Submission in response to

Review of Regulatory Arrangements for the National Broadband Network

Telecommunications Regulatory Arrangements

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CONTENTS

Section 1. Executive Summary

1.1 The legislative changes introduced to the regulatory regime in 2010 and 2011 were designed to facilitate a competitive level playing field in the fixed line broadband market with the roll-out of the National Broadband Network (NBN). The regulatory policy settings for the NBN are based on the premise that NBN Co will be a monopoly provider of essential infrastructure and as such it should be subject to the following principles:

(a) **Structural separation**: NBN Co should operate as a wholesale-only entity that cannot operate in retail markets. Neither should it be able to expand beyond the provision of wholesale fixed access services;

(b) **Open and equivalent access**: NBN Co should provide access on non-discriminatory terms to all RSPs;

(c) **Effective ACCC oversight**: The terms of access to the NBN should be approved by the ACCC. The ACCC should also be empowered to enforce compliance with NBN Co's obligations, including non-discrimination; and

(d) **Efficient cost based pricing**: Access prices should be based on prudent and efficiently incurred costs of supply. This objective should be enforced through a combination of ex ante and ex post regulatory measures.

1.2 In recognition that it would take time for the NBN to be rolled out, the regulatory framework was amended to improve competitive outcomes during the transition period — Telstra is subject to equivalence obligations and the ACCC's powers to make access determinations have been strengthened and streamlined.

1.3 Optus submits that many of these provisions are critical to achieving a competitive fixed line market in the future and they should remain. There should be no fundamental changes to Part XIC. Particularly while the roll-out timetable for the NBN as envisaged by the current Government is still subject to confirmation. There is merit, however, in refining or reinforcing some the provisions to ensure that they better deliver the outcomes anticipated by policy makers. Optus submits there are three areas that should be considered:

(a) Legislative hierarchy in Part XIC must be removed;

(b) Wholesale-only obligations in the NBN Corporations Act should be tightened; and

(c) Layer 2 restrictions on NBN Co should be legislated.

1.4 In addition, the opportunity should be taken to consider the appropriate form of regulation for a future market, where competition issues are just as likely to emerge at the service level. The current framework, which focuses solely on access related remedies, may not be best equipped to deal with such issues. Optus recommends that the Panel consider changes to Part XIC that would align it with ex ante competition regulation regimes, such as those that operate within the European Union (EU). This would provide the ACCC with a broader range of tools to regulate operators with significant market power (SMP) in specific communications markets.

Part XIC should not fundamentally change

1.5 Optus strongly supports the continuation of Part XIC. There is no evidence that supports major reform of Part XIC to align it more with Part IIIA processes. Competition in key

communications markets is due solely to effective use of Part XIC and its focus on promoting competition and the long term interest of end-users (LTIE).

1.6 Part XIC is more than an essential facilities access regime. It does not limit intervention to areas of non-duplicable assets of national significance. It does not limit declarable services to the use of a natural monopoly infrastructure facility. Any move to make Part XIC reflect Part IIIA would damage competition in the industry. Adoption of Part IIIA processes would result in the premature deregulation of resale fixed-line services and transmission services; and it is doubtful whether any termination services could be regulated.

1.7 Optus does not see any additional benefits flowing to either industry or consumers as a result of aligning Part XIC with Part IIIA.

Part XIC should provide for ex ante competition regulation

1.8 That is not to say there is no opportunity to improve the operation and scope of Part XIC as the industry moves away from infrastructure-based competition towards service-based competition. Optus supports reforming some elements of Part XIC to closer align its operation to ex ante competition regulation regimes, such as used in the EU.

1.9 Such reform would;

(a) Enable the ACCC to focus on promoting competition in specific markets rather than access to services. This would enable the ACCC to take a more holistic view on communications markets.

(b) Limit regulatory obligations to those operators with SMP in specific communications markets, thereby reducing the overall industry regulatory burden and compliance costs.

(c) Enable a wider range of remedies, including non-discrimination and separation obligations, allowing the ACCC greater flexibility to impose the full range of possible regulatory remedies with the requirement that it be proportionate to the problem identified.

Legislative hierarchy must be removed

1.10 Optus submits that an important change to facilitate improvements in the efficiency of the regulatory framework and to better promote end-user outcomes is removal of provisions allowing access agreements to prevail over regulatory determinations (hierarchy provisions).[1] In practice, the legislative hierarchy provisions have allowed the monopoly provider of broadband to make take-it-or-leave-it commercial offers which exclude regulatory oversight for the duration of the contract. Removal of these provisions would not prevent parties to a commercial agreement from waiving their rights to regulatory recourse, but it would prevent one party from unilaterally precluding such rights.

1.11 Optus acknowledges the description in the Discussion Paper outlining the Panel's view on the intended operation of the hierarchy provisions.[2] Optus agrees that where **both parties voluntarily agree** to alter terms of an access determination, such alteration is mutually beneficial and should be respected. But this is not a description of the effect of the hierarchy provisions; rather it outlines the scenario present in the market prior to the 2010 amendments.

[1] Sections 152BCC ,152BDB and 152CBIC.
[2] Telecommunications Regulatory Arrangements, Consultation Paper, p.21

1.12 Prior to the 2010 amendments, operators relied upon contract law to mutually agree to terms that precluded regulatory remedies subject to other beneficial concessions. Optus is not aware that the absence of hierarchy provisions caused particular problems with the operation of access arrangements in the industry. If one party did not wish to proceed, both parties had to rely on regulatory determinations.

1.13 By contrast the hierarchy provisions now in place automatically exclude all access agreements from regulatory recourse. This is so regardless of whether that is the intention of both of the parties to the agreement. As detailed in Optus' March 2014 submission, NBN Co has used the hierarchy provisions to force access seekers to sign an agreement (and exclude regulatory recourse) in circumstances where there is not full agreement on all matters, because the alternative is refusal to supply the NBN service.

1.14 This outcome is contrary to the views expressed by Parliament in support of the provisions and is proving to be more of a hindrance than a benefit to industry engagement. It exposes the fact that the views expressed in Parliament were heavily reliant on behavioural assumptions that have proven to be false.

Wholesale-only obligations should be tightened

1.15 Maintaining NBN Co's wholesale-only status should remain a fundamental principle in the NBN framework. It was one of the original objectives for the rollout of the NBN, and remains a crucial pillar towards achieving structural separation and effective competition in fixed-line communications services.

1.16 Optus reiterates that NBN Co should not be allowed to operate in retail markets; nor should it be allowed to expand beyond the provision of wholesale fixed access services.

1.17 Optus supports changes to the NBN Corporations Act that would have effect of:

(a) Removing the exemption to supply utilities;

(b) Clarifying NBN Co's ability to deal with end-users; and

(c) Clarifying that NBN Co can only provide broadband services to fixed locations.

Layer 2 restrictions should be legislated

1.18 There is currently no legislative obligation restricting NBN Co to the supply of Layer 2 services. Rather, this mandate has been implicitly expressed through various policy documents, most notably the Government's NBN Statement of Expectation.

1.19 Legislating this requirement would bring NBN Co into line with other providers of superfast broadband networks that are only allowed to provide Layer 2 services due to legislative provisions in Part XIC. It appears incongruous that such obligations are imposed on non-NBN Co companies while NBN Co's restrictions are only imposed through Ministerial guidance.

1.20 Optus submits that for regulatory certainty and consistency with other related legislative requirements and obligations, this limitation should be incorporated into the NBN Corporations Act.

Section 2. Changes to NBN Companies Act

2.1 In its March 2014 submission to the NBN Expert Panel, Optus discussed the importance of clarifying the key principles of the NBN and for NBN Co, namely:

(a) **Structural separation**: NBN Co should operate as a wholesale-only entity that cannot operate in retail markets. Neither should it be able to expand beyond the provision of wholesale fixed access services;

(b) **Open and equivalent access**: NBN Co should provide access on non-discriminatory terms to all RSPs;

(c) **Effective ACCC oversight**: The terms of access to the NBN should be approved by the ACCC. The ACCC should also be empowered to enforce compliance with NBN Co's obligations, including non-discrimination; and

(d) **Efficient cost based pricing**: Access prices should be based on prudent and efficiently incurred costs of supply. This objective should be enforced through a combination of ex ante and ex post regulatory measures.

2.2 Achieving this is likely to require some changes to both the NBN Companies Act and Part XIC in the CCA.

2.3 Optus' views on issues canvassed in the Consultation Paper are discussed below. Optus strongly supports amendments that will promote the four key principles above.

Supply of eligible services on a wholesale-only basis

2.4 Section 9 in the NBN Companies Act establishes that NBN Co can only supply eligible services on a wholesale-only basis to carriers or carriage service providers.

2.5 Optus supports the continued application of this provision, however this should be strengthened to exclude the exemptions that currently exists. Maintaining NBN Co's wholesale-only status should remain a fundamental principle of the NBN framework. It was one of the original objectives for the rollout of the NBN, and remains a crucial pillar towards achieving structural separation.

2.6 First-and-foremost, Optus reiterates that NBN should operate as a wholesale-only entity that cannot operate in retail markets. Neither should it be allowed to expand beyond the provision of wholesale fixed access services.

2.7 Optus supports changes that would have effect of:

(a) Removing the exemption to supply utilities;

(b) Clarifying NBN Co's ability to deal with end-users; and

(c) Clarifying that NBN Co can only provide broadband services to fixed locations.

NBN Co's ability to supply to utilities

2.8 Sections 10 to 16 in the NBN Companies Act currently provide a number of exemptions to the wholesale-only obligations for specified classes of utility bodies and transport authorities.

While these exemptions appear not to have been enacted, they allow NBN Co to directly bypass RSPs and supply eligible services to specified classes of utilities.

2.9 As highlighted during the debate prior to the introduction of the provisions, it was already recognised that "*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*."[3] RSPs expressed concerns this could effectively result in NBN Co competing with RSPs for supply of services to these utilities.

2.10 Optus submits that these exemptions be repealed.

2.11 Absent these provisions, there are already mechanisms in place that will allow utility bodies and transport authorities to apply for access to the NBN. Namely, the specified classes of utilities as an end-user are already able to purchase the NBN services from RSPs. Alternatively the utilities can source services through existing RSPs. It would not be appropriate for utilities to be both in a position to procure NBN services directly from NBN Co and RSPs — this would undermine the structurally separated market structure that would have led to the requirement for NBN Co to operate as a wholesale-only provider in the first place.

2.12 RSPs have the capability to deliver the types of services envisaged by the exemptions.

NBN Co ability to deal with end-users

2.13 NBN Co was established to be a wholesale-only provider and should continue to be prevented from providing services through a direct relationship with end-users, without exception. It is important to note that in this context, the end-user is the person using the NBN service.

2.14 The Panel has sought views on whether there are circumstances where there may be benefits in NBN Co clearly being able to deal directly with end-users for reasons of effectiveness and efficiency, and if so, the rules that would apply under such circumstances.

2.15 As discussed above, Optus submits that NBN Co should continue to be excluded from providing services directly to end-users, without exception. This is fundamental to the wholesale-only model and contributes towards ensuring that non-discrimination obligations continue to be adhered.

2.16 Optus sees merits in clarifying that the restriction to supply to RSPs requires that the RSPs on-sells NBN services to end-users. To that end, Optus supports amendments to section 9 of the NBN Corporations Act to state that:

> *An NBN corporation must not supply an eligible service to another person unless the other person is:*
>
> *(a) a carrier; or*
>
> *(b) a service provider; and*
>
> *(c) the other person uses an eligible service to provide communication services to:*
>
> *(i) an end-user; or*
>
> *(ii) another carrier or service provider.*

[3] Telecommunications Regulatory Arrangements, Consultation Paper, p.23

2.17 The intent of this amendment is to prevent large corporations from becoming RSPs for the purpose of obtaining direct supply of NBN services. This would undermine the market structure and wholesale-only structure of NBN Co. The amendment retains the flexibility to allow RSPs to wholesale NBN services to other RSPs.

Dealing with end-users other than supplying a service

2.18 NBN Co's dealings with end-users are not restricted to supply of NBN services, and may extend to other forms of interactions and communications. For example, NBN Co may have a role in sending information packs and letters to end-users within rollout areas notifying consumers about important changes to the network rollout status, such as copper disconnection letters.

2.19 Optus concedes that while there may be a role for NBN Co in providing external communications to end-users, these forms of communications should be done in consultation with RSPs with end-users within the relevant distribution area. This is particularly important in circumstances where the external communications contains information that directly impacts end-users and/or their relationship with their RSP.

2.20 Another example could occur where a NBN representative personally interacts with an end-user such as during a technician visit to end-user premise. There is the potential for the end-user (without notifying their RSP) to agree, for example, to a non-standard installation of the NBN service. As a result of this transaction, an RSP will incur liability for a cost that it has not authorised. The RSP bears the risk of recovering the cost.

2.21 To this extent, there should be a general understanding that interactions with end-users must be conducted in consultation with RSPs and with the knowledge of RSPs.

Supply of services to fixed locations

2.22 The purpose of the NBN is to provide broadband services to fixed locations in Australia through a mixture of technology, including fixed fibre, wireless and satellite. Optus has outlined in its previous submission to the Panel that it supports the principle of a single NBN network where a natural monopoly exists.

2.23 The Government established the NBN as a single national broadband network that will be used by all RSPs. The creation of a government-owned monopoly reverses the underlying trend of the past two decades with competition policy objectives shifting focus away from infrastructure-based competition. This approach appropriately recognises the high costs and associated monopoly characteristics of last mile high speed broadband access.

2.24 The economics of deploying a high speed broadband network requires that the scale benefits achievable by a monopoly provider be delivered. But the scale benefits of monopoly come with very real risk of the exploitation of monopoly power. Should the NBN Co monopoly extend beyond the boundaries of natural monopoly, there is a risk that the costs of NBN Co will be incurred without any offsetting efficiency benefits.

2.25 To that end, Optus strongly supports the inclusion of a new section in the NBN Corporations Act that explicitly restricts NBN Co's activities to where a natural monopoly exists — for example, the provision of broadband services to fixed locations. Such a provision would not impact upon the adoption of a multi-mix technology approach, as there is no restriction on how the service can be delivered to the fixed premise.

2.26 Optus also understands NBN Co is trialling a mobile tower backhaul service. Such a service should be restricted to areas where there is no contestable supply — that is, transmission

routes where absent NBN Co there exists only one supplier. Should NBN Co provide mobile backhaul services in areas where there are multiple suppliers, it would irrevocably damage competition in the transmission market.

Restricting NBN Co to the supply of Layer 2 services

2.27 There is currently no legislative obligation restricting NBN Co to the supply of Layer 2 services. Rather, this mandate has been implicitly expressed through various policy documents, most notably the Government's NBN Statement of Expectation. NBN Co has also indicated its ongoing intent to operate in this way, subject to operational requirements; and the arrangements have also been confirmed in NBN Co's SAU.

2.28 The Panel has sought views on whether NBN Co should be limited by law to operating at the lowest possible layer of functionality in the OSI stack, primarily at Layer 2 but potentially also at Layer 3 in some instances.

2.29 Optus notes that there already exist legislative requirements for non-NBN Co companies to provide superfast broadband services at a Layer 2 level. This was demonstrated through an amendment to Part XIC requiring the ACCC to declare a Layer 2 bitstream access service, known as the Local Bitstream Access Service (LBAS).

2.30 Importantly, Part XIC also requires that this Layer 2 bitstream access service cannot be varied or revoked and does not have an expiry date. As recognised by the ACCC:

> *The regulatory framework for the Layer 2 bitstream service is focussed on regulation of the customer access network, similar to how NBN Co will be providing the customer access network to the majority of premises in Australia. Consistent with this, the ACCC proposes a service description that covers the customer access network of non-NBN superfast networks. The ACCC has therefore reflected this by naming the declared service the 'local bitstream access service'.*[4]

2.31 Optus submits that for regulatory certainty and consistency with other related legislative requirements and obligations, this limitation should be incorporated into the NBN Corporations Act. It appears incongruous that such obligations are imposed on non-NBN Co companies but not NBN Co itself.

2.32 The currently accepted implicit mandate restricting NBN Co to the supply of Layer 2 services, however, has largely been expressed through policy statements, the NBN Co Corporate Plan and the NBN SAU — all of which are documents that can be varied or revoked without Parliamentary approval:

(a) The Statement of Expectations is a government policy statement and only remains valid until it becomes superseded by a revised Statement of Expectations as issued by the Communications Minister.

(b) The NBN Co Corporate Plan is a commercial document outlining NBN Co's progress and forecasts over the short to medium term, and is updated on an annual basis. The nature and details in this document can change quite significantly as a result of a change in the Statement of Expectations.

(c) The NBN SAU is a voluntary undertaking, where NBN Co can seek to have it varied or withdrawn at any time, subject to certain conditions.

[4] ACCC, Layer 2 bitstream service declaration, Final Report, February 2012, p.6

2.33 This does not provide the same certainty as required through the statutory requirement for LBAS, even though the effect of that declaration was to ensure that any similar non-NBN Co networks would also be captured within the regulatory framework for NBN.

2.34 Optus therefore submits that for consistency and investment certainty, there should be a legislative limitation restricting NBN Co to the supply of Layer 2 services.

Supply of other goods and services

2.35 Clauses 17 to 19 in the NBN Companies Act currently prevent NBN Co from the supply of content services, non-communication services, and non-communication goods except where the goods are used to supply an eligible communications service by NBN Co.

2.36 Optus supports the continued application of these provisions on NBN Co in restricting the categories of services NBN Co is able to offer. These provisions could also be further strengthened if the limitation for NBN Co to supply Layer 2 services discussed above is introduced.

2.37 These restrictions were designed to ensure that NBN Co remained focused on its core business of providing next generation wholesale broadband services, particularly in the access network. It is important that NBN Co maintains and continues to work towards this primary objective with no distraction.

Restrictions on investment activities

2.38 Clause 20 in the NBN Companies Act currently imposes a number of restrictions on investment activities in which NBN Co may partake.

2.39 Optus supports the continued application of the restrictions on investment activities set out at subparagraph (1)(a) and (1)(b). These require that any investment activities undertaken by NBN Co must be in relation to the supply of eligible services by NBN Co.

2.40 However, Optus submits that there should be scope for the third type of restriction at subparagraph (1)(c) to be strengthened. This provision currently allows NBN Co to effectively become a shareholder in any company that is engaged in the business of supply of a carriage service, for example this can include a RSP who purchases a NBN eligible services to supply to its end-user.

2.41 The Panel has noted that under Schedule 1, NBN Co can control a RSP for up to a 12 month period, only after which will NBN Co's aforementioned obligations apply. The Explanatory Memorandum to the NBN Companies Bill 2010 concluded that inclusion of this provision effectively:

> *Restricts NBN Co's flexibility to acquire shares in the capital of a corporation or divest itself of shares in a subsidiary to a degree, by ensuring that any subsidiary that it does not wholly own, but controls, will be subject to NBN Co's obligations.*[5]

2.42 While the provision at subparagraph (1)(c) directly addresses circumstances in which NBN Co is in a position to exercise control of a company, less certainty is afforded in circumstances in which NBN Co is a shareholder in another company where it is not in a position to exercise control of that company. Optus considers that in such circumstances, it is important that NBN Co's equivalence obligations should be applied.

[5] NBN Companies Bill 2010 and Telecommunications Legislation Amendment (NBN Measures – Access Arrangements) Bill 2010, Explanatory Memorandum, p.30

2.43 Optus reiterates that to ensure the wholesale-only status is not compromised, similar separation rules should require NBN Co to ensure that any dealings with related parties are conducted on a genuine arm's length basis. This same principle should apply irrespective of whether NBN Co has a controlling stake in the RSP or not — as such, neither party should be in a position to exert influence over the business dealings of the other in relation to the company.

Section 3. Changes to Part XIC of the CCA

3.1 In its March 2014 submission to the NBN Expert Panel, Optus discussed the importance for regulatory oversight of the NBN. The oversight of NBN Co is subject to numerous instruments, which have the effect of providing NBN Co with the discretion to determine key technical, operational and commercial terms of access to the NBN.

3.2 As such, it has created an unprecedented situation where the monopoly provider of fixed access infrastructure has the scope to limit the level of ACCC oversight through the establishment of 'commercial' agreements with RSPs.

3.3 In its reply to the Framing Paper, Optus proposed that NBN Co be subject to a more direct form of regulation. Optus therefore reiterates its view that the Review Panel recommend:

(a) The legislative hierarchy should not apply to NBN Co; and

(b) NBN Co SAU should be withdrawn and replaced with Part XIC oversight.

3.4 Importantly, the existing Part XIC framework is likely to best balance both the certainty required to ensure access to the NBN is provided; and the ability for the ACCC to actively participate and intervene in the determination of key terms and conditions, where appropriate.

3.5 Optus submits that the most immediate and greatest benefit will flow from the removal of the legislative hierarchy provisions. This still allows both parties to commercially agree not to pursue regulatory options, but it prevents one party from unilaterally precluding regulatory rights. NBN Co has exploited this unintended consequence to prevent RSPs from having such rights under the WBA. This is discussed below.

Legislative hierarchy provisions

3.6 Optus considers that there are strong grounds to amend the current hierarchy provisions that were introduced into Part XIC by the Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009. Specifically, reference to access agreements prevailing over Access Determinations (section 152BCC), BROCs (section 152BDB) and SAUs (section 152CBIC) should be removed.

3.7 Detailed commentary on Optus' concerns with the operation of the hierarchy is set out in its March 2014 submission to the Panel. However, it is worth reiterating the principle of our concerns.

3.8 Optus acknowledges the description in the Discussion Paper outlining the Panel's view on the intended operation of the hierarchy provisions. The Panel state:

> *… 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.*[6] [emphasis added]

3.9 Optus agrees — where **both parties voluntarily agree** to alter terms of an access determination, such alteration is mutually beneficial and should be respected. But this is not

[6] Telecommunications Regulatory Arrangements, Consultation Paper, p.21

a description of the effect of the hierarchy provisions; rather it outlines the scenario present in the market prior to the 2010 amendments.

3.10 Prior to the 2010 amendments there was no hierarchy imposed by legislation. Operators relied upon contract law to mutually agree to terms that precluded regulatory remedies subject to other beneficial concessions. Optus is not aware that the absence of such provisions caused particular problems with the operation of access arrangements in the industry. Optus' experience in dealing with Telstra is that the parties were often able to reach commercial agreements on matters. In some circumstances these agreements expressly excluded either party's right to seek regulatory recourse. This largely related to pricing issues that might be subject to a future ACCC determination. The key point to note is that the decision to exclude regulatory recourse over the relevant matters was a mutual decision. If one party did not wish to proceed, both parties had to rely on regulatory determinations.

3.11 By contrast with the hierarchy provisions now in place any agreement is assumed to be automatically excluded from regulatory recourse. This is so regardless of whether that is the intention of either of the parties to such an agreement. This gives substantial power to the access provider (which by definition has market power) to impose its terms and conditions independent of regulatory determinations. As detailed in Optus' submission of March 2014 this has proved to be problematic for access seekers in their engagement with NBN Co. NBN Co has used the hierarchy provisions to force access seekers to sign an agreement in circumstances where there is not full agreement on all matters, because the alternative is refusal to supply the service.

3.12 This outcome is contrary to the views expressed by the Government in support of the provisions in the debate on the Bill in the 2010 Senate Committee. In response to proposed amendments that would have altered the operation of the hierarchy provisions, the Minister for Communications made the following statement:

> *I indicate that this has probably been the toughest of the amendments for us to consider. It has many things in it that are very, very attractive to the government. I understand the sentiment and I understand why the Greens are moving this, and I have spoken to many of the people who have encouraged them to, but, on balance, after much consideration—and I know this will disappoint some people in the industry—we will be opposing this amendment.*
>
> *As has been said, the amendment proposes that either party to an access agreement may cancel that access agreement where it is inconsistent with the terms of an access determination, binding rules of conduct or a special access undertaking which comes into force after the access agreement is made. The* ***amendment is based on concerns*** *raised by the Competitive Carriers Coalition* ***that Telstra could compel access seekers into accepting an unfavourable access agreement in order to guarantee supply*** *of a declared service. However, the revised part at 11C will not operate in this way.* ***Access seekers will not be forced to agree to unfair access agreements … But I do acknowledge the very legitimate concerns in industry, and I will be keeping a very close eye on how this plays out in reality****.* [7] [emphasis added]

3.13 The view put forward in Parliament was based on a set of behavioural assumptions which did not reflect the reality of the market, or the incentive for a monopoly supplier to exploit its monopoly power. Optus submits that in practice the hierarchy provisions have put access seekers in the position of signing agreements on terms they are not fully satisfied with. The concerns raised by industry have been borne out in practice — but by NBN Co rather than

[7] Senator Conroy, Senate Hansard No. 4, 26 November 2010, p.2355

Telstra. NBN Co has forced access seekers to agree to unfair access agreements in order to guarantee supply of NBN services.

3.14 The rationale in support of the provision was that it would provide certainty that commercial access terms would be honoured and provided incentives for parties to make commercial agreements. Optus considers that each of these points has limited practical merit with regard to NBN Co, especially when set against the reality that there is limited opportunity to strike genuine commercial agreements with NBN Co given its strict non-discrimination obligations.

3.15 Optus considers that there is merit in removing reference to access agreements prevailing over Access Determinations, BROCs and SAUs in sections 152BCC, 152BDB and 152CBIC respectively. It has not operated in the way Parliament intended and is proving to be more of a hindrance than a benefit in industry engagement. Furthermore, the absence of these sections does not preclude access seekers and access providers relying upon contract law to mutually agree to terms that preclude regulatory remedies subject to other beneficial concessions.

Functional focus of Part XIC

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.

3.16 Optus strongly supports the continuation of Part XIC. Part XIC, and its focus on promoting the long term interest of end-users, is the reason why there is competition in the communications market today. Adopting Part IIIA processes within Part XIC would result in the deregulation of resale fixed-line services and domestic transmission services; and it is doubtful whether any termination services could be regulated. Part XIC has been used effectively to force unbundling of bottleneck services and to address drivers of market power.

3.17 The fundamentals of Part XIC must be retained. Optus sees no merit in paring back the powers under Part XIC.

3.18 This sub-section examines the rationale for Part XIC and suggests some changes that would improve its operation going forward.

Part XIC is more than a facilities access regime

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.

3.19 While Part XIC had its origins in the essential facilities approach, in reality it has never operated under a strict interpretation of the doctrine. There are several key differences between Part XIC and the industry-wide access regime operating under Part IIIA. Part XIC is more than an essential facilities access regime. It does not limit intervention to areas of non-duplicable assets of national significance.[8] It does not limit declarable services to the use of a natural monopoly infrastructure facility.[9]

[8] See declaration criteria under Part IIIA of the CCA, s.44G(2).
[9] See service definition under Part IIIA of the CCA, s.44B.

3.20 Part XIC allows for the declaration of certain carriage services where declaration would promote the long term interest of end-users (LTIE). In addition, the ACCC has wide discretion to define services. The EM for the 1996 Bill makes this clear:

> *… the ACCC will have a high level of flexibility to describe the service, whether it be in functional or any other terms. This will enable, where appropriate, the ACCC to target the access obligations … to specific areas of bottleneck market power by describing the service in some detail, or to more broadly describe a service which is generally important.*[10]

3.21 This flexibility has directly led to improved competition in downstream markets. It is not clear that key resale services declared under Part XIC — such as wholesale line rental, line sharing service, wholesale ADSL, origination and termination services — would be declarable services under Part IIIA. Yet these services have been vital wholesale inputs for competition to develop in downstream related telecommunications markets. These services will become more vital during the transition to NBN as the economics of DSLAM deployment prevent greater use of the ULLS.

3.22 In practice, Part XIC operates as an ex ante competition regime but with only one remedy: standard access obligations and access pricing. This has worked well over the last 20 years where the driver of market power has been ownership of bottleneck infrastructure.

3.23 But there are limits to the ability of Part XIC to solve all competition issues in communications markets. Part XIC could not prevent Telstra from over-building the roll-out of competitive fixed-line infrastructure in the late 1990s. Part XIC could not prevent Foxtel and Telstra monopolising the Pay TV market. Part XIC does not appear to be able to prevent Telstra from offering low cost naked broadband services on the provision end-users forsake other regulatory rights.[11] And it appears Part XIC may not effectively deal with the bundling of products to extend monopoly power across horizontal markets.

3.24 Optus believes that the limitations of Part XIC may be further exposed as NBN rolls-out and addresses the key infrastructure issue in fixed-line telecommunications. Optus notes the ACCC's observation that Part XIC allows limited remedies in response to market power, some of which may not be applicable post NBN.[12]

The need for an ex ante competition regime

3.25 Optus sees merits in introducing elements within Part XIC that would align it with ex ante competition regimes, like that within the European Union (EU). There are many similarities between the two approaches, but there are sufficient differences which if remedied would benefit the Australian regime.

3.26 The EU approach and the approach under Part XIC are outlined in table 1 below. As a broad overview, the EU approach begins with the identification of relevant economic markets (both wholesale and retail). The regime proceeds to assess the level of competition in the market, and where it is found not to be effectively competitive, operators that have significant market power are identified. The EU regime allows regulators to impose a range of proportionate regulatory remedies on operators with SMP.

3.27 To some degree, Part XIC does act like an ex ante competition regime. Part XIC allows regulatory intervention where a market and a related market are not effectively competitive,

[10] Trade Practices Amendment (Telecommunications) Bill (1996), Explanatory Memorandum, p.46
[11] See the customer terms of the Belong ADSL product which prevent customers from using preselect services. https://www.belong.com.au/customer-terms
[12] ACCC Submission to Vertigan Review, Regulatory Issues Framing Paper, p.13

and where regulation would promote competition. The ACCC limits intervention to where it can identify an enduring competition bottleneck. This process involves identifying economic markets and assessing level of market power that exist within the market. Part XIC also allows the ACCC to make SAOs apply to only those operators with market power — although this power is rarely used.[13]

Table 1 The EU ex ante and Australian Part XIC approaches

	European Union: ex ante regime	Australia: Part XIC of the CCA
General overview	1. The European Commission identified a number of relevant markets based on principles of competition law.[14] 2. Regulators assess if the market is competitive, taking into account the relevant upstream and downstream markets 3. If the market is found to be uncompetitive, regulators then assess if there is an operator with SMP 4. Impose remedies on SMP operator	1. Declaration (standard access obligations) In its declaration inquiry, it identifies the relevant upstream and downstream markets and assess if declaration will promote the LTIE. 2. Final Access Determination (access terms)
Regulate based on	Markets (including services market and access to facilities)	Declaration of specific carriage service
Who the regime applies to	SMP operators only. Can also apply to a carrier when a carrier, jointly with the others, enjoys a position equivalent to dominance. SMP criteria:[15] - Dominance; High market shares[16]; overall size of the carrier; control of infrastructure not easily duplicated; technological advantages or superiority; absence of or low countervailing buying power; easy or privileged access to capital markets/financial resources; product/service diversification (eg bundled products or services); economies of scale; economies of scope; vertical integration; a highly developed distribution and sales network; absence of potential competition; barriers to expansion; barriers to entry.	Access Providers. Scope to apply SAOs to specific access providers, but this power is rarely utilised.
Market definition	Based on competition law principles and methodologies	Based on competition law principles and methodologies
Remedies	Access obligations[17], Price control & cost accounting obligations[18], Transparency[19], Non-discrimination[20],	Access obligations, access terms and conditions (price and non-price terms)

[13] SAOs for wholesale ADSL only applies to Telstra. ACCC, Final Access Determination No.1 of 2013 (WADSL), 29 May 2013.
[14] The EC has identified seven communications markets in which ex ante regulation may be warranted. This does not prevent member states from identifying other markets. See Recommendation 2007/879/EC (Recommendation on relevant markets).
[15] COM 2002/C 165/03 (SMP Guidelines)
[16] Although high market share alone is not sufficient to establish the possession of SMP, it is unlikely that a firm without a significant share of the relevant market would be in a dominant position on the market concerned. Thus, undertakings with market shares of no more than 25% are not likely to enjoy a (single) dominant position on the market concerned.
[17] Access Directive, Article 12
[18] Access Directive , Article 13
[19] Access Directive, Article 9
[20] Access Directive, Article 10

Accounting separation[21], Functional Separation[22], Regulatory controls on retail services (including not to unreasonably bundle services)[23], and other obligations as the regulator sees fit.[24]

How would it differ from Part XIC

3.28 Optus has identified three material differences between the current operation of Part XIC and an ex ante competition regime. These are:

(a) Focus on markets rather than declaration of specific services;

(b) Focus on operators with significant market power; and

(c) Greater range of remedies, most of which are less intrusive than access obligations.

Focus on markets

3.29 A focus on promoting competition in economic markets rather than identifying telecommunications carriage services which display bottleneck characteristics would enable the ACCC to take a more holistic view on telecommunications markets. Part XIC allows regulated access to certain infrastructure and to carriage services — it provides access to wholesale services to provide connectivity in downstream markets.

3.30 Optus notes that there is a disconnect between the declaration of services and promotion of competition in specific markets. Some declared services relate to more than one market — MTAS relates to the markets for termination of calls on specific mobile operators' network and promotes competition in the market for fixed-to-mobile calls. On the other hand, many declared services impact upon the same downstream market — the fixed line communications market is impacted by the ULLS, WLR, LSS, PSTN OTA, and WADSL declarations.

3.31 Generally this approach has not been problematic due to effective management by the ACCC. But this is not always the case.

3.32 There are times when declaring a service does not pay sufficient regard for impacts in related downstream markets.

(a) This can occur where technological or market changes occur that alter the way in which the market utilises the declared service. For example, the Domestic Transmission Capacity Service (DTCS) was declared on the basis it would promote competition in downstream transmission markets. Over recent years the DTCS has become a vital element in the provision of IP service to corporate enterprise and government (C&G) end-user who require symmetric and uncontended data services. However, the Access Determination paid little regard to the impact of pricing elements of the DTCS had on the C&G market. As a result, the declaration has had little or no impact in addressing the lack of effective competition in this market.

(b) Or it can occur when a downstream market utilises regulated services as one of several bundled inputs into the final product. Thus allowing for cross-subsidisation

[21] Access Directive, Article 11
[22] Access Directive, Article 13A
[23] Universal Service Directive, Article 17
[24] Access Directive, Article 8

across different input costs, and dampening of the impact of declaration. The competition problem may not be solved by setting cost-based rates for some bottleneck inputs but not others. For example, bundling fixed broadband access with competitive mobile services, or bundling of more than one fixed-line market together.

(c) Or its effectiveness may be limited due to convergence of traditional communications networks and broadcasting. For example, Foxtel and Telstra have a monopoly position in the market for premium live sports content. The bottleneck lies in access to the content not in access to carriage services that provide Pay TV. The ability of Telstra to bundle Fox Sports with communications products enables it to exploit its market position across to retail fixed and mobile communications. It appears Part XIC cannot effectively deal with this issue.

3.33 Further, Optus anticipates that in a NBN-based market, access to bottleneck infrastructure may not be the main form of market power. Access to content and services and an ability to bundle these may be the drivers of market power. Scale may also provide some access seekers with significant cost advantages in the provision of NBN. There is a real chance that in a NBN-based access world, some providers will retain significant market power in related downstream markets and Part XIC will be unable to effectively deal with these concerns.

Focus on operators with SMP

3.34 An ex ante competition regime applies obligations upon operators within specific markets that have significant market power (SMP). Regulatory obligations are thus limited to operators that have the ability to exploit SMP to act and price independently of the market.

3.35 On the other hand, declarations under Part XIC are typically applied to *all* providers of declared services irrespective of their market power. Optus notes that Part XIC allows for application of SAOs to apply to specific operators, but this is not utilised by the ACCC. Only the WADSL Declaration is limited to the dominant supplier. All other Declarations apply to all providers of the service irrespective of the fact that Telstra remains the only supplier with SMP in the markets.[25]

3.36 A clearer obligation on the ACCC to apply regulation only on operators with SMP would reduce the regulatory burden on industry. There would be no detriment to end-users as non-SMP operators cannot act independently of the market and are thus bound by market discipline.[26]

Wider range of remedies

3.37 A wider range of remedies could be imposed that better address the source of the market power. It is foreseeable that a range of competition problems may arise for which access obligations are not the most efficient or effective solution. For instance, in the corporate and government market, it may be efficient to impose broad non-discrimination wholesale obligations on Telstra; or obligations that prevent Telstra from offering sign-on and retention payments to clients. These obligations are not available under Part XIC.

3.38 Part XIC has a limited range of regulatory options. Upon declaration, the ACCC can only impose SAOs together with price and non-price terms of access. All declared services under Part XIC have the exact same remedy irrespective of the competition problem identified.

[25] Exception is termination services, where all networks have market power on the market to terminate calls on their own networks.
[26] An ability to act independent of the market is the key assessment for SMP.

Optus notes the ACCC's observation that it is limited in its ability to impose structural remedies such as non-discrimination and separation obligations.[27] In addition, the EU ex ante regime contains a requirement that the remedy be proportionate to problem. No such requirement exists in Part XIC.

3.39 Optus sees merit in allowing the ACCC greater flexibility to impose the full range of possible regulatory remedies with the requirement that it be proportionate to the problem identified.

Relationship to Part XIB

3.40 Optus acknowledges that one possible response to the above discussion is that competition issues are best left to Part XIB. But Part XIB is fundamentally different from an ex ante competition regulation regime.

3.41 The primary purpose of Part XIB is to prohibit a service provider with a substantial degree of market power from engaging in conduct which has either the effect or purpose of substantially lessening competition.[28] However since its enactment in 1997, Part XIB has not been effective in restricting Telstra from engaging in anti-competitive conduct and promoting competition in the relevant markets.

3.42 Part XIB is an ex post competition regime. The ACCC can only issue a Competition Notice or any person can only institute proceedings for damages and/or injunction if Telstra has already engaged in specific anti-competitive conduct. In other words, Part XIB is not about controlling Telstra's behaviour before it could engage in anti-competitive conduct but rather punish Telstra if it did engage in anti-competitive conduct.

3.43 The ACCC has in the past issued a number of Part A Competition Notices to Telstra, including:

(a) May 1998 with respect to Telstra's anti-competitive conduct in the internet market — in place until June 1999. No action taken;

(b) August 1998 with respect to Telstra's customer transfer process. Three subsequent notices were issued and the ACCC commenced Federal Court action before the ACCC and Telstra reached a settlement agreement in February 2000;

(c) September 2001 with respect to Telstra's supply of wholesale and retail ADSL services to its wholesale and retail customers — in place until May 2002. No action taken;

(d) March 2004 with respect to Telstra's pricing behaviour on broadband services — revoked in February 2005 following agreement between Telstra and the ACCC; and

(e) April 2006 with respect to Telstra's pricing behaviour on wholesale line rental. In 2007, the Federal Court ruled that the Competition Notice was invalid on the basis of procedural fairness.

3.44 As it shows, whilst the ACCC had in the past commenced actions against Telstra under Part XIB, no enforcement action has resulted and Telstra remains the dominant provider of fixed broadband and voice service.

3.45 Although amendments were made to Part XIB in 2009,[29] the ACCC has not issued any Competition Notice since. The ACCC in its Telecommunications competitive safeguard 2012-

[27] ACCC Submission to Vertigan Review, Regulatory Issues Framing Paper, p.13

[28] Explanatory Memorandum, Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009, p.53

[29] Including, remove the requirement for the ACCC to undertake consultation before issuing a Part A Competition Notice; and clarify that Part XIB applies to content services supplied by carriers and CSPs.

13 Report states that it undertook one investigation into alleged anti-competitive conduct under Part IV and Part XIB during the reporting period. However it concluded the investigation on the basis that there was insufficient evidence to substitute the claim. This therefore illustrates the high evidentiary burden placed in substituting the claim, bearing in mind that court proceedings are costly to run. Optus submits a competition regime without effective penalty regime is unlikely to address anti-competitive behaviour.

3.46 Optus also notes that recent investigations into Wholesale ADSL[30] and Wholesale Line Rental[31] which were ultimately addressed by declaration under Part XIC. Similarly, in 2010 the ACCC took Telstra to the Federal Court for 'capping' its exchanges when in fact they were available for access. The Federal Court found that Telstra breached its SAOs under Part XIC and was fined for $18 million.[32]

3.47 This therefore shows that Part XIB has not been overly effective in preventing Telstra from engaging in anti-competitive behaviour. Rather, the ACCC has had to resort back to Part XIC to address competition issues.

3.48 Optus submits that Part XIB cannot be relied upon to regulate anti-competitive behaviour or incentives by the dominant operator. Optus supports reforms to Part XIC that would make it a more effective ex ante competition regime as the market migrates to a NBN-focused environment.

Part XIC and the concept of 'significant market power'

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

3.49 Optus refers the Panel to paragraph 3.25 of Optus' submission which discusses the differences between Part XIC and an ex ante competition regime. Optus sees merits in the introduction of a SMP test, and the more frequent use of targeted SAOs to specific operators with market power.

Part XIC and vectored VDSL 2

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 used in preparing advice to the Government on the structure of the Australian wholesale broadband market.

3.50 Optus understands the Panel is seeking views on the practical impact of the one kilometre exemption to extensions to existing superfast broadband networks contained in section 152AGA(6) of the CCA. The impact of this exemption is that the range of NBN regulatory arrangements would not apply to these extended networks. That is, there is no obligation to supply wholesale Layer 2 bitstream service on an open and non-discriminatory basis.

3.51 In its March 2014 submission to the Framing Paper, Optus stated that it would be an inefficient and ineffective use of limited Government resources to direct NBN Co to overbuild existing communications networks that can deliver NBN-equivalent services to end-users. Ultimately, end-users are likely to care about the ends and not the means: that is, they care

[30] ACCC, Telecommunications competitive safeguard 2011-12, p.31
[31] ACCC, Media Release, Competition Notice Lifted, 2 March 2007
[32] ACCC, Media Release, $18 million penalty imposed on Telstra, 28 July 2010

about the quality of the service received, not necessarily how these are delivered. Optus also submitted that the key principles for NBN should also apply to non-NBN Co providers of NBN-like services. Namely:

(a) Wholesale only, open access network with clear non-discrimination obligations; and

(b) Effective regulatory oversight.

3.52 However, it appears that extensions to existing superfast network operates as a 'loophole' that enables network operators to extend existing fibre networks to provide superfast broadband services while not being captured by the obligation attached to all other networks supplying superfast broadband services. A simple reading of the LBAS Declaration implies that it would not apply to existing networks that are extended under section 152AGA(6).

3.53 This could have the effect of superfast broadband services being delivered to residential and small business premises (be it FTTP or FTTB) not being covered by the suite of regulations aimed at ensuring wholesale-only, non-discriminatory supply of broadband services. Optus is concerned that continuation of this loophole has the potential to undermine the key principles on which the NBN project is based. Instead of having one national NBN (be it supplied by one or more network operators), there would be a patchwork system of NBN and non-NBN superfast networks and a patchwork of regulatory obligations.

3.54 Optus therefore sees merit in removing the extension loophole by removing sub-section 152AGA(6) that contains the one kilometre extension exemption clause. This would still enable promulgation of regulations to exempt specific extensions to existing superfast networks (s.152AGA(7)).

Revision to LTIE test

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?

3.55 Optus submits that the LTIE test does not need to be revised. Optus further submits that there is no need to place greater emphasis on the promotion of investment. It would be perverse outcome to do so at a time when the concept of infrastructure competition is being removed through the imposition of a Government-funded monopoly provider of services.

3.56 Under Part XIC the ACCC needs to have regard to the LTIE test in its declaration and final access determination inquiry. The LTIE test includes the following criteria:

(a) Promotion of competition in the relevant markets;

(b) Any-to-any connectivity; and

(c) Encourage the efficient use of, and investment in infrastructure.

3.57 As the Panel noted, the criteria themselves are very broad. This provides the ACCC with great flexibility in interpreting the criteria and the weight to be given in each of these criteria. This is particularly important in a dynamic industry like telecommunications. To place a greater emphasis on the promotion of investment could in effect damage competition in the

relevant markets — especially in circumstance where it may be more efficient to buy than to build infrastructure.

3.58 These criteria have not changed since Part XIC was first introduced in the CCA. Both the industry and the ACCC are familiar with the criteria and its interpretation. The LTIE test has worked well in the past and is the main reason why there is a greater level of competition than in the past. To change the criteria would risk creating uncertainty to the industry. Optus submits that this uncertainty would cause more damage than continual reliance on the current LTIE test.

Guidance on market definition

Is guidance required on the definition of a market?

3.59 In general, Optus does not consider legislative guidance is required on the definition of market. The ACCC has the relevant expertise and knowledge in defining the market. The ACCC uses similar market definition approach across all of its competition-related roles, including mergers and acquisition, lessening of competition tests, authorisation processes, etc. Section 4E of the CCA defines the market and there have been long standing economic principles and case laws in providing the relevant guidance to the ACCC in its interpretation of the market.

3.60 Given this long established and well accepted approach, legislative guidance is not required.

3.61 Optus sees merit in reinforcing the primacy of market analyses in the assessment for the need of ex ante regulation. Optus supports reforms to Part XIC that would see it more closely reflect the EU approach to ex ante competition regulation in the communications sector (see paragraph 3.25). Focusing on regulating network operators with SMP in specific communications markets will enable the ACCC to better target communications markets that are not effectively competition (for example, Corporate and Government telecommunications markets, the market for premium content and the market for bundles communications services).

Duration of Declaration

Whether there are services which should be declared on an enduring basis. 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.

3.62 Optus submits that it does not consider there are services that should be declared on an enduring basis. Optus also agrees with the Panel that the duration of the NBN Co SAU is too long. Optus agrees that a 30 year SAU is inconsistent with the broader government policy to sunset legislative instruments. It is also inconsistent with the duration of other carriage services' declaration, which is a 5 year term. A 30 year SAU is not appropriate for a dynamic industry like communications.

3.63 In its March 2014 submission in response to the Framing Paper, Optus submitted that the NBN Co SAU should be removed. However, should the SAU remain, Optus submits that the duration of the SAU should be amended to be consistent with the duration of other carriage services' declaration, i.e. a maximum of 5 years. Currently the ACCC has very little scope for intervention once the SAU has been accepted. Examples of the limitations include:

(a) The ability to set NBN price terms;

(b) The ability to review NBN price terms;

(c) Whether the regulatory determinations has any effect on access seekers; and

(d) The ability to participate in negotiations.

3.64 All of these are access terms that should be subject to regular reviews. Failure to do so poses significant risk to the industry as a whole. The benefits of regular reviews greatly outweighs the regulatory burden.

Standard Form of Access Agreements

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

3.65 Optus does not consider the SFAA processes work effectively. Optus refers the Panel to the discussion beginning at paragraph 3.6 above.

Standard Access Obligations

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

3.66 Optus submits that the SAOs should be revised to ensure greater equivalence between the service the access provider supplies to access seekers and self supplies to its retail arm.

3.67 Optus agrees with the Panel that the SAOs have not in the past ensured equivalence is achieved between the services Telstra supplies to its access seekers and self-supplies to its retail division. Failure to ensure equivalence of inputs has resulted in Telstra maintaining dominant market shares in almost all related downstream retail markets, notwithstanding the declaration of wholesale services.

3.68 As discussed above in paragraph 3.36, Optus believes SAOs should be better targeted at specific operators that have SMP in specific markets.

Non-discrimination requirements

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.

3.69 Optus supports the retention of the non-discrimination provisions. This principle is one of the fundamental principles of NBN and is key to the effective oversight of NBN Co. Please refer to section 2 in Optus' March 2014 submission in response to the Framing Paper.

Access Determinations

Effectiveness of access determinations

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?

3.70 Optus considers that access determinations remain an effective method to set access terms and conditions. Optus does not consider a reference offer model would better promote investment or the LTIE.

3.71 Due to the hierarchy of the different instruments, an access determination will have no effect where services are supplied through an access agreement or subject to an SAU. Optus supports repeal of section 152BCC. See discussion at paragraph 3.6.

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.

3.72 Under section 152BCA of the Part XIC, when making an access determination, the ACCC must consider the LTIE criteria; the legitimate business interests of the access provider, the interests of all persons who have the rights to use the declared service, the direct costs of providing access to the declared service, the value to a person of extensions, or enhancement of capability, whose cost is borne by someone else, the operational and technical requirements necessary for the safe and reliable operation of a carriage service, a telecommunications network or a facility, the economically efficient operation of a carriage service, a telecommunications network or a facility.

3.73 Optus submits that the criteria for making a FAD should remain the same. They are long standing principles. They have worked well in the past. The ACCC has the relevant experience and expertise in interpreting these criteria. The industry is also familiar with the criteria. To change the criteria would risk creating uncertainty to the industry.

3.74 Further, Optus considers no adjustment is required on the weight given to the various criteria. This provides the ACCC with the flexibility to determine on a case-by-case basis the appropriate weight that should be given in each of the criteria. Nevertheless from a practical point of view, it appears that even if the legislation states that greater weight should be given on a particular criterion, it would be very hard to quantify.

Different terms and conditions for different parties

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.

3.75 The ACCC should retain the power to specify different terms and conditions for different access providers and access seekers. Whilst this is rarely used, it still provides the ACCC with the flexibility to do so in circumstance that warrants it. An example is the WADSL Declaration where SAOs is applied on Telstra only.

3.76 Optus sees merits in allowing the ACCC to have a wider range of potential remedies, consistent with, for example, the EU regulatory regime. Further these remedies should only be applied to MNOs that have been assessed as having SMP with specific communications markets. See the discussion at paragraph 3.25. At the minimum, a positive obligation should be imposed for the ACCC to identify the operators that are subject to SAOs within Declarations rather than Declarations applying to all providers absent specific terms limiting its application. Optus recommends that this obligation should reflect the SMP test used

within the EU. This would ensure the ACCC only imposes costly regulations on operators that are able to operate independently of the market.

Methodology for determining prices

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 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?

3.77 Optus does not consider there is a need to legislate the methodology for determining wholesale prices. In addition, Optus does not consider there is a need to use Ministerial pricing determination in providing specific guidance to the ACCC.

3.78 The current legislation provides the ACCC with the flexibility to use the methodology as it sees fit. Optus considers the ACCC has the knowledge and expertise in determining the most appropriate methodology for the different declared services. Part XIC also allows for fixed principles that require future ACCC decisions to be consistent with the principles. Fixed principles provide sufficient certainty to access providers.

3.79 Whilst the legislation is silent on the methodology to be used by the ACCC, section 152BCA requires the ACCC to assess its pricing approach and its access terms (both price and non-price terms) against the LTIE criteria. To specify a specific methodology or to specifically require the ACCC to consider non-price factors might restrict the ACCC from achieving this. Optus notes the methodology that best promote the LTIE is likely to change for different markets and over time, depending on the specific facts of the case. For example, replacement cost approach could be suitable for infrastructure that is replicable and promotion of infrastructure investment best promotes the LTIE. But for other assets, or at another time, depreciated actual cost may better promote the LTIE as infrastructure competition becomes less relevant and assets become non-replicable.

3.80 The ACCC requires sufficient flexibility so as to use its expertise to assess potential methodologies against the LTIE. Further, Optus notes the use of fixed principles under Part XIC which bind future decisions. The use of fixed principles is sufficient to ensure industry certainty.

Merits review and access determinations

Should access determinations be subject to merits review?

3.81 Optus submits that access determinations should not be subject to merits reviews. The rationale for access determinations not to be subject to merits review still holds. The Explanatory Memorandum of the CCA states the following:

> *Merits review of ACCC decisions under the TPA can contribute to delays and regulatory uncertainty. This is problematic in the telecommunications sector which is characterised by rapid technological advances and changing market conditions …* [33]

3.82 The merits review processes can create significant delay and uncertainty, with associated high legal costs. The following are examples of cases which Telstra has appealed to the Australian Competition Tribunal (ACT):

(a) Final decision by the ACCC dated Aug 2006 in respect of the ordinary access undertakings submitted by Telstra for ULLS — the ACT upheld the ACCC's decision[34];

(b) Review of a decision by the ACCC to grant an exemption order to Telstra in respect of Optus' HFC network — the ACT upheld the ACCC's decision[35]; and

(c) Review of a decision by the ACCC in relation to the Telstra's ordinary access undertaking for ULLS in band 2 areas — the ACT upheld the ACCC's decision[36].

3.83 The ACT upheld the ACCC's decision in all these cases. It therefore follows that elimination of merits reviews has significantly improved the efficiency and timeliness of the access regime and reduced the cost of participation in the industry.

Procedural fairness and interim access determinations

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

3.84 Optus submits that the making of interim access determinations should not be subject to procedural fairness. Optus considers it would be quite difficult to preserve the effectiveness of the IAD while also imposing procedural fairness requirements.

3.85 To have an IAD issued is to provide certainty to the relevant parties in the interim. Under s152BCG of the CCA, the ACCC can only issue an IAD if there is urgent need to do so or if it is unlikely that a FAD will be made within 6 months after the commencement of the public inquiry. If there is a requirement to observe procedural fairness, it could potentially delay the time the ACCC takes to issue an IAD.

Binding Rules of Conduct

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

[33] Explanatory Memorandum, Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009, p.137
[34] Re Telstra Corporation Ltd (No 3) [2007] ACompT 3 (17 May 2007)
[35] Application by Telstra Corporation Limited [2009] ACompT 1 (22 May 2009)
[36] Application by Telstra Corporation Limited [2010] ACompT 1 (10 May 2010)

3.86 Optus consider the BROCs should be retained. While the ACCC has not set BROCs to date, it provides the ACCC powers to respond quickly to problems as they arise. This is important given the fast moving nature of the communications industry.

3.87 The legislative hierarchy provision (section 152BDB) in relation to BROCs should be removed.

Special Access Undertakings

Ordinary access undertakings

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.

3.88 Optus submits that the provisions on ordinary access undertaking should not be reinstated. The rationale to have it removed in the first place still holds. Telstra has in the past lodged a total of 26 undertakings to the ACCC, including 12 undertakings for ULLS service alone, 23 have been rejected or withdraw. Telstra has in the past used access undertaking as a means to undermine the ACCC's price signalling processes and delay arbitration decisions; and ultimately to undermine business certainty for access seekers.

3.89 To reinstate provisions on ordinary access undertaking would provide Telstra or other access providers the opportunity to engage in regulatory gaming. It therefore follows that eliminating access undertaking will only promote effectiveness and efficiency of the regime.

NBN Co use of SAUs

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

3.90 Optus submits that the NBN Co SAU should be removed. Instead, the ACCC should use the access determination to set the relevant access terms in relation to the declared services supplied by NBN Co. Optus discussed this in detail in its March 2014 submission in response to the Framing Paper. Specifically, refer to paragraphs 3.12 to 3.17, and paragraphs 3.42 to 3.56.

Fixed principles

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.

3.91 Optus supports the fixed principles powers within Part XIC. It enables the ACCC to provide ongoing certainty to industry that a consistent cost methodology will apply over time. Optus has highlighted that the effective use of fixed principles in ADs would provide NBN Co with sufficient certainty as to efficient cost recovery. As a result, there is no need to rely on NBN Co's SAU. Refer to paragraphs 3.12 to 3.17, and paragraphs 3.42 to 3.56 in Optus' March 2014 submission in response to the Framing Paper.

Ministerial pricing determinations

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.

3.92 Optus supports the removal of Ministerial pricing determinations. Optus sees little merit in this power in the current market and acknowledges the risk that it could undermine the independent regulator.

3.93 Further, in a NBN-focused market, Ministerial pricing determination may give rise to a conflict of interest between the Minister as an owner of NBN Co (maximise revenue) and the requirement to set prices that promotes the LTIE (minimise prices).

Access agreements and hierarchy of terms

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

3.94 Optus strongly disagrees with the legislative hierarchy outlined in Part XIC. Optus' position is discussed above starting at paragraph 3.6.

NBN Co's SFAA and the legislative hierarchy

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 mean its SFAA should formally be reflected in the hierarchy? Does NBN Co's potential market power mean that there should be scope for additional processes needed to ensure access seeker concerns can be effectively addressed before they enter into access agreements with NBN Co?

3.95 Optus strongly disagrees with the legislative hierarchy outlined in Part XIC. Optus' position is discussed above starting at paragraph 3.6.

Possible alternative approaches to Part XIC

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.

The second issue relates to the ability to obtain regulatory recourse while an access agreement based on an SFAA is in effect. Notably there is no immediate flow-through provision to the WBA.

3.96 Optus agrees with the fundamental aspects of Part XIC. See the discussion beginning at paragraph 3.16.

3.97 Optus strongly disagrees with aligning Part XIC with Part IIIA. Part XIC is more than an essential facilities access regime. It does not limit intervention to areas of non-duplicable assets of national significance. It does not limit declarable services to the use of a natural monopoly infrastructure facility. Any move to make Part XIC reflect Part IIIA would damage competition in the industry. Adoption of Part IIIA processes would result in the premature deregulation of resale fixed-line services and transmission services; and it is doubtful whether any termination services could be regulated

3.98 Optus sees merits in the refinement of Part XIC to better reflect an ex ante competition regulation regime. For example, that operating within the EU (see paragraph 3.25). Optus believes significant benefits would accrue from an approach that includes a:

(a) Focus on markets rather than declaration of specific services;

(b) Focus on operators with significant market power; and

(c) Greater range of remedies, most of which are less intrusive than access obligations.