# Cost-Benefit Analysis and Review of Regulatory Arrangements for the National Broadband Network

# Telecommunications Regulatory Arrangements

**CONSULTATION PAPER FOR THE PURPOSES OF SECTION 152EOA OF THE COMPETITION AND CONSUMER ACT 2010**

Public Consultation

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## Panel's terms of reference

In December 2013 the Minister for Communications announced a panel to conduct an independent cost-benefit analysis of broadband policy and review the regulatory arrangements for the National Broadband Network.

The panel's terms of reference and further background information are available on the Department of Communications' website.

## Review of Section 152EOA of the CCA

Under its terms of reference, the Cost-Benefit Analysis and Regulatory Review is required to undertake the statutory review of the telecommunications industry access arrangements that is required under the *Competition and Consumer Act 2010* (the CCA) (formerly the *Trade Practices Act 1974*).

These review requirements are set out in section 152EOA of the CCA. These are:

> ***Review of operation of this Part etc.***
>
> *(1) Before 30 June 2014, the Minister must cause to be conducted a review of the operation of:*
>
> *(a) this Part [i.e. XIC]; and*
>
> *(b) the remaining provisions of this Act so far as they relate to this Part; and*
>
> *(c) Division 2 of Part 2 of the National Broadband Network Companies Act 2011; and*
>
> *(d) the remaining provisions of the National Broadband Network Companies Act 2011 so far as they relate to Division 2 of Part 2 of that Act.*
>
> *(1A) Without limiting subsection (1), a review under that subsection must consider the following matters:*
>
> *(a) the supply by NBN corporations of eligible services covered by section 10, 11, 12, 13, 14, 15 or 16 of the National Broadband Network Companies Act 2011;*
>
> *(b) the types of eligible services that have been, are being, or are proposed to be, supplied by NBN corporations.*
>
> *(1B) For the purposes of subsection (1A), eligible service has the same meaning as in section 152AL.*
>
> *(2) A review under subsection (1) must make provision for public consultation.*
>
> *(3) The Minister must cause to be prepared a report of a review under subsection (1).*
>
> *(4) The Minister must cause copies of the report to be tabled in each House of the Parliament within 15 sitting days of that House after the completion of the preparation of the report.*

# Guidance for readers

As the review provision was added in the context of the amendments made to the regulatory regime in 2010 and 2011, the panel envisages these amendments will be the key focus of stakeholders, but recognises they may wish to raise other issues. For example, while the 2010 and 2011 amendments paved the way for an NBN-centred environment and the structural separation of Telstra, there is now scope to consider the effectiveness of the provisions in the context of the new NBN direction (e.g. with a multi-technology mix) and the new opportunities for industry that may be created (e.g. in new developments).

This paper provides an overview of the Part XIC access regime and raises issues and questions in relation to its principles and operation. It also presents some possible high level alternative approaches. Similarly, the paper provides an overview of provisions in the *National Broadband Network Companies Act 2011* (the NBN Companies Act) that need to be reviewed, and raises questions about their operation. The paper is the key mechanism by which the panel is seeking input on the provisions that need to be reviewed under section 152EOA of the CCA, although the panel's work more broadly is relevant to these provisions.

Given its specialised nature, the paper assumes a high degree of familiarity with the regulatory provisions concerned. If stakeholders need further background in these areas, they can consult the websites of the Department of Communications and the Australian Competition and Consumer Commission (ACCC), which provide a range of background information, including links to the relevant legislation and explanatory material.

The paper first examines the operation of Part XIC and then turns to the provisions in the NBN Companies Act that need to be reviewed. To the extent stakeholders consider there are other parts of the NBN Companies Act that warrant review and reform, they are encouraged to put their views. The panel may consult further on any provisions that might be raised.

Submissions in response to the paper should be provided by **Monday, 14 April 2014**. Details on making a submission are provided at the end of the paper.

In relation to the Part XIC access regime, it may be that stakeholders are broadly satisfied with the framework as it currently operates but consider some of its components could be improved without wholesale change. In this context, the paper canvasses issues as they arise in various areas. Conversely, while the review under section 152EOA may be seen as more of an opportunity to assess the 2010 and 2011 reforms, stakeholders may consider more fundamental reform is required. Stakeholders are encouraged to provide their views on any relevant matter they wish,

including on any of the provisions of the NBN Companies Act over and above those specified in section 152EOA and specifically discussed in the paper. As such, the paper should be seen as the starting point for a more wide-ranging consideration of the issues and options.

The panel is still considering the submissions[1] it has received in response to its regulatory framing paper[2] and as such the contents of these submissions is not generally reflected in this document. However, the panel recognises that many of those submissions anticipate issues in this paper. The panel does not expect stakeholders to provide further submissions if they consider they have already adequately provided their views. Where this is the case, the panel would be happy to receive a short submission to that effect. Alternatively, where a stakeholder feels this paper requires it to supplement its previous submission or raises new issues that warrant a response, it is encouraged to do so. Such submissions need not be lengthy.

The panel recognises that the matters that need to be reviewed under section 152EOA, while important in themselves, are nonetheless part of the broader regulatory framework for broadband and telecommunications generally. Responses to the questions posed below may depend on stakeholders' views on how the industry structure should develop in coming years. For example, the role and optimal design of the access regime where NBN Co is a dominant and ubiquitous wholesale provider may differ from a scenario where there is robust infrastructure competition in populous areas. To the extent stakeholders have expressed views on the future structure of the industry in their submissions in response to the panel's first framing paper, and believe that the future structure affects the desirable form of the regulatory arrangements, they should make those linkages clear in their responses.

Further, many of the issues covered below are relevant to the review's Term of Reference 4, which relates to NBN Co's capital investment, products and pricing. Again, if stakeholders believe there are linkages between the review's other terms of reference and the matters that need to be reviewed under section 152EOA then these linkages should be made clear in their responses.

[1] These submissions are available at: http://www.communications.gov.au/broadband/national_broadband_network/cost-benefit_analysis_and_review_of_regulation/submissions_received

[2] This Regulatory Issues Framing paper is available from the Cost-Benefit and Review of Regulation website at www.communications.gov.au/broadband/national_broadband_network/cost-benefit_analysis_and_review_of_regulation.

# Part 1: Part XIC

The CCA contains telecommunications-specific parts dealing with anti-competitive conduct and record-keeping rules (Part XIB) and regulated access (Part XIC).

Part XIC sets out a telecommunications industry-specific access regime and is administered by the Australian Competition and Consumer Commission (ACCC). It applies to listed carriage services or to services that facilitate the supply of a listed carriage service.

## Functional focus of Part XIC

The main issues here are whether Part XIC should give greater emphasis to access to lower level service functionality and the co-ordination between Part XIC and the facilities access regime in the *Telecommunications Act 1997* (the Tel Act).

Consistent with the other access regimes in the CCA, Part XIC is focused on services delivered over telecommunications networks rather than access to the network itself. In practice, this has meant that many declared services are of a resale nature, in that they largely allow access seekers to simply resupply the services supplied by the access provider to its own retail customers. To a certain extent, this could be seen as limiting the scope for innovation in the delivery of retail services by access seekers.

This is illustrated by the use of the unconditioned local loop service (ULLS), which gives access seekers greater control over the delivery of services to end-users. One consequence of this has been the decision by some access seekers to offer 'naked broadband services' even where this retail offer is not available from the network owner. The relative success of the ULLS in facilitating innovation and enhanced levels of competition raises the question of whether the current regime has already struck the right balance between resale and quasi-infrastructure services (noting that in many cases, access seekers use a combination of resale services, quasi-infrastructure services and their own network inputs to supply retail services).

The panel is seeking views on whether Part XIC should give greater emphasis to access to lower level functionality or whether the status quo, in which this is left to the discretion of the regulator, should remain. If a change to the legislation is the preferred approach, the practical implications of a lower level functionality focus, for instance in relation to access to dark fibre, should be addressed in submissions.

In this context, stakeholders may also wish to consider whether Part XIC should more clearly specify the ACCC's powers in relation to directly regulating access to facilities, and how such access can be made available in a timely manner. Direct access to certain facilities is provided for in Schedule 1 to the Tel Act. The facilities access regime in the Tel Act provides an *ex ante* right of access to certain types of facilities and retains a 'negotiate-arbitrate' mechanism to settle terms and conditions. By contrast, Part XIC, which may apply to services that are supplied over facilities, applies only to declared services, and uses an 'access determination' mechanism to set regulated terms and conditions.

## Part XIC and the concept of 'significant market power'

The main issue here is whether Part XIC should focus on parties with significant (or a substantial degree of) market power (SMP) rather than be of general application as it is at present.

The concept of SMP is well understood in broader competition law, particularly in regulating anti-competitive conduct. It is not explicitly used in Part XIC, although it is open to the ACCC to make special provision for particular access providers in access determinations (see below); it has done so in respect of the wholesale ADSL service. Restricting access obligations to providers with SMP could promote investment by smaller providers and new entrants who would not be required to provide access to declared services on their networks. It could also encourage the owners of private networks (i.e. non-carrier networks) to make their networks partially available for use by service providers, particularly if SMP markets were defined in terms of specific product or service features.

On the other hand, applying Part XIC only to providers with SMP could inhibit the achievement of any-to-any connectivity. Furthermore, and depending on decisions taken on other regulatory matters, it is possible that network owners may have a monopoly (at least once a contract for providing a network has been let) in the supply of services in localities even though they do not have SMP either nationally or regionally; new developments on the fringes of metropolitan areas are one example of this scenario; large apartment blocks are another. If Part XIC only applies to providers with SMP, and the relevant market is defined in wide geographical terms, then access seekers may not have an opportunity to supply retail services in those areas and end-users may have no choice of service provider, though it may be that the *ex-ante* competition to provide the facilities (for instance, in a new estate) in itself protects consumers from the abuse of market power. That said, the transactions costs of negotiating access to myriad such 'monopoly' networks may themselves constitute an entry barrier to retail competition.

In addition, restricting the access regime to providers with SMP could be argued to discriminate against these providers by imposing costs upon them that were not borne by other providers. However, these costs could arguably be offset by the advantages of scale and scope already enjoyed by the SMP provider, as well as by the public benefit of regulating market power.

## Part XIC and vectored VDSL 2

Concerns about the difficulty in gaining access to unregulated services could be significantly compounded by the use of VDSL2 with vectoring. Sub-optimal performance in the VDSL2 vectoring environment is expected if competing providers seek to operate multiple DSL technologies on copper lines within the same cable bundle. This means optimal performance may only be achieved by there being a single provider in such environments. If the approach taken was to maximise technical performance by limiting network competition, this would mean there would be exclusive providers, at least at the wholesale level, of the FTTN/vectored VDSL2 network in a locality.

The panel understands some large apartment blocks may already have entered into exclusivity agreement with providers in relation to vectored VDSL2. In these circumstances, it may be appropriate for access to be declared to services over these networks so that the residents of such complexes can enjoy the benefits of competition and choice. This may require declaration to be considered at a lower level of the network than has been the case in the past. As such, broad application of the concept of SMP may be counter-productive, or it may need to be able to be

applied, as it were, in relation to specific areas, which could be quite small (e.g. individual apartment complexes). Alternatively, more fundamental statutory arrangements to deal with these scenarios may be needed, particularly if the current framework does not allow the ACCC to deal with these issues in a timely fashion.

Another issue is that where these systems are operated over in-building customer cabling, which is often not owned by a carrier, the carrier operating the system will need to secure the agreement of the cabling owner. Moreover, if end-users are to have ongoing access to their existing RSPs, RSPs will need to agree to operate on those systems.

Stakeholder views are sought on whether existing provisions can adequately deal with these types of issues or whether new statutory arrangements are required.

The panel notes that it is examining the broader question of how existing network infrastructure should be able to be used in preparing advice to the Government on the structure of the Australian wholesale broadband market.

## Declaration

Before access-seekers can gain regulated access to a service, it must first be declared. There are four methods by which a service can be declared.

First, the ACCC can 'declare' the service following a public inquiry to determine whether declaration would promote the long-term interests of end-users (LTIE test). The criteria for the LTIE test are that declaration of a service would:

- promote competition in relevant markets;
- promote the achievement of any-to-any connectivity (where relevant); and
- encourage the economically efficient use of, and investment in, infrastructure.

Unlike other parts of the access regime, the LTIE criteria have been largely unchanged since the introduction of the regime in 1997. The ACCC is limited by the legislation in the matters it can consider as part of the LTIE, but the specified criteria are not ranked by the legislation. In practice, therefore, the ACCC must balance each of the criteria when deciding whether a particular course of action would be in the LTIE. While the promotion of any-to-any connectivity is of no less importance in the framework than the other criteria, it is not always directly relevant to individual regulatory decisions.

In general, a declaration made by the ACCC must have a duration of between three and five years, unless there are good reasons for the duration to be made for a longer or shorter period.

Second, the ACCC can also accept a special access undertaking (SAU) from an access provider which has the effect of declaring the service to which the SAU relates, but only in relation to that access provider.

Third, where a service is being supplied or is capable of being supplied by NBN Co and it publishes a Standard Form of Access Agreement (SFAA) for that service on its website, the NBN Co service to which the SFAA relates is declared.

Fourth and last, the ACCC may be required to declare a specified service in accordance with the CCA. In 2011, the CCA was amended to require the ACCC to declare a Layer 2 bitstream service.

This was consistent with amendments to the Tel Act which required superfast network operators to offer such a service on an open-access and non-discriminatory basis.

## The LTIE test

The LTIE test is central to the declaration process but also the wider operation of Part XIC and, as such, the panel is particularly interested in views on how it is currently operating or how it could be revised. As noted above, it has been largely unchanged since 1997. The criteria reflect circumstances at that time, including the telecommunications market structure, and it is worth considering whether these are still the matters of greatest importance in deciding whether actions are in the LTIE (as broadly understood).

While the ACCC is tightly constrained in the matters it must consider under the LTIE, it has relatively greater freedom in determining how those criteria are applied in any circumstance. Moreover, the criteria themselves are very broad and susceptible to a wide range of interpretations. Unlike the criteria in the National Access Regime, the LTIE criteria are not hurdles that must each be cleared before declaration but considerations the ACCC must address. The LTIE test gives the ACCC regulatory discretion to respond flexibly to a changing market and technological environment; however, it may also be seen as creating regulatory uncertainty that is harmful to investment and as permitting an undue proliferation of regulated services.

The definition of a market is a critical step in determining how the LTIE test is applied and has both geographic and product dimensions, and changes over time as markets converge and diverge. At present, Part XIC does not give the ACCC guidance on this issue and the ACCC's approach to defining markets is contained in its published guidelines. Respondents who consider the legislative framework should be more prescriptive in defining markets should set out how this would be achieved and what the consequences of that action would be.

In summary, the panel is seeking views on whether the LTIE test needs to be revised and, if so, to what end. Should greater emphasis be given to the promotion of investment and, if so, how? Should different categories of investment be given greater weight, e.g. investment in networks, infrastructure required to interconnect with networks (e.g. DSLAMs) or services? Is any-to-any connectivity still relevant? Is guidance required on the definition of a market? Should the LTIE criteria be brought closer in content and operation to those set out under the National Access Regime, and if so, how? The panel is also interested in views about the application of the LTIE test throughout Part XIC.

## Duration of declaration

The issue here is whether there are services which should be declared on an enduring basis.

It may be argued that there are some services which are of such fundamental importance to the operation of the telecommunications sector, and have enduring bottleneck characteristics, that they should remain declared for the foreseeable future. Examples of such services could include terminating access services and bitstream services supplied by NBN Co (if it has a near-monopoly on the supply of fixed line services). The ACCC could be given the option of declaring such services on an open-ended basis, promoting regulatory certainty. It is worth noting that the ACCC recently accepted an SAU from NBN Co which will not expire until 2040, with the effect that services supplied under the SAU will be declared services for the duration of the SAU.

However, this approach would not be consistent with the broader government policy to sunset legislative instruments (noting that declarations are not legislative instruments). More practically, it would not take account of the dynamic nature of the industry. The ACCC can already declare a service for longer than five years, but in the case of the mobile terminating access service, it is proposing to make the declaration for five years; a position that has the general support of the industry.

Additionally, it is desirable, as a general matter of public policy, to ensure every regulation is subject to periodic, rigorous review. As a result, were there scope for what amounted to indefinite declarations, other review mechanisms would need to be defined that acted as an alternative to expiry and sunset clauses.

The panel is therefore seeking views not only on the duration of declaration but also on the effectiveness of the review mechanisms for declarations. In setting out those views, submitters should bear in mind the general desirability of minimising the burden of regulation and of ensuring regulations only persist if their benefits clearly exceed their costs.

## Standard forms of access agreements

The panel is seeking views on whether SFAA processes work effectively and, if not, how they could be improved.

Under Part XIC, NBN Co can publish an SFAA setting out the terms and conditions on which it will provide services. The SFAA ensures access seekers have ready access to this information and it is open to public scrutiny. The SFAA also provides a mechanism by which NBN Co could put products into the marketplace in advance of the ACCC considering an SAU. As noted above, products specified in an SFAA are declared services. This is intended to ensure that such services are subject to ACCC regulation under Part XIC. It is also open to access seekers to negotiate on the terms of access set out in an SFAA, subject to constraints on NBN Co under its obligation not to discriminate between access seekers (s.152AXC) and its approved SAU.

An SFAA itself has no place in the regulatory hierarchy (see below), but provides the basis for an access agreement which sits at the top of the hierarchy. The SFAA therefore plays a key role.

SFAA processes may be seen as problematic because of NBN Co's ability to split its terms and conditions between its SAU and SFAA. This has the potential to cause complexity and confusion, particularly in terms of the hierarchy of terms and conditions – noting there is also scope for the ACCC to make binding rules of conduct and access determinations.

However, allowing the terms to be set in a range of instruments with different levels of regulatory involvement and potentially different timeframes allows for flexibility. For example, locking in a particular non-price term in an SAU may be inappropriate, but placing it in an SFAA may provide for the term to evolve over time in response to market developments.

There may also be concern that NBN Co's market power – particularly in the long term once its network is constructed – may encourage it to issue SFAAs on a 'take it or leave it' basis. However, unless a term or condition has already been approved as part of an SAU, it is open to access seekers to approach the ACCC to seek regulatory intervention. Given the time the ACCC will need to intervene and that access seekers need to maintain continuity of service, access seekers may feel pressured to accept the terms in the SFAA. Once they have done so, the SFAA would become

an access agreement, in relation to which the ACCC cannot intervene under Part XIC with respect to matters covered by the agreement (unless this is provided for in the terms of the agreement) until the agreement expires.

## Standard access obligations

Where a service has been declared, the standard access obligations (SAOs) require an access provider to supply the service to an access seeker upon request, subject to specified limitations and exceptions. There are two types of SAOs: those pertaining to access providers other than NBN Co (Category A SAOs); and those pertaining to NBN Co as a wholesale only company (Category B SAOs). The SAOs set out key principles for providing access to the service. The Category A SAOs specify principles in relation to technical and operational quality, fault detection and rectification, ordering and provisioning, billing information and interconnection of facilities.

In meeting the SAOs, NBN Co must not discriminate between access seekers except in very limited circumstances, e.g. where an access seeker is not creditworthy. Similar restrictions apply to the supply of a Layer 2 bitstream service by superfast network operators.

### Ongoing validity of the SAOs

The SAOs are the key requirement on access providers, i.e. the obligation to provide access to a declared service in a form that allows an access seeker to use the declared service to provide its own carriage or content service. The additional elements of the SAOs are intended to require access providers to supply the service to access seekers in a manner that is equivalent to how it supplies it to itself.

However, it is arguable that the SAOs do not ensure that services are supplied in an equivalent manner. This is implicitly recognised by the inclusion of interim equivalence and transparency arrangements in Telstra's structural separation undertaking. These arrangements were required to provide for greater levels of equivalence in how the services are supplied by Telstra to access seekers, notwithstanding the fact that the services covered by the interim arrangements are also declared services.

There may be a risk that making the SAOs more detailed in order to achieve equivalence in service delivery could result in regulatory requirements that are more cumbersome, but not necessarily more effective. This is because the different characteristics of declared services limit the extent to which prescriptive obligations can apply unaltered across different services. It is worth noting that the ACCC can also specify additional terms and conditions of supply in making an access determination (see below).

Do the SAOs need to be revised? If so, what should the SAOs cover?

### Application of Category B SAOs

Category B SAOs currently apply only to NBN Co, reflecting its wholesale-only status. However, it may be there will be other wholesale-only providers, particularly if the rules in Part 8 of the Tel Act requiring wholesale-only supply in certain circumstances are retained.

This raises the question of whether, logically, Category B SAOs need to be applied to other access providers that are wholesale-only.

## Non-discrimination requirements

Under sections 152AXC and 152AXD of the CCA, NBN Co must not discriminate between access seekers. The effect of this requirement is that terms and conditions of all services provided by NBN Co must be public and equally available to all access seekers, so that all services are offered on an open access and equivalent basis. Other operators of superfast networks (as defined in Parts 7 and 8 of the Tel Act) are subject to similar rules. The ACCC has published guidelines on the operation of the non-discrimination provisions.

In 2011, the Parliament rejected an alternative approach to allow NBN Co to discriminate where this would have aided efficiency, provided that all access seekers with like circumstances had an equal opportunity to benefit from the discrimination.

Arguably, this has curbed NBN Co's ability to take advantage of efficiencies, such as offering different price terms to access seekers who are prepared to make investments that reduce the costs to NBN Co of providing access or make significant contractual commitments that make the take-up of NBN services and NBN Co's revenue stream more certain. It may also reduce access seekers' incentives to develop innovative service offerings, knowing that whatever they negotiate with NBN Co will have to be offered on the same terms to its competitors.

The current arrangements require NBN Co to provide the ACCC with copies of all access agreements and variations to those agreements, and for the ACCC to publish these 'statements of differences' on its website. This places a significant burden on both NBN Co and the ACCC. In line with recently proposed legislative amendments to reduce the timing of the reporting requirements relating to the access agreements of non-NBN Co providers from monthly to quarterly[3], it could be argued that the NBN Co transparency arrangements should be relaxed, particularly in light of its wholesale-only status. On the other hand, it could be claimed that NBN Co's potential to be the monopoly provider in significant areas of Australia requires stricter oversight.

Against the costs of the non-discrimination restrictions must be set potential benefits in reducing the risk of anti-competitive conduct. However, the ACCC has argued on numerous occasions that the risk of anti-competitive discrimination is inherently related to vertical integration; and that in the absence of vertical integration, such discrimination, should it occur, would be readily identified and controlled through other instruments, including the general competition laws. Indeed, this

[3] Under amendments in the Omnibus Repeal Day (Autumn 2014) Bill 2014, access providers will be required to give the ACCC a quarterly list of all access agreements in place. Currently, they must provide copies of all agreements and variations.

argument has been at the heart of the case for structural separation. Were that argument correct, it is not clear why the specific restrictions on discrimination by a structurally separated entity would yield benefits that exceed their costs.

That said, it could be undesirable to relax those provisions if it results in a situation where there is great uncertainty as to what NBN Co may or may not do. Nor would it be desirable for additional discretionary powers to be vested in the regulator, unless a compelling case could be made that they would yield significant net benefits. The panel is mindful of the experience under the anti-discrimination provisions of the *Telecommunications Act 1991*, and sees little merit in repeating that experience. It therefore places great weight both on the efficiency of the outcomes being sought and on the certainty and clarity of the regulatory arrangements and the rules under which they operate.

The panel is therefore seeking views on whether the non-discrimination provisions applying to NBN Co and superfast network operators should be retained, relaxed or repealed.

### Anticipatory exemptions

Where a service has not been declared, an access provider may seek an exemption from the SAOs that would apply in the event that the service was to be declared in the future. This would provide the access provider with greater certainty on how an important new service might be regulated. If the ACCC considers that granting an anticipatory exemption would meet the LTIE test, it may give an anticipatory individual exemption to a single carrier or an anticipatory class exemption to members of a specified class of access providers.

Previously, access providers could apply for an ordinary individual exemption from the SAOs in respect of a service that was declared at the time of the application. This provision was repealed in 2010 on the basis that an access determination (see below) could exempt an access provider, or class of access providers, from some or all of the SAOs in respect of a declared service.

Stakeholder views on the following matters are sought: whether anticipatory exemptions have an ongoing role to play and, if so, whether the existing arrangements can be improved; and whether ordinary individual exemptions for services that are declared should be reinstated. One area where they may have a role is in providing greater certainty for carriers in greenfield scenarios.

## Access determinations

Changes to the operation of access determinations were a key element of the 2010 reforms and the panel is particularly interested in views as to how these changes have fared.

In general, once a service has been declared via the public inquiry route or in compliance with a statutory requirement, the ACCC must hold an inquiry into making an access determination in respect of the service. The access determination sets out the terms and conditions of supply of the service, including the terms on which the SAOs are delivered. It must include price-related terms and may include non-price terms.

In respect of services which are declared as the result of an SAU being accepted or by virtue of an SFAA being published, the ACCC may make an access determination but is not required to do so.

In making an access determination, the ACCC must consider a range of criteria, including the LTIE, the legitimate business interests and relevant investments of the access provider, the direct costs of providing access, operational and technical requirements and the economically efficient operation of the service, network or facility.

The CCA is deliberately broad in outlining the scope for determining the terms and conditions of supply of a declared service. An access determination may set different terms for specified access providers or access seekers. It may also exempt, either in whole or in part, different access providers from the terms of the access determination.

The ACCC may include 'fixed principles' provisions in an access determination that have the effect of locking in those provisions for a period that is longer than the period of the access determination. In the 2011 access determinations for fixed line services, fixed principles provisions were used to specify the framework for estimating wholesale prices using a particular costing approach until 2021.

In certain circumstances where an access determination is not in force, the ACCC must make an interim access determination which applies until a final access determination is made. In making an interim access determination, the ACCC is not required to hold a public inquiry or to consult with relevant parties in accordance with normal rules of procedural fairness.

### Effectiveness of access determinations

The access determination model of setting access terms and conditions was introduced in 2010 to replace the 'negotiate-arbitrate' model which had been heavily criticised by most stakeholders. The principal criticism of the 'negotiate-arbitrate' model was that it allowed the dominant access provider to unduly extend the regulatory process, creating uncertainty for access seekers and allowing it to favour its own retail business.

Access determinations have now been made for all declared services (other than those covered by an SAU) and comments are sought both on the general model, the matters that may be covered by an access determination – including exemptions from the SAOs for specified providers – and the process for making an access determination.

An alternative approach to allowing the regulator to make an access determination would be to require service providers to set out the terms and conditions on which they would provide access to services. This offer would be subject to review by the regulator who, at least in principle, could be given powers to amend it if required. This approach would have the advantage of more closely aligning access terms with the business needs of the access provider but might carry a higher risk of disputation with access seekers.

In summary, the main question is whether access determinations remain an effective method in setting access terms and conditions. Would a reference offer model better promote investment or would it merely increase disputation? Is the application of the access determination process to NBN Co where a service is declared through an SFAA or SAU reasonable?

### Criteria for access determinations

The issue here is whether the criteria for making an access determination should be revised and, if so, to what end.

The criteria for making an access determination are largely carried forward from the criteria that previously applied to the resolution of arbitrations. This includes the LTIE and seeks to balance the interests of both providers and users of a service. Comments are sought on whether the criteria achieve the balance sought or whether any adjustments are required in order to do so.

### Different terms and conditions for different parties

The access determination provisions were intended to provide the ACCC with greater flexibility in how determinations apply to individual access providers and access seekers or classes of such. This was viewed as a more efficient approach than the previous model of providing exemptions from the SAOs. It also allows the SAOs to be more carefully targeted where this is appropriate.

Stakeholder views are sought on whether the ACCC should have the power to specify different terms and conditions for different access providers and access seekers.

### Methodology for determining prices

Part XIC is silent on the methodology to be employed by the ACCC in setting access terms and conditions. Instead, the ACCC undertakes extensive consultation with industry on this issue, particularly in relation to the regulation of fixed services.

Specifying particular methodologies to be used in Part XIC could enhance the predictability of regulatory outcomes but might affect the ACCC's ability to respond flexibly to changing circumstances or take a more nuanced approach where that would be desirable. For instance, a test could be introduced requiring the ACCC to be satisfied that any access determination will allow recovery, at least in expectation, of prudently incurred costs. That could promote investment, but would leave open the precise methodology by which that likelihood of cost recovery had been assessed.

If it was considered desirable for the Government to give greater direction to the regulator, then Ministerial pricing determinations (see below) could be used for this purpose. This approach would have the advantage of being more easily updated than provisions in Part XIC, while continuing to be subject to Parliamentary oversight.

On the other hand, relying on Ministerial pricing determinations has significant risks of its own, including those of introducing political interference in the conduct of regulation. Given those risks, and the abiding value of regulatory certainty and clarity, it may be preferable to introduce some hurdles any regulatory price setting would be required to meet. Those hurdles could include providing for the recovery of costs prudently incurred, including in terms of reasonable estimates of the cost of capital.

More specifically, should the methodology for determining wholesale prices be specified in legislation? If so, should this be at a high level (e.g. cost based approach) or a more detailed level (e.g. building block methodology)? Should use of the Ministerial pricing determination (see below) to provide guidance to the ACCC be encouraged? Should specific guidance be provided to the ACCC, for example, on how to take account of embedded cost subsidies when determining prices? Should the ACCC consider non-price factors such as positive and negative externalities?

## Merits review and access determinations

At issue here is whether access determinations should be subject to merits review.

Australia's telecommunications regulation arrangements provide little by way of vertical control of regulatory decision-making. Moreover, those arrangements vest in a single entity both the responsibility for developing key rules and for implementing those rules as regulations – in contrast, for example, to the energy regime, which vests rule-making in one entity and regulations (the implementation of rules) in another.

Thus, ACCC decisions in relation to access determinations are not subject to merits review by the Australian Competition Tribunal (ACT), although they are subject to judicial review. This is consistent with the unavailability of merits review for arbitration determinations under the previous negotiate-arbitrate framework; arbitration determinations had originally been subject to merits review, but this was removed in 2002. While arbitration determinations were not subject to merits review, merits review applied to exemption applications and access undertakings. This resulted in a recurring pattern of exemption applications and access undertakings being submitted to the ACCC; being largely rejected; being appealed to the ACT (including by access seekers where an exemption was granted); and being largely rejected by the ACT. This pattern greatly increased the regulatory cost and uncertainty for all parties.

ACCC decisions on access determination, and other matters under Part XIC, are subject to judicial review by the Federal Court under the *Administrative Decisions (Judicial Review) Act 1977*.

It is noted that in 1999, the Administrative Review Council, which is the body established to provide advice to the Attorney General about administrative law, published guidelines about what kinds of administrative decisions are suitable for merits review. The Council found that decisions which involve extensive public inquiries or consultations are not suitable for merits review. Access determinations might be seen as falling into this category.

On the other hand, merits review plays an important role in other areas characterised by extensive public inquiries and consultation. For example, in the authorisation process under the general competition laws, merits review has contributed to the clarification of key concepts (such as market definition and the meaning of market power) and hence provided guidance to the ACCC and to affected parties. By doing so, it has reduced the burden of disputation in the long run. Additionally, it has allowed what emerged to be significant errors to be corrected, thus reducing the social costs of inaccurate decisions. Last but not least, it has provided strong incentives for the first-instance decision-maker to carefully monitor the quality of its decision-making, thus leading to better regulation over time. Similar considerations apply to Part IIIA, where merits review has clarified the meaning and proper application of key terms.

Obviously, the introduction of merits review could potentially lead to a number of access determinations being reviewed, leading to increased regulatory cost, uncertainty and delay. Equally obviously, this concern would need to be balanced against the possible benefits flowing from merits review of access determinations, including reduced error costs and improved incentives for due care to be taken in first-instance decision-making.

## Procedural fairness and interim access determinations

Stakeholder views are sought on whether the making of interim access determinations should be subject to procedural fairness.

There are limited circumstances in which the ACCC may make an interim access determination and their purpose is to provide regulated terms and conditions for a service in the period before a first access determination is made. As there are time limits for making access determinations, interim access determinations are of limited duration. Requiring the ACCC to exercise procedural fairness in relation to interim access determinations could result in services being declared but without any regulated terms and conditions of access. On the other hand, the ACCC could develop ways of ensuring it met the requirements of procedural fairness while still providing for regulated terms and conditions.

Comment is also sought on whether it would be possible to preserve the effectiveness of the interim determination provisions while also imposing procedural fairness requirements.

## Binding rules of conduct

Where the ACCC considers there is an urgent need, it may make binding rules of conduct (BROCs) setting out the terms and conditions on which access providers must comply with the SAOs. BROCs may only be made in relation to declared services and are more limited in scope than access determinations.

In making BROCs, the ACCC is not required to hold a public inquiry or to consult with relevant parties in accordance with normal rules of procedural fairness. However, BROCs must have a duration of no more than 12 months and the ACCC must commence an inquiry to make or vary the relevant access determination within 30 days of making BROCs.

In effect, BROCs were designed to allow the ACCC to deal with urgent problems relating to the supply of declared services without the delays necessarily caused by normal consultation requirements. No BROCs have been made to date.

### Ongoing role of BROCs

The issue here is whether the power to make BROCs should be removed, retained or expanded.

As a general matter, it is undesirable to vest powers in a regulator to over-ride property rights without appropriate safeguards being in place. As a result, instruments such as BROCs should only be retained if there is a compelling case for doing so. However, it is noted that BROCs can only be made in respect of a declared service and, therefore, it has already been determined that the regulated supply of this service to access seekers is in the LTIE.

As no BROCs have been made to date, it is difficult to evaluate their effectiveness. While it is possible that the ACCC's ability to make BROCs has itself acted as a constraint on the actions of access providers, this is difficult to establish.

BROCs are limited to the application of the SAOs in respect of a declared service and have a narrower scope than access determinations. How the SAOs are fulfilled are generally the most critical component of the terms and conditions of access and are likely to be of greatest importance in urgently resolving problems relating to access to a service.

### Merits review, procedural fairness and BROCs

The questions here are whether BROCs should be subject to merits review and/or procedural fairness.

The ACCC will only be able to make BROCs if it considers that there is an urgent need to do so. If an issue is not urgent, the ACCC must address it by varying the relevant access determination. Requiring the ACCC to comply with procedural fairness in making BROCs could risk compromising their effectiveness. On the other hand, as noted above, derogations from requirement to exercise procedural fairness should only be made where there is a clear and compelling case for doing so, and where appropriate safeguards are in place.

Comment is sought on whether it would be possible to preserve the effectiveness of BROCs while also imposing procedural fairness requirements.

## SAUs

Where a service has not previously been declared – or in the case of a service provided by NBN Co, has not been declared following a public inquiry and no access determination applies – an access provider can lodge an SAU with the ACCC, setting out its proposed terms of access for the service. The terms of access must set out how the access provider will comply with the applicable SAOs. If the SAU is accepted by the ACCC, the provider must supply the service on the terms in the SAU.

An SAU may provide for the ACCC to perform certain functions or exercise certain powers in relation to the undertaking, e.g. it may enable the ACCC to make decisions on adjustments to the terms and conditions of supply within certain pre-determined parameters.

Similarly to access determinations, an SAU may contain fixed principles provisions.

In assessing an SAU, the ACCC must consider whether its terms are 'reasonable'. In considering whether the terms are reasonable, the ACCC must have regard to similar criteria used in making an access determination, including the LTIE.

Previously, access providers could lodge an ordinary access undertaking with the ACCC, setting out their proposed terms of access for the supply of a declared service. This provision was repealed in 2010 on the basis that its use had effectively reduced regulatory certainty and consumed considerable resources for all parties.

### Ordinary access undertakings

Ordinary access undertakings had been intended to promote regulatory certainty but it was considered that they had failed to do so in practice. Comment is sought on whether ordinary access undertaking provisions should be reinstated and, if so, the reasons why they would be more effective in promoting regulatory certainty than was previously the case. For example, it may be that their reinstatement could help provide greater certainty for private sector investors in greenfield scenarios, especially if such undertakings allowed for fixed principles extending beyond the term of a single regulatory period. In addressing this question, consideration must be given to the issue, discussed immediately below, of the use of SAUs by NBN Co. In particular, it would not be desirable for significant differences to exist between NBN Co and other entities in their scope to craft the regulatory arrangements that would apply to them, unless those differences had a

clear public policy justification. In this context, it is noted that NBN Co can only supply declared services.

### NBN Co use of SAUs

The issue here is whether NBN Co should be permitted to make SAUs in relation to declared services.

The SAU is a vehicle for NBN Co to gain greater regulatory certainty about how it can operate its business and that it can recover its investment. It also offers certainty to access seekers and the ACCC in terms of NBN Co's commitments.

As noted above, NBN Co may be considered to have greater flexibility than other carriers in providing an SAU. This is because NBN Co can submit an SAU in relation to services that are already declared by virtue of their inclusion in an SFAA. However, it is able to do this because NBN Co can only supply declared services, which are declared by inclusion in an SFAA, an SAU or following declaration by the ACCC. However, in line with the rules applying to other carriers, once an NBN Co service has been declared by the ACCC as a result of an access inquiry or is the subject of an access determination, NBN Co is no longer able to submit an SAU in relation to that service.

It could be argued that, as a potential monopoly infrastructure provider, NBN Co's ability to make SAUs gives it too much power to set its own terms of access. However, the SAU process also enables NBN Co to propose terms and conditions that better reflect its business needs and the ultimate decision to accept or reject an SAU lies with the ACCC through the application of the reasonableness test as described above. In considering NBN Co's SAU, the ACCC conducted a process that subjected NBN Co to several rounds of public consultation. As such, the SAU can be seen as a means for access seekers and the ACCC to actually shape some of NBN Co's terms, conditions and processes.

If NBN Co could not lodge SAUs, in the absence of any other mechanism, it would be necessary to rely on the ACCC making access determinations under the existing access regime. But that would make it no different from any other provider of declared services. As a result, if there is a compelling case for NBN Co retaining the scope it now has, the question must be raised as to whether that scope should not also apply to other similarly-placed access providers.

### SAU criteria

The criteria for assessing a proposed SAU are similar in nature to the criteria that apply to the making of an access determination and seek to balance the interests of both providers and users of a service. Comments are sought on whether the criteria for assessing the SAU achieve the balance sought or whether they should be amended and, if so, to what end.

### Fixed principles

Under s152CBAA of the CCA, submitters of SAUs have the option to include fixed principles. If the ACCC has previously accepted an SAU that contains fixed principles terms or conditions that are in effect, the ACCC must not reject another SAU for the same service for reasons relating to those fixed principles terms or conditions. The SAU may also provide that one or more specified circumstances are qualifying circumstances in relation to the fixed principles term or condition. The qualifying circumstances set out the conditions in which the restriction on the ACCC (i.e. the

requirement that it must not reject a later undertaking on the basis of the fixed principles) does not apply. Fixed principles enable a provider to establish longer term certainty, which is particularly important for an asset, such as a fixed telecommunications network, which typically requires a long period to recoup initial construction costs.

For the ACCC to accept a fixed principle term and condition, it will need to be certain of its meaning and its long term implications, including for the ACCC's ability in future to reject a relevant SAU for the reason that the document does not comply with the term and condition. Equally, the access provider putting forward the fixed principle wants to be confident the principle will provide the regulatory certainty and continuity intended. However, as worded, the phrase 'reasons relating to those fixed principles' is an inherently open concept that may encompass a broad range of other issues within an SAU. Consequently, unless a fixed principle is very narrowly and precisely defined, it is unlikely the ACCC will find it acceptable.

The panel welcomes views on whether the fixed principles concept serves a useful purpose, and if so, whether it should be given a legislative form to provide greater certainty for the ACCC and infrastructure providers.

## Ministerial pricing determinations

The Minister may make a Ministerial pricing determination setting out principles dealing with price-related terms and conditions relating to the SAOs for a declared service. Access determinations, BROCs and SAUs have no effect to the extent that they are inconsistent with a Ministerial pricing determination. No Ministerial pricing determination has ever been made.

Since the introduction of Part XIC, governments have been reluctant to directly involve themselves in the detailed administration of the framework. Such involvement could be seen to dilute the separation of roles between the government and the regulator that was intended by Parliament and which is a common feature of regulatory arrangements across the developed world.

Comment is sought on whether those concerns remain valid and whether the power to make a Ministerial pricing determination should be repealed or retained as a reserve power only. Alternatively, the panel is interested in views that support the use of Ministerial pricing determinations and the circumstances in which they could be used without the independence of the regulator being undermined.

## Access agreements and hierarchy of terms

The main question here is whether access agreements should continue to have primacy in the regulatory framework.

Access providers and access seekers may negotiate agreements for access to declared services on commercial terms. NBN Co has an SFAA that provides the basis for access agreements, which it enters into with wholesale customers. Other access seekers may have similar documents for commercial reasons. Access agreements may also rely in part on regulated terms, i.e. access determinations, BROCs or SAUs.

Part XIC establishes a legislative hierarchy, in that terms and conditions of access have priority depending on where they are set out. An access agreement has priority, an SAU follows, then

BROCs, then an access determination. Terms in an access determination will apply where they are not inconsistent with an access agreement, SAU or BROCs.

Access agreements have been given priority over other arrangements on the basis that access agreements enable parties to reach agreement on terms and conditions that are mutually beneficial but which differ from regulated terms.

As a general matter, where market participants negotiate, against the backdrop of effective regulatory instruments, agreements that in one way or the other modify the default terms those regulatory instruments provide, there is a reasonable presumption that those modifications make both parties better off. For instance, if an access seeker and an access provider come to the view that some bespoke terms better meet their needs than would the terms in an access determination, then it is reasonable to believe those terms are at least as efficient, from a societal perspective, as the general terms they replace.

In saying that, the panel recognises that such agreements might have anti-competitive effects. However, that risk is generally better managed through *ex post* conduct regulation than through *ex ante* access regulation; moreover, in the case of NBN Co, there are specific restrictions (discussed above) on its ability to discriminate. Finally, Part XIB, should it be retained, would provide added safeguards against anti-competitive agreements.

The presumption, that agreements negotiated 'in the shadow of regulation', will embody gains from trade, then leads to the view that the parties entering into such agreements should be able to rely upon them. Their primacy in the regulatory architecture follows from that presumption.

Where an SAU is accepted by the ACCC, the access provider has a reasonable expectation that it has regulatory certainty about the terms and conditions on which it will provide access. As such, an SAU has precedence over BROCs and access determinations. Access providers should nonetheless be allowed the opportunity to reach agreement with an access seeker on different terms and conditions where that is mutually beneficial.

The purpose of BROCs is to address urgent problems with the supply of a declared service, even if there is already an access determination in place in relation to that service. This purpose can only be achieved where BROCs take precedence over access determinations.

The panel nonetheless remains open to the possibility of revisiting this ordering, should there be a compelling case for doing so.

Is the hierarchy of terms set correctly? If not, how should it be set?

### NBN Co's SFAA and the legislative hierarchy

In relation to NBN Co's Wholesale Broadband Agreement (WBA), which is an SFAA, access seekers have raised two related issues. The first is that the SFAA sits outside the hierarchy and so it is not clear how it relates to the other instruments in the hierarchy or whether NBN Co is obliged to incorporate any ACCC decisions into an SFAA. To provide industry with greater certainty, there may be merit in giving the SFAA a formal place in the hierarchy, logically below access determinations.

The second issue relates to the ability to obtain regulatory recourse while an access agreement based on an SFAA is in effect. In the hierarchy, an ACCC access decision would not apply to the

extent that it was inconsistent with the access agreement. NBN Co's response to this problem has been to shorten the term of its WBA, so that access seekers can gain access to any regulated terms and conditions at the end of each WBA term. Alternatives could include rearranging the hierarchy so that ACCC decisions are higher than access agreements with NBN Co, or requiring access agreements based on SFAAs to 'pass through' subsequent regulatory decisions or requiring NBN Co to submit its SFAA to the ACCC for approval. Such options, however, would effectively compromise the commerciality of negotiations and, in the case of the first two, reduce certainty for parties to the agreement.

The main question here is can the current use of SFAAs by NBN Co be improved and if so, how? Does NBN Co's potential position in the market place mean its SFAA should formally be reflected in the hierarchy? Does NBN Co's potential market power mean that there should be scope for access seekers to have recourse to the ACCC in relation to NBN Co access agreements? Or are additional processes needed to ensure access seeker concerns can be effectively addressed before they enter into access agreements with NBN Co?

## Possible alternative approaches to Part XIC

As outlined in the introduction, the existing framework could be amended to seek to promote certain goals (e.g. greater emphasis on investment) or to improve its existing operation. Amendments could either be of major significance or minor in nature. In addition, it would be possible to devise alternative approaches to the existing framework. These could include, but are not limited to:

- repealing the access regime and relying on commercial negotiations and the operation of anti-competitive conduct provisions;
- requiring the providers of fixed line services to be wholesale only and rely on commercial negotiations and the operation of anti-competitive conduct provisions;
- relying on the general access regime in the CCA (Part IIIA);
- requiring access providers to supply all services on a wholesale basis and on terms and conditions that are equivalent to the terms and conditions that are supplied to their retail business; and
- requiring access providers to provide services upon request, unless otherwise exempted by statutory criteria or by the regulators, with the regulator setting terms and conditions as necessary.

The panel welcomes views on whether it should consider a fundamentally different approach to regulating access to telecommunications services. If a different approach is proposed, views as to its form and its benefits should be provided.

# Part 2: Rules about operations of NBN corporations

Section 152EOA of Part XIC also requires a review be conducted of Division 2 of Part 2 of the NBN Companies Act, as well as the rest of the Act as far as it relates to Division 2 of Part 2.

Division 2 of Part 2 sets out rules to focus NBN Co's activities (and activities of NBN corporations) by specifying the:

- types of persons to whom it can supply services;
- types of services and goods it can supply; and
- restrictions on the type of investments it can make.

## Supply of eligible services on a wholesale-only basis

To give effect to NBN Co's wholesale-only obligation, the general rule is that NBN Co must not supply an eligible service to another person unless the other person is a carrier or a service provider.

This raises the question of whether the general requirement that NBN Co only supply to carriers and service providers is an effective means of giving effect to its wholesale-only obligation.

## NBN Co's ability to supply to utilities

An exception to the general rule is that NBN Co can directly supply 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. This exemption has not yet been used.

The exception is designed to assist utilities with the management of their networks, for example, through operating smart metering and smart grids. Utilities must still acquire NBN services for communications purposes other than network management from an intermediary service provider. Utilities are not permitted to re-supply the service they acquire from NBN Co.

These arrangements were included in the NBN Companies Act in recognition of the practical synergies that the NBN, as a ubiquitous national network, could provide other utilities. It also reflected the fact that utilities operate extensive networks of their own, which, but for statutory exemptions, would require them to have carrier licences. That is, if this statutory exemption did not apply to them, they would still be eligible to be supplied by NBN Co as carriers. However, during debate in the Parliament on these provisions, concerns were expressed that supply to utilities would effectively constitute supply to a class of end-users, inconsistent with NBN Co's wholesale-only mandate. Moreover, as NBN Co's wholesale customers could also resupply NBN Co services to utilities, it is also possible that NBN Co could compete with its customers, creating a possible conflict of interest that was inconsistent with the wholesale-only model. It was largely due to concerns such as these that the arrangements were included in the review provisions in section 152EOA.

The main issue here is should NBN Co continue to be eligible to supply services to specified classes of utilities?

## NBN Co ability to deal with end-users

As a wholesale-only provider, NBN Co is generally prevented from providing services to end-users. This is fundamental to the wholesale-only model and aims to prevent it competing with its wholesale customers and advantaging itself over them. However, there may be circumstances when there could be advantages in NBN Co having some discretion to deal directly with end-users. In offering network extensions to communities, fibre on demand and installing parts of its network (e.g. network termination devices), there may be benefits in NBN Co clearly being able to deal directly with end-users for reasons of effectiveness and efficiency.

To the extent that NBN Co could operate better by dealing with end-users, its supply would not necessarily displace retail service providers and could indeed be to their benefit (were NBN Co best placed to provide those services).

To that extent, it would seem desirable to provide NBN Co with the scope to so deal with end-users, potentially subject to narrowly confined conditions. Alternatively the view could be taken that all such engagements should take place through retail providers separate from NBN Co.

The panel seeks comments on whether there are circumstances where NBN Co might be perceived as needing to deal directly with end-users and, if so, the rules that would apply where it was permitted to do so.

## Restricting NBN Co to the supply of Layer 2 services

NBN Co has been required to operate at the lowest practical layer of the Open Systems Interconnection (OSI) stack with a view to limiting its operational footprint and stimulating wider industry investment and innovation. NBN Co has indicated its ongoing intent to operate in this way, subject to operational requirements. For example, to supply satellite services efficiently it appears that NBN Co may need to provide some functionality at Layer 3 in the OSI stack. These arrangements are now confirmed in NBN Co's SAU. The issue of whether NBN Co should be limited to Layer 2 by a licence condition has been examined previously. This was not seen as necessary because NBN Co's network was fundamentally being designed and built to operate at Layer 2. The issue that arises here is whether NBN Co should still be limited by law to a particular level of functionality or whether this can be dealt with satisfactorily by Government direction and ACCC oversight, noting NBN Co's SAU is now in place and that licence conditions can be imposed on NBN Co to limit its operation if required.

Comment is sought on whether NBN Co should be limited by law to operating at the lowest possible layer of functionality in the OSI stack, this primarily being Layer 2 although potentially being Layer 3 in some instances. The panel wants to understand stakeholder reasons why this limitation should or should not apply and views as to the benefits or risk involved.

## Supply of other goods and services

The question here is whether specific restrictions on NBN Co in relation to the supply of goods and services should be strengthened or relaxed and if so, why?

NBN Co is prevented from supplying content services, non-communications services, and non-communications goods except where the goods are used to supply an eligible communications service. Non-communications services are services that do not involve the supply or are incidental to the supply of wholesale carriage services. Incidental services enable the supply of services to end-users, such as facilities access services or access to NBN Co's operational and business support systems. NBN Co may also provide both intellectual property rights and commercial/technical advice, but only in connection with the supply of eligible services, goods related to eligible services, or facilities. These restrictions are designed to ensure NBN Co remains focussed on its core business of providing next generation wholesale broadband services, particularly in the access network.

However, the restrictions do significantly limit NBN Co's opportunities to operate in other markets.

## Restrictions on investment activities

In general, NBN Co may only invest where the investment relates to the supply of telecommunications services or goods in connection with the supply of telecommunications services. NBN Co may also invest in shares in a carriage service provider (subject to its wholesale-only and divestment obligations[4]) or in Commonwealth, State or Territory securities (or as otherwise prescribed by regulations made under the *Financial Management and Accountability Act 1997).* Again these restrictions are designed to focus NBN Co on its core activities.

The question here is whether these restrictions on NBN Co investments activities are appropriate and effective. Should they be strengthened or relaxed and if so, how and why?

## Remaining provisions

Section 152EOA also requires the remaining provisions of the NBN Companies Act so far as they relate to Division 2 of Part 2 of that Act to be reviewed. Section 152EOA does not specify what these provisions are. There are a number of possible candidates. For example, under section 41 of the NBN Companies Act, the Minister can make licence conditions requiring NBN Co to provide or not provide specific services. This could be seen as a provision relating to the eligible services NBN Co supplies.

[4] Under Schedule 1 of the NBN Companies Act, an NBN corporation can control a retail service provider for up to 12 months. This was intended to enable it to build its network through acquisitions if this was considered appropriate, on the basis the retail operations would be divested within 12 months.

The panel welcomes views on any other concerns with other parts of the NBN Companies Act, so far as they relate to Division 2 of Part 2 and Part XIC of the CCA, that should be addressed.

## Other concerns with the legislation governing NBN Co's operation

Section 152EOA only requires a small and specific part of the NBN Companies Act to be reviewed. However, the panel is conscious that the NBN Companies Act contains a number of other significant provisions that are relevant to its wider review role. These include, for example, provisions relating to the functional or structural separation of NBN Co (ss.23-32), its public ownership and privatisation (ss.44-68), and control of ownership following its privatisation (ss.69-74). Such provisions are directly relevant to this review's second term of reference relating to the optimal long-term ownership and regulatory arrangements for NBN Co.

An important part of the governance of NBN Co is the arrangements applying to it under the *Commonwealth Authority and Companies Act 1997* and the associated governance rules.

With a view to facilitating the panel's overall review, stakeholders are invited to raise in their submissions any issues with these wider arrangements. As with the panel's first regulatory framing paper, this will assist the panel to determine how it should proceed with the review.

## How to make a submission

Submissions should be lodged with the panel by **Monday, 14 April 2014.** The panel cannot ensure that submissions received after this date will be able to be considered.

Submissions can be lodged in the following ways:

**Email**: NBNReview@communications.gov.au

**Post**: NBN Regulatory Review
Department of Communications
GPO Box 2154
CANBERRA ACT 2601

Submissions must include the respondent's name, organisation (if relevant) and contact details. Submissions with no verifiable contact details will not be considered.

Respondents should be aware that submissions will generally be made publicly available, including on the website of the Department of Communications (www.communications.gov.au). The panel reserves the right not to publish any submission, or part of a submission, which in the view of the panel contains potentially defamatory material, or where it considers it appropriate to do so for confidentiality or other reasons.

All submissions will be treated as non-confidential information unless the respondent specifically requests the submission, or a part of the submission, is kept confidential, and acceptable reasons accompany the request. Email disclaimers will not be considered sufficient confidentiality requests. Note that submissions will generally be subject to the *Freedom of Information Act 1982*.

The *Privacy Act 1988* establishes certain principles with respect to the collection, use, and disclosure of information about individuals. Any personal information respondents provide to the panel through their submission is used only for the purposes of consideration of issues raised in this paper. Respondents should clearly indicate in their submission if they do not wish to have their name included in any summary of submissions that the panel may publish.

Queries about the submission process can be directed to **NBNReview@communications.gov.au**.