

# **NBN Australia: Legislative Framework (governance and access arrangements)**

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This paper considers the legislative provisions that underpin the governance and access arrangements relating to the National Broadband Network (NBN) in Australia. It is not intended as an overview of the Australian Telecommunications regime or the broader legislation impacting on the NBN. There is also an expectation that this legislation could be changed, to align it with current government policy.

## Background

In April 2009, the Rudd Government (Labour Government) announced its commitment to build a National Broadband Network (NBN). The motivation was to deliver significant improvements in broadband quality, to address the lack of high speed broadband in Australia, particularly outside of the metropolitan areas, and to restructure the telecommunications sector.<sup>1</sup>

The NBN was envisaged as a national, wholesale only, open access, high speed broadband network. In order to respond to Australia's geographical challenges (huge land mass with population centres concentrated around the coast), the NBN was to use a mix of three technologies: primarily optic fibre, using FttH/FttP technology (to cover 93% of premises providing broadband speeds of upto 1 gigabit per second), fixed wireless and next generation satellite (to cover 7% of the premises in regional and rural Australia, providing peak speeds of up to 25 megabits per second).

In 2009, NBN Co, a new company, was established as a government owned business enterprise<sup>2</sup> to design, build and operate the NBN. NBN Co was to operate as a wholesale only company and provide access to the NBN to all telecommunications retail service providers on an open and non-discriminatory basis, thus promoting efficient and effective retail level competition.

Construction of the NBN began with a trial rollout in Tasmania in July 2009 and the first services went live in July 2010. Since then NBN Co has continued to provide

<sup>1</sup> *Statement of Expectations* released on 20 December 2010.

<sup>2</sup> <sup>A</sup> Government Owned Business Enterprise (GBE) is a Commonwealth Authority or Company as defined by the Commonwealth Authorities and Companies Act 1997 (CAC Act) and prescribed as a GBE under the Commonwealth Authorities and Companies Regulations 1997 (CAC Act Regulations). GBE's are also subject to The Commonwealth Government Business Enterprise Governance and Oversight Guidelines 1997 (Governance Arrangements). GBE's can be created in two ways – as a statutory corporation by a specific act of parliament, or, be registered as a company under the corporations law as a public company. GBE's possess features of both public and private sector organisations and can be described as public bodies engaging in private sector activities. Like private companies they engage in commercial activities aiming to make a profit, and, like public sector companies are required to execute government policies and have greater accountability requirements. The Minister for Finance administers the CAC Act. The oversight of GBEs are usually jointly managed between the Finance Minister and the relevant portfolio minister. Shareholder minister's exercise strategic control of GBE's consistent with their accountability to Parliament and the public by setting and communicating the government's objectives. The Ministers generally communicate jointly with the GBE (eg: by Issuing Statements of Expectations, setting out the Governments objectives).

details of its FTTH rollout (including an interactive rollout webpage map), contracted the supply of two satellites for remote access and commenced provision of point to point wireless services.<sup>3</sup>

The total cost of this project was anticipated at the time as A\$43 billion (peak funding 45.6 billion) over an eight year construction period but this figure kept changing. During the NBN roll out the Government was to retain full ownership of NBN Co, it would sit within the portfolio of the (now) Department of Communications (previously Department of Broadband, Communications and the Digital Economy (DBCDE) and will report to two shareholder Ministers (the Ministers for Finance and Communications). Funding of the project was essentially through taxpayer funds – to be sourced from government equity until NBN Co had sufficient cash flows to support private sector debt without explicit government support<sup>4</sup>. This model was envisaged as providing funding certainty, particularly during the construction phase of the NBN.

The legislation establishing the regulatory framework for the NBN was passed and received assent. In April 2011<sup>5</sup>. In order to deliver on the objectives of the NBN and its wholesale only, open access telecommunications market structure, the issue of Telstra and its role in an NBN context had to be addressed. In 2011, Telstra<sup>6</sup> agreed to a structural separation of its wholesale and retail services. This was the culmination of a process that began in September 2009, when the Government introduced legislation<sup>7</sup> designed in part to achieve the “voluntary” structural separation of dominant incumbent Telstra’s wholesale and retail business.<sup>8</sup> Related negotiations also included a financial agreement (finalised in 2011) which provided for Telstra to be recompensed for leasing access to its in-ground infrastructure (eg; ducts, pits and pipes), the decommissioning of its copper network and the migration of its customers to NBN Co.<sup>9</sup> The total value of the transaction was estimated to be A\$11 billion.

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<sup>3</sup> On 8 February 2012, the government announced a \$620 million agreement between NBN Co and the US Company Space Systems/Loral to design and build two satellites to deliver high speed broadband to rural and remote Australia. On 4 March 2013, NBN Co announced that Arianespace, the European satellite launch company had been awarded the \$300million contract to propel NBN's satellites into space. The satellites will allow fast Internet to up to 200,000 homes, farms and businesses in rural and remote Australia

<sup>4</sup> Statement of Expectations issued 17 Dec 2010

<sup>5</sup> NBN Companies Act 2011 and the Telecommunications Legislation Amendment (NBN Measures- Access Arrangements) Act 2011

<sup>6</sup> Telstra, Australia’s dominant Telco, owns the copper network connecting almost every house, the largest cable and mobile networks and a 50% stake in Foxtel, Australia’s largest subscription television provider.

<sup>7</sup> Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Act 2010

<sup>8</sup> A number of options appeared to have been under discussion, including enforced functional separation, the barring of bidding for future wireless spectrum, and the divestment of its Hybrid Fibre Coaxial cable assets.

<sup>9</sup> The total deal is estimated to be about A\$11 billion. It covers the migration of Telstra’s customers from Telstra’s copper and HFC networks to NBN fibre and the decommissioning of Telstra’s copper network. Thus enabling full structural separation. The Agreement also provided for NBN Co’s use of Telstra’s existing fit-for-use infrastructure such as ducts , pits and conduit and a right to acquire Telstra backhaul services and space in Telstra exchanges.

On 18th October 2011, this agreement<sup>10</sup> was approved by Telstra shareholders and on 7 March 2012, the Definitive Agreements were signed between the government, Telstra and NBN Co. This agreement is currently being renegotiated by the current government (Coalition Government) who won the elections in Sept 2013 as part of “re modelling” the NBN.

During 2010–2013 the cost, scope and impact of the NBN polarised many opinions in the telecommunications industry and in particular the two main political parties (incumbent: Labour vs Opposition–Coalition). In September 2013, the Coalition Government won the election and soon after issued an initial statement on the NBN. Referred to as an “interim statement of expectations”<sup>11</sup>, it directed NBN Co to continue with its FTTP rollout under existing contracts as rapidly and as cost effectively as possible pending the outcome of several reviews (strategic review, cost benefit analysis and review of regulation<sup>12</sup> and an audit of NBN Co's governance of the project). It also provided NBN Co with the flexibility to use a wide range of technologies<sup>13</sup> reflecting the Coalition Government’s proclaimed “technology agnostic”<sup>14</sup> attitude to deploying the NBN as opposed to the Labour Government’s commitment to FTTP technology. In addition, the Department of Communications undertook a 90 day study on Broadband availability and quality. Soon after, a new NBN Co Board was appointed including a new Chairman (Dr Ziggy Switkowski, former CEO of Telstra<sup>15</sup>) with the expectation that a new Corporate Plan based on the reviews would be developed to give the business an updated long term project goal.

In December 2013, NBN Co completed the Strategic Review of the NBN and delivered its findings to the Government. This found that the existing NBN Plans is forecast to miss its completion date by 3 years (now June 2024 vs December 2021) and would cost A\$ 73 Billion to complete. The higher funding requirement was attributed to the Labour Government’s optimistic costs and revenue estimates.

The Coalition government’s response was a multi-technology approach that would reduce costs from an estimated \$73 billion to \$41 billion and facilitate completion by

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<sup>10</sup> The agreement was between NBN Co, the Government, and Telstra

<sup>11</sup> Interim Statement of Expectations 24 September 2013

<sup>12</sup> On 13 Feb 2014 a Regulatory Issues Framing Paper was released for public comment and closing date for public submissions is 14 March 2014. NBN Panel of experts was appointed on 12 December 2013 to make recommendations on regulation and policy, including the role of government support for fast broadband, industry structure and competition, and other longer terms industry matters. The Panel is expected to provide its final report to the Government in June 2014.

<sup>13</sup> eg: to experiment with VDSL technology in multi-dwelling premises to reduce the backlog of 66,000 premises where those passed by the network currently cannot connect). The construction to be completed in 300,000 premises where construction contracts signed.

<sup>14</sup> Our NBN Policy. Malcolm Turnbull 12 September 2013 at [www.malcomturnbull.com.au/media/our-nbn-policy](http://www.malcomturnbull.com.au/media/our-nbn-policy)

Also see Sept 25, 2013 <https://theconversation.com/turnbulls-agnostic-approach-could-restore-faith-in-the-nbn>

<sup>15</sup> Dr Ziggy Switkowski appointed Executive Chairman of NBN CO (3 Oct 2013)

2019. The “multi technology” approach would combine fibre to the node, HFC, fibre to the premises, fixed wireless, satellite as well as any future advances in telecommunications technology.

This approach is expected to deliver access to wholesale speeds of up to 50 Mbps to 90% of Australia’s fixed line footprint and wholesale speeds of up to 100Mbps to 65%-75% by 2019. Further, this approach claims to enable homes/businesses to access the NBN sooner than the previous FTTP model. Consequently, the early flow of revenues are also expected to help fund the already reduced cost of construction with flow on benefits of lower debt levels and interest charges. A new Corporate Plan is expected by 1 July 2014 consistent with the “new look” NBN that the Coalition Government believes will “invest taxpayers money appropriately on the right technologies at the right time, by translating a long term milestone into a rolling series of realistic and actionable near term plans, and by being alert to upgrades in technology and shifts in consumer needs”.<sup>16</sup>

### **Legislative Framework**

The legislation implements policy commitments made by the Labour Government when it announced the NBN initiative on 7 April 2009. This legislation establishes the framework for NBN Co’s governance, ownership and operating arrangements. It also sets out the access regime to facilitate open access to the NBN for retail level telecommunications service providers subject to oversight by the Australian Competition and Consumer Commission (ACCC)<sup>17</sup>.

These arrangements establish NBN Co to operate as a wholesale only company, providing access retail level telecommunications service providers with access to the NBN on an open and non-discriminatory basis. This process is subject to oversight by the ACCC, Australia’s competition regulator<sup>18</sup>.

The legislative framework for the NBN is underpinned by two Acts, the NBN Companies Act 2011 (NBN Companies Act) and the Telecommunications Legislation Amendment (NBN Measures-Access Arrangements) Act 2011 (NBN Access Act).<sup>19</sup> These Acts added to the generic telecommunications regulatory framework including the Telecommunications Act 1997, the Competition and Consumer Act 2010 (CCA) and the Telecommunication Legislation Amendment (Competition and

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<sup>16</sup> [www.nbnco.com.au/about-us-media-news-strategic-review](http://www.nbnco.com.au/about-us-media-news-strategic-review) (12 December 2013)

<sup>17</sup> The Australian Competition Regulator (ACCC), is an independent commonwealth statutory authority, responsible for promoting competition, remedying market failure, enabling access to essential infrastructure and protecting consumers. The Competition and Consumer Act 2010 which replaced the Trade Practices Act 1974 is implemented by the ACCC.

<sup>18</sup> the Australian Competition Regulator (ACCC), which is an independent commonwealth statutory authority, responsible for promoting competition, remedying market failure, enabling access to essential infrastructure and protecting consumers

<sup>19</sup> The Acts were passed by Parliament on 28 March 2011 and received Royal Assent on 12 April 2011. All of these provisions are now operational.

Consumer safeguards) Act 2010 (CCS Act)<sup>20</sup> which regulate all telecommunications industry participants including the NBN.<sup>21</sup>

## **GOVERNANCE ARRANGEMENTS**

### ***National Broadband Network Companies Act 2011) (NBN Companies Act)***

The NBN Companies Act establishes the framework for NBN Co to build and operate the NBN. It sets out the structure and function of NBN Co and essentially limits NBN Co's operations to fulfilling its wholesale only mandate. Additionally, the Companies Act also sets out the process, subject to certain conditions being met, for the eventual sale of the Commonwealth's stake in NBN Co. This is in line with the expectation that the NBN will become profit making enterprise eventually.

The main provisions of the NBN Companies Act as follows:

#### *Definition of NBN Corporation*

Essential to the effective operation of the regime is its broad definition for the entity" that would build and operate the network. Referred to broadly as 'NBN Corporations', this definition includes the already established NBN Co, NBN Tasmania and any subsidiary/company that NBN Co could in the future in a position to exercise control over.<sup>22</sup> By broadly defining NBN Corporations in this manner, the Act ensures that not only NBN Co but also its subsidiaries are subject to the same wholesale only obligations and other obligations imposed on NBN Co, including those relating to functional separation and the divestiture of assets (discussed below). The main exceptions to this are the sale and ownership provisions of the network which only apply to NBN Co Ltd (discussed below) and reporting obligations which NBN Co in its capacity as a wholly owned Commonwealth company, prescribed as a Government Business enterprise must comply with in addition to other governance arrangements<sup>23</sup>. Subsidiaries of commonwealth owned companies are exempted from reporting obligations<sup>24</sup>.

#### Operational Obligations:

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<sup>20</sup> This Act introduced a series of reform including reintroducing measures that were in the Telecommunications Legislation Amendment (Competition and Consumer safeguards) Bill 2009 which was introduced to Parliament in 2009 and lapsed (previous Bill). This Act amends the Telecommunications Act 1997, Parts XIB and XIC of the Competition and Consumer Act 2010 (formally the Trade Practices Act 1974), Telecommunications (Consumer Protection and Services) Standards Act 1999 (the Consumer Protection Act), Also makes consequential amendments to the Radiocommunications Act 1992 and the National Transmission Network Sale Act 1998 (NTN Sale Act).

<sup>21</sup> The Competition and Consumer Act 2010 replaced the Trade Practices Act 1974.

<sup>22</sup> An NBN Corporation is defined in Schedule 122 of the Act as NBN Co, NBN Tasmania and any company over which NBN Co is in a position to exercise control over

<sup>23</sup> Commonwealth Authorities and Companies Act 1997 (CAC Act), the Commonwealth Authorities and Companies Regulations 1997 (CAC Act Regulations), the Corporations Act 2001, and Governance Arrangements for Commonwealth Government Business Enterprises (June 1997). The governance arrangements define the relationship between the company and its shareholder ministers (the Minister for Finance and the Minister for Communications)<sup>23</sup>, and includes Parliamentary scrutiny.

<sup>24</sup> Commonwealth Authorities and Companies Act 1997 (CAC Act),

Division 2 of Part 2 of the Companies Act sets out rules to ensure that NBN Corporations operate in a manner consistent with its wholesale only mandate. This includes specifying the types of persons to whom they can supply services to, the types of services and goods they can supply, and also the type of investments they can make.

*Supply of services -wholesale only basis*

The Companies Act limits NBN Co to only supplying services to carriers or service providers.<sup>25</sup> This ensures that NBN Co will only supply services on a wholesale basis, thereby giving effect in legislation to one of the key elements of the Government's NBN announcement.

Section 10 however provides an exception to this rule, by allowing NBN Co to supply network management services to a number of utilities which would otherwise not be able to receive a service from NBN Co. These utilities are limited to transport authorities, electricity, gas and water supply bodies, sewerage service supply bodies, storm water drainage services bodies and State or Territory road authorities<sup>26</sup>. However NBN Co is only permitted to supply a service that is used to carry communications necessary or desirable for specific uses by these entities. For example in the case of traffic authorities, this is effectively a basic connectivity services that permits monitoring of signals, so that the authority can monitor and manage traffic flows. In the case of the electricity industry for example, NBN Co could facilitate the rollout of smart grids and smart metering. By enabling these utilities to access services directly from an NBN Corporation (ie direct access to a Layer 2 bitstream service), they are able to avoid any potential issues that could arise by dealing with multiple intermediaries to cover their area of operation, making it difficult for example to coordinate an overall picture of their traffic flows.

*Restrictions on activities: services and investment*

Consistent with NBN Co's wholesale-only mandate the Companies Act limits NBN Co's business activities to the supply of goods or services, or investments, that are associated with its primary function as a supplier of wholesale telecommunications services. Thus NBN Co is prohibited from supplying a content service<sup>27</sup> such as broadcasting or online entertainment service<sup>28</sup> or any services or goods that are

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<sup>25</sup> Division 2, Section 9.

<sup>26</sup> Division 2, Section 10-16

<sup>27</sup> Part 2, Division 2, Subdivision B, Sections 17, 18 and 19

<sup>28</sup> Defined in section 15 of the Telecommunications Act 1997



incidental or ancillary to NBN Co's supply of an eligible service<sup>29</sup> referred to as "non communications services or goods"<sup>30</sup>.

Similarly, NBN Co's investment activities are also limited<sup>31</sup>. Under the Act, NBN Co may only make investments if it is related to the supply of eligible services<sup>32</sup> or goods directly related to those services, or, where the investment is in shares in a company which is carrying on a business as a carriage service provider (may only do so if it is necessary for the purposes of rolling out the NBN<sup>33</sup>), investing in Commonwealth or state securities, or earning interest from bank deposits. Any other form of investments are restricted. Again these provisions are designed to limit and focus NBN Co's activities on its core objectives and prevent potential impacts on competition through its entry into related but distinct markets.

#### *Functional separation*

Division 2, Part 2 of the Act provides a mechanism for the potential future functional separation of NBN Corporations. Functional separation requirements maybe imposed on one or more NBN Corporations , if necessary to improve transparency or promote competition. These provisions aim to cover the future where subject to how technology and the telecommunications market functions, the Government may need to require NBN Co to implement greater transparency and equivalence obligations.

The Shareholder Ministers have the flexibility to determine the appropriate form of separation at any time. However these arrangements must be based on the functional separation principles outlined in section 24 and could include full functional separation of all of the business units of NBN Co, or be more 'light touch', such as requiring separate financial statements and asset registers for different business units.

#### *Divestiture of Assets*

Part 2, Division 4, Sections 33-36 empowers the shareholder ministers to require NBN Co to dispose of one or more specified assets, or to transfer one or more specified assets from one NBN corporation to another. Whilst use of the latter powers (ie transfer assets to another NBN Corporation) is limited to the period

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<sup>29</sup> Eligible service- This is defined in section 152 AL of the Competition and Consumer Act 2010 as a listed carriage service or a service that facilitates the supply of a listed carriage service where the service is supplied or capable of being supplied by a carrier or carriage service provider (whether to itself or to other persons). A listed carriage service is a carriage service of the type listed in section 16 of the Telecommunications Act 1997, that is a carriage service between two points where at least one point is in Australia

<sup>30</sup> Section 18. The term "Non Communications services" is defined in section 5 of the Companies Act and includes all services that do not involve the supply of wholesale carriage services, or services that are incidental to the supply of wholesale carriage services.

<sup>31</sup> Part 2, Division 2, Subdivision C, Section 20

<sup>32</sup> Eligible service - same meaning as in section 152AL of the Competition and Consumer Act 2010

<sup>33</sup> Section 20 allows NBN Corporations to purchase other carriage service providers for the purposes of assisting with the roll out of the NBN. As NBN Corporations will operate on a commercial basis, they should be free to undertake prudent investment , consistent with normal commercial behaviour that is advantageous to fulfilling its mandate.

during which the commonwealth ownership provisions are in effect, use of the former powers (to require NBN Co to dispose of specified assets) are not limited in this way and could continue after NBN Co is privatised.

These powers provide a further mechanism to facilitate greater transparency in NBN Co's operations and equivalence of treatment. It could also be used to structure the eventual privatisation of NBN Co, to maximise its appeal to different investors. Post-sale, these provisions provide a strong mechanism to address potential concerns including those relating to competition arising from the integration of passive and active businesses, despite NBN Co's wholesale-only mandate. Overall these provisions appear to provide the Commonwealth with the powers it needs to respond to issues of integration that have previously caused concern in the Telstra context and also perhaps to forewarn NBN Co that the Commonwealth is able to exercise this power in the future.

#### *Carrier Licence conditions*

Division 5 enables the Minister to impose a condition on NBN Co's carrier licence, requiring it to provide a specified telecommunication service<sup>34</sup>. This would be a mandatory service and would be specified by the Minister following consultation with the ACCC and NBN Co<sup>35</sup>. Equally, the Minister may also make a condition prohibiting NBN Co from providing a specified carriage service to carriers or service providers.

These provisions provide a useful tool for the government to ensure that NBN Co meets its objectives in terms of coverage<sup>36</sup> and the provision of services. Using these means (i.e imposing a carrier licence condition) has previously been used to establish coverage obligations as in the case for example of Optus' network roll-out and Telstra's CDMA switchover. If required, the Minister can also use this mechanism to specify the layer at which NBN Co should operate. Currently NBN Co has indicated that it will provide Layer 2 bit stream services over its fibre network which appears to be consistent with the Governments view that NBN Co should operate at a lower rather than a higher layer in the network stack.

#### *Commonwealth ownership and privatisation arrangements*

Part 3 of the Companies Act sets out the rules governing the ownership of NBN Co. This makes it very clear that NBN Co must remain in full in full commonwealth ownership until the communications minister declares that the NBN is built and fully operational. Ensuring the Commonwealth retains ownership of NBN Co until it is built and fully operational enables the Commonwealth to pursue its objectives in the rollout of the network and also guarantees consistency with NBN Co's wholesale only mandate. These provisions also include process for the commonwealth to transfer its ownership of NBN Co.

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<sup>34</sup> Part 2, Division 5, Section 37-40 and Division 6, sections 41 and 42

<sup>35</sup> Section 42

<sup>36</sup> ie 93% of premises to be connected with fibre-to-the-premises infrastructure, 3% to be connected with next generation wireless and satellite technologies

Part 3 of the Act sets out the arrangements for the future privatisation of NBN Co. Essentially, a sale of NBN cannot occur until a Productivity Commission<sup>37</sup> inquiry into the NBN regulatory framework has been concluded<sup>38</sup>, the Parliamentary Joint Committee on the Ownership of the NBN (established by this Act<sup>39</sup>) has examined this report, and the Finance Minister has declared that conditions are suitable for carrying out an NBN sale scheme.

Subsequent to the Commonwealth sale of its stake in NBN Co, the Act provides measures that counter concerns relating to the possibility of NBN Co's wholesale only mandate being undermined by potential buyers. For example this could occur by retail service providers investing in NBN Co with a view to gaining control of it and favouring their downstream operations, undermining NBN Co's wholesale only mandate. In this type of scenario, the Act enables the Governor-General to make regulations regarding unacceptable private ownership or control situations in relation to NBN Co<sup>40</sup> and also if required enable the ACCC make a decision in that regard. The Productivity Commission when considering ownership and control issues as part of its Inquiry into the regulatory framework for the NBN, could also recommend limits on investments in NBN Co by retail service providers and this could be specified in statute prior to sale. Regarding the eventual sale of NBN, the Act contains specific arrangements relating to an NBN sale scheme<sup>41</sup>. These are largely aligned with previous legislation dealing with the sale of other commonwealth entities, such as Telstra<sup>42</sup>.

#### *NBN Co reporting obligations*

NBN Co, as a wholly owned government business enterprise is required to comply with specific reporting obligations. Most of these obligations are already required by the CAC Act. However, the CAC Act only applies to companies wholly-owned by the Commonwealth. As a result, if the Commonwealth transfers part of its stake in the NBN, the reporting obligations required by the commonwealth ownership provisions in the CAC Act would cease to apply as it is no longer "wholly- owned". Thus Part 4 of the Act ensures that NBN Co's reporting obligations would continue to apply during

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<sup>37</sup> The Productivity Commission is the Australian Government's independent research and advisory body on a range of economic, social and environmental issues affecting the welfare of Australians. Its role, expressed simply, is to help governments make better policies in the long term interest of the Australian community — [www.pc.gov.au](http://www.pc.gov.au).

<sup>38</sup> Part 3, Division 2, section 49 - the inquiry would look at a wide range of issues pertaining to the Government objectives for the NBN including the equity of access to broadband carriage services in metropolitan, regional, rural and remote areas, competition in telecommunications markets, the structural features of telecommunications markets, the structural organisation of NBN Co, the impact of on future annual Commonwealth budgets of a sale of the Commonwealths equity in NBN Co and issues relating to ownership and control of the NBN, as well as such other matters the Productivity Commission considers relevant.

<sup>39</sup> Schedule 2 to the Companies Act.

<sup>40</sup> Division 3, Part 3, Sections 69-70

<sup>41</sup> Division 2, Part 3, Subdivision C sets out arrangements for the NBN sale scheme

<sup>42</sup> Telstra (Transition to Full Private Ownership) Act 2005

the time when NBN Co ceases to be a wholly-owned commonwealth company but still holds the majority shares in NBN Co.

Key obligations include:

- Providing financial statements (Section 79)
- Notifying the communications minister and finance minister of significant events (Section 80)
- Keeping the shareholder ministers informed of the operations of NBN Corporations, and giving the Ministers such reports, documents and information in relation to those operations as the Minister requires (Section 81)
- Preparing a corporate plan for NBN Co at least once a year, covering a period of at least 3 years and not more than 5 years, and also keeping the Ministers informed about changes to the Plan (Section 82)

## **ACCESS ARRANGEMENTS**

### ***The Telecommunications Legislation Amendment (National Broadband Network Measures - Access Arrangements Act 2011 (NBN Access Act)***

The NBN Access Act<sup>43</sup> establishes the regulatory regime for the NBN. This Act builds upon the Companies Act, and amends the Telecommunications Act 1997 (Tel Act) and the Competition and Consumer Act 2010 (CCA 2010) to establish new access, transparency and non discrimination obligations for NBN Co's supply of wholesale services. Subject to the ACCC's oversight this legislation aims to give effect to a key objective of NBN Co i.e. to promote competition at the retail services level.

Key elements of NBN's access arrangements aim to:

- ensure services required by wholesale customers are available,
- that information about those services and the terms and conditions of supply are available and transparent,
- there is open, non-discriminatory access to those services, and
- subject to ACCC oversight

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<sup>43</sup> The NBN Access Act must also be read together with Telecommunication Legislation Amendment (Competition and Consumer safeguards) Act 2010 (CCS Act)<sup>43</sup> which enacted further reforms to the telecommunications competition regime and strengthened consumer safeguards. This Act (CCS Act) introduced a series of reform including reintroducing measures that were in the Telecommunications Legislation Amendment (Competition and Consumer safeguards) Bill 2009 which was introduced to Parliament in 2009 and lapsed (previous Bill). This Act amends the Telecommunications Act 1997, Parts XIB and XIC of the Competition and Consumer Act 2010 (formally the Trade Practices Act 1974), Telecommunications (Consumer Protection and Services) Standards Act 1999 (the Consumer Protection Act), Also makes consequential amendments to the Radiocommunications Act 1992 and the National Transmission Network Sale Act 1998 (NTN Sale Act) .

In order to meet those objectives, the NBN Access Act sets out a regulatory framework that encompasses the following key elements;

- 1) NBN Co must only supply services that are declared services<sup>44</sup>. Declared services must be supplied to access seekers on request<sup>45</sup> and are subject to oversight and scrutiny by the ACCC.**

Part XIC of the CCA establishes Australia's telecommunications access regime that is administered by the ACCC. The general purpose of the access regime is to facilitate access to services provided by monopoly or bottleneck infrastructure in order to promote competition in related markets. Specifically the object of Part XIC is to promote the "long term interests"<sup>46</sup> of end users of carriage services or of services provided by means of carriage services<sup>47</sup>.

In brief the telecommunications access regime can be summarised as follows. The ACCC, may, if it believes it to be in the long term interests of end users, "declare" a particular telecommunication service. A service is declared through a process that includes public consultation. Part XIC of the CCA 2010, empowers the ACCC to determine the terms of access to a declared service and to compel service providers to supply that particular service. A "declared" service is subject to regulation and carriers who supply a "declared service" must comply with the standard access obligations (SAO) in relation to that service. These include, obligations to provide the declared service to other carriers when requested, at a technical and operational quality equivalent to that which it supplies itself, and permit interconnection. Access providers are also able to provide the ACCC with undertakings (Special Access Undertaking (SAU)) and propose terms and conditions of supply for a declared service. The ACCC assesses the Undertaking's terms and conditions against the reasonableness criteria which includes consideration of the long term interests of end users, the legitimate business interests of access provider and access seekers. The ACCC can reject or accept the entire undertaking (it cannot accept parts). Public consultations are part of this process and there are rights of appeal to the Australian Competition Tribunal. If a service is not declared, it is not subject to regulation and are not subject to the standard access obligations (SAO). Service providers may negotiate the terms and conditions of supply with their customers and supply services or not based on commercial negotiations.

The NBN Access Act provides three mechanisms for NBN Co to provide services (Section 152 CJA). The process involved ensures that the resulting service is a "declared" services and subject to regulation under Part XIC. This establishes that all services supplied by an NBN Corporation must be a declared service.

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<sup>44</sup> unless the services are not eligible to be declared services) CCA, s. 152CJA(1).

<sup>45</sup> CCA, s.152AXB

<sup>46</sup> Broadly this includes promoting competition, ensuring any to any connectivity, encouraging economically efficient use of infrastructure and economically efficient investment in infrastructure.

<sup>47</sup> CCA, s.152AB(1)

- *NBN Co can choose to provide a service* - NBN Co can choose to provide services by publishing a Standard Form of Access Agreement<sup>48</sup>(SFAA) in relation to a service, or give a Special Access Undertaking<sup>49</sup> (SAU) to the ACCC in relation to the provision of access to a service;
- *The Minister makes it a condition of NBN Co's carrier licence that it must supply a specified service* - this could include services that NBN Co is not currently supplying. NBN Co must then give an SAU or formulate an SFAA in relation to that service; and
- *the ACCC may, under section 152AL(8A), declare<sup>50</sup> a service – this could include a service that NBN Co has not indicated it will supply, but which it is capable of supplying and the ACCC considers, after consultation, that it would be in the long-term interests of end-users to supply.*

This process, (ACCC declaring an NBN service<sup>51</sup>, accepting a SAU given by NBN Co<sup>52</sup> and/or NBN Co publishing a Standard Form of Access agreement (SFAA) that relates to access to a service<sup>53</sup> ensures that the services supplied by NBN Co, or are capable of being supplied by NBN Co, become a declared service.

By ensuring that all services provided by the NBN are declared services, services provided by NBN Corporations must comply with the standard access obligations and provide a services when requested based on the published offers. All offers, whatever the process used (SAU, SFAA or ACCC declaring a service) must be published. This provides transparency of the terms and conditions of services offered by NBN Co and NBN Co's customers and potential customers are made are aware of what services are available, and that they are entitled to receive non-discriminatory access to those services.

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<sup>48</sup> Standard Form of Access Arrangement (SFAA) – a document published on the NBN website, setting out the terms and conditions on which NBN Co is obliged to enter into access arrangements with an access seeker on request and declares the service to which it relates. NBN Co can decide to provide a service and publish an SFAA in relation to that service. NBN Co can also publish an SFAA regarding a new service not set out in the SAU, or publish an SFAA to complement/add to an SAU. Once the SFAA is published it becomes a declared service and subject to Part X1C. This will ensure that at all times NBN Co's customers and potential customers will know what services are available and that they can receive non-discriminatory access to those services.

<sup>49</sup> Special Access Undertaking (SAU)- a voluntary undertaking given to the ACCC by a supplier of telecommunications service specifying terms and conditions upon which it agrees to supply a listed carriage service or a service which facilitates the supply of a listed carriage service. A listed carriage service is of the type described in section 16 of the Telecommunications Act 1997- that is a carriage service between two points where at least one point is in Australia.

<sup>50</sup> Declared Service – ACCC compels service providers to supply a service by “declaring it”.

<sup>51</sup> CCA, s.152 AL(8A)

<sup>52</sup> CCA, s.152 AL(8A)

<sup>53</sup> CCA., 152AL (8D)

*ACCC declaring a service* (CCA 152AL (8A) – This process is modelled on the same processes used by the ACCC when declaring a service under the CCA<sup>54</sup> and includes public consultation and the consideration of all likely competition implications. A copy of any declaration made under this section will need to be published to provide transparency.

*Special access undertaking (SAU)*<sup>55</sup> – Section 152CBA of the CCA (as amended by the Access Act) allows NBN Co to give a Special Access Undertaking (SAU) to the ACCC<sup>56</sup> (as per its role as a carrier or carriage service provider). This is a voluntary written undertaking given to the ACCC by NBN Co, specifying the terms and conditions upon which it will supply a particular service, however, it will not specify all the terms and conditions of access to NBN Co's services. The SAU will include a commitment to be bound by the SAO's<sup>57</sup> and specify an expiry term for the undertaking<sup>58</sup>. The ACCC can make regulatory determinations (eg: Binding Rules of Conduct, Access Determinations) which specify terms and conditions for matters not directly dealt with by the SAU as well as in the event that commercial agreement between NBN Co and an Access seeker cannot be reached.

Once an SAU is accepted by the ACCC, it becomes a declared service. An access seeker can then request NBN to supply services on regulated terms and conditions in the SAU, Binding Rules of Conduct<sup>59</sup> or Access determinations<sup>60</sup>. Binding Rules of Conduct and Access determinations are regulatory instruments used to provide clarity and certainty in the interpretation of an SAU's terms, as an SAU is not required to specify all the terms and conditions of access to NBN Co's services. The ACCC's role in assessing and accepting an SAU is defined by Part XIC of the CCA 2010. Broadly, this requires that the ACCC must be satisfied that the SAU is reasonable and

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<sup>54</sup> CCA 152 AL(3). Process includes: ACCC holding a public inquiry under Part 25 Tel Act and prepares report about the inquiry under section 505 of the Tel Act. The report has been published and the ACCC is satisfied that making of the declaration would promote the long term interests of end users (meaning given in subsection 152AB(2))

<sup>56</sup> Section 152CBA(1) establishes two separate circumstances in which an SAU can be provided to the ACCC. The first provision relates to a person other than an NBN Corporation. The second provision (152CBA(1)(b)) relates to an NBN Corporation and who is, or expects to be, a carrier (according to the meaning under the Tel Act 1997) or carriage service provider supplying a listed carriage service of a service that facilitates the supply of a listed carriage service. An NBN Corporation may give a written undertaking to the ACCC in relation to access to the service, so long as the service is not a declared service under section 152AL(8A) or there is no access determination that is applicable to that service.

<sup>57</sup> CCA,s.152CBA(3A)

<sup>58</sup> CCA,s.152CBA(6)

<sup>59</sup> Binding rules of conduct - written rules made by the ACCC specifying any or all terms and conditions for compliance with Standard Access obligations or requiring compliance with any or all applicable SAO's in a manner specified in the rules. These rules are made when there is an urgent need to do so.

<sup>60</sup> Access Determinations- Written determinations made by the ACCC relating to terms and conditions for access to a declared service

will promote the long-term interests of end-users of the NBN.

In December 2011, NBN Co submitted a 'Special Access Undertaking' (SAU) to the ACCC which was later rejected, leading to a revised undertaking being submitted in Nov 2012. As a result current access to the NBN network is made under an interim agreement. In August 2013 the ACCC announced it was deferring its decision until after the Federal Election to be held in Sept 2013. However in December 2013, the ACCC accepted the SAU lodged by NBN Co, in accordance with section 152CBA or Part X1C of the CCA. This sets out the regulatory and pricing framework for the operation of the NBN until June 2040<sup>61</sup>.

*Standard Form of Access Agreement* - NBN Corporations can choose to provide services by formulating and publishing open offers on its website relating to those services<sup>62</sup>. The terms and conditions that comprise these offers are referred to as a Standard Form of Access Agreement<sup>63</sup> (SFAA). NBN Co is obliged to enter into an Access Agreement, at the request of an access seeker, on the terms and conditions contained in the SFAA<sup>64</sup>. The SFAA is not an access agreement instead, it acts like a template, or a standard offer of terms which the access seeker and NBN Co can sign up to which then results in an access agreement.

The trigger for the declaration of a service under this route is dependent upon NBN Co's self directed action. NBN Co can also publish an SFAA regarding a new service not set out in the SAU (eg conforming to the Ministers carrier licence condition), or publish an SFAA to complement/add to an SAU it has previously submitted to the ACCC.

NBN Co's act of publishing an SFAA on its website not only provides transparency of its terms and conditions, but also has the effect of declaring the service to which the SFAA relates, signalling the availability of non discriminatory access to those terms and conditions. This means any access seeker is now able to request access to the services covered by the SFAA (given that they are now declared services) and NBN Co must enter into an access agreement with that access seeker on the terms and conditions set out in the SFAA<sup>65</sup>. An SFAA therefore provides one means by which an access seeker may obtain access to NBN Co's services and once executed as an

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<sup>61</sup> <http://www.accc.gov.au/regulated-infrastructure/communications/national-broadband-network/nbn-co-special-access-undertaking-2013/final-decision>

<sup>62</sup> Section 152 CJA (2) NS 152 CJF

<sup>63</sup> Standard Form of Access Arrangement (SFAA)(CCA, ss 152 CJA (2) (b) and 152 CJF) where NBN CO decides to provide a service and publish an SFAA in relation to that service. The terms and conditions that comprise these offers are referred to as a Standard Form of Access Agreement (SFAA). NBN Co can also publish an SFAA regarding a new service not set out in the SAU, or publish an SFAA to complement/add to an SAU. Once the SFAA is published it becomes a declared service and subject to Part X1C. This will ensure that at all times NBN Co's customers and potential customers will know what services are available and that they can receive non discriminatory access to those services.

<sup>64</sup> CCA ss. 152CJA(2)(c) and 152 CJA (2) (d)

<sup>65</sup> CCA, s. 151DA



Access Agreement, NBN Co must comply with the applicable Standard Access Obligations (SAOs).

Entry into an Access Agreement for example based on an SFAA is a commercial decision for persons who may wish to provide services utilising NBN Co's network. NBN Co has formulated and published several SFAA's and these are available on its website. In December 2013, following the ACCC acceptance of the SAU, NBN Co published a Wholesale Broadband Agreement (WBA)<sup>66</sup>. The WBA constitutes an SFAA for the purposes of the CCA. The WBA sets out comprehensive pricing and non price terms in relation to the supply of NBN Co's services and includes operational and technical information in relation to those services.

The above provisions make it clear that NBN Co may thus comply with its obligations through commercial agreements with access seekers (eg; Access Agreements<sup>67</sup> based on an SFAA), an accepted SAU, or an ACCC determination that relates to access to a declared service. The process involved ensures that services supplied based on SFAA, or an SAU are declared services. The expectation is that the majority of services supplied by NBN Corporations would be supplied based on an SFAA or SAU. However Section 152 AL (8A) regarding the ACCC's power to declare a service after public inquiry, is considered necessary in order to "catch" those services that NBN Co is capable of supplying but not supplying, and which the ACCC considers after consultation, that it would be in the long term interests of end users for specified NBN Corporations to supply. As a result section 152AL (8A) provides the ACCC with the power to declare those services.

NBN Co is also able to negotiate specific terms with individual access seekers to vary the terms set out in an Access Agreement to those that are contained in an SFAA<sup>68</sup>. An Access seeker can request NBN Co to supply services on regulated terms and conditions in an SAU, Binding Rules of Conduct or and Access Determination<sup>69</sup>. An Access seeker does not have to enter in an Access Agreement to obtain access on these regulated terms (though parties can commercially agree to include those regulated terms in an Access Agreement if they wish). NBN Co, the ACCC and access seekers can enforce these regulated terms.<sup>70</sup> NBN Co will be permitted to negotiate with individual access seekers to vary the terms set out in an SFAA<sup>71</sup>, SAU or an

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<sup>66</sup> NBN Co: Wholesale Broadband Agreement

<sup>67</sup> Access agreements- an agreement between an carrier (access provider) and an access seeker for the supply of declared services. The requirements for a legally valid access agreement are set out in section 152BE of the CCA 2010

<sup>68</sup> An access seeker and NBN Co can negotiate and agree to different terms and conditions in an Access Agreement to those that are contained in an SFAA,(CCA 152 CJA(3)68 subject to NBN Co's non-discrimination obligations.

<sup>69</sup> An access seeker can request NBN Co to supply services on regulated terms and conditions in the SAU, Binding Rules of Conduct or Access Determinations. Although at the time of negotiations, the ACCC would not have made any Access Determinations or Binding Rules of Conduct in relation to that service.

<sup>70</sup> CCA, 152 BCQ,BDH

<sup>71</sup> CCA, section 152 CJA (3)

Access Determination , but this is based on clearly specified criteria, including being subject to NBN Co's non discrimination obligations and subject to ACCC oversight.

To the extent that there is inconsistency between these instruments, Part XIC establishes a hierarchy to allow parties to identify which terms and conditions would apply. This recognises the primacy of commercial agreements and consequently, the terms of an Access Agreement will override other instruments. Thus, if an access seeker requests that NBN Co enter into an Access Agreement, these Access Agreements will prevail over regulated terms specified by the accepted SAU, Binding Rules of Conduct<sup>72</sup> or Access Determinations<sup>73</sup>, to the extent of any inconsistency with the Access Agreement<sup>74</sup>. Further any Binding Rules of Conduct and Access Determinations will have no effect to the extent that they are inconsistent with an accepted SAU<sup>75</sup>. Thus this process recognises that commercially agreed terms and conditions of access are desirable where these can occur, but also provides a "regulatory fallback" (through the SAU process) in the absence of a commercial agreement. It has been argued that the opportunity for a regulated outcome can, in and of itself, enhance the likelihood of commercial agreement being reached. Either way, the supply of services by NBN Co will remain consistent with the legislative intent of Part XIC, which provides that all services supplied by NBN Co will be declared services and hence able to be regulated by the ACCC when necessary<sup>76</sup>.

**2) Once its services are declared, NBN Co is required to comply with NBN specific Standard Access Obligations<sup>77</sup>, known as Category B Standard Access Obligations (SAOs)<sup>78</sup>.**

Standard access obligations (SAO) require the provision of access to declared services on request so that access seekers are able to provide carriage services or content services based on or using declared service<sup>79</sup>. The Access Act establishes a separate category of standard access obligations applicable to the declared services provided by NBN Co<sup>80</sup>. This is because the current SAOs as specified under the CCA 2010<sup>81</sup> are designed for retail service providers and vertically integrated access providers who provide services to their own retail units as well as to other access seekers. This would not be appropriate for an NBN corporation operating as a wholesale only company. Consequently, the Access Act establishes two categories of SAOs. Category A SAOs, applicable to access providers other than NBN

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<sup>72</sup> Binding rules of conduct - written rules made by the ACCC specifying any or all terms and conditions for compliance with Standard Access obligations or requiring compliance with any or all applicable SAO's in a manner specified in the rules. These rules are made when there is an urgent need to do so.

<sup>73</sup> Access Determinations- Written determinations made by the ACCC relating to terms and conditions for access to a declared service

<sup>74</sup> CCA ss. 152AY, 152BCC, 152BDB and 152CBIC.

<sup>75</sup> CCA ss. 152AY, 152BIA, 152CBIB and 152CBIC.

<sup>76</sup> Explanatory Memorandum to the *Telecommunications Legislation (National Broadband Measures – Access Arrangements) Bill 2010*, p. 136.

<sup>77</sup> CCA, ss. 152AZ and 152BA.

<sup>78</sup> CCA, s. 152AXB

<sup>79</sup> CCA, s.152 AA

<sup>80</sup> CCA, s. 152AXB

<sup>81</sup> Section 152 AR CCA 2010 amended by Access Act 2011

Co<sup>82</sup> requiring an access provider to supply services at the same operational and technical quality as it supplies itself, and, three new Category B SAOs, designed to reflect the wholesale only activities of an NBN corporation<sup>83</sup>.

NBN-specific Category B SAO's require NBN Corporations to provide on request, access to declared services<sup>84</sup>, interconnection to facilities for the purpose of providing access to a declared service<sup>85</sup>, and to supply any service that is necessary to enable a service provider to provide carriage and/or content services by means of the declared service using the conditional-access customer equipment<sup>86</sup> by which NBN Co supplies the declared service<sup>87</sup>.

These ensure:

- a guaranteed supply of declared services subject to standard exemptions relating to the access seekers creditworthiness, ability to comply with the terms and conditions of access and ability to protect the integrity of the network and its workers.
- a guarantee of interconnection of facilities to the NBN; and
- NBN Co must enable access to equipment where it supplies a declared service by means of a conditional-access customer equipment (eg: an optical network termination unit to control access)

The terms and conditions by which access providers are required to comply with applicable SAO's maybe specified in one or a combination of different instruments such as Access Agreements<sup>88</sup>, Special Access Undertakings<sup>89</sup>, Binding Rules of Conduct<sup>90</sup> and Access Determinations<sup>91</sup>. NBN Co must comply with the SAOs (especially if there is inconsistency) in accordance with the hierarchy of these instruments established by Part XIC which recognise the importance of commercially negotiated conditions. Thus, commercially negotiated and agreed terms and

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<sup>82</sup> CCA, s 152 AR

<sup>83</sup> Section 152 AXB, CCA 2010 amended by Access Act 2011

<sup>84</sup> CCA, s. 152AXB (2).

<sup>85</sup> CCA, s. 152AXB (4).

<sup>86</sup> Conditional access equipment is defined in the CCA Section 152A. The definition intends to capture any customer equipment that: consists of incorporates a conditional access system that allows a service provider to determine whether or not an end user is able to receive a particular service; and is intended for use in connection with the supply of a content service or is of a particular kind of equipment that is specified in regulation.

<sup>87</sup> CCA, s. 152AXB(5)

<sup>88</sup> An Access Agreement — a commercial contract between the access provider and an access seeker which sets out negotiated terms and conditions of supply for an agreed period of time.

<sup>89</sup> A Special Access Undertaking — a document given by the access provider proposing the terms and conditions on which it will offer access to its services (if approved by the ACCC, access seekers can obtain supply on these terms)

<sup>90</sup> Binding Rules of Conduct — written rules made by the ACCC where there is an urgent need to make such rules, specifying any or all of the terms and conditions for compliance with any or all of the SAOs, or requiring compliance with any or all of the SAOs in a manner specified in the rules.

<sup>91</sup> An Access Determination — written determinations made by the ACCC relating to access to a declared service after conducting a public inquiry, specifying any or all of the terms and conditions for compliance with any or all of the SAOs

conditions (set out in an Access Agreement) will prevail over regulated terms in an accepted Special Access Undertaking, Binding Rules of Conduct, and Access Determinations.

### **3) NBN Co is subject to non-discrimination and transparency obligations<sup>92</sup>**

#### *Non discrimination obligations*

To reinforce the open access principles underpinning the NBN, the Access Act introduced non-discrimination obligations applying to NBN Co<sup>93</sup> in Part XIC of the CCA. This requires NBN Corporations to supply declared services on a non discriminatory basis, subject to limited exceptions. This ensures that all services provided by an NBN Corporation must be made equally available to all access seekers and the terms and the terms and conditions of those services must also be made equally available to all access seekers.

The requirements of the non-discrimination obligations relating to NBN Co are that:

- NBN Co must not discriminate between access seekers in complying with the SAOs and in the carrying on of certain activities related to the supply of declared services,<sup>94</sup> and
- NBN Co must not discriminate in favour of itself in the supply of declared services.<sup>95</sup>

As a basic principle, NBN Co must not discriminate between access seekers, although NBN Co can negotiate with individual access seekers to vary the terms and conditions set out in an SFAA, SAU or an access determination subject to ACCC oversight. Limited exceptions to the non discrimination obligations permit discrimination on the basis of creditworthiness or an inability or failure to comply with the terms and conditions of service, if it aids efficiency<sup>96</sup> and access seekers with like circumstances have an equal opportunity to benefit from any variations; or on grounds or circumstances specified in a legislative instrument made by the ACCC. The ACCC is required to monitor compliance and on 19 April 2012 has published guidelines relating to NBN Co's non-discrimination obligations<sup>97</sup>.

#### *Transparency obligations*

The transparency obligations requires NBN Co not to offer a service unless all the terms and conditions of that service has been published on its website. It also requires NBN Co to publish a summary of any changes it makes to its standard terms

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<sup>92</sup>CCA, ss. 152AXC and 152AXD.

<sup>93</sup>CCA, Section 152 AXC and 152AXD

<sup>94</sup>CCA, ss. 152AXC(1) and 152AXD(1).

<sup>95</sup>CCA, s. 152AXC(7).

<sup>96</sup>The concept of efficiency" is intended to be read broadly and is subject to normal commercial considerations.

<sup>97</sup>For further information about the ACCC's approach to assessing compliance with these non-discrimination obligations, please refer to the ACCC's *Part XIC Non-Discrimination Guidelines*. Available at: <http://www.accc.gov.au/regulated-infrastructure/communications/national-broadband-network/non-discrimination-under-part-xic/guideline>

(for example, on grounds of exercising exceptions to the non discrimination obligation such as justifying different terms on grounds of aiding efficiency). All access agreements must be lodged with the ACCC, but there is no obligation to publish or otherwise release an access agreement. However under section 152 BEB, if an NBN Corporation has entered into an access agreement on different terms and conditions set out in an SFAA, SAU or access determination, it must provide the ACCC with a statement, setting out the different terms and conditions within seven calendar days of the agreement being entered into. The statement will be kept in a register by the ACCC, and made available on the ACCC's website, providing transparency to other access seekers that an agreement varying the standard terms has been reached. This allows access seekers to assess whether they may in like circumstances also request services on the varied terms. The transparency obligation ensures that access seekers at all times are aware of NBN Co's service offers, what the standard terms and conditions are in relation to a service, and whether they too could have an opportunity to receive different terms and conditions that have been supplied to another access seeker.

### **Conclusion**

There is an expectation that the current NBN landscape is likely to be changed in line with the current Government's vision for the NBN, providing for a multi technology network design. More definitive indications are expected in July 2014 with the publication of NBN Co's Corporate Plan.

# Glossary

**Access agreements** – An agreement between a carrier (access provider) and an access seeker for the supply of declared services. The requirements for a legally valid Access Agreement are set out in section 152BE of the *Competition and Consumer Act 2010*.

**Access determinations** – Written determinations made by the ACCC relating to terms and conditions for access to a declared service.

**Access seeker** – A content service provider or carriage service provider that makes, or proposes to make, a request to NBN Co for access to its services, as defined in section 152AG of the *Competition and Consumer Act 2010*. Also used as a generic term to refer to customers of NBN Co's network.

**Ancillary services** – NBN Co defines this as the services supplied by NBN Co that facilitate the supply of the NBN access service, but excludes the facilities access service.

**Binding rules of conduct** – Written rules made by the ACCC specifying any or all terms and conditions for compliance with Standard Access Obligations or requiring compliance with any or all applicable Standard Access Obligations in a manner specified in the rules. These rules are made when there is an urgent need to do so.

**Carrier** – a carrier is a holder of a telecommunications carrier licence granted under the Telecommunications Act 1997

**Carriage service provider** – supplies or proposes to supply, listed carriage services (that is carriage between two or more points at least one of which is located in Australia) to the public

**Content service provider** – supplies or proposes to supply content services to the public (eg: Pay TV services)

**Carriage service** – This is defined in section 7 of the *Telecommunications Act 1997* as a service for carrying communications by means of guided and/or unguided electromagnetic energy.

**Customer** – NBN Co defines this as a carrier or carriage service provider that has entered into, or is otherwise subject to, an Access Agreement with NBN Co.

**Eligible service** – This is defined in section 152AL of the *Competition and Consumer Act 2010* as a listed carriage service or a service that facilitates the supply of a listed carriage service where the service is supplied or capable of being supplied by a carrier or carriage service provider (whether to itself or to other persons).

**Layer 2 bitstream** – A point-to-point data stream with defined interface protocol. It is independent of the underlying network technology and the services running over it.

**Listed carriage service** – A carriage service of the type listed in section 16 of the *Telecommunications Act 1997*, that is, a carriage service between two points where at least one point is in Australia.

**NBN access service** – NBN Co describes this as a Layer 2 service supplied on the NBN Co network between and including: a User Network Interface on a Network Termination Device; and the Network-Network Interface at the point of interconnect associated with the relevant Network Termination Device, for the purpose of enabling an access seeker or another service provider that is a customer of an access seeker to supply carriage or content services.

**NBN Co** – NBN Co Limited.

**Network termination device (NTD)** – The device on the customer end of an access network used to send and receive signals sent across the physical access medium.

**POI (point of interconnect)** – The geographical point where traffic stops being carried on the network of the access seeker and is given to the network owned by NBN Co to carry.

**Product components** – These are the UNI, AVC, CVC, NNI, and any new or varied product components introduced by NBN Co pursuant to the product development provisions in the SAU or any new or varied product components introduced by NBN Co that are Initial Products or Licence Condition Products.

**Regulatory determination** – A term used in the SAU to mean either an Access Determination or a Binding Rule of Conduct.

**Retail Service Providers (RSPs)**

The retail network service providers and application/content service providers are those that provide services to end users and have a direct customer relationship with the end users. Wholesale service providers do not have this relationship.

**SAU (special access undertaking)** – A voluntary undertaking given to the ACCC by a supplier of a telecommunications service specifying the terms and conditions upon which it agrees to supply a listed carriage service or a service which facilitates the supply of a listed carriage service.

**SAU term** – Refers to the term of NBN Co's Special Access Undertaking. This term commences on the date that the ACCC notifies NBN Co that it has accepted the SAU and ends on 30 June 2040.

**Standard Form of Access Agreement (SFAA)** – A document published on the NBN Co website which sets out terms and conditions on which NBN Co is obliged to enter into in an Access Agreement with an access seeker upon request, and declares the services to which it relates.

**Wholesale broadband agreement (WBA)** – The WBA sets out comprehensive price and non-price terms in relation to the supply of NBN Co's services; and the processes for providing NBN Co's customers with operational and technical information in relation to those services. The WBA is a Standard Form of Access Agreement.

**Wholesale services Provider(WSP)** – A provider of wholesale services to Retail Service Providers (RSP)

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