed subsection 152AL(8A) provides the ACCC's power to declare such services.

The overall effect of these arrangements is that, an NBN corporation, unlike other carriers or CSPs, will not be able to offer to supply or supply services unless those services are declared services and therefore subject to the regulatory oversight applying to declared services.

Proposed subsection 152AL(8F) clarifies that the ACCC may declare a service under subsection 152AL(8A) even though the service may be covered, or partially covered by an SAU in relation to that service given to the ACCC under proposed subsection 152AL(8E). This reflects the operation of subsection 152AL(8) of the CCA.

#### **Item 42 – Subsection 152ALA(8) and (9)**

Item 42 inserts references to paragraphs 152AL(8A)(a), (b) and (c), into subsections 152ALA(8) and (9) of the CCA. This is required as a result of the amendments made under item 41.

#### **Item 43 – Subsections 152AM(1) and (3)**

#### **Item 44 – Subsection 152AN(1)**

#### **Item 45 – Subsection 152AO(3)**

#### **Item 46 – Paragraph 152AQ(2)(c)**

These items make consequential amendments to these subsections which insert reference to subparagraph 152AL(8A)(a). This is required as a result of the amendments made under item 41.

#### **Item 47 – Before section 152AR**

Item 47 inserts the new heading 'Subdivision A—Category A standard access obligations'. This is necessary as the Access Bill establishes two categories of SAOs.

In effect this item renames the existing standard access obligations under section 152AR, which will continue to apply to all carriers/CSPs other than NBN corporations, due to the introduction of the concept of 'Category B standard access obligations' (which apply exclusively to NBN corporations: see item 50).

#### **Item 48 – Subsection 152AR(1)**

#### **Item 49- Subsection 152AR(2)**

Items 48 and 49 make a consequential amendment to subsections 152AR(1) and (2) to replace reference to 'standard access obligations' with 'category A standard access obligations' and to clarify that these subsections only apply to a carrier or CSP other than an NBN corporation as a result of amendments made under items 35 and 50.

## **Item 50 – Before section 152AY**

Item 50 inserts proposed Subdivision B into Division 3 of Part XIC of the CCA, dealing with Category B SAOs. Category B SAOs apply to NBN corporations only. The concept of ‘standard access obligations’ as used in the Access Bill is the same as currently exists under the CCA, however, the Access Bill will make provision for two different categories of SAOs (see item 35): category B SAOs, which apply to NBN corporations, and category A SAOs, which apply to all other carriers/CSPs. The NBN-specific category B SAOs (at proposed sections 152AXB, 152AXC and 152AXD) will establish open access obligations, which, along with the equivalence and transparency measures set out under items 40 and 67, promote a level playing field for access seekers using services over the NBN.

The current SAOs in section 152AR are designed for access providers who also supply retail services, making them inappropriate for an NBN corporation operating as a wholesale-only company. In particular, as an NBN corporation will not generally be supplying a service to itself, the requirement under the Category A SAOs for an access provider to provide a declared service of equivalent technical and operational quality to that which it supplies to itself is inappropriate. Mandating compliance by NBN corporations with the Category A SAOs could, for example, create difficulties for the ACCC and NBN corporations during the process of considering an SAU given by an NBN corporation. Section 152CBD requires the ACCC to assess whether the terms and conditions of services set out in an SAU are consistent with the SAOs, and this could cause complexities if the ACCC is required to assess whether an NBN corporation will supply services that are of equivalent technical and operational quality to those which it supplies to itself, but the NBN corporation is not supplying the service to itself.

Consequently, the Access Bill introduces SAOs that are specifically designed to reflect the wholesale-only activities of NBN corporations.

Item 50 also provides for existing sections 152AY-152BBD in Division 3 of Part XIC to be under a new Subdivision C, dealing compliance with the SAOs, by inserting a heading for Subdivision C before section 152AY.

As noted above, under item 41, the effect of the category B SAOs is that an NBN corporation is required to supply on request to access seekers any declared service that relates to that NBN corporation – unlike the category A SAOs, there is no further requirement for the declared service to be an ‘active declared service’ before the category B SAOs are triggered.

The terms and conditions on which an NBN corporation is required to comply with the category B SAOs are to be determined in accordance with the hierarchy set out at (new) section 152AY, which is inserted into the CCA by the CCS Bill (that Bill repeals and replaces an older section 152AY). Section 152AY, as inserted by the CCS Bill, sets out how terms and conditions are to be identified. For example, there may be an access agreement (resulting from an SFAA) and an access determination that are both in operation in relation to a declared service that relates to an NBN corporation. Alternatively, there may be both an SAU and binding rules of conduct that are both in operation and that both deal with a declared service that relates to an NBN

corporation. A detailed explanation of the operation of the hierarchy established by section 152AY is provided in the explanatory memorandum for the CCS Bill.

## **Proposed Subdivision B—Category B standard access obligations**

### **Proposed section 152AXB Category B standard access obligations**

The effect of this proposed section is that NBN corporations will be subject to the obligations which provide basic prerequisites of access – guaranteed supply (see proposed subsection 152AXB(2)), interconnection (see proposed subsection 152AXB(4)) and supply of conditional-access customer equipment (see proposed subsection 152AXB(5)).

#### *Supply of declared service to service provider*

Proposed subsection 152AXB(2) provides a requirement for an NBN corporation to supply a declared service. This first SAO requires an NBN corporation that is a carrier or CSP, where a declared service under subsection 152AL(8A), (8D) or (8E) relates to the NBN corporation, and if requested to do so by a service provider, to supply the declared service to the service provider in order that the service provider can provide carriage services and/or content services.

The requirement to supply services on request (proposed subsection 152AXB(2)) must be read together with the rules relating to the supply of services by an NBN corporation (proposed Division 6A of Part XIC, described below) which prohibits an NBN corporation from supplying an eligible service unless:

- the service has been declared by the ACCC under proposed subsection 152AL(8A) and relates to that NBN corporation; or
- the NBN corporation has published an SFAA in relation to the service; or
- the ACCC has accepted an SAU from that NBN corporation in relation to the service.

An NBN corporation could choose to publish an SFAA in relation to a new service not set out in a SAU, or to publish an SFAA as the means of specifying the terms and conditions which are not covered by, or complement the terms and conditions contained in, the SAU it has given to the ACCC. The fact that an agreement stemming from an SFAA can complement the terms and conditions in an SAU is clear from the operation of section 152AY (which is inserted by the CCS Bill; see comments above).

Providing these arrangements are in place, an NBN corporation is obliged to supply a service that is declared under one of the three mechanisms (subject to the exemptions from the Category B SAOs set out below). However, an NBN corporation may only supply a service through one of these three mechanisms. If an access seeker requests a service that is not subject to one of these three mechanisms, an NBN corporation cannot supply it: before supplying a new service that it wishes to commence supplying, an NBN corporation must either publish an SFAA relating to that service or lodge an SAU with the ACCC. If an NBN corporation indicated it did not wish to develop an SAU or an SFAA in relation to a service requested by an access seeker, the access seeker would need to approach the ACCC to conduct a declaration inquiry in relation to the service.



The only time an NBN corporation is required to lodge an SAU or to formulate an SFAA is if the Minister makes a condition of an NBN corporation's carrier licence that it must supply a specified eligible service (see clause 41 of the Companies Bill, and proposed section 152CJB of the CCA, to be inserted by item 79).

Proposed subsection 152AXB(3) limits the obligation under proposed subsection 152AXB(2) if the imposition of the obligation would have any of the listed effects. This subsection is based on the current subsection 152AR(4) exemptions already available to access providers. The exemptions are carried through to the category B SAOs to ensure consistency.

The exemption under proposed paragraph 152AXB(3)(a) gives protection to the reasonably anticipated usage of a service provider who already has access to a declared service. It ensures that an access seeker has ongoing access to services already being supplied.

The exemption under proposed paragraph 152AXB(3)(b) gives protection to the reasonably anticipated usage of an NBN corporation. An NBN corporation should not be required to supply services if this means not having enough capacity remaining for its own internal supply, in the limited circumstances where this may occur. For example, if an NBN corporation's networks are near capacity and a request to supply a service would mean it was no longer able to perform its own internal network monitoring and communications, then it could use this exemption. Such internal supply would be for its own operational purposes or for the purposes of supplying carriers and services providers: under section 9 of the Companies Act, an NBN corporation is limited to supplying services to carriers, service providers and specified utilities, for specified purposes.

The term 'pre-request right' in proposed paragraph 152AXB(3)(c) is consistent with paragraph 152AR(4)(c) of the CCA. It is defined in proposed subsection 152AXB(7) to mean 'a right under a contract that was in force at the time when the request was made'. The exemption under proposed paragraph 152AXB(3)(c) gives protection to the service provider who has a contractual right to obtain a sufficient level of access. It ensures that an NBN corporation cannot cease to supply services to be supplied under a contract simply because it does not have sufficient capacity to supply the service to other access seekers.

#### *Interconnection of facilities*

Proposed subsection 152AXB(4) requires an NBN corporation that is a carrier or CSP and that owns or controls one or more telecommunications facilities, or is a nominated carrier in relation to one or more facilities, if requested to do so by a service provider, to permit interconnection of the facilities it owns or controls with the facilities of a service provider on request, where that interconnection is for the purpose of enabling the service provider to be supplied with declared services in order that the service provider can provide carriage services and/or content services.

Section 384 of the Tel Act enables the ACMA to make technical standards relating to the interconnection of facilities. No technical standards are currently in place under

section 384 of the Tel Act, however, proposed paragraph 152AXB(4)(d) will require the NBN corporation to take all reasonable steps to ensure compliance with any such standard. The requirement for the NBN corporation to take reasonable steps reflects the possibility that there may be situations in which compliance is not feasible (for example, if an exemption from the Category B SAO applies), and therefore it would not be appropriate to mandate absolute compliance with a standard.

This provision reflects subsection 152AR(5) in the category A SAOs.

Note amendments are also proposed to the Tel Act regarding compliance with technical standards relating to Layer 2 bitstream service: see item 88 below.

#### *Conditional-access customer equipment*

Proposed subsection 152AXB(5) requires an NBN corporation that is a carrier or CSP, and who supplies a declared service by means of conditional-access customer equipment to, if requested by a service provider (under proposed subsection 152AXB(2)), supply any related service that is necessary to enable that provider to supply its relevant retail service and/or content services by means of the declared service and using the equipment. This provision reflects subsection 152AR(8) in the category A SAOs.

‘Conditional-access customer equipment’ is defined in section 152AC of the CCA. The definition is intended to capture any customer equipment that:

- consists of or incorporates a conditional access system that allows a service provider to determine whether an end user is able to receive a particular service; and
- is intended for use in connection with the supply of a content service or is of a particular kind of equipment that is specified in the regulations.

It is possible that optical network termination (ONT) units could fall within this category if the ONT is installed on the customer’s side of the telecommunications network boundary and an access seeker requires access to the ONT to supply services. It is also possible that, if an NBN corporation were to supply customer premises equipment, for example in connection with wholesale wireless or satellite services, an access seeker would require access to this equipment to supply services.

#### *Exceptions*

The obligations under proposed section 152AXB do not apply if the relevant NBN corporation considers, (on reasonable grounds), that:

- the access seeker would fail to materially comply with the terms and conditions on which the NBN corporation complies, or is reasonably likely to comply (see paragraph 152AXB(6)(a)) ;
- the access seeker would not protect the integrity of a telecommunications network or the safety of individuals working on, or using services supplied by means of, a telecommunications network or a facility (see paragraph 152AXB(6)(b)).

For consistency, the exceptions under proposed subsections 152AXB(5) and (6) reproduce the exemptions already in place under subsections 152AR(9) and (10) of the CCA, which apply to the category A SAOs. The exceptions make it clear that any refusal to supply must have reasonable grounds.

Proposed subsection 152AXB(7) provides examples of reasonable grounds under which the exception from paragraph 152AXB(6)(a) could be relied on. Evidence that the access seeker is not creditworthy and repeated failures by the access seekers to comply with the terms and conditions on which the same or similar access has been provided are examples. The list is not intended to be exhaustive.

Proposed subsection 152AXB(8) defines ‘pre-request right’, in relation to a request made for the purposes of proposed subsection 152AXB(2), to mean a right under a contract that was in force at the time when the request was made – this definition is materially similar to that provided at subsection 152AR(12) in relation to the use of this term in the category A SAOs.

### **Proposed section 152AXC NBN corporation to supply declared services on a non-discriminatory basis**

Proposed subsection 152AXC(1) sets out the non-discrimination requirements for NBN corporations. It requires NBN corporations to supply declared services on a non-discriminatory basis, but sets out limited grounds for discrimination on the basis of creditworthiness, on the basis that the discrimination aids efficiency, or on grounds or circumstances specified by the ACCC in an instrument (see proposed subsections 152AXC(5) and (6)).

Even though NBN corporations are required to be wholesale-only providers, it is possible that they may have incentives to favour certain access seekers. For example, there may be incentives to focus on the largest customers, at the expense of smaller players. In order to ensure equity across access seekers, proposed subsection 152AXC(1) establishes the general rule that an NBN corporation must not, in complying with any of its category B SAOs, discriminate between access seekers. The effect of this requirement would be that all services provided by an NBN corporation must be made equally available to all access seekers, and the terms and conditions of those services must be made equally available to all access seekers, consistent with the Government’s open access and equivalence objectives for the NBN. An NBN corporation could not enter into exclusive arrangements.

However, the Access Bill builds upon the approach set out in the CCS Bill, so that an NBN corporation may enter into an access agreement with an access seeker that varies the standard terms set out in an SFAA, SAU or access determination so long as the variation is permitted under proposed section 152AXC. The Access Bill permits NBN corporations to negotiate the terms and conditions of access agreements with access seekers and recognises that there may be commercial circumstances where discrimination may be justified. Access agreements are, of course, subject to the competition provisions of the CCA. It should be noted that if an NBN corporation were to enter into an agreement, contract or understanding which substantially lessened competition, this could breach section 45 of the CCA. Consequently,

differentiation in price and/or non-price terms should not substantially lessen competition.

The Access Bill sets out tight restrictions on the ability of NBN corporations and access seekers to negotiate different terms and conditions from those set out in ‘standard terms’ (whether those standard terms are in an SFAA or SAU prepared by the NBN corporation, or in access determination made by the ACCC). Different terms and conditions are only permitted in three circumstances. Firstly, the rule in proposed subsection 152AXC(1) does not prevent discrimination against an access seeker if the NBN corporation has reasonable grounds to believe that the access seeker would materially fail to comply with the terms and conditions on which the NBN corporation complies or is reasonably likely to comply (refer proposed subsection 152AXC(2)). Examples of objective grounds under proposed subsection 152AXC(3) include, but are not limited to:

- where the access seeker is not creditworthy; or
- where there has been repeated failure by the access seeker to comply with the terms and conditions on which the same or similar access has been provided.

Secondly, proposed subsection 152AXC(4) permits discrimination where the discrimination aids efficiency and all access seekers with like circumstances have an equal opportunity to benefit from the discrimination.

Access seekers may want to receive different terms to promote their own investment and service differentiation. It is well accepted that in certain circumstances differentiation on price and/or non-price aspects can aid efficiency, promoting innovation and investment.

The concept of ‘efficiency’ under proposed subsection 152AXC(4) is intended to be read broadly and to facilitate discrimination based on normal commercial considerations, such as taking account of supply and demand conditions, as well as discrimination that reflects investments made by access seekers which reduce the cost of providing access.

Examples of discrimination that aids efficiency may therefore include, but need not be limited to:

- the sharing of risk between an NBN corporation and access seekers which reduces an NBN corporation’s risks including risk of asset stranding;
- material reductions in the NBN corporation’s costs achieved through any of the following:
  - differing network or technology requirements;
  - reduced operational requirements;
  - reduced support requirements;
- material reductions in expenditure associated with access seekers’ involvement on behalf of an NBN corporation; or
- material reductions by NBN corporations or access seekers in the consumption of scarce resources which may be achieved through reduced utilisation of limited resources.

The effect of proposed paragraph 152AXC(4)(c) is to impose an additional restriction on discrimination involving volume discounting. It provides that, in addition to the

requirements that discrimination must aid efficiency and be available to all access seekers in like circumstances, where the proposed discrimination involves a discount or similar benefit given on condition that the access seeker acquires a particular volume of good, service or other things, the discrimination will only be permitted if:

- an SAU given by the NBN corporation is in operation; and
- the discount, allowance, rebate or credit is in accordance with terms and conditions specified in the undertaking.

In all instances volume discounts will still need to be justified in terms of aiding efficiency and as the terms and conditions of volume discounting will need to be set out in an SAU, they will need to have been approved in advance by the ACCC before being offered to an access seeker. The Access Bill intentionally uses words of wide import for the purposes of capturing any permutation of discount that an NBN corporation, as access provider, may offer or allow to an access seeker. The provision is intended to capture any form of volume discount (i.e., an allowance, rebate or credit given or offered subject to the access seeker agreeing to purchase a particular volume, number, quantity or amount of goods, services or other things from the access provider).

The concept of ‘like circumstances’ as used in proposed paragraph 152AXC(4)(b) is not defined in the Access Bill as its ordinary meaning is intended to apply. However, by way of guidance, it is noted that the concept is used in the non-discrimination obligations in the telecommunications chapters of the General Agreement on Trade in Services and Australia’s free trade agreements.

Under proposed paragraph 152AXC(4)(b), an NBN corporation will be able to define what constitutes ‘like circumstances’, subject to ACCC oversight. NBN Co may, for example, set out its approach to discounting when it submits an SAU in relation to a service. Consistent with provisions of Part XIC inserted by the CCS Bill, NBN Co must lodge with the ACCC any access agreements it enters into with access seekers, which could take action if it considered that the non-discrimination rule had been breached. The ACCC will also publish guidance material on non-discrimination issues which could, for example, set out its approach to defining ‘like circumstances’ (see proposed section 152CJH, inserted by item 79). The ACCC would refer to that guidance in assessing an SAU, considering a complaint that an access agreement was discriminatory or making an access determination.

Proposed subsection 152AXC(5) sets out a further exception to the general rule against discrimination (as set out in proposed subsection 152AXC(1)). This provision will enable the ACCC to specify in a written instrument particular grounds upon which discrimination is permitted. For example, if the non-discrimination requirement would result in outcomes that are clearly inefficient or disproportionate, or if discrimination is required in relation to national security matters, the ACCC could approve discrimination. Proposed subsection 152AXC(6) establishes a similar exception in relation to circumstances that are specified in a written instrument made by the ACCC. For example, if in certain circumstances the non-discrimination requirement would conflict with other regulatory obligations, the ACCC could permit discrimination in accordance with those obligations.

Proposed subsection 152AXC(7) also clarifies that an NBN corporation that is a carrier or CSP and is subject to the category B SAOs must not discriminate in favour of itself in relation to the supply of a declared service that relates to it. While such circumstances are expected to be limited given NBN corporations' wholesale-only and equivalence obligations, this provision deals with a potential situation in which an NBN corporation supplies a declared service both to its own business units and to access seekers. Its business units may, in effect, be competing with other access seekers in the provision of the declared service. Under these circumstances, an NBN corporation may have the incentive and ability to discriminate in favour of its downstream operations. The Companies Act also provides for functional separation and divestiture rules for NBN corporations that can be employed to deal with such self-supply situations should it be warranted.

The obligation only extends to the supply of declared services, not wholesale inputs which are not subject to declaration by the ACCC, or which are not the subject of an SAU or SFAA. Furthermore, the requirement is absolute, and does not permit an NBN corporation to negotiate with one of its own business units to discriminate if it aids efficiency. An NBN corporation is required to supply declared services to its own business units on an equivalence of inputs basis, meaning it must supply declared services on exactly the same terms and conditions as it supplies them to access seekers.

Proposed subsections 152AXC(8) and (9) provide for two exceptions to the general rule against an NBN corporation discriminating in favour of itself. These provisions will enable the ACCC to specify, in a written instrument, particular grounds and circumstances upon which discrimination is permitted. For example, if the outcomes of the non-discrimination requirement would be inefficient or disproportionate, the ACCC could take account of these. It is difficult to determine beforehand with any degree of certainty discriminatory behaviour for which an exception would be in the public interest. Accordingly, there are preconditions which must be satisfied before the ACCC can exercise such powers, namely, before making the exemption determination, the ACCC must publish a draft of the instrument on its website and invite people to make submissions on the instrument, and consider any submissions that were received within the stated timeframe.

Proposed subsection 152AXC(11) specifies that an instrument made under subsections 152AXC (5) or (6) is not a legislative instrument. This is a substantive exemption from the LIA. As the telecommunications industry will require certainty about what specific grounds or circumstances identified by the ACCC will be permissible, it would not be appropriate to subject such instruments to the Parliamentary disallowance process. The ACCC will be required to consult on a draft instrument before making it, so this will ensure that any instrument is subject to appropriate public commentary and transparency, notwithstanding that the instrument is not a legislative one for the purposes of the LIA.

## **Proposed section 152AXD NBN corporation to carry on related activities on a non-discriminatory basis**

Proposed subsection 152AXD(1) will prohibit an NBN corporation from carrying on seven specified activities in a way which discriminates between access seekers. Those activities effectively fall into three categories:

- developing new, or enhancing existing, services;
- providing information about new or existing services; and
- providing information about technical and commercial systems and processes in place by which services are supplied.

Section 152AXD has been included to extend an NBN corporation's non-discrimination obligations to activities that are associated with the supply of services, but may not necessarily be captured under proposed section 152AXC.

Proposed subsection 152AXD(2) provides for exceptions to the prohibition under subsection 152AXD(1). Specifically, an NBN corporation will be permitted to undertake discriminatory activity in favour of an access seeker if:

- the activity represents the piloting or trialling of a new eligible service or an enhanced declared service; and
- a determination made by the ACCC under proposed subsection 152AXD(3) is applicable to the pilot or trial, and the number of days in the anticipated period of the pilot or trial does not exceed the maximum timeframe specified in the determination.

This exception seeks to balance the objective of non-discrimination with the need to facilitate innovation and competition in the supply of new services by competing access seekers.

Proposed subsection 152AXD(3) provides that the ACCC, by legislative instrument, may determine that, for the purposes of proposed paragraph 152AXD(2)(b), a specified number of days is the maximum allowable duration of a specified pilot or trial. As noted above, this covers the second limb of the exception to the non-discrimination rule. The provision has been inserted to ensure that some limitation is placed on the time in which a pilot or trial can be covered by this proposed subsection. The accompanying note to proposed subsection 152AXD(3) reminds readers that subsection 13(3) of the LIA provides guidance in relation to the specification in legislation by class.

A further exception to the rule is set out in proposed subsection 152AXD(4). This covers the situation where an access seeker has asked an NBN corporation to develop a new eligible service or enhance an existing declared service. NBN corporations may provide information to the access seeker about the development of a new eligible service or the enhancement of a declared service. The relevant activity involves the provision of information.

For example, an NBN corporation may be asked by an access seeker to modify a current NBN service offer, or to supply a new service. An access seeker may want to develop a new or enhanced service to promote its own commercial interests. The NBN corporation will make a decision on whether or not to develop the new or

enhanced service based largely on its own commercial interests. If it accepts that it wishes to develop the service, it may enter into a period of negotiation with the access seeker, and may also trial or pilot a service with that access seeker. The NBN corporation is not therefore, under an obligation to consider any request to modify a current service offer or to supply a new service, but would only need to consider a request if it considers it has been submitted in good faith. The NBN corporation would be free to consider the product development request with regard to its own commercial and operational interests.

The proposed exemption would allow an NBN corporation to restrict its negotiations and trialling to that access seeker for a limited period of time – i.e., the period of time during which the request can be considered, the product developed or enhanced and trialled. Once the NBN corporation is ready to supply the service, it is subject to the overarching obligation not to supply a service unless an SFAA, SAU or access determination is in place in relation to that service. As a result, once the NBN corporation issues an SFAA for the service, other access seekers would also have an opportunity to benefit from the service.

The exemption promotes innovation by allowing an access seeker to gain a limited but legitimate ‘first mover’ advantage to develop and trial new services and products with an NBN corporation. Without the exemption, access seekers and the NBN corporation may be reluctant to engage directly to discuss product development because the NBN corporation would be required to release information that may reveal the access seeker’s commercial strategies.

Proposed subsection 152AXD(5) provides that, if an SAU given by an NBN corporation is in operation, the obligations in proposed subsection 152AXD(1) do not apply to an activity to the extent (if any) to which the activity is covered by a statement included in the undertaking in accordance with proposed subsection 152CBA(3C). In this context it is relevant to note that subsection 152CBA(3B), inserted by the CCS Bill, expands the possible scope of SAUs, and SAUs could therefore include undertakings concerning this type of activity. This means that, if an NBN corporation has an approved SAU which includes statements about product development or enhancement, and the other activities set out in proposed subsection 152AXD(1), then section 152AXD will not apply as long as that SAU is in operation.

Proposed subsection 152AXD(6) clarifies that for this section, the term ‘eligible service’ has the same meaning as in section 152AL of the CCA.

#### **Item 51 – After paragraph 152AZ(a)**

Item 51 inserts proposed paragraph 152AZ(aa) into the CCA. This amendment ensures that any rules provided in proposed sections 152AXC and 152AXD that are applicable will be considered to be a carrier licence condition that must be complied with by an NBN corporation that is a carrier (within the meaning of the Tel Act).



**Item 52 – After paragraph 152BA(2)(a)**

Item 52 inserts proposed paragraph 152BA(2)(aa) into the CCA. This amendment ensures that any rules provided in proposed sections 152AXC and 152AXD that are applicable will be considered to be a service provider rule that must be complied with by an NBN corporation that is a service provider (within the meaning of the Tel Act).

**Item 53 – After subsection 152BB(1)**

If an NBN corporation has contravened a rule imposed by proposed subsection 152AXC(1), (8) or 152AXD(1), proposed subsection 152BB(1AB) enables the Federal Court, upon application from the ACCC or any person whose interests are affected by the contravention, to make all or any of the following orders directing the NBN corporation: to comply, to compensate any other person who has suffered loss or damage, or such orders as it considers appropriate.

**Item 54 – Section 152BBD**

**Item 55 – Section 152BBD**

**Item 56 – At the end of section 152BBD**

Items 54, 55 and 56 make consequential changes to section 152BBD of the CCA due to the amendments made by items 47 and 50.

Item 56 inserts a new subsection into section 152BBD to provide that the ACCC must have regard to the desirability of NBN corporations and access seekers agreeing on terms and conditions under paragraph 152AY(2)(a) in a timely manner when exercising its powers under sections 152BBA and 152BBC.

**Item 57 – After subsection 152BC(4)**

Item 57 inserts proposed subsections 152BC(4A), 152BC(4B) and 152BC(4C) into the CCA. These subsections deal with access determinations, which are created under the CCS Bill. Under the CCS Bill, the ACCC may make access determinations in relation to declared services. Effectively, the access determination sets out the terms and conditions under which that declared service must be supplied (see also section 152AY). The proposed subsections provide that an access determination can be NBN-specific, in which case it will not apply to access to a declared service supplied by a person other than an NBN corporation. Likewise, an access determination that is not NBN-specific will not apply to an NBN corporation.

**Item 58 – At the end of paragraphs 152BCB(1)(a) and (b)**

Item 58 makes a consequential change to paragraphs 152BCB(1)(a) and (b) of the CCA by adding reference to proposed section 152AXB. The effect of this amendment is that the ACCC must not make an access determination that would be inconsistent with the category B standard access obligations in proposed section 152AXB.

#### **Item 59 – After subsection 152BCB(4)**

Item 59 inserts proposed subsections 152BCB(4A)-(4F) into the CCA.

Proposed subsection 152BCB(4A) requires that the ACCC must not make an access determination that, in relation to any category B SAOs applicable to an NBN corporation, has the effect of discriminating between access seekers, whether directly or indirectly.

However, proposed subsections 152BCB (4B)-(4F) establish exceptions to the rule under proposed subsection 152BCB(4A).

Proposed subsections 152BCB(4B) and (4D) mirror in substance those set out in proposed subsections 152AXC(2)-(4), whilst the exceptions under proposed subsections 152BCB(4E) and (4F) cover those grounds or circumstances specified in an instrument made by the ACCC under proposed subsections 152AXC(5) and (6).

#### **Item 60 - Subsection 152BCB(5)**

Item 60 makes a consequential amendment to subsection 152BCB(5) of the CCA. It provides that if an access determination has any of the effect in proposed subsection 152BCB(4A) (in addition to subsections 152BCB(1) and (3)), then the access determination does not operate to the extent that it would have those effects.

#### **Item 61 – Before subsection 152BCF(4)**

Item 61 inserts proposed subsections 152BCF(3B) and (3C) into Part XIC of the CCA. These amendments provide that, for access determinations that relate to a declared service covered by subsections 152AL(8D) or (8E) (ie. a declared service covered by an SFAA or SAU relating to an NBN corporation), the specified day which the determination comes into force must not be earlier than the day on which the service became a declared service under those subsections.

#### **Item 62 – At the end of subsection 152BCK(1)**

Item 62 makes an amendment to subsection 152BCK(1). Section 152BCK provides for a time limit on the ACCC to make an access determination where the ACCC holds a public inquiry under Part 25 of the Tel Act. This item will provide that this section does not apply to a declared service which is covered by an access determination under proposed subsection 152AL(8D). This means that the ACCC need not, if it so chooses, make an access determination in relation to a service supplied under an SFAA. However, it is open to the ACCC to make an access declaration in relation to such a service should it consider there is a need to do so.

#### **Item 63 – After subsection 152BD(4)**

Item 63 inserts proposed subsections 152BD(4A)-(4C) into the CCA. These proposed subsections provide that binding rules of conduct can be NBN-specific, in which case they will not apply to access to a declared service supplied by a person other than an

NBN corporation. Likewise, binding rules of conduct that are not NBN-specific will not apply to an NBN corporation.

**Item 64 – At the end of paragraphs 152BDA(1)(a) and (b)**

Item 64 makes a consequential change to paragraphs 152BDA(1)(a) and (b) of the CCA by adding a reference to section 152AXB. The effect of this amendment is that the ACCC must not make binding rules of conduct that would be inconsistent with the Category B SAOs in proposed section 152AXB.

**Item 65 – After subsection 152BDA(4)**

Item 65 inserts proposed subsections 152BDA(4A)-(4F) into the CCA. Proposed subsection 152BDA(4A) requires that the ACCC must not make binding rules of conduct that, in relation to any category B SAOs applicable to an NBN corporation, have the effect of discriminating between access seekers, whether directly or indirectly.

Proposed subsections 152BDA(4B) and (4D) provide exceptions to this general rule that mirror in substance those set out in proposed subsections 152AXC(2)-(4), whilst the exceptions under proposed subsections 152BDA(4E) and (4F) cover those grounds or circumstances specified in an instrument made by the ACCC under proposed subsections 152AXC(5) and (6).

**Item 66 – Subsection 152BDA(5)**

Item 66 makes a consequential amendment to subsection 152BDA(5) of the CCA. The effect of the change is that where binding rules of conduct have any of the effects in proposed subsection 152BDA(4A) (in addition to subsection 152BDA(1), (3), and (3A)), then the binding rules of conduct do not operate to the extent that it would have those effects.

**Item 67 – After section 152BEB**

Proposed sections 152BEBA, 152BEBB and 152BEBE supplement the provisions in relation to access agreements being inserted in the CCA by the CCS Bill. Under section 152BEA, inserted by the CCS Bill, all access agreements must be lodged with the ACCC, but there is no requirement to publish or otherwise release an access agreement. These proposed sections will require an NBN corporation, if it has entered into an access agreement with an access seeker with different terms and conditions from those set out in an SFAA, SAU or access determination, to give the ACCC a statement, in a form approved in writing by the ACCC, setting out the different terms and conditions within seven calendar days of the agreement being entered into. The statement will be kept in a register by the ACCC, which will be available on the ACCC's website, and provides transparency to other access seekers that an agreement has been reached to vary the standard terms, and allows them to assess whether they may be in like circumstances. If an access seeker considers that it has like circumstances, it can apply to the NBN corporation for similar or the same terms.

**Proposed section 152BEBA NBN corporation to give the Commission a statement about the differences between an access agreement and a standard form of access agreement**

Proposed subsection 152BEBA(1) requires an NBN corporation, if it has entered into an access agreement in accordance with proposed subsection 152BE(1) to provide a declared service, where an SFAA was available on the NBN corporation's website in relation to that declared service, and where there are different terms and conditions in the access agreement from those set out in that SFAA, to give the ACCC a statement in a form approved by the ACCC, within seven days of the agreement being entered into.

The statement that is to be provided to the ACCC must cover the following things:

- the parties to the access agreement;
- a description of the differences between the terms and conditions set out in the access agreement and those under the SFAA;
- where differences have been agreed because they aid efficiency, the differences authorised by proposed subsection 152AXC(4) must be specified, together with a description of what other access seekers must do in order to be able to benefit from the same changes to the access agreement;
- where an access agreement picks up discrimination authorised on grounds, or in circumstances specified in a determination made by the ACCC under proposed subsections 152AXC(5) or (6), the differences; and
- any other information about the access agreement as required by the ACCC's form—this could cover, for example, further details of the access agreement, such as the term of the agreement.

An NBN corporation must, under proposed section 152BEA (inserted by the CCS Bill), lodge the access agreement with the ACCC. If the ACCC were required to publish the actual agreement in full this could reveal commercial-in-confidence information. If this information were to be revealed, there may be no incentive for any access seeker to seek differentiated terms, which could reduce innovation and efficiency. The proposed statement therefore is intended to provide a practical solution, whilst ensuring that there remains clear transparency of any different terms and conditions that have been offered by an NBN corporation in an access agreement.

As an NBN corporation will be required to lodge access agreements and statements with the ACCC, the ACCC will be in a position to judge whether the NBN corporation has offered similar varied terms to access seekers in like circumstances and could take action if it considered that the NBN corporation had breached the non-discrimination rule in proposed section 152AXC.

Proposed subsection 152BEBA(2) requires an NBN corporation, if it has entered into a variation agreement (see subsection 152BE(3), inserted by the CCS Bill) relating to an access agreement to provide a declared service, where the declared service was covered by an SFAA available on the NBN corporation's website, and the terms and conditions in the access agreement as varied are different from those set out in that SFAA, to give the ACCC a statement in a form approved by the ACCC on the variation agreement within seven days of the variation agreement being entered into.

The statement that is to be provided to the ACCC must cover the following things:

- the parties to the access agreement (as varied);
- a description of the differences between the terms and conditions set out in the access agreement (as varied) and those in the SFAA;
- where the differences aid efficiency, the statement must identify the differences that are authorised by proposed subsection 152AXC(4), and describe what access seekers must do in order to be able to benefit from the same changes to the access agreement;
- where the access agreement picks up discrimination authorised on grounds, or in circumstances, specified in an instrument made by the ACCC under proposed subsections 152AXC(5) or (6), a description of the differences; and
- any other information required by the ACCC's form.

**Proposed section 152BEBB NBN corporation to give the Commission a statement about the differences between an access agreement and a special access undertaking**

Proposed subsection 152BEBB(1) requires an NBN corporation, if it has entered into an access agreement (under subsection 152BE(1)) to provide a declared service, where an SAU was in operation, and where there are different terms and conditions in the access agreement from those set out in that SAU, to give the ACCC a statement in a form approved by the ACCC regarding that agreement within seven days of the agreement being entered into.

Proposed subsection 152BEBB(2) similarly requires an NBN corporation, if it has entered into a variation agreement to provide the ACCC with a statement on the variation agreement within seven days of the variation agreement being entered into, similar to proposed subsection 152BEBA(2).

The statements which must be provided by the NBN corporation to the ACCC must cover substantially the same things required under proposed section 152BEBA with some minor variation. The main point of difference is that the forms under proposed subsection 152BEBB capture the differences between the terms and conditions of an access agreement and the terms and conditions set out in an SAU (as originally made, or if applicable, as varied).

**Proposed section 152BEEC NBN corporation to give the Commission a statement about the differences between an access agreement and an access determination**

Proposed subsection 152BEEC(1) requires an NBN corporation, if it has entered into an access agreement (under subsection 152BE(1)) to provide a declared service, where an access determination was in force immediately before the agreement was entered into, and where there are different terms and conditions in the access agreement from those set out in that access determination, to provide the ACCC with a statement on that agreement within seven days of the agreement being entered into.

Proposed subsection 152BEEC(2) similarly requires an NBN corporation, if it has entered into a variation agreement, to provide the ACCC with a statement on the

variation agreement within seven days of the variation agreement being entered into, similar to proposed subsection 152BEBA(2).

The statements which must be provided by the NBN corporation to the ACCC must cover substantially the same things required under proposed section 152BEBA with some minor variation. The main point of difference is that the forms under proposed subsection 152BEBC capture the differences between the terms and conditions of an access agreement and the terms and conditions set out in an access determination (as originally made, or if applicable, as varied).

### **Proposed section 152BEDB Register of NBN Access Agreement Statements**

As discussed above, where an NBN corporation enters into access agreements which contain terms and conditions that are different from the terms and conditions set out in an SFAA, SAU or access determination, as the case may be, it is required to provide statements to the ACCC under the proposed sections 152BEBA, 152BEBB; and 152BEBC.

Proposed section 152BEDB requires the ACCC to maintain a Register of access agreement statements provided to it by NBN corporations. These statements would include statements setting out how, and on what basis, NBN corporations have offered different terms and conditions from those set out in their standard offers. The ACCC may redact information in the statements that could prejudice substantially the commercial interests of a person, and the prejudice outweighs the public interest in the publication of the matter (proposed subsection 152BEDB(5)).

If commercially sensitive material contained in a statement is withheld from publication, the ACCC is required to include in the Register an annotation to that effect (refer proposed subsection 152BEDB(6)). This will make it clear to a person looking at the published statement, that certain information was removed from that version.

Subsection 152BEDB(4) clarifies that the register is not a legislative instrument for the purposes of the LIA. This subsection is enacted for the avoidance of doubt, because the ACCC will be publishing statements which it has redacted. The material will be made public in any event.

### **Item 68 – Section 152BEC**

### **Item 69 – Subsection 152BED(2)**

Items 68 and 69 make consequential amendments to section 152BEC and subsection 152BED(2) to include references to proposed sections 152BEBA, 152BEBB, and 152BEBC due to changes made by item 67.

### **Item 70 – Subsection 152CBA(1)**

Item 70 repeals the current subsection 152CBA(1) and substitutes an amended subsection 152CBA(1) of the CCA.

Subsection 152CBA(1) defines the services to which section 152CBA (dealing with SAUs) will apply. This amendment does not change the defined services, but establishes two separate circumstances in which a person can give an SAU. The first provision under proposed paragraph 152CBA(1)(a) relates to a person other than an NBN corporation (this remains the same as currently provided for). The second provision under proposed paragraph 152CBA(1)(b) relates to a person who is an NBN corporation and who is, or expects to be, a carrier or CSP supplying either a listed carriage service or a service that facilitates the supply of a listed carriage service. An NBN corporation may give a written undertaking to the ACCC in relation to access to the service, so long as the service is not a declared service under proposed subsection 152AL(8A) or there is no access determination that applies in relation to access to the service.

#### **Item 71 – Subsection 152CBA(3)**

Item 71 amends subsection 152CBA(3) of the CCA as a result of changes made in item 70. This change will make clear that subsection will only be relevant if proposed paragraph 152CBA(1)(a) applies (i.e. if the SAU is given by a person other than an NBN corporation).

#### **Item 72 – After subsection 152CBA(3)**

Item 72 inserts proposed subsection 152CBA(3A) into the CCA as a result of changes made in item 70. This subsection will only be relevant if proposed paragraph 152CBA(1)(b) applies (i.e. if the SAU is given by a person who is an NBN corporation). This proposed subsection specifies what the undertaking must state and includes an agreement to be bound by the obligations in proposed section 152AXB, and an undertaking to comply with the terms and conditions specified in relation to the obligations referred to in proposed section 152AXB.

A note to the proposed subsection clarifies that the undertaking need not specify all terms and conditions (see subparagraph 152AY(2)(b)(ii) of the CCA).

#### **Item 73 – Before subsection 152CBA(4)**

This item inserts proposed subsections 152CBA(3C) and (3D) as a result of the changes proposed under items 50 and 70 (see above).

Proposed subsection 152CBA(3C) makes it clear that the undertaking can expressly provide that the NBN corporation will engage in any of the listed activities (refer proposed paragraphs 152CBA(3C)(a)-(g), and see also proposed section 152AXD, inserted by item 50).

Proposed subsection 152CBA(3D) is inserted to make it clear to access seekers that any statement made in accordance with proposed subsection 152CBA(3C) should be disregarded when seeking to establish whether a statement in the undertaking covers a particular service or proposed service. This provision clarifies that where provisions in Part XIC refer to an SAU “relating to a service” (e.g. subsection 152CBD(1), or an SAU “in relation to a service or a proposed service” (e.g. subsections 152AL(7) and 152CBA(2)) or “an SAU that relates to a service” (e.g. proposed

subparagraphs 152CJA(1)(c)(ii) and 152BEBB(1)(c)(i), inserted by items 79 and 67 of Schedule 1 to the Access Bill, respectively), any statements in the SAU that are covered by proposed subsection 152CBA(3C) are to be disregarded. For the purposes of provisions in Part XIC that refer to an SAU, the SAU will only relate to the service that is the main service dealt with under the SAU: that is, the service in relation to which, under an SAU given by an NBN corporation, that NBN corporation agrees to be bound by the obligations in proposed section 152AXB as if the service were a declared service (see proposed subsection 152CBA(3A), described above at item 72). This is intended to clarify that, where an SAU given by an NBN corporation deals with any additional activities listed at proposed subsection 152CBA(3C) in relation to declared services that are additional to the main service that is the subject of that SAU, the SAU will not be treated as “relating to” those additional services, for the purposes of provisions in Part XIC that refer to this concept.

#### **Item 74 – Subsection 152CBA(11)**

Item 74 amends subsection 152CBA(11) of the CCA as a result of changes made in item 70.

#### **Item 75 – Paragraphs 152CBD(2)(a) and (b)**

Item 75 repeals and replaces paragraphs 152CBD(2)(a) and (b) of the CCA as a result of changes made in item 70. Section 152CBD provides criteria that the ACCC must be satisfied of before it can accept an SAU relating to a service.

Paragraph 152CBD(2)(a) will only be relevant if paragraph 152CBA(1)(a) applies (i.e. if an SAU is given by a person other than an NBN corporation).

Paragraph 152CBD(2)(b) will only be relevant if paragraph 152CBA(1)(b) applies (i.e. if an SAU is given by a person who is an NBN corporation).

The effect of the proposed paragraphs will be that the ACCC cannot accept an SAU unless it is satisfied that particular terms and conditions are consistent with obligations under section 152AXB and those terms and conditions are reasonable. Reasonable is defined in section 152AH of the CCA.

#### **Item 76 – Before paragraph 152CBD(2)(d)**

Item 76 clarifies that, if proposed subsection 152CBA(3C) applies, the ACCC must be satisfied that the conduct specified in accordance with that proposed subsection will promote the long-term interests of end-users before it can accept an SAU. Proposed subsection 152CBA(3C) provides that an operational SAU given by an NBN corporation may contain a statement about any of the obligations in relation to non-discrimination in relation to related activities set out in proposed subsection 152AXD(1). Proposed subsection 152AXD(5) clarifies that, if an operational SAU given by an NBN corporation does contain such a statement, then the relevant obligations in proposed subsection 152AXD(1) do not apply.



### **Item 77 – Paragraph 152CBF(2)(b)**

Item 77 makes a consequential amendment to paragraph 152CBF(2)(b) to reflect changes made by item 71.

### **Item 78 – Subsection 152CBI(3)**

Item 78 makes a consequential amendment to subsection 152CBI(3) to reflect changes made by item 41.

### **Item 79 – After Division 6 of Part XIC**

#### **Proposed Division 6A—Supply of services by NBN corporations**

Item 79 inserts proposed Division 6A of Part XIC, which sets out several new sections dealing with the supply of services by NBN corporations, and also inserts proposed Division 6B, dealing with ACCC explanatory material on anti-discrimination provisions.

#### **Proposed section 152CJA Supply of services by NBN corporations**

Proposed subsection 152CJA(1) establishes that an NBN corporation must not supply an eligible service unless:

- the service has been declared by the ACCC under subsection 152AL(8A); or
- the NBN corporation has formulated an SFAA that relates to access to the service and it has published it on its website; or
- an SAU has been given by the NBN corporation relating to the service, and such an undertaking is in force.

An eligible service is defined in section 152AL of the CCA.

Proposed subsection 152CJA(2) establishes that an NBN corporation must comply with a request from an access seeker under proposed section 152AXB for a service if the NBN corporation has formulated an SFAA that relates to access the service and published it on its website, and the access seeker requests the NBN corporation to enter into an access agreement that relates to access to the service and sets out terms and conditions that are the same as the terms and conditions set out in the SFAA. The SFAA therefore acts as a template, or standard offer of terms which the access seeker and access provider can sign up to, which results in an access agreement with an NBN corporation. The SFAA itself is not an access agreement. The SFAA does not operate in the same way that a standard form of agreement operates currently under Part 23 of the Tel Act. In the case of SFAAs, the parties will execute an agreement which specifies the terms and conditions set out in the SFAA, including the basis on which the terms and conditions may be varied.

Proposed subsection 152CJA(3) clarifies that, if an access seeker does not make a request under proposed paragraph 152CJA(2)(d) to enter into an access agreement that has the same terms and conditions as those set out in an SFAA, there is no implication that an NBN corporation and the access seeker cannot enter into an access agreement that sets out terms and conditions that vary from the SFAA. As noted

under item 50 above, any such variations must be consistent with the non-discrimination obligations. Furthermore, as noted under item 67, details of the variations must be submitted to the ACCC and the ACCC must publish those details on its website.

An NBN corporation may choose to publish an SFAA for a new service, or to publish an SFAA as the means of specifying the terms and conditions which are not covered by, or to complement the terms and conditions contained in, the SAU it has given to the ACCC (on the interaction between terms and conditions in an SAU and access agreement, see section 152AY of the CCA, inserted by the CCS Bill). It is already recognised that Part XIC of the CCA does not exclude supplementing the terms and conditions of services set out in an SAU with ancillary documents which may form part of the agreement between an access provider and an access seeker in relation to the supply of a declared service.

The note accompanying proposed subsection 152CJA(3) will remind readers that an NBN corporation will not have to comply with the Category B SAOs, if an exception under proposed subsections 152AXB(3) or (6) applies.

### **Proposed section 152CJB Mandatory NBN services**

Proposed section 152CJB establishes the process for compliance with the requirement to provide a service in accordance with a condition of a carrier licence made under section 63 of the Tel Act, in accordance with clause 41 of the Companies Bill.

Proposed section 152CJB should be read together with clause 41 of the Companies Bill. Clause 41 of the Companies Bill clarifies that the Minister may make a condition of an NBN corporation's carrier licence under section 63 of the Tel Act specifying services that an NBN corporation must supply. If the Minister does this, proposed section 152CJB has the effect of requiring the NBN corporation to publish an SFAA or lodge an SAU in relation to that service.

Proposed subsection 152CJB(2) sets out the timeframe in which the relevant NBN corporation is required to formulate an SFAA and publish the SFAA on its website. The timeframe is 90 calendar days after the carrier licence condition comes into force. In the case where the NBN corporation wishes to have an SAU in connection with the provision of access to the service, it must give an SAU to the ACCC within the 90 day timeframe.

In the case where the NBN corporation has given an undertaking in accordance with proposed subsection 152CJB(3), and the ACCC rejects the SAU, the NBN corporation must, within 90 days of the rejection, formulate (and publish on its website) an SFAA that relates to access to the service. This additional mechanism provides added certainty to prospective access seekers.

All SFAAs made in accordance with proposed subparagraph 152CJB(2)(a)(ii) or proposed paragraph 152CJB(3)(d) must be available on the NBN corporation's website at all times during the remainder of the period when the condition is in force (see proposed subsection 152CJB(4)).

The 90-day timeframe has been chosen to ensure that the NBN corporation has reasonably sufficient time to prepare and publish the relevant documentation.

Proposed subsection 152CJB(5) provides that if an SAU is given in accordance with proposed paragraph 152CJB(2)(b), the ACCC accepts the undertaking, and the undertaking subsequently ceases to be in operation, the NBN corporation must ensure that an SFAA that relates to access to the service and is formulated by the NBN corporation is available on the NBN corporation's website at all times during the remainder of the period when the condition is in force. It is expected that an NBN corporation would begin formulating a new SAU or SFAA sufficiently in advance of expiry of the SAU.

#### **Proposed section 152CJC Carrier licence condition**

Proposed section 152CJC provides that a carrier licence held by an NBN corporation is subject to a condition that the NBN corporation must comply with any applicable rules in proposed section 152CJA. Any breach by an NBN corporation of the rules in proposed section 152CJA would therefore be dealt with as a breach of carrier licence, and the enforcement mechanisms under the Tel Act would apply (see proposed section 152CJE below).

#### **Proposed section 152CJD Service provider rule**

Proposed subsection 152CJD(2) provides that if an NBN corporation is a service provider, the NBN corporation must comply with any applicable rules in proposed section 152CJA of the Access Bill. Proposed subsection 152CJD(1) clarifies that any rule in proposed subsection 152CJD(2) of the Access Bill applicable to service providers will be considered as a service provider rule for the purposes of the Tel Act, and that these rules are in addition to rules mentioned in section 98 of the Tel Act.

#### **Proposed section 152CJE Judicial enforcement of obligations**

If an NBN corporation has contravened an obligation imposed by section 152CJA or 152CJB, proposed subsection 152CJE(1) enables the Federal Court, upon application from the ACCC or any person whose interests are affected by the contravention, to make all or any of the following orders directing the NBN corporation: to comply, to compensate any other person who has suffered loss or damage, or such orders as it considers appropriate.

Proposed subsection 152CJE(2) empowers the Federal Court to vary or discharge the operation of orders granted under this section.

#### **Proposed section 152CJF Standard form of access agreement**

Proposed section 152CJF clarifies that an NBN corporation is able to formulate an SFAA relating to access to a service that has not yet been declared, on the assumption that the service is a declared service. However, if the Minister were to make a carrier licence condition prohibiting a particular NBN corporation from supplying the service, an SFAA could not be made in relation to that service.

**Proposed section 152CJG When NBN corporation is not capable of supplying a carriage service**

Proposed subsection 152CJG(1), which is included for the avoidance of doubt, should be read together with clause 41(3) of the Companies Bill which clarifies that the Minister may make a condition of a carrier licence under section 63 of the Tel Act applying to an NBN corporation preventing that NBN corporation from providing a specified eligible service. Should the Minister make a condition on an NBN corporation's carrier licence prohibiting the supply of a specified service, the ACCC would not be able to declare the service under proposed subsection 152AL(8A) of the CCA.

**Proposed Division 6B—Explanatory material relating to anti-discrimination provisions**

**Proposed section 152CJH Explanatory material relating to anti-discrimination provisions**

Proposed section 152CJH requires the ACCC, as soon as practicable after the commencement of this section (see clause 2 above), to publish on its website explanatory material which explains the ACCC's views on the operation of (and how it will administer, i.e. its approach to enforcement) the following provisions:

- proposed section 152AXC;
- proposed section 152AXD;
- proposed subsections 152BCB(4A)-(4F);
- proposed subsections 152BDA(4A)-(4F).

To ensure that the material remains relevant, the ACCC will be required to ensure that any such explanatory material is kept up-to-date.

This provision addresses industry's request for greater up-front certainty on when an NBN corporation may negotiate to offer different terms and conditions, and what sort of discrimination would be permitted. The ACCC's guidance may set out its views on how it intends to enforce the obligations on NBN corporations, thereby providing a clear signal to the marketplace of the limits of allowable discrimination. It could also, for example, set out the way in which the ACCC will consider volume discounts in relation to an SAU given by an NBN corporation, and when discrimination in relation to creditworthiness is reasonable. Should the ACCC make an instrument setting out grounds or circumstances permitting discrimination by an NBN corporation, it is expected that the ACCC will issue explanatory material which sets out the ACCC's rationale for the instrument and how it expects industry to comply.

The explanatory material to be published by the ACCC on its website is analogous to the guidance material it issues on other sections of the CCA, such as the obligations under Parts IV, IVA and V, and to material it has issued on its interpretation of telecommunications provisions under Parts XIB and XIC. The explanatory material does not in any way constitute rules in relation to the operations of an NBN corporation, or bind the ACCC.

**Item 80 – Subsection 152CK(4)**

**Item 81 – At the end of section 152CK**

Item 80 makes a consequential amendment to subsection 152CK(4). The effect of this amendment is that this subsection will only apply to an SAU given by a person other than an NBN corporation.

Item 81 inserts subsection 152CK(5) which will be relevant if an SAU is given by an NBN corporation. This subsection would provide that if an SAU is in operation, it can be assumed that proposed subsection 152AL(8E) has effect in relation to the undertaking as if paragraph 152AL(8E)(c) had not been enacted. The effect of this clause is that an eligible service set out in an SAU given by an NBN corporation will be a declared service regardless of whether the NBN corporation supplies the service or proposed service for the purposes of section 152CK, in that a notification under section 44S of the CCA must not be given. This section reflects that provided for non-NBN corporation SAUs under current subsection 152CK(4) of the CCA.

**Item 82 – After paragraph 155(9)(b)**

Item 82 inserts proposed paragraph 155(9)(ba) in the CCA. Section 155 of the CCA sets out information-gathering powers of the ACCC. This amendment ensures that any references in that section to a ‘designated communications matter’ will include a reference to the performance of a function, or the exercise of a power, conferred on the Commission by or under the Companies Bill.

**Item 83 – Transitional—continuity of special access undertakings**

Item 83 is included to clarify that none of the changes made to section 152CBA by Part 1 of Schedule 1 to the Access Bill affect the continuity of special access undertakings that are in force at the time this item commences.

## **Part 2—Amendments relating to infringement notices**

### ***Telecommunications Act 1997***

Part 2 of Schedule 1 to the Access Bill makes an amendment to paragraph 572E(4)(b) of the Tel Act.

#### **Item 84 – At the end of paragraph 572E(4)(b)**

Item 84 amends paragraph 572E(4)(b) of the Tel Act to include new subparagraphs (xiv)-(xviii).

Section 572E of the Tel Act sets out when an infringement notice may be issued. Certain provisions have been excluded for the purposes of the infringement notice scheme under subsection 572E(4) and this amendment includes additional provisions of the CCA and the Companies Act as exempt provisions. The provisions which have been listed as exempt are:

- carrier licence conditions under proposed section 152CJC of the CCA and proposed clause 41 of the Companies Bill; and
- service provider rules set out under sections 152CJC (2) of the CCA and proposed subclause 12(2) of the Companies Bill;

This change is made because it is considered more appropriate for the ACCC or the Minister to enforce these provisions, rather than the ACMA.

### **Part 3—Amendments relating to Layer 2 Ethernet bitstream services**

Proposed Part 3 of Schedule 1 to the Access Bill makes changes to the Tel Act and the CCA to establish new arrangements to require carriers (other than NBN corporations) operating certain superfast broadband networks, after an appropriate transition period, to offer a wholesale Layer 2 bitstream service on an open and equivalent access basis. These proposed new measures are designed to ensure that other providers of superfast broadband networks in Australia can provide to consumers outcomes similar to those available on the NBN and ensure that NBN Co operates on a more level regulatory playing field to assist it to achieve the range of objectives for which it has been established.

Readers should consult the Outline of this Explanatory Memorandum and the Regulation Impact Statement on these measures for information on the background, rationale, objectives and operation of these provisions.

The measures in Part 3 of Schedule 1 are intended to work in conjunction with the amendments to Part 6 of the Tel Act set out in items 12-16 of Schedule 1 to the Access Bill, which will facilitate the making of codes and standards in relation to FTTP facilities and services. As a result of those code and standard processes, a framework will be put in place through which those new networks will meet NBN-consistent specifications. This will help ensure consumers using these networks will receive comparable outcomes from a technical perspective. The amendments made by Part 3 build on these arrangements by requiring new superfast FTTP networks and other new and upgraded mass market superfast networks, regardless of the technology, to offer a Layer 2 bitstream service. Part 3 then proceeds to require those Layer 2 bitstream services to meet open and equivalent access requirements based on those applying to NBN corporations.

Amongst other things, these arrangements draw on the Government's consultations on the provision of services in new developments and the Implementation Study on the NBN, including recommendation 73. For the avoidance of doubt, the arrangements apply in all localities, however, not just new real estate developments.

The new requirements under Part 7 will only come into operation on Proclamation or after 12 months from the day in which the Act receives the Royal Assent as indicated in item 4 of the Table in clause 2 of the Access Bill.

### ***Telecommunications Act 1997***

#### **Item 85 – Section 7**

Item 85 inserts a proposed definition of 'Layer 2 bitstream service' in section 7 of the Tel Act. The same meaning of Layer 2 as applied under the Open System Interconnection (OSI) Reference Model for data exchange will apply in this context. The OSI model is widely known and used in the telecommunications industry, and in particular in relation to the provision of bitstream services. For example, NBN Co itself has indicated that it intends to offer Layer 2 bitstream services, and the Implementation Study on the NBN also recommended that NBN Co offer Layer 2 bitstream services. Ethernet is also a widely used industry standard and is intended to

have its commonly-applied definition. The term has been discussed in documents issued by the ACCC, for example, in the ACCC's 2010 decision to amend the definition of the Domestic Transmission Capacity Service.

The reference to 'line' in proposed paragraph (c) of the definition of 'Layer 2 bitstream service' makes it clear that that term is not intended to capture services provided through mobile, satellite or wireless networks. It would not be appropriate to capture these networks because the objective of the provisions is to provide a more level regulatory playing field in relation to superfast carriage services, defined as providing a download transmission speed of more than 25 Mbps, provided over fixed-line networks. Moreover, as these technologies do not generally provide the threshold download speed of more than 25 Mbps being applied on a dedicated basis, it has not been considered necessary to capture them.

'Carriage service' is defined in section 7 of the Tel Act to mean a service for carrying communications by means of guided and/or unguided electromagnetic energy.

### **Item 86 – After Part 6**

Item 86 inserts a proposed Part 7 into the Tel Act, which will set out a rule relating to the supply of Layer 2 bitstream services using certain network units.

## **Proposed Part 7—Layer 2 bitstream services**

### **Proposed section 140 Simplified outline**

Proposed section 140 provides a simplified outline of proposed Part 7 of the Tel Act to assist the reader. In summary, proposed section 141 sets out an obligation on owners of network units, where those network units are part of a telecommunications network that comes into existence after 25 November 2010 or is altered or upgraded after that date, and are capable of supplying superfast carriage services, to supply a Layer 2 bitstream service. It does this by preventing the owners of such network units from providing other carriage services over such networks unless a Layer 2 bitstream service is provided using that network. Proposed subsections 141(5) and (6) provide that the Minister, may by written instrument, exempt a specified owner or network unit from this obligation. Any exemption must be made following consultation with the ACCC and the ACMA (see proposed subsection 141(8)). 'Superfast carriage services' in this context has the meaning given by proposed subsection 141(10), see below.

### **Proposed section 141 Supply of Layer 2 bitstream services**

Proposed subsection 141(1) establishes which network units will be subject to the new Layer 2 bitstream requirements.

The network units which are proposed to be covered are any network unit which belongs to a telecommunications network which is not the NBN, and which is used, or is capable of being used, to supply a superfast carriage service to customers (actual and prospective) anywhere in Australia. To be covered, the network unit must be part of a telecommunications network that either:



- comes into existence after 25 November 2010; or
- if it existed prior to that date—is altered or upgraded after 25 November 2010, with the result being that the network becomes capable of being used to supply a superfast carriage service.

If no Layer 2 bitstream service is available for supply to those customers or prospective customers using the network, then the network unit cannot be used to supply carriage services.

A key exemption is provided for network units that are used wholly to supply carriage services to a single end-user, where the end-user is a public body or a company. This exemption is intended to exempt existing or future network units that are installed by carriers on a point-to-point basis to service government agencies or corporations. Such network units are usually installed by a carrier for the sole purpose of supplying a single end-user and involve agreements reached between the customer and the carrier in relation to the supply of services. It would generally not be appropriate for carriers to supply access over these network units.

The arrangements are also not intended to capture proprietary networks installed for the sole use of a person or the person's immediate circle. Such networks would not involve supply to the public and as such they would not be caught by the 'network unit' concept.

Examples of the alteration or upgrading of a network could include extending an existing network, for example, by adding new line links, or upgrading the operation of a network so that it will support higher-speed broadband services. If an existing network is operating to normally provide a download transmission speed in excess of 25 Mbps it would not be covered by these provisions. However, if a network is currently not capable of providing such services, but that network is upgraded, for example, through the deployment of new hardware or software or both, to be capable of supplying a download speed of more than 25 Mbps, the network would be captured.

The new arrangements will commence on Proclamation, or, if there is no Proclamation, after 12 months from the day on which the Access Bill receives the Royal Assent (see clause 2). This is intended to provide a transitional period and to signal to carriers upgrading or building new networks that these rules will apply to their networks, but to provide a period of up to 12 months for them to put in place arrangements to meet these requirements. The threshold date of 25 November 2010 has been selected as that is the planned date of introduction of the Access Bill into the House of Representatives (i.e. the date from which the public will become aware of the proposed new requirements). At the same time, this approach to capturing certain networks moving forward is designed to minimise any attempts by network owners to circumvent the new Layer 2 bitstream requirements.

Proposed subsections 141(2) and (3) set out two new prohibitions on the use of network units; one relating to network units where there is only one owner, and another in relation to network units with multiple owners.

Proposed subsection 141(2) provides that if there is only one owner of the network unit, and the network unit satisfied proposed subsection 141(1), the owner of the network unit must not:

- use the unit, either alone or jointly with one or more other persons, to supply a fixed-line carriage service; or
- allow or permit another person to use the unit to supply a fixed-line carriage service.

Multiple owners of a network unit are covered by proposed subsection 141(3). It provides that for a network unit where there are two or more owners, an owner must not:

- use the unit, either alone or jointly with one or more other persons, to supply a fixed-line carriage service; or
- either alone or together with one or more other owners, allow or permit another person to use the unit to supply a fixed-line carriage service.

If a person who is subject to a requirement under proposed subsection 141(2) or (3) engages in conduct which breaches the applicable requirement, they will have committed an offence (refer proposed subsection 141(4)) and the penalty is 20,000 penalty units. Presently, under the *Crimes Act 1914*, a penalty unit is valued at \$110. The penalty for contravention of the rules at proposed subsections 141(2) and (3) matches the penalty for contravention of section 42 of the Tel Act, which provides the rule that a network unit must not be used to supply a carriage service to the public unless the owner of the network holds a carrier licence or there is a nominated carrier declaration in force in relation to the network.

The Minister may, by written instrument, exempt a specified owner (refer to proposed subsection 141(5)) or a specified network unit (refer to proposed subsection 141(6)) from proposed subsections 141(2) and (3). This exemption power is included to provide flexibility, as the industry develops, in relation to the application of these provisions, so that if there are circumstances in which the application of the obligations could be disproportionate or inefficient, the obligations would not apply. For example, the exemption arrangements could be utilised if there was a situation where a carrier could provide a wholesale service other than a Layer 2 bitstream service for a period and the provision of that service would be beneficial to retail service providers and consumers, pending the provision of a Layer 2 bitstream service or the rollout in the area of the NBN. Such situations could apply in both new real estate developments and established areas.

Proposed subsection 141(7) provides that an instrument under proposed subsection 141(5) or (6) may be unconditional or subject to such conditions as specified in the instrument. A condition that could be provided for in the instrument may, for instance, relate to the circumstances in which the exemption would be in effect.

Proposed subsection 141(8) ensures that before the Minister can make an instrument under proposed subsection 141(5) or (6), the Minister must consult with the ACCC and the ACMA.

Proposed subsection 141(9) provides that an exemption instrument under proposed subsection 141(5) or (6) is not a legislative instrument for the purposes of the LIA. Industry will require certainty that exemptions from the obligation under section 141 can be made without being disallowed by Parliament. Accordingly, it is not appropriate for instruments made under proposed subsections (5) or (6) to be legislative instruments.

Proposed subsection 141(10) clarifies that for the purposes of proposed section 141, the term ‘fixed-line carriage service’ means:

- a carriage service that is supplied using a line to premises occupied or used by an end-user; or
- a service that facilitates the supply of such a carriage service (e.g. an infrastructure-based service that is not of itself a carriage service).

The provision also clarifies that the term ‘national broadband network’ has the same meaning as proposed section 5 of the Companies Act (see clause 5 of the Companies Bill).

The term ‘superfast carriage service’ will be defined to capture carriage services which:

- allow end-users to download communications at a data transmission speed of more than 25 megabits per second (under normal conditions); and
- are fixed-line services supplied to premises occupied or used by an end-user (i.e. retail services).

The 25 megabits per second download speed has been selected because it is the minimum speed higher than the peak speeds currently available on ADSL2+ platforms, and reflects the speed at which a network might be considered capable of supplying a service at a similar performance to the NBN.

### **Item 87 – Section 373**

Item 87 inserts an additional dot point to the outline of Part 21 set out in section 373 of the Tel Act to include a reference to technical standards relating to Layer 2 bitstream services. This change represents a consequential amendment flowing from the inclusion of proposed Division 5A of Part 21 by item 88, below.

### **Item 88 – After Division 5 of Part 21**

#### **Proposed Division 5A—Technical standards relating to Layer 2 bitstream services**

Item 88 would insert proposed Division 5A into Part 21 of the Tel Act. This proposed Division deals with technical standards relating to Layer 2 bitstream services. This will facilitate the ACMA’s ability to make technical standards in this area should it be required.

### **Proposed section 389A ACMA's power to determine technical standards**

Proposed section 389A confers power on the ACMA to determine technical standards relating to Layer 2 bitstream services. The technical standards would be made by a legislative instrument. It is envisaged that technical specifications could cover a broad range of matters, including the download and upload speeds, the grades of service offered, reliability, the number of retail service providers that can be supported by an optical network terminal (ONT), the functionality of the wholesale services available and the future scope for physical unbundling of the telecommunications network.

A note accompanying proposed section 389A is inserted to clarify that section 589 of the Tel Act provides that instruments under this Act may provide for matters by reference to other instruments. For instance, the ACMA may refer to the published standards relating to Layer 2 and Ethernet in making any standards in this area. Relevant specifications could also be contained in a technical document produced by NBN Co.

### **Proposed section 389B Compliance with technical standards**

Proposed subsection 389B(1) makes compliance with a standard determined under proposed section 389A mandatory for carriers and CSPs. Proposed subsection 389B(2) contains ancillary contravention provisions which prohibit the involvement of a person in a contravention of proposed subsection 389B(1) in any manner that is outlined in that proposed subsection.

Proposed subsection 389B(3) clarifies that proposed subsections 389B(1) and (2) are civil penalty provisions. This means if a person contravened proposed subsection 389B(1)—e.g. if a person installed a line that did not comply with a technical standard—that person would be subject to the pecuniary penalty provisions in Part 31 of the Tel Act. Subsection 570(1) of the Tel Act states that if the Federal Court is satisfied that a person has contravened a civil penalty provision, the Court may order the person to pay to the Commonwealth such pecuniary penalty, in respect of each contravention, as the Court determines to be appropriate.

The Minister may, by written instrument, exempt a specified carrier or a specified CSP from the obligation to comply with technical standards (refer proposed subsection 389B(4)). Proposed subsection 389B(5) provides that an instrument under proposed subsection 389B(4) may be unconditional or subject to such conditions as specified in the instrument. A condition that could be provided for in the instrument may, for instance, relate to the circumstances in which the exemption would be in effect, or set out certain actions that must be carried out by the carrier or CSP in order for the exemption to apply. This provides flexibility, for example to deal with any transitional or localised issues, should this be necessary.

Proposed subsection 389B(6) ensures that before the Minister can make an instrument under proposed subsection 389B(4), the Minister must consult with the ACCC and the ACMA. Consultation with these two regulatory bodies is considered necessary because, in the case of the ACCC, an exemption could potentially impact on competition and the provision of services to consumers, and in the case of the ACMA, change to technical regulation is involved.

Industry will require certainty that exemptions from the obligation under proposed section 389B can be made without being disallowed by Parliament. Accordingly, it is not appropriate for an instrument made under proposed subsection 389B(4) to be a legislative instrument. Therefore, proposed subsection 389B(7) provides that an instrument under proposed subsection 389B(4) is not a legislative instrument.

### ***Competition and Consumer Act 2010***

#### **Item 89 – Section 152AC**

#### **Item 90 – Section 152AC**

#### **Item 91 – Section 152AC**

#### **Item 92 – Section 152AC**

These items amend the CCA to give effect to the level playing field arrangements for superfast telecommunications networks. In particular, they ensure the Layer 2 bitstream service that must be supplied is subject to open access and equivalence requirements based on those applying to NBN services.

Item 89 of Schedule 1 to the Access Bill inserts a proposed definition of ‘designated superfast telecommunications network’. This will have the same meaning under proposed section 152AGA of the CCA (see item 92 of the Access Bill).

Item 90 inserts a proposed definition of ‘Layer 2 bitstream service’. It will have the same meaning as in the Tel Act. Item 75 inserts a proposed definition of ‘Layer 2 bitstream service’ in section 7 of the Tel Act (see above).

Item 91 inserts a proposed definition of ‘national broadband network’ as having the same meaning as in the Companies Act. Clause 5 of the Companies Bill will provide that an ‘NBN corporation’ means NBN Co or NBN Tasmania, or a company over which NBN Co is in a position to exercise control.

Item 92 provides that the definition of ‘superfast carriage service’ has the same meaning as in section 141 of the Tel Act (refer to item 86 above).

#### **Item 93 - After section 152AG**

Item 93 inserts proposed section 152AGA which sets out the mechanism for determining, for the purposes of Part XIC of the CCA, when a network will be a ‘designated superfast telecommunications network’.

#### **Proposed section 152AGA Designated superfast telecommunications network**

For the purposes of Part XIC of the CCA, as amended by the Access Bill, a telecommunications network will be a designated superfast telecommunications network if all the following conditions are met:

- the network is used or is capable of being used to supply one or more Layer 2 bitstream services to customers, or prospective customers, in Australia;

- the network is used, or is capable of being used, to supply a superfast carriage service to customers;
- the network is not the NBN;
- either:
  - the network comes into existence after 25 November 2010; or
  - the network is altered or upgraded after 25 November 2010 and, as a result of the alteration or upgrade, the network becomes capable of being used to supply a superfast carriage service to customers, or prospective customers, in Australia;
- the network is not a ‘point-to-point’ network: that is, the network is not used wholly to supply services to a single end-user that is a public body or a company.

The definition reflects the type of networks that will be subject to the requirements relating to Layer 2 bitstream services under proposed Part 7 of the Tel Act, inserted by item 86 above.

A non-NBN network that is in existence prior to 25 November 2010 will only be captured as a designated superfast telecommunications network if, at any point after that date, it is altered or upgraded in such a manner as to make it capable of supplying a superfast carriage service. The date of 25 November 2010 is specified as that it the intended date of introduction of the Access Bill, and the date from which this measure will be made public.

#### **Item 94 – Before subsection 152AL(4)**

Item 94 inserts proposed subsections 152AL(3C)-(3H) into section 152AL.

In simple terms, proposed subsection 152AL(3C) would place an obligation on the ACCC to make a declaration that a specified Layer 2 bitstream service is a declared service. The new provision relates to telecommunications networks which fall within the scope of a ‘designated superfast telecommunications network’ as set out under proposed section 152AGA (see item 92 above).

To ensure that only suppliers of superfast carriage services over a designated superfast telecommunications network are subject to the new Layer 2 access requirements, proposed subsection 152AL(3D) makes it clear that an ACCC declaration under proposed subsection 152AL(3C) has no effect except to the extent to which a Layer 2 bitstream service is supplied using a ‘designated superfast telecommunications network’.

Proposed subsection 152AL(3E) states that paragraphs 152AL(3)(a)-(d) do not apply to a declaration mentioned in proposed subsection 152AL(3C). Proposed paragraphs 152AL(3)(a)-(d) set out the process by which the ACCC may declare an eligible service, and do not apply to the Layer 2 bitstream service as that service is deemed to be declared.

Proposed subsections 152AL(3F) and (3G) makes it clear that if a Layer 2 bitstream service is declared under proposed subsection 152AL(3C), that proposed subsection does not prevent the ACCC from making a declaration in relation to another, or the same, Layer 2 bitstream service. This is intended to clarify that proposed

subsection 152AL(3C) does not affect the ability of the ACCC to declare a Layer 2 bitstream service as a declared service applying to the supply of such services using a network other than a designated superfast telecommunications network, using the general declarations power at subsection 152AL(3).

Proposed subsection 152AL(3H) determines that if the ACCC makes a declaration under proposed subsection 152AL(3) relating to Layer 2 bitstream services, that other declaration has no effect to the extent to which a Layer 2 bitstream service is supplied using a designated superfast telecommunications network.

**Item 95 – Before subsection 152AL(8C)**

Proposed subsection 152AL(8CA) states that proposed subsection 152AL(3C) does not prevent a Layer 2 bitstream service from being declared under proposed subsection 152AL(8A), which is inserted by item 41 of Schedule 1 to the Access Bill and provides that the ACCC may declare a service that is supplied, or capable of being supplied, by an NBN corporation. Proposed subsection 152AL(8CA) makes it clear that the ACCC's power to declare a Layer 2 bitstream service that is supplied, or capable of being supplied, by an NBN corporation is unaffected.

**Item 96 – Subsections 152ALA(1) and (5)**

Item 96 makes amendments to these subsections, which deal with the expiry dates for declarations made under section 152AL. As a result of the changes made by item 86, the mandatory declaration of Layer 2 bitstream services under proposed subsection 152AL(3C) will not be required to specify an expiry date. It is not appropriate to require that declaration to expire.

**Item 97 – After subsection 152ALA(5)**

Item 97 inserts proposed subsection 152ALA(5A) which provides that a declaration mentioned in proposed subsection 152AL(3C) will remain in force indefinitely. The change provides certainty in relation to the enduring nature of this requirement.

**Item 98 – At the end of section 152AO**

Item 98 inserts proposed subsection 152AO(4), which provides that the ACCC must not vary or revoke a declaration mentioned in proposed subsection 152AL(3C), dealing with Layer 2 bitstream services. The change provides certainty in relation to the enduring nature of this requirement.

**Item 99 – After section 152AR**

Item 99 inserts proposed section 152ARA into Part XIC of the CCA.

**Proposed section 152ARA Layer 2 bitstream services to be supplied on a non-discriminatory basis**

Proposed section 152ARA applies the non-discrimination obligations based on those applying to NBN corporations to carriers or CSPs who supply a declared Layer 2

bitstream service over a designated superfast telecommunications network. It is intended that there be only one Layer 2 service that is declared under proposed subsection 152AL(3C). As the Access Bill creates separate mechanisms for NBN corporations in relation to the declaration and the supply of services, it is necessary to create separate provisions dealing with the supply of Layer 2 bitstream services by other carriers or CSPs.

A carrier or CSP (other than an NBN corporation) must not, in complying with any of its category A SAOs in relation to the declared Layer 2 bitstream service, discriminate between access seekers (see proposed subsection 152ARA(1)).

Proposed subsection 152ARA(2) provides for an exception to the rule in proposed subsection 152ARA(1): discrimination against an access seeker is not prevented if the carrier or CSP has reasonable grounds to believe that the access seeker would materially be unable to comply with the reasonable terms and conditions of relevant obligations. This is modelled on paragraph 152AR(9)(a).

Proposed subsection 152ARA(3) lists examples of grounds for believing that a carrier or CSP would materially fail to comply with the obligations. The list mirrors the examples set out in proposed subsection 152AXC(3) – see item 50 above.

Proposed subsection 152ARA(4) provides for a further exception to the rule in proposed subsection 152ARA(1). Discrimination against an access seeker is not prevented if the discrimination aids efficiency and all access seekers with like circumstances have an equal opportunity to benefit from the discrimination (this proposed provision mirrors arrangements applying to NBN corporations in proposed subsection 152AXC(4) – see the discussion above).

However, in a case where the discrimination involves volume discounting, proposed paragraph 152ARA(4)(c) sets out further matters which must be satisfied before the exception to the rule in proposed subsection 152ARA(1) applies. This further restriction operates in the same way as proposed paragraph 152AXC(4)(c), and has the effect that volume discounting is only permitted if the terms and conditions on which the volume discounting is provided by an access provider are set out in an SAU that is in operation and relates to that access provider.

As indicated above, the drafting is deliberately broad to cover a variety of circumstances in which a volume discount may be offered. It could, for example, relate to a discount offered up-front for the purchase of a specified number of services, or a discount for the purchase of a specified amount of capacity. The Access Bill intentionally uses words of wide import for the purposes of capturing any permutation of discount that an access provider may offer or allow to an access seeker. The provision is intended to capture any form of volume discount.

It should be noted that, under amendments made to the CCA by the CCS Bill, an SAU will not be able to be lodged in relation to a service that is a declared service (see the amendment to section 152CBA of the CCA made by item 162 of Schedule 1 to that Bill). This means that there will only be a limited timeframe for an access provider to lodge an SAU before the ACCC declares the Layer 2 bitstream service under proposed subsection 152AL(3C).



Proposed subsection 152ARA(5) sets out a further exception to the general rule against discrimination (as set out in proposed subsection 152ARA(1)). This provision will enable the ACCC to specify in a written instrument particular grounds upon which discrimination is permitted. For example, if the non-discrimination requirement would result in outcomes that are clearly inefficient or disproportionate, or if discrimination is required in relation to emergencies or natural disasters like bushfires, the ACCC could approve discrimination. Proposed subsection 152ARA(6) establishes a similar exception in relation to circumstances that are specified in a written instrument made by the ACCC. For example, if in certain circumstances the non-discrimination requirement would conflict with other regulatory obligations, the ACCC could permit discrimination in accordance with those obligations. It is difficult to determine beforehand with any degree of certainty discriminatory behaviour for which an exception would be in the public interest. Accordingly, there are preconditions which must be satisfied before the ACCC can exercise such powers, namely, before making the exemption determination, the ACCC must publish a draft of the instrument on its website and invite people to make submissions on the instrument and consider any submissions that are received within the stated timeframe.

Proposed subsection 152ARA(7) establishes a prohibition against a carrier or CSP (other than an NBN corporation) discriminating in favour of itself in relation to the supply of a Layer 2 bitstream declared service. This prohibition relates to declared services supplied over a designated superfast telecommunications network. In such cases, a carrier or CSP will be subject to a Category A SAO in relation to that service. As indicated above, if a carrier or CSP supplies declared services both to its own business units and to access seekers, it will have the incentive and ability to discriminate in favour of its downstream operations. This proposed provision ensures that the terms and conditions of supply of the declared service must be the same for the carrier's or CSP's own business units and for its customers.

Proposed subsections 152ARA(8) and (9) mirror proposed subsections 152ARA(5) and (6) and establish that the ACCC may make instruments permitting discrimination on grounds or circumstances permitted in the instruments. As it is difficult to determine beforehand with any degree of certainty discriminatory behaviour for which an exception would be in the public interest, there are preconditions which must be satisfied before the ACCC can exercise such powers, namely, before making the exemption determination, the ACCC must publish a draft of the instrument on its website and invite people to make submissions on the instrument, and consider any submissions that are received within the stated timeframe.

Proposed subsection 152ARA(11) provides that instruments made under proposed subsections 152ARA(5), (6), (8) and (9) are not legislative instruments for the same reason that the corresponding instruments are not legislative instruments in relation to proposed subsection 152AXC(11).

**Proposed section 152ARB Layer 2 bitstream services—carriers and carriage service providers to carry on related activities on a non-discriminatory basis**

Proposed section 152ARB mirrors the prohibition on NBN corporations discriminating in carrying on related activities (proposed section 152AXD). However, there is no equivalent in proposed section 152ARB of proposed subsection 152AXD(5), which provides that the rule concerning discrimination in related activities does not apply to any activity to the extent to which that activity is covered in a statement in an SAU. The reason for this is that, as a result of changes to the CCA being made by the CCS Bill (noted above), there will only be a limited opportunity for providers of Layer 2 bitstream services to submit a SAU before the ACCC declares the service under proposed subsection 152AL(3C).

Proposed subsection 152ARB(1) provides that this section applies if a carrier or CSP is providing a declared Layer 2 bitstream service over a designated superfast telecommunications network and is subject to a category A SAO in relation to that service.

Proposed subsection 152ARB(2) prohibits a carrier or CSP from carrying on any of the following activities in a way which discriminates between access seekers:

- developing a new eligible service;
- enhancing a declared service;
- extending or enhancing the capability of a facility or telecommunications network by means of which a declared service is, or is to be, supplied;
- planning for a facility or telecommunications network by means of which a declared service is, or is to be, supplied;
- an activity that is preparatory to the supply of a declared service;
- an activity that is ancillary or incidental to the supply of a declared service;
- giving information to service providers about any of the above activities.

Proposed subsection 152ARB(3) (which reflects the operation of proposed subsection 152AXD(2)) provides for exceptions to these prohibitions. Specifically, a carrier or CSP will be permitted to undertake discriminatory activity in favour of an access seeker if:

- the relevant activity relates to a pilot or trial of a new eligible service or an enhanced declared service; and
- a determination is in force under proposed subsection 152ARB(4) and that determination is applicable to the pilot or trial and the number of days in the anticipated period of the pilot or trial does not exceed the maximum allowable duration of the pilot or trial (as specified in the determination).

Proposed subsection 152ARB(4) provides that the ACCC, by legislative instrument, may determine that, for the purposes of proposed paragraph 152ARB(3)(b), a specified number of days is the maximum allowable duration of a specified pilot or trial. As noted above, this covers the second limb of the exception to the discrimination rule. The provision has been inserted to ensure that some limitation is placed on the time in which a pilot or trial can be covered by this proposed subsection, if the ACCC considered that the time taken has been unreasonable. The accompanying note to proposed subsection 152ARB(4) reminds readers that

subsection 13(3) of the LIA provides guidance in relation to the specification in legislation by class.

A further exception to the rule against discriminatory activity is set out in proposed subsection 152ARB(5). This covers the following circumstance:

- where the relevant activity consists of giving information to the access seeker about the development of a new eligible service or the enhancement of a declared service; and
- the access seeker requested the particular development of the new eligible service or the enhancement of the existing declared service.

Proposed subsection 152ARB(6) clarifies that for the purposes of section 152ARB, the term ‘eligible service’ has the same meaning as in section 152AL.

#### **Item 100 – Paragraph 152AZ(aa)**

Item 100 amends proposed paragraph 152AZ(aa) of the CCA. Section 152AZ provides that a carrier licence held by a carrier is subject to a condition that the carrier must comply with the SAOs, and ancillary obligations set out under section 152AYA. Proposed paragraph 152AZ(aa) is inserted by item 51 of Schedule 1 to the Access Bill and ensures that a carrier licence held by an NBN corporation is also subject to compliance with the non-discrimination obligations set out in proposed sections 152AXC and 152AXD.

This amendment ensures that any rules in relation to Layer 2 bitstream services provided in sections 152ARA and 152ARB that are applicable will be considered to be a carrier licence condition that must be complied with by the relevant carrier.

#### **Item 101 – Paragraph 152BA(2)(aa)**

Item 101 amends proposed paragraph 152BA(2)(aa) of the CCA. Section 152BA provides that a service provider must comply with the SAOs and ancillary obligations set out under section 152AYA. Proposed paragraph 152BA(2)(aa) is inserted at item 52 of the Access Bill and ensures that an NBN corporation that is a CSP must also comply with the non-discrimination obligations set out in proposed sections 152AXC and 152AXD.

This amendment ensures that any rules in relation to Layer 2 bitstream services provided in proposed sections 152ARA and 152ARB that are applicable will be considered to be a service provider rule that must be complied with by the relevant CSP.

#### **Item 102 – Before subsection 152BB(1AB)**

If a carrier or CSP has contravened a rule imposed by proposed subsections 152ARA(1) or (7) or 152ARB(2), proposed subsection 152BB(1AA) enables the Federal Court, upon application from the ACCC or any person whose interests are affected by the contravention, to make all or any of the following orders: an order directing the carrier or CSP to comply, an order to compensate any other person who has suffered loss or damage, or such other orders as it considers appropriate.

### **Item 103 – After subsection 152BC(4)**

Item 103 inserts proposed subsection 152BC(4A) into Part XIC of the CCA. Section 152BC is inserted by the CCS Bill and sets out the matters that may be covered by an access determination. Paragraphs 152BCA3(h) and (i) provide that the Category A SAOs may either not be applied, or be limited in their application, in an access determination.

This proposed subsection provides that paragraphs 152BCA(3)(h) and (i) do not apply to an access agreement that relates to a declared service that is a Layer 2 bitstream service. This is required as new access obligations will apply to this service.

### **Item 104 – After subsection 152BCB(4F)**

Proposed subsection 152BCB(4G) provides that the ACCC must not make an access determination that relates to a Layer 2 bitstream service that is a declared service, and has the effect of discriminating between access seekers.

Proposed subsection 152BCB(4H) provides for an exception to that rule: discrimination against an access seeker is not prevented if the ACCC has reasonable grounds to believe that the access seeker would be materially unable to comply with the reasonable terms and conditions of the relevant obligation.

Proposed subsection 152BCB(4J) lists examples of grounds for believing that the carrier or CSP would materially fail to comply with the obligations. The list set out in the proposed subsection is not exhaustive. For consistency in regulation, the list mirrors the list of factors set out in proposed subsection 152AXB(7) (see above), which apply to NBN corporations.

Proposed subsection 152BCB(4K) provides for a further exception to the rule: discrimination against an access seeker is not prevented if the ACCC considers that the discrimination aids efficiency and that all access seekers with like circumstances would have an equal opportunity to benefit from the discrimination.

Proposed subsections 152BCB(4L) and (4M) provide for an exception to the rule in proposed subsection 152BCL(4G) on grounds or circumstances provided for under an instrument made by the ACCC in proposed subsections 152ARA(5) or (6) (see item 99).

### **Item 105 – Subsection 152BCB(5)**

Item 105 makes a consequential amendment to include a reference in subsection 152BCB(5) to proposed subsection 152BCB(4G) due to item 104.

### **Item 106 – After subsection 152BDA(4F)**

Proposed subsection 152BDA(4G) provides that the ACCC must not make binding rules of conduct that relate to a Layer 2 bitstream service that is a declared service, and have the effect of discriminating between access seekers.

Proposed subsections 152BDA(4H)-(4M) operate in a similar way to proposed subsections 152BCB(4H)-(4M), inserted by item 104 and described above.

#### **Item 107 – Subsection 152BDA(5)**

Item 107 makes a consequential amendment to include a reference in subsection 152BDA(5) to proposed subsection 152BDA(4G). This change is required as a result of item 106 above.

#### **Item 108 – After subsection 152BE(1A)**

Item 108 inserts proposed subsection 152BE(1B) into Part XIC of the CCA. This proposed subsection provides that subparagraphs 152BE(1)(e)(ix) and (x) do not apply to an agreement that relates to a declared service that is a Layer 2 bitstream service. Section 152BE is to be inserted into the CCA by the CCS Bill, and sets out the matters that may be covered by access agreements. Paragraphs 152BE(1)(e)(ix) and (x) provide that an access agreement may provide that the Category A SAOs are not applicable, or limit their application to the access agreement. This change is required as new access obligations will apply to the Layer 2 bitstream service.

#### **Item 109 – After section 152BEBD**

This item inserts proposed sections 152BEBE and 152BEBF into Part XIC of the CCA.

Proposed sections 152BEBE and 152BEBF supplement the provisions in relation to access agreements being inserted in the CCA by the CCS Bill. They mirror proposed sections 152BEBA-152BEBE applying to NBN corporations. These sections will require a carrier or CSP that is not an NBN corporation and that supplies a declared Layer 2 bitstream service, if it has entered into an access agreement with an access seeker with different terms and conditions from those set out in an SAU or an access determination, to provide the ACCC with a statement on that agreement within seven days of the agreement being entered into, which statement will then be published by the ACCC on its website.

The statement provides transparency to other access seekers that an agreement has been reached to vary the standard terms, and allows them to assess whether they may be in like circumstances. NBN corporations are under the same obligations to provide statements to the ACCC (see item 67).

#### **Proposed section 152BEBE Layer 2 bitstream services—carrier or carriage service provider to give the Commission a statement about the differences between an access agreement and a special access undertaking**

Proposed subsection 152BEBE(1) requires a carrier or CSP, if it has entered into an access agreement (under subsection 152BE(1)) to provide a declared Layer 2 bitstream service, where an SAU lodged by that carrier/CSP was in operation in relation to that declared service, and where there are different terms and conditions in that access agreement from those set out in that SAU, to give the ACCC a statement

in a form approved by the ACCC regarding that agreement within seven days of the agreement being entered into.

The requirements in relation to the content of the statement set out in proposed paragraphs 152BEBE(1)(f)-(k) mirror those requirements set out in proposed paragraphs 152BEBB(1)(e)-(j), however, in this context, the content relates to differences between a Layer 2 bitstream service provider's access agreement and an SAU.

Proposed subsection 152BEBE(2) requires a carrier or CSP, if it has entered into a variation agreement to provide a declared Layer 2 bitstream service, where the SAU was in operation, and the terms and conditions in the access agreement as varied are different from those set out in that SAU, to provide the ACCC with a statement on the variation agreement within seven days of the variation agreement being entered into.

The requirements in relation to the content of the statement set out in proposed paragraphs 152BEBE(2)(f)-(k) largely mirror those requirements set out in proposed paragraphs 152BEBB(2)(e)-(j), however, in this context, the content relates to differences between a Layer 2 bitstream service provider's variation to an access agreement and a special access undertaking.

**Proposed section 152BEBF Layer 2 bitstream services—carrier or carriage service provider to give the Commission a statement about the differences between an access agreement and an access determination**

Proposed subsection 152BEBF(1) requires a carrier or CSP that is not an NBN corporation, if it has entered into an access agreement (under subsection 152BE(1)) to provide a declared Layer 2 bitstream service, where an access determination was in force in relation to that declared service immediately before the agreement was entered into, and where there are different terms and conditions from those set out in that access determination, to provide the ACCC with a statement on that agreement within seven days of the agreement being entered into.

The requirements in relation to the content of the statement set out in proposed paragraphs 152BEBF(1)(f)-(k) largely mirror those requirements set out in proposed paragraphs 152BEBB(1)(e)-(j), however, in this context, the content relates to differences between a Layer 2 bitstream service provider's access agreement and an access determination.

Proposed subsection 152BEBF(2) requires a carrier or a CSP, if it has entered into a variation agreement to provide a declared service, where an access determination was in force, and the terms and conditions in the variation agreement are different from those set out in the access determination, to provide the ACCC with a statement on the variation agreement within seven days of the variation agreement being entered into.

The requirements in relation to the content of the statement set out in proposed paragraphs 152BEBF(2)(f)-(k) largely mirror those requirements set out in proposed paragraphs 152BEBB(2)(e)-(j), however, in this context, the content relates to

differences between a Layer 2 bitstream service provider's variation to an access agreement and an access determination.

### **Proposed section 152BEBG Register of Layer 2 Bitstream Access Agreement Statements**

Proposed subsection 152BEBG(1) provides that the ACCC is to maintain the Register of Layer 2 Bitstream Access Agreement Statements, which is to include all statements given to the ACCC under proposed sections 152BEBE and 152BEBF.

This provision mirrors the requirement for the ACCC to maintain a Register of NBN Access Agreement Statements under proposed section 152BEDD.

The Register is to be maintained by electronic means (refer proposed subsection 152BEBG(2)), and, to ensure transparency, the ACCC is to make it available on the ACCC's website for inspection by the public (refer proposed subsection 152BEBG(3)).

Proposed subsection 152BEBG(4) clarifies that the Register is not a legislative instrument for the purposes of the LIA.

However, in recognition of the commercial sensitivity of certain information which may be contained in statements made to the ACCC about access agreements, the ACCC is conferred with discretion under proposed subsection 152BEBG(5). This discretion mirrors that conferred under proposed subsection 152BEDD(5). This will enable the ACCC to remove material if it forms that view that the publication of particular material contained in a statement could reasonably be expected to prejudice substantially the commercial interests of a person and that prejudice outweighs the public interest in making it available to the public to scrutinise.

In similar terms to proposed subsection 152BEDD(6), the ACCC is required to include in the Register an annotation relating to any commercial sensitive content that has been redacted (refer proposed subsection 152BEBG(6)). This will make it clear to a person looking at the published statement, that certain information was removed from that version.

### **Item 110 – Section 152BEC**

### **Item 111 – Subsection 152BED(2)**

Items 110 and 111 make minor consequential amendments as a result of item 109 above. These items will insert a reference to 'sections 152BEBE and 152BEBF' in each of the provisions.

### **Item 112 – Before subparagraph 152CJH(a)(i)**

This item inserts a reference to additional provisions, sections 152ARA and 152ARB, into subsection 152CJH(a) which is to be inserted by the Access Bill under item 79. Proposed section 152CJH requires the ACCC, as soon as practicable after the commencement of the section, to publish on its website guidelines setting out an explanation of specific provisions and to keep those guidelines up-to-date.

**Item 113 – Subparagraph 152CJH(a)(iii)**

**Item 114 – Subparagraph 152CJH(a)(iv)**

Items 113 and 114 make consequential amendments to these provisions (inserted by item 79, above), necessary as a result of items 104 and 106.



## **Part 4—Amendments relating to freedom of information**

### ***Freedom of Information Act 1982***

Part 4 of Schedule 1 to the Access Bill makes amendments to the FOI Act, in order to make NBN Co a ‘prescribed authority’ for the purposes of the FOI with an exemption for documents for its commercial activities (being activities carried on by NBN Co on a commercial basis or which may be undertaken on a commercial basis in the foreseeable future).

#### **Item 115 - Subsection 4(1)**

The FOI Act applies to bodies which are ‘prescribed authorities’ (defined under subsection 4(1) of the FOI Act). Item 115 amends the interpretation section of the FOI Act (subsection 4(1)) by inserting a definition of ‘NBN Co’. The definition specifies the full legal name of the corporation (NBN Co Limited), and includes the company’s Australian Company Number.

#### **Item 116 - Subsection 4(1) (at the end of paragraph (a) of the definition of prescribed authority)**

Item 116 represents a minor amendments and adds the words “or” at the end of existing paragraph 4(1) (a) of the definition of ‘prescribed authority’. This is necessary because item 117 inserts a new paragraph 4(1) (aa) in the definition of ‘prescribed authority’.

#### **Item 117 - Subsection 4(1) (after paragraph (a) of the definition of prescribed authority)**

The purpose of item 117 is to make NBN Co subject to the FOI Act. This is achieved by the insertion, at subsection 4(1) (after paragraph (a) of the definition of prescribed authority), of a new paragraph (aa) which specifies ‘NBN Co’. If and when NBN Co is privatised, amendments to the FOI Act would be required to remove NBN Co from the scope of the Commonwealth FOI laws.

#### **Item 118 - Subsection 4(1) (at the end of paragraph (b) of the definition of prescribed authority)**

Item 118 represents a minor technical amendment and inserts the word “or” at the end of existing paragraph 4(1) (b) of the definition of ‘prescribed authority’. This makes it clear that paragraph (b) of the definition of prescribed authority is an alternative to the other paragraphs in the definition.

#### **Item 119 - Subsection 4(1) (after paragraph (b) of the definition of responsible Minister)**

The ‘responsible Minister’ of a prescribed authority has various responsibilities under the FOI Act, such as publishing information concerning functions and documents of agencies (section 9). Item 119 inserts a new paragraph (ba) to the definition of ‘responsible Minister’ at subsection 4(1) of the FOI Act. The new paragraph (ba)

provides that the Minister administering the *National Broadband Network Companies Act 2011* is the Minister responsible for NBN Co (ie being the prescribed authority referred to in paragraph (aa) of that definition—as proposed by the amendment at Item 117 above). This represents a minor consequential change. The Communications Minister would be the responsible Minister.

**Item 120 - Subsection 7(3)**

**Item 121 - After subsection 7(3)**

Proposed items 120 and 121 amend subsection 7(3) of the FOI Act. The combined effect of these items, together with Item 122, is to specify the types of documents relating to NBN Co’s commercial activities which will be exempt from the scope of the FOI Act.

Subsection 7(2) of the FOI Act provides that the persons, bodies and Departments specified in Part II of Schedule 2 to the FOI Act are exempt from the operation of the FOI Act in relation to their documents referred to in that Schedule. As a result of item 117, NBN Co will become an entity which is subject to the FOI Act, and item 122 (see notes below) will list NBN Co (and the types of exempt documents) in Part II of Schedule 2 to the FOI Act.

The purpose of items 120 and 121 is to provide for an NBN Co-specific definition of ‘commercial activities’. Specifically, item 120 inserts the words “(except when used in relation to NBN Co)” in subsection 7(3) before the word “means”. The effect of this change is that the existing definition of ‘commercial activities’ will not apply to NBN Co.

Item 121 inserts a new subsection 7(3A), being an NBN Co-specific meaning of the term, ‘commercial activities’. Under this new definition, commercial activities, when used in relation to NBN Co, will cover activities carried on by NBN Co:

- on a commercial basis; or
- that may reasonably be expected in the foreseeable future to be carried on by NBN Co on a commercial basis.

The proposed exemptions for documents in relation to NBN Co’s commercial activities recognise the unique situation of NBN Co, which is currently a Corporations Act entity and a Government Business Enterprise. By modifying the existing ‘commercial activities’ definition accorded to statutory corporations such as Australia Post, this assists in reflecting that the treatment for NBN Co will be similar to other Government Business Enterprises whilst avoiding uncertainty, in the event that a future interpretation of NBN Co’s commercial activities are found not to be in competition with other persons or bodies. This approach aims to provide NBN Co with the necessary certainty in respect of its own commercial documents, together with those commercial documents it may hold from third parties, whether they are suppliers, contractors, customers or other bodies.

**Item 122 - Division 1 of Part II of Schedule 2**

Item 122 amends Division 1 of Part II of Schedule 2 to the FOI Act. The effect of this item is to exempt NBN Co from the operation of the FOI Act for documents in respect of its commercial activities.