



Australian
Competition &
Consumer
Commission

**ACCC submission to the *Independent Cost Benefit Analysis
Review of Regulation* first issues framing paper**

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Executive Summary

The structure of the telecommunications industry and the role of the National Broadband Network (NBN) will have a fundamental influence on the delivery of telecommunications services and the broader Australian economy for many years to come. The ACCC agrees with the panel that considering the various structural models for the NBN is an appropriate starting point for the panel's review of regulation.

The ACCC notes that any decisions as to the appropriate structural model for the NBN and the telecommunications industry have consequences for a number of interrelated policy decisions such as whether and how infrastructure-based competition should be restricted and the appropriate mechanism for subsidising non-commercial regions.

Generally speaking, the ACCC considers that, where it is economically efficient, infrastructure-based competition is likely to promote the long term interests of end-users. Where efficient network duplication can occur, competition between networks can drive dynamic efficiencies in terms of product differentiation, innovation and timely investment. Telecommunications is a complex and highly dynamic industry, and therefore there may be benefits to be gained from encouraging network-level competition and innovation. The ACCC considers that non-NBN Co network operators should generally not be constrained from deploying networks in competition with NBN Co, including in new developments, unless there are particular circumstances which suggest it would not be in the interests of end-users.

However, where NBN Co faces competition, its ability to compete on price may be constrained by broader objectives and/or regulation. In particular, NBN Co's pricing response may be constrained by a requirement to internally cross-subsidise non-commercial regions or a degree of national pricing parity. This is because under certain scenarios, infrastructure-based competition could lead to price competition only in certain geographic areas (e.g. low cost areas). Under a cross-subsidy policy, these low cost areas could have been expected to provide the revenues used to fund the cost of servicing high-cost areas. Price competition will potentially erode the funding base that may be available to support a policy of internal cross-subsidies. The ACCC considers that explicit subsidies to non-commercial areas are preferable and more transparent than internal cross-subsidies. This approach could address the dual questions of NBN Co being better positioned to respond to competitive pressure arising from infrastructure-based competition and the broader social objective of promoting the interests of consumers in non-commercial areas.

Where infrastructure-based competition does occur, and NBN Co competes against a non-NBN Co network, it is not necessary for the non-NBN Co networks to be subject to regulation. This is because consumers can receive the benefits of robust retail competition and NBN-standard price and quality outcomes by purchasing a retail service delivered over the NBN.

However, in circumstances where the non-NBN network is a sole (monopoly) supplier those networks should be subject to effective access regulation and similar wholesale-only requirements that apply to NBN Co. Although decisions regarding the NBN footprint are a matter for government, the ACCC consider that it should not be mandatory for NBN Co to overbuild existing NBN-comparable wholesale-only open access networks where those networks have natural monopoly characteristics or where overbuild would not lead to improved consumer outcomes.

Regulation of the non-NBN Co monopoly will encourage robust retail competition to deliver better price and service quality outcomes for consumers, and promote overall efficiency in the market. In addition, consumer interests may be promoted by faster deployment of superfast networks. Other regulatory/policy settings may be required to ensure that consumer outcomes are protected. The ACCC plays a key role in consumer protection as Australia's national consumer protection agency, and expects to expand on additional retail market and consumer issues in later submissions to the panel.

Finally, the ACCC notes the government's stated support for structural reform and considers that this is compatible with a multi-technology mix NBN. The ACCC considers that the key aspects of achieving structural reform include: a wholesale-only NBN subject to effective regulation; the structural separation of Telstra; and the imposition of 'wholesale-only' open access requirements on all other monopoly providers of fixed-line telecommunications services.

The ACCC looks forward to further engagement with the panel as it considers other issues within the scope of its review.

1 Introduction

The ACCC welcomes the opportunity to contribute to the government's *Independent cost-benefit analysis and review of regulation*. The panel's approach in its first issues framing paper is to seek submissions on the key principles, objectives, issues and possible ways forward with a focus on broad industry structure issues. The ACCC agrees with this approach as an appropriate starting point to the broad task before the panel, and notes that the panel intends to consult further on other issues in due course.

The panel notes that it is proceeding on the basis of a number of working assumptions. Some of those assumptions address matters of government policy — such as specific speed objectives — which are beyond the purview of the ACCC. Others, particularly those that raise issues of regulatory approach, are addressed throughout this submission, as relevant.

2 Overall approach

The panel has noted that it is most interested in stakeholders' views as to what the preferred structural model should be overall and why.

The ACCC's overall approach is that the preferred structural model is one which best promotes the long term-interests of end-users. These interests are best promoted by a structure that addresses long-standing vertical integration concerns through a wholesale-only NBN, the structural separation of Telstra, and the imposition of 'wholesale-only' open access requirements on all monopoly providers.

This submission outlines the ACCC's views as follows:

- **Part 3** outlines why structural reform is in the long-term interests of end-users, noting the history of vertical integration in impeding competition and associated consumer benefits in telecommunications markets.
- **Part 4** addresses the role of non-NBN Co network operators and how these networks should be regulated.
- **Part 5** considers the provision of non-commercial services and subsidies.
- **Part 6** addresses new real estate developments.
- **Part 7** comments on some additional issues that may be helpful to the panel in tackling the task before it, including the ACCC's general approach to economic regulation and the role of Part XIC.

The ACCC expects to make further submissions on additional matters – including NBN Co specific regulation and on the operation of Part XIC —in response to further consultation by the panel.

3 Structural models

This part of the submission responds to the following framing paper discussion question:

1. What broader structural model or models for the industry should the panel consider? Why? Should the panel be considering significantly different industry scenarios to those outlined above? If so, what are those scenarios and why should they be considered?

Ensuring a competitive industry structure for telecommunications services is important to promoting effective competition and efficiency outcomes, and ultimately promoting the long-term interests of end-users. The benefits of competitive market structures have long been recognised. For example, the 1993 Hilmer Report on National Competition Policy supported the principle of structural reform of public monopolies via the separation of natural monopoly and potentially competitive activities.¹

Fixed-line telecommunications infrastructure in Australia, in particular access network infrastructure, has natural monopoly characteristics. That is, it is more efficient to have all customers served by a single infrastructure provider than to have multiple competing providers. In particular, the high and largely 'sunk'² costs of investment in the most fundamental elements of telecommunications networks (e.g. ducts, pits, poles, copper, cable and fibre), low ongoing marginal costs, and economies of scale, scope and density, impose high barriers for new entrants.

However, telecommunications is a complex industry with a number of different network elements. Telecommunications infrastructure can provide services to diverse customer groups over a range of geographic areas. Also, there are many aspects of telecommunications that are, by their nature, highly dynamic and characterised by technological advances which can provide entrants with the means and opportunity to compete. Accordingly, while natural monopoly characteristics may be present in many circumstances, there may be other instances in which it will be economically efficient for there to be multiple operators of particular network infrastructure. In particular, areas with lower cost of deployment and relatively dense customer distributions may be more efficiently served by competing infrastructure.

In other words, the optimal market structure depends on the circumstances and the long term interests of end-users may, in some situations, be best served by the dynamic efficiency generated by infrastructure based competition.

Some examples of where efficient infrastructure-based competition has developed in the market today include the competing transmission networks on particular geographic routes³ and DSLAM⁴/ULLS-based competition. The ACCC has sought to promote this type of competition where it is efficient and technically feasible. In particular, the ACCC has provided effective access to bottleneck infrastructure as deep into the network as feasible (e.g. the underlying copper access service, known as the Unconditioned Local Loop Service (ULLS)). This has encouraged access seekers to invest in and deploy their own network infrastructure (e.g. DSLAMs and transmission equipment)

¹ National Competition Policy, 1993, pp. xxxi and 221.

² A 'sunk' investment is one which cannot be put to an alternative use if the purpose for which it was originally made becomes redundant.

³ There are a number of transmission networks of varying coverage operated by Telstra, Optus, TPG/Pipe, NextGen and others.

⁴ Digital Subscriber Line Access Multiplexer, used to provide DSL broadband services.

where economically viable. However, where the infrastructure has stronger natural monopoly characteristics, effective regulation still remains essential (e.g. monopoly transmission routes in rural and regional areas).

Historically, the incumbent network operator, Telstra, has been the dominant owner of network infrastructure and has operated a number of networks with natural monopoly characteristics and has therefore held a very high degree of market power. Typically, where a network operator has substantial market power, it is not constrained by competition in terms of the pricing or quality of services provided to customers, and there is limited competitive pressure to invest and innovate to ensure the provision of new and better services over time. Further, in fixed-line telecommunications markets the network operator's ability to take advantage of its monopoly power is not, absent regulation, typically constrained by countervailing power of access seekers. The regulatory tools to address these issues are discussed further in section 7.

The vertical integration of Telstra has been a key factor that has influenced the development of the telecommunications industry and competition within the market. As the vertically integrated provider of access to the ubiquitous fixed-line network, Telstra has had the incentive and ability to favour its retail businesses over its wholesale customers. This has allowed Telstra to maintain a dominant position in downstream markets and has hindered the development of fully effective competition.⁵

In response to concerns regarding the vertical integration in the telecommunications industry, the previous government determined that the National Broadband Network should operate as a wholesale-only, open access network. Consistent with this objective, the Parliament also passed legislation which provided a framework for the voluntary structural separation of Telstra.⁶ Under this framework, the ACCC accepted a Structural Separation Undertaking (SSU) from Telstra in February 2012. The SSU provides for the structural separation of Telstra via the progressive migration of end-users from the copper and HFC networks as the NBN is rolled out across Australia.

The panel has adopted a number of working assumptions regarding the objectives of policy and regulation, which go to general issues of market structure, including:

- NBN Co will primarily operate at Layer 2 in the service stack to provide scope for downstream innovation and product differentiation.
- In so far as a network owner has a substantial degree of market power, there should be safeguards against behaviour that provides advantages to its own upstream or downstream operations over those of competing providers that cannot reasonably compete without access to its network.

⁵ The Explanatory Memorandum to the *Telecommunications Legislation Amendment (Competition And Consumer Safeguards) Bill 2010* pp.13-15 included a list of types of discriminatory behaviour that a vertically integrated incumbent might engage in which included: price discrimination; discriminatory use or withholding of information; delaying tactics; quality discrimination; strategic design of product characteristics; and undue use of information. The EM also listed the range of concerns interested parties had regarding Telstra's conduct as a vertically integrated network operator.

⁶ *Telecommunication Legislation Amendment (Competition and Consumer Safeguards) Act 2010*

The ACCC supports these working assumptions as fundamental to supporting a competitive market structure for the telecommunications industry. The ACCC supports the long-term structural reform that is intended via the rollout of the NBN. The wholesale-only mandate for NBN Co is an essential component of this reform and arrangements to reinforce this structural model need to be maintained in legislation (as intended by the *National Broadband Network Companies Act 2011*).

The ACCC also notes the panel's working assumption that:

- The rollout of the NBN will achieve the structural separation of Telstra in respect of retail fixed network services supplied in the mass market.

The ACCC supports the structural reform of the industry, in particular separation between the fixed-line access networks and retail operations, as the best way to promote the long-term interests of end-users.⁷ Removing this type of vertical integration will reduce the incentives for network operators to hinder the development of competition by discriminating against its downstream rivals in the supply of essential network inputs.

The ACCC notes the current government's stated support for the structural separation of Telstra.⁸ The panel has also recognised the complexities of considering questions of market structure and regulation in the context of existing markets and regulation, noting that there is 'no clean slate'. While there are a number of ways that structural reform of the industry can be achieved, the current model involves the progressive migration of Telstra's retail and wholesale customers from legacy networks onto the NBN network. The ACCC considers that the current migration approach will provide an effective model for structural reform. However, if there are significant changes to NBN policy, there should be consideration of how to maintain robust structural reform for the industry, and how this reform can be realised in a timely manner.

The ACCC considers the objective of structural separation is compatible with a variety of NBN deployment models, including a multi-technology mix (MTM). However, the ACCC notes that the existing SSU arrangements are closely tied to a ubiquitous network model for the NBN rollout.

The framing paper asks a number of specific questions about the role of non-NBN Co network operators. The ACCC's general position is that to achieve the benefits of structural reform non-NBN Co network operators should be subject to open access and wholesale-only obligations in circumstances where they are monopoly suppliers. The ACCC's views on these issues are addressed in section 4.

⁷ Throughout this submission the ACCC refers to the objective of structural reform. Inherent in this is the ACCC's view that structural reform is the best means by which to promote the long-term interests of end-users.

⁸ The Coalition's plan for fast broadband and an affordable NBN, April 2013, p. 10.

4 Role of other network operators

This part of the submission responds to the following framing paper discussion questions. The ACCC has considered these questions together as they all relate to the role of other network operators.

- 3. Should NBN Co continue to be subject to wholesale-only (structural separation) and open access requirements? If so, to what extent and under what circumstances, if any, should those obligations apply to other market participants?*
- 4. Should all market participants, including NBN Co, be subject to the same regulations to the greatest possible degree or are specific regulations that do not apply across the board necessary and justifiable in some areas? To the extent to which there should be specific regulations, what is the purpose, nature and scope of the differences?*
- 5. To what extent should competitive neutrality between NBN Co and other market participants be ensured and if so, how?*
- 6. Where providers other than NBN Co supply fixed network services, should there be provisions that ensure consumers secure particular outcomes, for instance by comparison to those generally available from NBN Co?*
- 7. Where an infrastructure provider other than NBN Co delivers outcomes comparable to those delivered by the NBN, what obligations or restrictions should apply on NBN Co? For example, should NBN Co be prevented from overbuilding that network?*
- 8. Were NBN Co to be restricted in supplying services in areas serviced to a specified standard by other network operators, what undertakings, if any, should those operators be required to give about their ongoing performance? Noting links with question 3 in relation to wholesale-only and open access requirements, would it be sufficient to rely on Part XIC processes to secure access to services on these networks, or on Part XIC processes that were further refined?*
- 9. What are the essential characteristics that service provided over a network other than NBN Co's should have to meet for those services to be seen as operating on an NBN-comparable basis? [examples omitted].*

4.1 Structural reform of the fixed-line telecommunications industry

4.1.1 Objectives of regulatory and policy settings

As outlined in section 3, there have been longstanding concerns that Telstra, as the vertically integrated provider of access to the ubiquitous fixed-line access network, has the incentive and ability to favour its retail businesses over its wholesale customers. This has allowed Telstra to maintain a dominant position in downstream markets and has hindered the development of fully effective competition.

The ACCC considers that the overall objective of regulation of telecommunications services is to promote the long-term interests of end-users. Further, the ACCC considers that:

- Structural reform of the fixed-line telecommunications industry promotes the long-term interests of end-users by addressing competitive detriment resulting from vertical integration concerns, delivering increased competition and associated benefits to consumers.
- The long-term interests of end-users are promoted where consumers have access to higher quality goods and services, such as high quality superfast broadband services, at a

reasonable price. Product differentiation allows consumers to choose the level of service quality that they want.

The current legislative and regulatory arrangements that apply to NBN Co and non-NBN Co providers are outlined at Attachment A to this submission. The ACCC notes that the panel has asked a number of questions about the appropriate arrangements going forward.

4.1.2 Arrangements that should apply to NBN Co

The panel has asked if NBN Co should continue to be the subject of wholesale-only and open access requirements.

For the reasons outlined in section 3, the ACCC considers that NBN Co should continue to be wholesale-only in order to ensure a competitive fixed-line telecommunications industry structure in the medium-long term. Wholesale-only and open access requirements will reduce incentives for NBN Co to favour a downstream retail service provider(s) and/or discriminate between downstream rivals, both of which would negatively affect competition in retail telecommunications markets. Wholesale-only and open access requirements imposed on NBN Co establish the long-term structure of the fixed line telecommunications industry and will strongly influence the way competition develops in the coming years.

4.1.3 Arrangements that should apply to other market participants (non-NBN Co network operators)

The panel also asks if wholesale-only and open access requirements should be extended to other market participants (non-NBN Co network operators). The ACCC considers that, subject to materiality and practicality considerations, open access and 'wholesale-only' obligations should apply to other market participants where they are likely to be the monopoly provider of superfast services to an area over a sustained period over time. This is because these obligations are fundamental to the structural reform objective and, without them, there is potential for consumers serviced by non-NBN operators to miss out on the competition benefits associated with these reforms. However, where a market participant is not a monopoly provider different considerations may apply, as discussed below.

The ACCC's views on these issues are detailed under both of the following scenarios:

- there is infrastructure-based competition in particular geographic areas between NBN Co and a non-NBN Co network operator (section 4.2)
- a non-NBN Co network operator is a monopoly provider in a geographic region, and NBN Co does not intend to overbuild that network (section 4.3).

The ACCC has then made some observations about other issues related to the development of retail market competition that could apply in either scenario (section 4.4).

4.2 Infrastructure-based competition between NBN Co and non-NBN Co network operators

4.2.1 Efficient infrastructure-based competition can promote the long-term interests of end-users

Infrastructure-based competition should be encouraged, unless there are special circumstances that suggest it would not be efficient. In general, infrastructure-based competition can benefit consumers by allowing rivals to differentiate their services and compete more vigorously across multiple elements of the supply chain.

Significant competition between network operators may drive dynamic efficiency by facilitating greater differentiation in downstream services. Dynamic efficiency refers to the efficient deployment of resources between present and future uses such that the welfare of society is maximised over time. It includes efficiencies flowing from innovation leading to the development of new services, or improvements in production techniques. To distinguish their product offerings from NBN Co's, infrastructure-based competitors have strong incentives to innovate.

Competition between networks can drive other efficiency gains, particularly where one operator faces competitive pressure to reduce prices, for example, where the non-NBN Co network operator improves its efficiency and reduces prices to remain competitive against NBN Co.

However, the extent to which NBN Co can respond to competitive pressure to compete on price may be constrained by broader objectives and/or regulation. In particular, NBN Co's pricing response may be constrained by a requirement to internally cross-subsidise non-commercial regions or a degree of national pricing parity. This is because, under certain scenarios, infrastructure-based competition could lead to price competition only in certain geographic areas (e.g. low cost areas). Under a cross-subsidy policy, these low-cost areas could have been expected to provide the revenues used to fund the cost of servicing high-cost areas. Price competition will potentially erode the funding base that may be available to support a policy of internal cross-subsidies.

As discussed in section 5, the ACCC considers that explicit subsidies to non-commercial areas are preferable and more transparent than internal cross-subsidies. This approach could address the dual questions of NBN Co being better positioned to respond to competitive pressure arising from infrastructure-based competition and the broader social objective of promoting the interests of consumers in non-commercial areas.

The ACCC considers network operators should generally not be constrained or prevented from deploying networks in competition with NBN Co. In weighing efficiency considerations, it may be appropriate to err on the side of not constraining the deployment of competing networks in situations where private firms are proposing to invest in duplicative networks.

However, the ACCC notes that there are some circumstances where infrastructure-based competition may not promote the long-term interests of end users, such as where it leads to net inefficiencies. As noted in section 3, some fixed-line telecommunications facilities have natural monopoly characteristics such that duplication of networks may be inefficient. Another relevant

factor for consideration may be the technical feasibility of competitive supply, for example considering the extent to which the existence of multiple operators degrades technical quality.

Additional considerations are relevant where a supplier has retained or developed substantial power in relevant markets, including horizontal and upstream markets. In those circumstances, it may be appropriate to limit a firm's role in particular markets as the risk of anti-competitive conduct outweighs any theoretical benefits associated with infrastructure-based competition.

4.2.2 Regulation of non-NBN Co network operators not necessary where there is competition with NBN Co

Where NBN Co overbuilds a non-NBN Co network, access seekers will be able to purchase Layer 2 bitstream services from NBN Co on non-discriminatory regulated terms and supply consumers with retail products based on NBN-quality inputs. In these circumstances, through the rollout of the NBN, consumers will benefit from having access to retail products supplied over a network that reaches the government's quality objectives.

Having regard to the panel's working assumption that in so far as a network operator has a substantial degree of market power there should be safeguards against behaviour that provides advantages to its own operations,⁹ the ACCC notes that should a vertically integrated non-NBN operator favour its own operations, access seekers can switch to the NBN product. Where there is infrastructure-based competition, consumers would not be at risk of being 'stranded' with sub-optimal service because the NBN would be available even in areas where alternate providers had deployed networks. For these reasons, it is not necessary to impose wholesale-only or open access requirements on the non-NBN operator as the network operator will be constrained by NBN Co.

4.2.3 NBN Co should not be restricted from competing with other infrastructure suppliers

The panel has asked whether NBN Co should be restricted in supplying services in areas serviced by other network operators. The ACCC agrees with the panel's working assumption that regulation should be no more intrusive or burdensome than needed.¹⁰

As noted in section 3, the long term interests of end users may, in some circumstances, be best served by infrastructure-based competition. Given this, in markets contestable to other non-NBN market participants, the ACCC does not consider that NBN Co should be restricted from competing with other infrastructure suppliers (e.g. through a regulatory prohibition). To do so could result in a loss of dynamic efficiency arising from sustained infrastructure-based competition.

However, it may also be relevant for the government to consider the appropriate role for government business enterprises in competitive markets in terms of competitive neutrality and whether overbuild by the NBN Co is of a public benefit. The ACCC has previously noted that that

⁹ Regulatory issues framing paper, February 2014, p.5

¹⁰ Regulatory issues framing paper, February 2014, p.5

regulation should only focus upon markets where competition is not effective.¹¹ The ACCC also acknowledges that, as a business, NBN Co may consider the presence of competitive alternatives in considering its deployment schedule.

The ACCC does not consider that NBN Co should be required to overbuild existing wholesale-only open access networks where those networks have natural monopoly characteristics and where overbuild would not lead to improved outcomes in the long-term interests of end-users.

4.3 Non-NBN Co network operator as the sole (monopoly) supplier

4.3.1 Sole (monopoly) suppliers should be subject to open access and wholesale-only requirements

In geographic footprints where a non-NBN Co network is the sole (monopoly) supplier and will remain so over the long term, subject to materiality and practicality considerations, some constraint on the exercise of market power is necessary to ensure the best outcomes for end-users. In the absence of regulation, a vertically integrated operator might choose to offer no wholesale services creating a monopoly at the retail level. This is likely to result in consumer detriment in the form of more limited product offerings, monopoly pricing and inefficiencies. Further, vertical integration by a sole (monopoly) supplier in a footprint area would not achieve the objectives of structural reform and the supplier would have the incentive and ability to favour its own downstream retail operations. This outcome would not promote the long term interests of end-users.

It is appropriate in such cases that the non-NBN Co network is subject to wholesale-only and open access requirements similar to those that apply to NBN Co. To effectively constrain monopoly power, the non-NBN Co network should also be subject to effective price regulation. In addition, to ensure consumer outcomes are not compromised the quality of services supplied by the non-NBN Co network operator would have to reach NBN standards or be overbuilt by the NBN.

4.3.2 Quality standard commitments from non-NBN Co network operators

An important consideration where a geographic area is supplied by a sole (monopoly) non-NBN Co network operator is ensuring that consumer outcomes are not compromised. The long-term interests of end-users may not be promoted if, instead of supply over the NBN Co network, consumers receive services supplied over a lower-quality network in circumstances where consumers demand higher-quality services. Whether non-NBN Co networks are in fact of lower quality depends on the circumstances – for example, where access seekers are able to influence the service levels offered by a network supplier the quality may better reach consumer needs. However, the ACCC understands that the panel's questions regarding quality standards address circumstances where NBN Co does not overbuild and are directed at providing safeguards to ensure consumers received the same competitive outcomes and an NBN-comparable quality of service regardless of location.

¹¹ ACCC Advice to Government, National Broadband Network Points of Interconnect, Public Version, November 2010, p.2

In terms of the content of quality standards, the ACCC considers that the appropriate standards for NBN Co are primarily a matter for NBN Co and its shareholder (government) and form an important part of the government's policy objectives.¹² For example, the panel notes the ability to support certain minimum broadband standards and has noted in its assumptions that the government has expressed a policy objective of ensuring universal access to minimum download data rates of 25Mbps. Setting quality standards involves a consideration of the demands of consumers. The current 'adequately served' criteria,¹³ which reflect NBN-comparable outcomes, could form a starting point to developing 'NBN standard' specifications that align with the government's revised policy objectives.

In terms of practical implementation, extending quality standards to sole (monopoly) non-NBN Co network operators could be done by way of:

- commitments from the network operator, which could take the form of undertakings or carrier licence conditions
- Part XIC, although this may only be an appropriate tool to some extent.

On the first option, it is not clear that all non-NBN Co network operators would have sufficient incentives to give such a commitment. A consideration for non-NBN Co network operators is both the extent of competition they will face (e.g. from NBN Co) and the nature and degree of any regulation (e.g. whether they are subject to a wholesale-only obligation). Some carriers may be willing to offer commitments in return for an understanding that NBN Co would not overbuild. Under current policy arrangements, several networks have received 'adequately served' status for pre-2012 networks on this basis. However, other network operators may prefer to compete against NBN Co particularly where they have a strong 'first mover' advantage and consider they can maintain market share over time.

On the second option, while Part XIC could set some service quality parameters it may not be able to mandate all the parameters the government may wish to set. Given the ACCC's responsibility for administering Part XIC, the ACCC has expanded on these views in some detail in section 4.3.3 of this submission.

The key mechanism for ensuring consumers receive services that meet the government's quality objectives is likely to remain the NBN Co rollout. Given the government's broad concern for the long-term interests of end-users and maximising the welfare of all Australians, the ACCC considers it appropriate that the government consider the consumer outcomes associated with other networks in determining the scope of the NBN Co network. An assessment of whether a network is 'NBN comparable', and/or whether a provider is willing to commit to provide certain outcomes, could feed into decisions regarding NBN Co's deployment schedule. However, where networks do not

¹² Note that more detailed standards in relation to NBN services, such as service standards and timeframes, have been developed by NBN Co and industry through the commercial negotiation of the Wholesale Broadband Agreement (WBA). The ACCC retains the ability to specify regulated service standards through access determinations or binding rules of conduct, should this be required in the future.

¹³ Adequately Served Policy available on Department of Communications Website: http://www.archive.dbcde.gov.au/2013/september/national_broadband_network/adequately_served_policy_to_facilitate_the_nbn_rollout

reach NBN standards, overbuild is the most reliable way to ensure that NBN-standard services are delivered to end-users.

4.3.3 Role of Part XIC for non-NBN Co network

As noted above, Part XIC declaration/determination processes may not be an appropriate tool for all the government's objectives to deliver NBN-equivalent outcomes. In short, while Part XIC regulation can regulate price and non-price terms of supply, it is limited in its ability to regulate other issues such as wholesale-only requirements, non-discrimination, and quality enhancements amounting to network upgrades or new services.

Under Part XIC the ACCC can 'declare' a service after conducting a public inquiry if it is in the long-term interests of end-users to do so. Where services are declared, the ACCC must make an access determination which must contain a price or method of ascertaining price. An access determination can also set out non-price terms, although this must be within the general scope of matters that can be included in an access determination¹⁴. Part XIC also provides some other mechanisms for setting terms of access.¹⁵

However, compared with the other types of regulation listed in the framing paper,¹⁶ Part XIC regulation is limited in its ability to deal with:

- structural separation
- non-discrimination
- upgrades or new services.

Firstly, the scope of Access Determinations and/or Part XIC does not extend to imposing a wholesale-only requirement on a network provider. This is one reason why, for example, the structural separation of Telstra required a voluntary undertaking under the Telecommunications Act and could not be effected by access determinations for services supplied over the copper customer access network. Further, the existing wholesale-only requirements on Local Bitstream Access Service (LBAS) services supplied over designated superfast networks are implemented by Parts 7 and 8 of the Telco Act and not through Part XIC declaration.

Secondly, should the government wish to retain strict non-discrimination obligations Part XIC may not be an effective mechanism. This is because access agreements prevail to the extent of any

¹⁴ Section 152BC(3) sets out what matters an access determination may address and section 152BCB sets out certain limitations.

¹⁵ The ACCC can also make binding rules of conduct, which have a similar scope but can only be made in urgent circumstances and expire after 12 months. Parties may agree to different terms to those in an access determination in an "access agreement", and these will prevail over regulatory determinations to the extent of any inconsistency

¹⁶ Question 9 of the framing paper lists i) ability to support certain minimum broadband speeds; ii) provision of wholesale services on an open access basis (possibly involving structural separation or some equivalent method of ensuring non-discrimination) and support for retail level competition; iii) an obligation on at least one provider to service all customers within a service area; iv) acceptable performance characteristics – for example in terms of latency, jitter, loss and network availability; v) price structures and levels that provide affordable access; vi) credible, transparent and predictable upgrade paths to higher speeds; vii) the ability to support voice services and the various legacy services; and viii) clear and reasonable timeframes for connection and service restoration.

inconsistency, and a network operator could make bilateral access agreements that differed from any “non-discriminatory” terms set out in an access determination. Where discrimination between access seekers represents a taking advantage of market power for a proscribed purpose or with the likely effect of substantially lessening competition, Part XIB may be able to address that conduct. However, the strict non-discrimination obligations that apply to NBN Co and the designated superfast networks are currently imposed by specific CCA provisions.

Thirdly, the Part XIC framework is unlikely to be an effective mechanism to mandate that non-NBN Co network operators significantly upgrade their networks and/or provide new services. For example, where a provider currently supplies stand-alone broadband ‘voice services’, these could be considered a new service. Part XIC allows the ACCC to direct a carrier or carriage service provider to extend or enhance the capability of a facility by which a declared service is provided, so long as it would not have the effect of requiring a person (other than an access seeker) to bear an unreasonable amount of the costs associated with the extension or enhancement.¹⁷ However, these powers have not been exercised by the ACCC. Similar provisions in Part IIIA were recently considered by the Productivity Commission which supported the retention of these powers but noted difficulties in their use.¹⁸ Further, in terms of the ability to support new services, Part XIC currently regulates *services* not *networks* which could place some limitations on requiring new services to be developed. Nevertheless, Part XIC can include mechanisms to incentivise efficient network investment such as service levels, technical specifications and effective price regulation.

Rather than reliance on Part XIC declaration/determination powers, should the government wish to extend NBN-regulation to non-NBN Co network operators this could be effected by legislative amendments:

- extending the operation of Part 7 and 8 of the Telecommunications Act
- extending the non-discrimination obligations
- inserting new requirements for the ACCC to make additional declarations and/or extend the service description of the existing LBAS service.

One benefit of implementing the policy in this way is that it would provide certainty to network operators and potential access seekers as to the regulation that will apply. The ACCC notes the Productivity Commission, in its recent review of the National Access Regime, has noted that in considering regulation governments should seek to demonstrate a lack of effective competition that is best addressed by access regulation.¹⁹ The ACCC agrees that any new regulatory imposts should generally have a sound economic rationale. As the ACCC has noted, non-NBN Co network operators that are monopolies may raise different considerations to those that are subject to competition from NBN Co.

¹⁷ CCA s.152(3)(d), s.152BCB

¹⁸ Productivity Commission, National Access Regime, Inquiry Report No. 66, 25 October 2013, p. 141. “*Due to the practical difficulties of directing extensions, information asymmetry and the complexity of user funding arrangements, including difficulties in setting appropriate access charges, it is likely that the benefits of using the power would rarely outweigh the costs.*” The ACCC also noted some of these issues in its submission to the inquiry; ACCC, Productivity Commission Review of the National Access Regime, ACCC submission to issues paper, February 2013, pp. 49-50.

¹⁹ Productivity Commission, *National Access Regime – Inquiry Report*, February 2014, <http://www.pc.gov.au/projects/inquiry/access-regime/report>

4.4 Other issues associated with retail market competition and consumer outcomes over non-NBN Co networks

In addition to efficiency considerations considered above, the long-term interests of end-users may be promoted by faster deployment of superfast networks, leading to earlier realisation of the associated benefits. However, where NBN Co is not the network operator there are other considerations to ensure that the long-term interests of end-users are promoted.

Wholesale access regulation – in particular, open access commitments – is directed at ensuring that competition in retail service provision is promoted even where there is a monopoly-provider. However, the ACCC considers it important to note that wholesale access regulation does not guarantee particular retail market outcomes and other regulatory/policy settings may be required to support optimal consumer outcomes.

Firstly, RSPs may choose not to supply services on small-scale networks operated by non-NBN operators due to logistics, increased costs such as interconnection costs, or limitations on revenue opportunities due to the small addressable market. This is demonstrated by experience to date with private greenfield fibre deployments. Even where the level playing field obligations and LBAS declaration apply those markets have not seen the same range of RSP entry and retail product offerings as NBN markets. This has resulted in lessened consumer choice, notwithstanding equivalent wholesale access regulation.

In particular, interconnecting with different operators and different network types may impose increased costs on RSPs and deter competitive retail market entry. A common industry-developed business-to-business ordering interface specification could go some way to minimise these costs, thereby encouraging retail market competition and promoting the long-term interests of end-users. The ACCC considers it important that barriers to retail market entry are minimised so that wholesale access regulation of non-NBN Co network operators is as effective as possible in promoting end user outcomes.

Secondly, informational barriers may impede the effective operation of retail markets. Consumers with poor information may make sub-optimal purchasing choices, which can inhibit competition both in terms of the benefits experienced by consumers and the market signals that consumers send to suppliers. Given that increased broadband performance is a key driver behind the deployment of high speed networks, it is critical that consumers have a reliable basis for evaluating the different service tiers and retail providers available to them.

The potential for increased transparency to improve market outcomes is well recognised. The Australian Government 'Best Practice Regulation Handbook'²⁰ states that 'markets may not allocate resources efficiently if one party in a transaction has significantly more information about a good or service than another'. In addition, the Organisation for Economic Co-operation and Development (OECD) has found that consumers with 'too little information, poor quality information or mis-information' can dampen the competitive process (reducing the incentives of firms to innovate, improve quality and reduce costs) by paying too much for a service or choosing the wrong service for

²⁰ Australian Government, Best Practice Regulation Handbook, July 2013, page 50.

their needs.²¹ In fact, the OECD considers that access to information, the ability to use that information and the costs/barriers to switching providers are key indicators in the evaluation of competition in telecommunications markets.²²

There is currently a dearth of reliable information in the market about the performance of different broadband networks – both NBN Co’s and those of other operators – and retail providers.²³ The ACCC is currently consulting on the potential for a broadband monitoring and reporting scheme which would provide transparency over the performance of both NBN and non-NBN networks.

Such a program would provide visibility over the performance of services marketed and delivered to consumers. The information produced would provide consumers with a reliable basis for comparing RSP performance pre-purchase, and would assist them in choosing a service appropriate for their needs. Increasing visibility over broadband service performance at both the wholesale and the retail level would in turn drive network operators and RSPs to innovate and improve the performance of their offerings, and would encourage efficiency.

Programs similar to that proposed by the ACCC are being or have been implemented in the EU, the US, the UK, Singapore, Brazil and New Zealand.

The ACCC plays a key role in consumer protection as Australia’s national consumer protection agency. The ACCC expects to expand on additional retail market and consumer issues in later submissions to the panel.

5 Provision of non-commercial services

This part of the submission responds to the following discussion questions, which we have considered together as they all relate to the provision of non-commercial services:

10. To what extent should the provision of non-commercial services by NBN Co be funded through cross-subsidies, and if so, what safeguards, if any, should apply to those cross-subsidies?

11. Were it not feasible or sustainable in a competitive market for NBN Co to earn sufficient revenue to enable it to cross-subsidise uneconomic customers, how should services to those customers be provided and funded?

The ACCC considers that robust competition in telecommunications markets alongside appropriate and effective economic regulation of fixed-line networks will generally benefit consumers in terms of increased broadband availability and quality and lower prices. However, when broadband services are provided on a purely commercial basis, these measures alone may not benefit ‘non-commercial services’ — those supplied to consumers who do not generate enough revenue to cover the costs of service provision. This typically arises in regional and remote markets where high per-customer costs

²¹ Organisation for Economic Co-operation and Development, *Enhancing Competition in Telecommunications: Protecting and Empowering Consumers*, 24 May 2008, page 6.

²² Organisation for Economic Co-operation and Development, *Indicators for the assessment of telecommunications competition*, 17 January 2003, pages 16 and 19-20.

²³ The ACCC also notes that NBN Co (and other similar network operators) only provides services over the access network. There are a number of other network elements (and factors) that impact retail outcomes.

and low population density may make it commercially unattractive for infrastructure investment and market entry by RSPs.²⁴

One way of delivering lower broadband prices in these areas, while retaining minimum levels of broadband quality and coverage, is through the use of cost effective technologies and services. For example, fixed wireless and satellite services can be deployed to certain geographical areas instead of fixed-line services. In any event, to the extent that it continues to be commercially infeasible to supply services to certain regions, some form of subsidy may be required to fund the shortfall between costs and revenues.

The ACCC agrees with the panel that any subsidy to support non-commercial services should be as transparently and efficiently delivered as reasonably possible.²⁵ The most efficient subsidies are generally those that minimise market distortions and are targeted towards promoting specific and measurable pricing and service objectives.

The former government's policy was to deliver broadband services via uniform national wholesale pricing and internal cross-subsidies. This was reflected in the 2010 Statement of Expectations to NBN Co which stated "NBN Co will be able to cross-subsidise from its national revenue flows and offer a common entry level broadband price structure for all Australian premises across all technologies used in the rollout."²⁶ Internal cross-subsidies mean that the service provider internally funds the cost of supplying non-commercial services through revenues received from its commercial services (typically in low-cost areas and/or from high revenue services).

NBN Co's ability to internally cross-subsidise non-commercial services may need to be considered in light of the potential role of other network operators in providing broadband services. In particular:

- whether NBN Co faces competition from other network providers in particular geographic markets
- whether the scope of the NBN rollout is reduced due to a decision not to overbuild other network providers in particular geographic markets (including new developments).

If NBN Co faces competition in particular geographic markets, this will likely reduce the number of customers served by NBN Co in these markets. This reduces the revenue available in these areas that may be used to cross-subsidise non-commercial services in other geographic markets.

If the scope of the NBN rollout is reduced due to a decision not to overbuild other networks in particular geographic regions (e.g. networks that are 'NBN standard'), this may have similar effects. On one hand, if NBN Co is not required to service premises in regions served by other networks this will reduce NBN Co's overall capital and operating costs. However, this will also reduce potential sources of revenue to cross-subsidise non-commercial services. Given that non-NBN Co networks are more likely to be deployed in regions that have low costs per end-user and/or higher average

²⁴ Some of these costs include the high costs of providing transmission services (due to longer distances required) and the inability to spread fixed network costs over a larger number of customers.

²⁵ The ACCC does not intend to comment on the objective of universal broadband coverage given that this is a government social policy and beyond the purview of the ACCC.

²⁶ *Statement of expectations*, 17 December 2010, p. 4

revenue per user, the overall effect may be to hinder NBN Co's ability to cross-subsidise non-commercial services.

An alternative means of funding non-commercial services is an explicit subsidy by the government of part of the network build costs in non-commercial regions. As opposed to equity funds provided by the government for the NBN rollout, explicit subsidies of this sort generally mean that NBN Co is not required to return these costs to the government (including a rate of return). This means that access prices faced by end-users in these regions will not need to cover the additional costs associated with non-commercial services. Similarly, customers in metropolitan returns will avoid the higher access prices that would otherwise be required to cross-subsidise non-commercial services. Another model may be to have explicit build subsidies for uneconomic areas that are open to competitive tender.

Another means of funding non-commercial services is ongoing subsidies of the difference between revenues and costs in non-commercial regions. This means that NBN Co access prices will not need to cover the additional costs in non-commercial regions. One example of on-going subsidies is levies or fees imposed on industry participants, which may include other network operators and RSPs.²⁷

The ACCC recognises that uniform national wholesale pricing has at times been a government policy objective. The ACCC has consistently noted that uniform national wholesale prices can be achieved without the use of internal cross-subsidies.²⁸ For example, if external subsidies are provided to NBN Co to recover the additional per end-user costs or revenue shortfalls in non-commercial regions, NBN Co will be able to charge the same price to customers in regional and remote areas that it charges customers in metropolitan areas.

Finally, the ACCC notes that existing regulatory mechanisms are generally flexible enough to accommodate a range of policy approaches regarding universal broadband and the use of subsidies.

6 Approach in greenfield developments

This part of the submission responds to the following discussion question:

12. What approach should be taken in new developments? Do they raise particular structural regulatory issues?

The ACCC's position on efficient infrastructure-based competition, the role of other network operators in deploying broadband networks and the regulation of these networks (as outlined in section 4) applies to the deployment of broadband networks in new real estate developments.

In particular, the ACCC considers that there should be no restrictions on the ability of NBN Co or another network operator to deploy networks in new developments, including in competition with each other. Where a new development is serviced solely by a non-NBN Co network provider,

²⁷ This is similar to the universal service fund which is used to compensate Telstra for fulfilling its Universal Service Obligation. All carriers in Australia contribute to the universal service fund via a levy which is based on each carrier's share of eligible revenue. The OECD has noted that a universal service funding mechanism of this sort is a preferable approach to recover the costs or revenue shortfalls of providing non-commercial services (see OECD, *Access Pricing in Telecommunications*, 2004, pp. 134-135).

²⁸ For example, see ACCC, *Assessment of Proposals National Broadband Network Process — Report to Expert Panel (Public Version)*, January 2009, Appendix F, p. 119

structural separation and constraint on the exercise of market power by this provider is necessary to promote the long-term interests of end-users. This may include imposing wholesale-only and open access requirements and economic regulation similar to those that apply to NBN Co, as well as ensuring that the quality of services supplied reaches NBN standards.

The ACCC notes that an estate developer's selection of an operator to deploy a network in a new development may be in some circumstances be considered a form of 'competition for the market'. This is because potential network operators may compete with each other for the right to deploy the network in a new development (e.g. in the form of a tender process), which may lead to more efficient network rollout costs. However, the ACCC considers that this is not a substitute for the competitive tension that results from infrastructure-based competition, or removes the need for access regulation, as competition for the market does not address the potential exercise of market power by the network operator.

In situations where an estate developer does not choose (or is unable to secure), a non-NBN Co network operator to deploy a network, under existing arrangements fixed-line infrastructure will be provided by Telstra or NBN Co. The government has previously released a policy ('Fibre in New Developments') that generally requires NBN Co to install fibre in new developments within the fibre footprint of 100 or more premises (and smaller developments where it is practical to do so). At the same time, Telstra is subject to a universal service obligation which requires Telstra to deploy fixed-line infrastructure where it is required to provide basic telephone services.²⁹ NBN Co is not subject to a universal service obligation to provide broadband infrastructure.

The ACCC notes that the policies and legislation for deciding which provider should deploy infrastructure in a new development should be clear and unambiguous. If there is uncertainty about which operator should deploy a network in a new development, this could lead to rollout delays or inefficient duplication which would not promote the long-term interests of end-users in new developments.

7 Other issues

7.1 Rationale for economic regulation

The review's terms of reference indicate that the panel will consider optimal long term regulatory arrangements. Based on the statements in the framing paper, the ACCC understands that these will be the focus of subsequent consultation by the panel. However, the ACCC has some preliminary observations that can be made here.

Economic access regulation is an appropriate regulatory arrangement for industries with natural monopoly characteristics where an infrastructure facility forms a bottleneck for firms operating in upstream or downstream markets. The economic regulation of natural monopolies aims to achieve

²⁹ Telstra is required under its universal service obligations to provide a basic telephone service to an end-user on request. Where there is no existing infrastructure in place, this may require Telstra to install fixed-line infrastructure to provide the service. Telstra may choose to install copper or fibre infrastructure. Telstra may provide an interim wireless telephone service where it has a reasonable basis for believing that another provider (e.g. NBN Co) will deploy a fixed-line network within 12 months of the end-user requiring a service, or there is no 'pit and pipe' infrastructure available.

the productive efficiency benefits of a single infrastructure operator while preventing the allocative and dynamic efficiency losses that would result from the monopolist's use of its market position. Access regulation is also intended to promote competition in markets that need access to bottleneck infrastructure.

As noted in section 3, network operators with market power:

- maximise profits by setting prices above the level which would exist in a competitive market (monopoly pricing)
- have incentives to provide inadequate service quality (e.g. to incur minimal cost of service)
- have limited incentives to undertake investment in an economically efficient manner
- have incentives to favour their own operations related markets, by price and/or non-price discrimination, where the network operator is vertically integrated and operates in a market in which its infrastructure services are a production input for other firms.

Structural reform may go to address concerns regarding vertical integration. However, effective economic regulation remains a necessary tool to ensure that a monopoly network operator is constrained from exercising its market power with respect of prices, investment and service quality.

It is anticipated that NBN Co will be a network operator with substantial market power at least in those geographic areas where it does not face competition from other network operators. The extent to which any such competition would constrain NBN Co's market power is dependent on several factors and may be limited (this is discussed further in section XXXX). Nevertheless, NBN Co's ubiquitous (or near ubiquitous) national coverage as a provider of wholesale broadband services, in addition to the substantial sunk investment in its network infrastructure and its extensive economies of scale and scope, are expected to confer on NBN Co significant enduring market power. Even if NBN Co faces infrastructure-based competition in certain local geographic areas or if NBN Co has a reduced footprint, it is likely to have market power across much of Australia.

NBN Co's role as a wholesale-only network operator means that different, and potentially less extensive, regulation should apply than would do so to a vertically integrated operator (such as Telstra) although it does not change the underlying incentives of a network operator with market power with respect of prices, service quality and investment.

7.2 Part XIC and the ACCC's role in economic regulation

The economic regulation of telecommunications industry is provided for through Part XIC of the *Competition and Consumer Act 2010* (the CCA), which contains a telecommunications industry-specific access regime. The regime provides for the regulation of telecommunications service where it would promote the long-term interests of end-users, which is determined by having regard to the objectives of:

- Promoting competition in market for telecommunications services
- Achieving any-to-any connectivity between end-users
- Encouraging the economically efficient use of, and investment in, infrastructure by which telecommunications services are supplied or likely to become supplied.

Part XIC was introduced into the CCA in 1997 (at that time the *Trade Practices Act 1974*). The Second Reading Speech from its introduction in Parliament states that:

'... there remain good reasons for there to continue to be industry-specific competition regulation for telecommunications ... [and that] the government's philosophy in preparing the telecommunications access regime has been to follow an approach based on part IIIA of the Trade Practices Act as far as practicable—nevertheless, to introduce some additional refinements to ensure that the arrangements will work effectively for the telecommunications industry.'

In 2010 Part XIC underwent significant reforms, in part to address the issues with the initial 'negotiate-arbitrate' access framework, in particular the vast numbers of access disputes notified under this framework, and replace it with an up-front/ex-ante Access Determination model. The Part XIC access regime applies to both NBN Co and other network operators, although there are some aspects of the framework that are NBN-specific which were added in 2011.³⁰

The principal operation of Part XIC allows the ACCC to undertake public inquiries to: i) consider which specific services should be 'declared' (regulated) to promote the long-term interests of end-users; and ii) specify through Access Determinations reasonable terms and conditions for access to those services, including prices. Part XIC, however, maintains the primacy of commercial agreements between access providers and access seekers, allowing parties to contract away from the regulated terms where it is in their interests and where they can agree.

Part XIC also includes other mechanisms, such as the Special Access Undertaking (SAU) provisions which allow for an access provider to propose, and seek ACCC approval for, terms of access for new services. Under these provisions, the ACCC, NBN Co and industry have developed access arrangements for the NBN. NBN Co's SAU was accepted by the ACCC in December 2013.

The ACCC considers that the SAU will deliver a framework for the regulation of NBN Co services that allows for vigorous retail competition, while providing sufficient certainty to NBN Co that it will be able to recover the prudent costs of its investment, subject to demand for its services meeting expectations. The ACCC considers that the current SAU and Part XIC framework is sufficiently flexible to allow the ACCC, NBN Co and industry to respond to changing circumstances and/or policy.

Based on the experience to date, the ACCC considers that the current Part XIC framework works well to provide effective access regulation for telecommunications services and would support the preservation of the core of the framework in its present form.

In addition to economic regulation (as well as competition and general consumer protection law) which resides with the ACCC, the regulation of telecommunications industry is shared with the Australian Media and Communications Authority (ACMA). The ACMA has a number of roles and responsibilities for the technical and consumer regulation of telecommunications industry including, but not limited to, promoting and facilitating industry self-regulatory and co-regulatory solutions to emerging issues, specifying mandatory technical standards, the management of radio-frequency spectrum, and compliance with telecommunications legislation, license conditions, certain industry codes of practice, and customer service guarantees. The ACMA also has a broader role encompassing the media and broadcasting industries.

³⁰ Via the *Telecommunications Legislation Amendment (National Broadband Network Measures – Access Arrangements) Act 2011*

Concluding remarks

The ACCC welcomes the opportunity to contribute to the panel's review and looks forward to contributing to further discussion papers over the course of the review. The ACCC would be happy to provide further information at the request of the panel.

Attachment A — Overview of current regulatory arrangements on NBN Co and other network operators

This attachment outlines the current legislative framework for the regulation of NBN Co and other network operators.

NBN Co

NBN Co is subject to access regulation by Part XIC of the CCA. NBN Co must only supply services that are declared services.³¹ Declared services supplied by NBN Co are subject to ‘standard access obligations’,³² which provide that upon the request of an access seeker, NBN Co must supply the declared service and provide interconnection to its facilities. These ‘open access requirements’ are supported by explicit ‘non-discrimination obligations’, for example that NBN CO must not discriminate between access seekers in complying with its standard access obligations.³³

On 13 December 2013 the ACCC accepted a ‘special access undertaking’ from NBN Co which sets out some of the terms and conditions upon which NBN CO will supply declared services, including price terms. The SAU forms part of the Part XIC regulatory framework, which also provides for ‘access agreements’ between NBN Co and access seekers³⁴ and for the ACCC to make access determinations³⁵ or binding rules of conduct³⁶.

In addition to ‘open access’ supply obligations and regulated terms of supply, NBN Co is also required to operate on a “wholesale-only” basis.³⁷ Ownership restrictions in the *NBN Companies Act* are also intended to prevent any degree of vertical-reintegration of NBN Co.

In addition to the CCA obligations, as a government business enterprise NBN Co’s operational actions are subject to the directions of its Shareholder Ministers – the Minister for Communications and the Minister for Finance. Most prominently, the policy directions of the government are set out in the Statement of Expectation(s) (SOE).

Other network-operators

The *Telecommunications Legislation Amendment (National Broadband Network Measures – Access Arrangements) Act 2011 (NBN Access Arrangements Act)* introduced amendments to both the Telecommunications Act 1997 (Telecommunications Act) and the Competition and Consumer Act 2010 (the CCA) regarding the regulation of certain Layer 2 bitstream services. The purpose of these

³¹ CCA, s. 152CJA(1).

³² NBN Co is subject to a ‘Category B Standard Access Obligation’ (CCA, s. 152AXB). A separate ‘Category A SAO’ applies to other service providers (CCA, s. 152AR). The Category A SAO imposes additional equivalence obligations on the access provider in relation to technical and operational quality and the fault rectification of its services.

³³ CCA, s 152AXC

³⁴ CCA, s. 152AY(2)(a).ss. 152CJA(2) and 152CJF.

³⁵ CCA, s. 152AY(2)(d).

³⁶ CCA, s. 152AY(2)(c).

³⁷ NBN Co is only allowed to supply services to carriers and service providers (although exemptions apply for utility providers and transport authorities); sections 9-16 of the *National Broadband Network Companies Act 2011*.

amendments – called the “level playing field obligations” – was to extend the technical and open access obligations to owners of other non-NBN superfast networks.³⁸

The level playing field obligations in Parts 7 and 8 of the Telecommunications Act provide that designated superfast network providers:

- must offer to supply a Layer 2 bitstream access service, which is a basic connectivity service of a wholesale nature, and
- must *only* use designated superfast networks to supply carriage services at the wholesale level—that is, they must not supply services to retail end-users directly³⁹.

Further, s.152AL(3C) of the CCA required that the ACCC declare a Layer 2 bitstream service “as soon as practicable” after that provision commenced. On 22 February 2012 the ACCC declared the layer 2 bitstream service (LBAS). As a declared service, the ACCC was required to make an access determination, and on 3 October 2012 the ACCC made an access determination for the LBAS service setting price terms. The CCA also imposes ‘non-discrimination obligations’ – similar to those that apply to NBN Co - in relation to the LBAS service.

It is important to note that the open access and wholesale-only obligations in the Telecommunications Act and the LBAS declaration only apply to LBAS services supplied over *designated superfast networks*. This definition excludes most networks built prior to 1 January 2011⁴⁰, exempted networks⁴¹, and various other networks based on exceptions in the legislation.⁴² On current legislative arrangements, there are therefore a number of non-NBN Co networks that are un-regulated and not subject to open access or wholesale-only commitments or to price regulation.

For example, the HFC networks are not currently captured by the LBAS service declaration and are not subject to supply obligations, wholesale-only obligations, or price regulation. However, it is the intention in current commercial arrangements (which could be revised) for customers on these networks to be moved across to the NBN network.

³⁸ Revised Explanatory Memorandum, Telecommunications Legislation Amendment (National Broadband Network Measures – Access Arrangements) Bill 2011, p 9, p.13-14

³⁹ Telecommunications Act 1997, s.141 and s.143

⁴⁰ “most networks” – networks modified or upgraded, and certain types of extensions, of pre 1 January 2011 networks are captured.

⁴¹ Subsection 141A(1) of the Telco Act confers power on the Minister to exempt specified superfast carriage networks from the Layer 2 bitstream requirements of section 141 of the Act. Subsection 144(1) of the Act confers power on the minister to exempt specified superfast carriage networks from the wholesale-only requirements of section 143 of the Act. A number of networks are exempt: specified Telstra Velocity networks, specified TransAct fibre networks, upgrades to TransAct’s VDSL network, TransAct very small scale networks, and Telstra’s South Brisbane Exchange Service Area.

⁴² As one example, s.141B(4) and s.156(5) of the Telco Act provide that if a telecommunications network was in existence immediately before 1 January 2011 and the network was extended on or after 1 January 2011 and no point on the infrastructure of the extension is located more than 1km - or, if a longer distance is specified in regulations, that longer distance – from a point on the infrastructure of the network as the network stood immediately before 1 January 2011 then the subsection that states that ‘extensions’ are subject to provisions imposing wholesale-only requirements do not apply.