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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

THE SENATE

**NATIONAL BROADBAND NETWORK
COMPANIES BILL 2010**

SUPPLEMENTARY EXPLANATORY MEMORANDUM

Amendments to be moved on behalf of the Government

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

NATIONAL BROADBAND NETWORK COMPANIES BILL 2010

OUTLINE

The purpose of the National Broadband Network Companies Bill 2010 (the Companies Bill) is to establish the regulatory framework covering the ownership and operations of NBN Co Limited (NBN Co), and the arrangements for the eventual sale of the Commonwealth's stake in NBN Co.

The Government amendments and new clauses proposed to be moved by the Government relate to the following:

- requiring the Communications Minister and the Finance Minister to jointly make functional separation principles under clause 24;
- clarifying, for the avoidance of doubt, that a utility or authority may not resupply a service supplied to it by an NBN corporation;
- exempting from State/Territory stamp duties and taxes two categories of matters related to the structural separation of Telstra Corporation Limited (Telstra) and the creation, development or operation of the national broadband network; and
- amending the date by which the national broadband network is to be declared built and fully operational, under subclause 48(1), to 31 December 2020.

FINANCIAL IMPACT STATEMENT

The amendments are not expected to have a financial impact for the Commonwealth.

ABBREVIATIONS

The following abbreviations are used in this explanatory memorandum:

CCA:	<i>Competition and Consumer Act 2010</i>
Companies Bill/Act:	National Broadband Network Companies Bill 2010/that Bill once enacted
NBN:	National Broadband Network
Access Bill:	Telecommunications Legislation Amendment (National Broadband Network Measures—Access Arrangements) Bill 2011
Tel Act:	<i>Telecommunications Act 1997</i>
TLA(CCS) Bill:	<i>Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2010</i>

NOTES ON AMENDMENTS

AMENDMENT (1)

Amendment (1) omits item 2 of the table at clause 2 of the Companies Bill and substitutes in its place three new items. This change is necessary as the result of the proposed insertion of new clause 98A (see amendment (20) below).

Item 2 of the table at clause 2 provides that clauses 3 to 98 and Schedules 1 and 2 to the Companies Bill will commence at 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. Similarly, new item 2B of the table at clause 2 provides that clauses 99 to 101 to the Companies Bill will commence the day after the Companies Bill receives the Royal Assent, or immediately after the commencement of item 2 of Schedule 5 to that Act, whichever occurs later in time. These items are in substantially the same terms as current item 2 of the table at clause 2 of the Bill – the commencement of existing clauses 3 through 101 are unaffected by these changes to the table.

New item 2A of the table at clause 2 provides that clause 98A of the Companies Bill will commence on 22 March 2011, being the day after the amendments are proposed to be introduced into Parliament. The stamp duty exemption is provided to facilitate the structural reform of the telecommunications industry. Progressing this reform is a priority of the Government. Therefore, the proposed exemption would operate on a retrospective basis, from 22 March 2011, to enable transactions between Telstra and NBN Co in support of the reforms to be progressed without unnecessary delay. This approach is consistent with that applying to many other Commonwealth tax measures.

The signing of the Definitive Agreements between Telstra and NBN Co (which is discussed below) is most likely to be after the stamp duty trigger date. Therefore, in order for the proposed stamp duty exemption under new clause 98A to be of practical effect, it must provide exemption from the date upon which any stamp duty liability might be triggered.

Accordingly, this amendment ensures that the stamp duty exemption takes effect from the specified date before the Definitive Agreements are executed by Telstra and NBN Co.

AMENDMENT (2) – (16)

Amendments (2)–(16) represent changes made to the exemptions provided to utilities under clauses 10 -16 of the Companies Bill. While the Companies Bill as drafted makes it clear that services supplied by an NBN corporation to a utility or transport body must be for the sole use of the entity concerned, these amendments are being made to further confirm this matter given concerns expressed by industry. Similar changes are being made by amendments moved by the Government in relation to the Access Bill.

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. Clauses 10 – 16 of the Companies Bill sets out exemptions to the general rule under clause 9, with each of those exemptions relating to the provision of eligible services to the following entities:

- transport authorities (clause 10);
- electricity supply bodies (clause 11);
- gas supply bodies (clause 12);
- water supply bodies (clause 13);
- sewerage services bodies (clause 14);
- storm water drainage services bodies (clause 15); and
- State or Territory road authorities (clause 16).

Amendments (2)-(4), (6), (8), (10), (12), (14) and (16) make it clear that the exemption for the specific body does not apply unless the carriage service is supplied on the basis that the body must not re-supply the carriage service. See the supplementary explanatory memorandum to the Access Bill for further details about these changes.

Amendments (5), (7), (9), (11), (13) and (15) represent minor technical changes flowing from the abovementioned changes.

AMENDMENT (17)

Subclause 24(1) of the Companies Bill 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. Amendment (2) inserts the words “and the Finance Minister” after “Communications Minister” in subclause 24(1) of the Companies Bill. The purpose of this amendment is to require both shareholder Ministers to jointly make a determination relating to functional separation principles for the purposes of the application of the Companies Act to a particular NBN corporation. This is consistent with clause 25 of the Bill which requires both Ministers to make a functional separation requirements determination.

AMENDMENT (18)

Amendment (18) removes subclause 24(4) which provided that the Communications Minister must consult with the Finance Minister, before making a determination under subclause 24(1). This amendment is consequential to amendment (17).

AMENDMENT (19)

Amendment (19) alters the date by which the NBN must be declared by the Communications Minister to be built and fully operational, under subclause 48(1). Existing clause 48 provides that the Communications Minister must declare that the NBN should be treated as built and fully operational during the period starting at the commencement of the section and ending at the end of 30 June 2018. Amendment (19) would change this end date to 30 December 2020. This was consistent with the Government’s original timeframe for the NBN rollout of eight years. The revised date is consistent with NBN Co Limited’s corporate plan dated 15 December 2010, which indicates that the rollout of the NBN will be complete by 31 December 2020.

AMENDMENT (20)

Amendment (20) inserts a new clause 98A in the Bill.

New clause 98A Exemption from stamp duty—matters related to the creation, development or operation of the national broadband network

As part of the process of implementing structural separation, in accordance with Part 33 of the Tel Act, Telstra is expected to enter into certain agreements with NBN Co. Those agreements are known as the Definitive Agreements. Telstra and NBN Co entered into a preliminary agreement on 20 June 2010 announcing their intentions to enter into such agreements – that earlier agreement is referred to as the Financial Heads of Agreement (FHoA).

The Definitive Agreements are expected to provide for three transactions:

- migration of Telstra’s subscribers (set out in category A designated matters);
- acquisition by NBN Co of Telstra conduits (set out in category B designated matters); and
- access by NBN Co to Telstra infrastructure (set out in category B designated matters).

The purpose of this new clause is to ensure that the transactions and conduct involved in the Definitive Agreements under the FHOA between Telstra and NBN Co are not subject to any State/Territory stamp duty or other State/Territory tax. The Definitive Agreements will be critical to delivering the envisaged structural reform of the telecommunications sector. As such, the purpose of clause 98A is to facilitate the structural reform of the telecommunications industry.

The Definitive Agreements will, among other things, give effect to the structural separation of Telstra and the transfer of assets to NBN Co for the purposes of creating, developing and operating the NBN. It is not appropriate for the Definitive Agreements to be subject to stamp duty or other State or Territory tax, because they are the mechanisms that give effect to the Australian Government’s preferred policy outcome: structural reform of the telecommunications industry. As a fundamental component of the government’s reforms, the Definitive Agreements are not part of normal business operations, and so it is appropriate for the transactions and conduct involved in the Definitive Agreements to be exempt from State and Territory stamp duty and taxes.

This approach is consistent with the approach adopted in section 577BA of the Tel Act authorising, for the purposes of subsection 51(1) of the CCA, certain conduct engaged in by Telstra, NBN corporations and other relevant persons, where that conduct relates to an undertaking given by Telstra to the ACCC under section 577A of that Act (a ‘structural separation undertaking’). The exemption offered by clause 98A is closely linked to the operation of section 577BA of the Tel Act. The reason for this is to ensure that the proposed exemption under clause 98A operates only to cover the transactions and conduct relating to structural reform of the telecommunications industry. NBN Co and Telstra would continue to be subject to Commonwealth and State and Territory duties and taxes in the usual manner in respect of dutiable/taxable transactions arising from their ordinary day-to-day business operations.

Statutory exemptions from stamp duty and other State and Territory taxes have previously been granted under Commonwealth legislation in analogous circumstances.

Application of proposed stamp duty exemption

The proposed exemption (under clause 98A) applies to ‘category A designated matters’ and ‘category B designated matters’, (as defined under proposed subclause 98A(1)). These categories are discussed in further detail below.

(a) Category A designated matters

Subclause 98A(2) provides an exemption from stamp duty or other tax under a law of a State or Territory in respect of a ‘category A designated matter’, or 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, a ‘category A designated matter’. Category A designated matters cover five separate matters which are listed at proposed (a)-(e) of the definition of that term.

The first and second matters (at proposed paragraphs (a) and (b) of the definition) are intended to cover the migration of customer services from Telstra’s fixed-line and hybrid fibre-coaxial networks to the new wholesale-only fibre network to be built and operated by NBN Co. The paragraphs use similar language to that used in section 577BC of the Tel Act, which sets out the requirements for a migration plan (which forms a part of Telstra’s structural separation undertaking). The effect of these paragraphs is that, where Telstra takes action involved in the migration of customers from a network over which it is in a position to exercise control, and that action is authorised under section 577BA of the Tel Act for the purposes of subsection 51(1) of the CCA, the action will be a category A designated matter, and as such exempt from State and Territory stamp duty and other taxes. The reference in these paragraphs to the action being authorised under section 577BA of the Tel Act is included to ensure that the migration actions that benefit from the exemption are constrained to those actions that are authorised under that section for the purposes of Part IV of the CCA. Under section 577BA of the Tel Act, a range of actions are authorised. A detailed description of the operation of that provision is set out in the Explanatory Memorandum for the TLA(CCS) Bill.

The third category (at proposed paragraph (c) of the definition) covers the receipt of money by a person in respect of a matter covered by proposed paragraphs (a) or (b).

The fourth category (at proposed paragraph (d) of the definition) covers any agreement between Telstra and an NBN corporation relating to a matter covered by proposed paragraphs (a) or (b) where, at the time the agreement is entered into, a structural separation undertaking is in force.

The fifth category (at proposed paragraph (e) of the definition) covers any agreement between Telstra and an NBN corporation relating to a matter covered by proposed paragraphs (a) or (b) where the operative provisions of the agreement are subject to a condition precedent relating to a structural separation undertaking coming into force.

The question of when a structural separation undertaking comes into force is dealt with by section 577AB of the Tel Act.

Paragraph (e) of the definition is intended to deal with agreements between Telstra and an NBN corporation that deal with the topic of migration of customers and that are entered into prior to a structural separation undertaking coming into force. The reference in paragraph (e) of the definition of category A designated matter to ‘operative provisions’ of an agreement

being subject to a condition precedent reflects language used in subsection 577BA(3) of the Tel Act, and is intended to acknowledge that there may be some provisions in such agreements (such as provisions relating to confidentiality) that take effect from the time the agreement is entered into.

The concept of ‘control’ is used in the definition of the first type of category A designated matter at subparagraph 98A(1)(a). Subclause 98A(6) provides that for the purposes of Section 98A, control over a telecommunications network is to be determined under Division 7 of Part 33 of the Tel Act. Section 577Q in that Division sets out, for the purposes of Part 33, when Telstra is in a position to exercise control of a telecommunications network.

(b) Category B designated matters

Subclause 98A(4) provides an exemption from stamp duty or other tax under a law of a State or Territory in respect of a ‘category B designated matter’, or 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, a category B designated matter. The definition of that term at subclause 98A(1) describes seven types of matters to be ‘category B designated matters’.

The first type of matter under the definition of category B designated matter (at proposed paragraph (a) of the definition) relates to the transfer of:

- conduits, fixed wires or cables; or
- any related equipment, apparatus or other thing used, or for use, in or in connection with a conduit, wire or cable;

where such a transfer is for the creation, development or operation of the NBN and where the transfer is authorised under section 577BA of the Tel Act for the purposes of subsection 51(1) of the CCA. Subsection 577BA(7) deals specifically with the authorisation of the disposal by Telstra of assets in accordance with its structural separation undertaking, and the acquisition of those assets by parties identified in that undertaking.

The reference to “thing” in this context is intended to cover such upstream and downstream connections at each end of the conduit as may be transferred to NBN Co. These things may not normally be considered ‘apparatus or equipment’. In respect of the upstream connections, the reference to “things” is intended to include things such as a lead-in conduit to a medium density fibre board, optical fibre distribution frame, T Block, termination box, null node and other things placed on the relevant premises beyond which there is no continuous pipe.

The second type of category B designated matter (at proposed paragraph (b) of the definition) relates to Telstra granting an NBN corporation access to a telecommunications facility owned or operated by Telstra (such as telecommunications equipment, dark fibre, a building, a tower, or an underground facility which is used to hold lines), where such access is for the creation or development of the NBN, and where such access is authorised under section 577BA of the Tel Act for the purposes of subsection 51(1) of the CCA. The giving by Telstra of such access could be authorised for the purposes of the CCA under subsections 577BA(3), (6) or (8) of the Tel Act.

The third type of category B designated matter (at paragraph (c) of the definition) relates to Telstra giving an NBN corporation access to the site of a telecommunications site (e.g. the site of a telecommunications building, or of a tower, or of an underground facility which is

used to hold lines), which Telstra owns, occupies or controls, where such access is for the creation or development of the NBN, and where such access is authorised under section 577BA of the Tel Act for the purposes of subsection 51(1) of the CCA. It is envisaged that this access would be given to enable an NBN corporation to situate a telecommunications facility for the purposes of the NBN on that site. As above, the giving by Telstra of such access could be authorised for the purposes of the CCA under subsections 577BA(3), (6) or (8) of the Tel Act.

The fourth type of category B designated matter (at paragraph (d) of the definition) relates to Telstra supplying an eligible service to an NBN corporation where such supply is for the creation or development of the NBN, and where such access is authorised under section 577BA of the Tel Act for the purposes of subsection 51(1) of the CCA. It is possible that, as part of its structural separation arrangements, Telstra could supply eligible services to NBN corporation to enable the NBN to be rolled out. The supply of such services could be authorised under subsections 577BA(3), (6) or (8).

As noted above, subsections 577BA(3), (4) and (5) will allow Telstra to enter into agreements with NBN Co and other NBN corporations in the expectation of the ACCC accepting a structural separation undertaking that is submitted to it.

It is noted that the concept of giving access is intended to cover access powers under Part 3 or Part 5 of Schedule 1 to the Act, or access pursuant to a lease or any other form of access. The inclusion of paragraphs (b), (c) and (d) of the definition of category B designated matter is not intended to suggest that the fact of granting access to a facility, or supplying an eligible service, is of itself a transaction that could give rise to a stamp duty.

The remaining types of category B designated matter (at paragraph (e), (f) and (g) of the definition of that term) mirror the types of category A designated matter described at paragraphs (c), (d) and (e) of the definition of that term. These provisions apply in a similar way.

Sunset Clauses

The sunset clauses for the designated matters (as described below) ensure that the exemption does not continue into the future, when other business as usual transactions would be subject to State/Territory laws regarding stamp duty and other taxes.

The proposed stamp duty and tax exemption for category A designated matters (under proposed subsection 98(4)) ceases to operate 24 months from the day that the Communications Minister makes a declaration under section 48 of the Companies Bill that, in the Communication Minister's opinion, the NBN should be treated as built and fully operational (see subclause 98A(3)).

The timeframe aligns with the migration timeframe proposed for the NBN. The migration of customers is expected to commence during the rollout of the NBN and proceed on an incremental basis, but continue for up to 24 months after the NBN is built and fully operational. Accordingly, the timeframe covers the additional period after the rollout that is necessary to complete the migration.

The proposed stamp duty and tax exemption for category B designated matters (under

subclause 98A(4)) ceases to have effect from the day that the Communications Minister makes a declaration under section 48, that, in the Communication Minister's opinion, the NBN should be treated as built and fully operational (see subclause 98A(5)). This expiration trigger point is selected because any transfer of a conduit, wire or cable, or giving of access to a facility, site or service, is expected to have been completed by the time the roll out of the NBN is complete.

Transitional definitions

Proposed subclause 98A(7) is necessary because of the proposed retrospective commencement of new clause 98A (see amendment (1) above). It ensures that key definitions set out under the Companies Bill are treated as having been in force from 22 March 2011 (the date of commencement of clause 98A) until the date that section 5 of the Companies Act commences.