

# Chapter 3

## The Access Bill

3.1 The Telecommunications Legislation Amendment (National Broadband Network Measures – Access Arrangements) Bill 2010 (the Access Bill) amends the *Competition and Consumer Act 2010*<sup>1</sup> and the *Telecommunications Act 1997* to introduce new access, transparency and non-discrimination obligations relating to the supply of wholesale services by NBN Co and any of its corporations. The bill also extends technical and open access obligations to owners of other superfast networks.<sup>2</sup>

3.2 The Access Bill operates in conjunction with the National Broadband Network Companies Bill 2010 which establishes the regulatory framework covering the establishment, ownership and eventual sale of NBN Co. Details of this latter bill are covered in Chapter 2.

3.3 In announcing the NBN initiative, the government indicated that NBN Co would operate on an open and equivalent access basis, subject to clear oversight by the Australian Competition and Consumer Commission (ACCC). The Explanatory Memorandum states that:

Amongst other things, this approach responds to longstanding concerns about barriers to competition in the Australian telecommunications market flowing from Telstra's control of the access network and its vertical integration.<sup>3</sup>

3.4 In order to increase competition in the telecommunications sector, in November 2010 the Parliament passed the Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2010 (the CCS Bill).<sup>4</sup> These amendments require Telstra to functionally separate its operations if it does not voluntarily implement structural separation. As noted in chapter 1, NBN Co is currently negotiating arrangements for the use of Telstra's copper network and for the migration of customers from Telstra's copper and hybrid fibre-coaxial (HFC) networks to the NBN as contemplated in the Explanatory Memorandum for the CCS

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1 Formerly the *Trade Practices Act 1974*.

2 Explanatory Memorandum, National Broadband Network Companies Bill 2010 Telecommunications Legislation Amendment (National Broadband Network Measures—Access Arrangements Bill) 2010, p. 8.

3 Explanatory Memorandum, National Broadband Network Companies Bill 2010 Telecommunications Legislation Amendment (National Broadband Network Measures—Access Arrangements Bill) 2010, p. 9.

4 House of Representatives, *Votes and Proceedings No. 19*, 25 November 2010, p. 266.

Bill.<sup>5</sup> The amendments also streamline the access and anti-competitive conduct regimes.<sup>6</sup>

3.5 The Access Bill seeks to expand on these reforms to the telecommunications competition regime:

The CCS Bill is intended to reform the access regime in Part XIC of the CCA to reduce delays and opportunities for gaming and provide upfront certainty on access prices and terms and conditions. NBN Co will be subject to this reformed access regime, but with additional measures being introduced by the Access Bill to reflect the unique wholesale-only nature of the company. The amendments in the Access Bill need to be read together with the CCS Bill.<sup>7</sup>

3.6 An exposure draft of the bill was released for public comment on 24 February 2010 for which 21 submissions were received.<sup>8</sup> Several submissions to this inquiry noted the various amendments that flowed from the exposure draft process. For example Optus stated that the government 'positively responded to the feedback it has received from the industry and that a number of important amendments have been made to the Bills.'<sup>9</sup>

3.7 The key provisions of the Access Bill are:

- it makes all services provided by NBN Co 'declared' and thereby subject to supply and equivalence requirements and Australian Competition and Consumer Commission (ACCC) oversight;
- it establishes the mechanisms to ensure that the terms and conditions relating to the supply of services by NBN Co are transparent;
- it requires NBN Co to offer services on an equivalent basis, with discrimination only allowed where it aids efficiency and in other limited circumstances, subject to ACCC oversight;

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5 Explanatory Memorandum, Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2010, p. 3.

6 Explanatory Memorandum, Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2010, pp 1–2.

7 Explanatory Memorandum, National Broadband Network Companies Bill 2010 Telecommunications Legislation Amendment (National Broadband Network Measures—Access Arrangements Bill) 2010, p. 9.

8 The Hon. L. Tanner, MP, Minister for Finance and Deregulation and Senator the Hon. S. Conroy, Minister for Broadband, Communications and the Digital Economy, 'Draft legislation released for NBN Co operations', media release, 24 February 2010. Submissions on the exposure draft are at: [www.dbcde.gov.au/broadband/national\\_broadband\\_network/nbn\\_company\\_legislation\\_and\\_access\\_regime/national\\_broadband\\_network\\_company\\_legislation\\_and\\_access\\_regime\\_-\\_submissions](http://www.dbcde.gov.au/broadband/national_broadband_network/nbn_company_legislation_and_access_regime/national_broadband_network_company_legislation_and_access_regime_-_submissions), (accessed 16 March 2011).

9 Optus, *Submission 17*, p. 4.

- it requires the ACCC to publish details of non-standard access agreements to provide a high level of transparency;
- it establishes a level regulatory playing field for carriers who build or upgrade certain fixed-line superfast access networks after the introduction of the bill into Parliament; and
- it makes provision to simplify industry codes and standards for fibre infrastructure services.

3.8 Contentious aspects of the bill that were raised in submissions to this inquiry are elaborated on below.

### **Supply of services on a non-discrimination basis**

3.9 A core provision of the bill, and one of the underlying principles of the NBN, is that it '...will offer open and equivalent access to wholesale services, at the lowest levels in the network stack...'<sup>10</sup> Proposed section 152AXC of the *Consumer and Competition Act 2010* sets out the main non-discrimination provisions.

3.10 Proposed section 152AXC provides that:

- (1) An NBN Corporation must not, in complying with any of its...standard access obligations, discriminate between access seekers.

3.11 This statement however is qualified and allows an NBN corporation to discriminate in certain circumstances:

- (4) The rule in subsection (1) does not prevent discrimination if:
  - (a) the discrimination *aids efficiency*; and
  - (b) all access seekers with like circumstances have an equal opportunity to benefit from the discrimination; and
  - (c) in a case where the discrimination involves a *discount*, allowance, rebate or credit given or allowed, or offered to be given or allowed, on the condition that the access seeker acquires, or agrees to acquire, a particular *volume*, number, quantity or amount of goods, services or other things:
    - (i) a special access undertaking given by the NBN corporation is in operation; and
    - (ii) the discount, allowance, rebate or credit is in accordance with terms and conditions specified in the undertaking.
- (5) The rule in subsection (1) does not prevent discrimination on grounds specified in a written instrument made by the [ACCC].

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10 Senator the Hon P. Wong, Minister for Finance and Deregulation and Senator the Hon S. Conroy, Minister for Broadband, Communications and the Digital Economy, *Statement of Expectations*, December 2010.

- (6) The rule in subsection (1) does not prevent discrimination in circumstances specified in a written instrument made by the [ACCC].<sup>11</sup>

3.12 Submitters raised two key concerns from this proposed provision: 'aids efficiency' and 'volume discounts' – both of which are italicised above and discussed below.

**'Aids efficiency'**

3.13 Submissions on the exposure draft called for a clearer definition of conduct that 'aids efficiency'. As a result proposed section 152CJH of the *Competition and Consumer Act 2010* would require the ACCC to publish guidance material on non-discrimination within six months of the bill taking effect.<sup>12</sup>

3.14 Several examples of arrangements that may aid efficiency were given during the committee's hearings:

There are a range of different things ranging from technical and operational efficiencies in billing or ordering and provisioning or potentially there could be things like lowering our risk profile and that may result in a lower cost of capital for us somewhere down the track, immediately or even further...<sup>13</sup>

3.15 The majority of submissions to the inquiry agreed with the non-discrimination principle, however many believed the exemptions that are allowed are ill defined and not specific. In particular many submitters were concerned with the exemptions in subsection 4(a) which allow discrimination if the discrimination aids efficiency.

3.16 The Internet Society of Australia contended that 'efficiency' is too broad and imprecise a word to be used on its own in justifying discrimination between access seekers:

The current wording does not identify whether the NBN Corporation, the access seeker(s), or end-users should be the beneficiary of the extra efficiencies for the discrimination to be permitted.<sup>14</sup>

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11 Emphasis added. Proposed subsections 2 and 3 also allows an NBN corporation to discriminate if there is evidence that an access seeker is not creditworthy or repeatedly fails to comply with the terms and conditions on which the same or similar access has been provided. Proposed subsections 152AXC (7)-(9) also provide that an NBN corporation must not discriminate in favour of itself unless it has permission in a written instrument made by the Australian Competition and Consumer Commission.

12 Explanatory Memorandum, National Broadband Network Companies Bill 2010 Telecommunications Legislation Amendment (National Broadband Network Measures—Access Arrangements Bill) 2010, p. 12.

13 Mr J. Endres, Senior Regulatory Adviser, NBN Co, *Committee Hansard*, 9 March 2011, p. 47.

14 Internet Society of Australia, *Submission 9*, p. 3.

3.17 Optus also raised concerns about the lack of detail contained in the exemptions:

The current provisions of the NBN Access Bill give NBN Co wide discretion to determine the circumstances in which 'aid efficiency' and 'like circumstances' are to apply. This is not acceptable. It opens the risk for price terms to be offered in a way that tilts the playing field in favour of one access seeker.<sup>15</sup>

3.18 Both Optus and the Internet Society of Australia suggested changes to the 'aids efficiency' clause. The Internet Society of Australia argued that a new efficiency test be adopted that instead puts the onus on allowing discrimination only in cases where it does not result in decreased competition.<sup>16</sup> Optus called for the ACCC to have a greater role in determining what aids efficiency.<sup>17</sup>

3.19 The Competitive Carriers Coalition (CCC) objected outright to the principle of allowing discrimination on the basis of efficiency. The CCC believed:

...that attempting to apply a principle that measures efficiencies and attempting to translate those efficiencies into price reductions on the acquisition of specific services would be such an imprecise art and would create such a burden on the regulator, access seekers and the NBN Co. that it would likely be a path to disputation and potential discrimination over time.<sup>18</sup>

3.20 The Australian Telecommunications Users Group (ATUG) called for greater transparency in permitting discrimination that aids efficiency. According to their argument, any aids to efficiency should be investigated by the ACCC and made transparent so that any benefits of the economies of scale should be shared by all retailers.<sup>19</sup>

3.21 The Department of Broadband, Communications and the Digital Economy explained that discrimination based on efficiency grounds is a long recognised principle in competition policy:

Price discrimination that aids efficiency is permitted under the general access regime in Part IIIA of the *Competition and Consumer Act 2010* as well as the telecommunications-specific access regime in Part XIC.<sup>20</sup>

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15 Optus, *Submission 17*, p. 5.

16 Internet Society of Australia, *Submission 9*, p. 4.

17 Optus, *Submission 17*, p. 8.

18 Mr M. Healy, Chair, Competitive Carriers' Coalition (CCC), *Committee Hansard*, 4 March 2011, pp 15–16.

19 Mrs R. Sinclair, Managing Director, Australian Telecommunications Users Group (ATUG), *Committee Hansard*, 4 March 2011, p. 52.

20 Mr D. Quinlivan, Deputy Secretary, Department of Broadband, Communications and the Digital Economy (DBCDE), *Committee Hansard*, 9 March 2011, p. 66.

3.22 The ACCC also advised the committee that discrimination that aids efficiency is a well established practice in the telecommunications industry as well as across the broader competition regime:

...we have already considered those concepts in a number of other sectors such as aviation and railways—albeit I suspect not with the degree of scrutiny that we may get in this sector, so I would not suggest that our analysis in those sectors is highly developed. What I would expect is that the ACCC will approach the concept of efficiency in the existing legislation in the same way that it does in all its regulatory roles, which is that it will consider efficiency as an economic concept and not a more loosely defined concept. The impact of that is that it is unlikely that we will be looking at what individual parties might see as the efficiencies for their individual business cases as a determinant of whether a particular arrangement aids efficiency. In other words, we are likely to do a substantial competition analysis and we are likely to be highly cognisant and cautious about the impact of any arrangement upon competition in any downstream market.<sup>21</sup>

### **Committee comment**

3.23 The committee acknowledges the concerns raised by submitters regarding price discrimination. However, the committee notes that the bill's default position is that NBN Co must offer the same terms and conditions to all access seekers. Only in a limited range of circumstances can price discrimination be contemplated, and then only if all access seekers with like circumstances have an equal opportunity to benefit from the varied terms and conditions.

3.24 The committee is satisfied that the bill strikes the right balance in allowing price discrimination in limited and generally accepted circumstances where it 'aids efficiency'. If NBN Co reaches an agreement with different terms from the standard terms, it must advise the ACCC and the ACCC must publish the agreement on its website. This process offers both robust regulatory oversight as well as full public transparency.

### ***Volume discounts***

3.25 Submissions on the exposure draft and to this inquiry expressed concern that under the proposed amendments, NBN Co. could offer volume discounts that would favour the largest service providers, thereby granting them an unfair competitive advantage over smaller players.

3.26 The Explanatory Memorandum to the bill explains why volume discounts are permitted by the bill:

Given that differentiation of standard price terms can aid efficiency, the Access Bill does not prohibit volume discounts. However, recognising the

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21 Mr M. Cosgrave, Group General Manager, Communications Group, Australian Competition and Consumer Commission (ACCC), *Committee Hansard*, 9 March 2011, p. 60.

concerns of smaller players, the Access Bill provides that, should NBN Co choose to offer volume discounts, it would not be able to do so unless proposed volume discounting agreements are consistent with those set out in a SAU [Special Access Undertaking] that has been approved by the ACCC and is in operation.<sup>22</sup>

3.27 The increase in oversight powers of the ACCC in relation to volume discounts has been welcomed by a number of submitters, however many still argued that the discounts will have 'the un-intended outcome of transferring the existing Telecom monopoly situation from the 'last mile' monopoly to the new emerging 'Layer 3' market'.<sup>23</sup>

3.28 Many submitters believed that volume discounts would have the effect of creating a monopoly in the broadband industry. Optus posited the following scenario that was typical of number of submissions:

This raises a clear opportunity for Telstra to be given a price discount on the basis that the arrangement will help to underpin the long-term viability of the NBN thereby 'aiding efficiency'. Whilst the same terms might be made available to other access seekers in 'like circumstances', in practice no other access seeker is likely to qualify for the discounted access terms because it will not be in a position to provide the same services to NBN Co that Telstra can. Such an outcome would undermine the principle of equivalence and significantly tilt the NBN playing field in favour of Telstra.<sup>24</sup>

3.29 Peak telecommunications bodies and retail service providers submitted that volume discounts will have a negative impact on competition. The Communications Expert Group (CEG) stated:

...discounts could damage the NBN Co, because the NBN Co would have to make up the value of the discounts by surcharging smaller RSPs. This will lead to further reductions in competition as well as increasing pressure on the NBN Co and Legislators to provide additional protection, and reduce scrutiny of the NBN Co.<sup>25</sup>

3.30 AUSTAR also commented on this point:

Virtually all of the scenarios that we have considered where we believe this principle could be put into practice only serve to benefit the largest, incumbent RSPs. Implementing this provision will lead directly to anti-

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22 Explanatory Memorandum, National Broadband Network Companies Bill 2010 Telecommunications Legislation Amendment (National Broadband Network Measures—Access Arrangements Bill) 2010, p. 12.

23 Communications Expert Group, *Submission 7*, p.4.

24 Optus, *Submission 17*, p. 5. Similarly Communications Expert Group, *Submission 7*, p. 4; Austar, *Submission 14*, p. 6.

25 Communications Expert Group, *Submission 7*, p. 4.

competitive outcomes for the rest of the industry, as the current market conditions will simply prevail, a situation that not only contradicts the NBN's stated policy, objectives, but will also not meet LTIE [Long-Term Interests of End-users].

3.31 Telstra in its submission argued that discrimination in order to aid efficiency should be permitted:

Non-discrimination should not be an end in itself, but rather a means to promoting competition. In many circumstances, differential treatment of customers (i.e. discrimination) will be economically efficient and welfare enhancing, particularly where end-user preferences are heterogeneous.<sup>26</sup>

3.32 The consumer body ATUG called for greater transparency and the publishing of terms and conditions if discriminatory pricing occurred to aid efficiency:

ATUG's view is that NBN economies of scale should be captured by NBN Co and reflected in the uniform national wholesale price. Efficiencies that come from the internal operations of RSPs should be reflected in their retail price.<sup>27</sup>

3.33 One recommendation put forward by AAPT to overcome the possibility of creating a monopoly in the market, whilst still maintaining volume discounts, is to place a limit on the discount allowed if discrimination does aid efficiency:

...AAPT expressed concern about a situation arising where, for example, the two largest Retail Service Providers (**RSPs**) were afforded discounts in excess of say 20% (or perhaps even higher, eg 40% or 50%)...

If price discrimination is considered to be beneficial on economic grounds (and AAPT accepts that many economists do argue in favour of it) then AAPT considers that the simplest and safest way to avoid the negative outcome detailed above is to impose a 5% cap on the extent of the discrimination permitted.<sup>28</sup>

3.34 The Competitive Carriers Coalition (CCC) argued outright against volume discounts. The CCC stipulates that:

...it is an IP world, and with the traffic on the network the cost of providing the service is not increased by the volume of traffic going through the pipes...These networks are always on. Whether the pipe is full or just a trickle is going through it, the costs associated with the provision of that pipe do not change – and if they do change they change immaterially.<sup>29</sup>

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26 Telstra, *Submission 16*, p. 16.

27 ATUG, *Submission 19*, p. 9.

28 AAPT, *Submission 15*, p. 2.

29 Mr M. Healy, Chair, CCC, *Committee Hansard*, 4 March 2011, p. 18.



3.35 The CCC also raised concerns that the ACCC's process of investigating whether discrimination aids efficiency could be mired by disputation, delay, cost and confusion. It is argued that any potential benefit for the consumer could be greatly outweighed by the side effects of working in a regulated system.<sup>30</sup>

3.36 In its appearance before the Committee, the ACCC responded to submitters' concerns about the application of volume discounts that 'aid efficiency':

At the conceptual level we would probably think in terms of an overall competition analysis or efficiency where the volume discount was allied to other factors. We have undertaken, for purposes of preparing ourselves for whatever regime comes, a comparative analysis of some external regimes, domestically and internationally, and have also examined our past practices not only in this sector but across sectors. We are struggling to find an example where we have effectively ticked off on a volume discount by itself. I guess we are saying we would expect in the event that such arrangements were put to us that there would be a fairly high hurdle for people to convince us that they would aid efficiency.<sup>31</sup>

### **Committee comment**

3.37 The committee acknowledges the concerns raised by submitters regarding volume discounts. However, the committee notes that a volume discount cannot be offered by NBN Co unless it is in accordance with the arrangements set out in a Special Access Undertaking which has been approved by the ACCC. This process will ensure that all concerned parties have an opportunity to comment on any volume discount proposals and that approved discounts aid efficiency and do not have an adverse impact on competition.

3.38 The committee is satisfied that the oversight provisions of the bill will only allow volume discounts in specific circumstances where the ACCC is convinced that genuine efficiencies can be made. The committee also notes that the availability of volume discounts occurs in other sectors and that, to date, the ACCC has not identified any instances where volume discounts have aided efficiency on their own.

### **Level playing field arrangements**

3.39 Part 3 of the bill relates to level playing field arrangements. These proposed amendments to the *Telecommunications Act 1997* seek to impose 'specific technical and open access requirements on carriers who build or upgrade fixed-line superfast

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30 Mr D. Forman, Executive Director, CCC, *Committee Hansard*, 4 March 2011, pp 16–17.

31 Mr M. Cosgrave, Group General Manager, Communications Group, ACCC, *Committee Hansard*, 9 March 2011, p. 58.

access networks after 25 November 2010, the date the of the Access Bill's introduction into the Parliament.<sup>32</sup>

3.40 The level playing field amendments are intended to ensure that NBN Co will remain commercially viable whilst meeting its stated objective of providing fixed-line fibre access to 93 per cent of Australian homes.<sup>33</sup> The *Implementation Study for the National Broadband Network* identified that:

If, as proposed, NBN Co charges a uniform wholesale access price across its fibre footprint, this implies providing an implicit cross-subsidy to higher cost-to-serve areas from lower cost-to-serve areas. In effect, NBN Co will be charging an averaged price across the FTTP footprint...

This raises the risk that carriers other than NBN Co might construct fixed-line superfast access networks...only in high-income and low-cost, high-density areas and then undercut NBN Co's average price due to the lack of any need to subsidise operations in higher-cost areas. This cherry-picking approach could undermine Government's affordability policy by enabling the cherry-picker to undercut NBN Co's pricing based on its lower costs...

3.41 NBN Co's Corporate Plan outlines the importance of the level playing field amendments to its economic viability:

If NBN Co were to be 'cherry picked' by competitors in the most lucrative regions, and it resulted in a decrease of 50% of Greenfields connections...then the NBN projected returns would reduce to 5.4% [down from 7.0%]...The effect on total funding (levered) would be an extra \$1.2 billion in total funding and \$1.7 billion additional requirement in Government equity...In addition to the impact of cherry picking in Greenfields, there would be an impact in the most commercially attractive areas of Brownfields. This would take the returns well below 5%. As a consequence, equity funding would be significantly increased.<sup>34</sup>

3.42 The Implementation Study recommended that the government look at implementing wholesale and open-access arrangements for any future fixed-line superfast access network and consider the introduction of a universal service levy on owners of all such networks.<sup>35</sup>

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32 Explanatory Memorandum, National Broadband Network Companies Bill 2010 Telecommunications Legislation Amendment (National Broadband Network Measures – Access Arrangements Bill) 2010, p. 13.

33 Senator the Hon P. Wong, Minister for Finance and Deregulation and Senator the Hon S. Conroy, Minister for Broadband, Communications and the Digital Economy, *Statement of Expectations*, December 2010.

34 NBN Co, *Corporate Plan 2011-2013*, p. 52.

35 McKinsey-KPMG, *Implementation Study for the National Broadband Network*, 5 March 2010, Recommendations 73 and 74, p. 467.

3.43 Submissions to the inquiry concerning the level playing field arrangements were divided as to whether the provisions would have positive or negative effects on the industry and NBN Co's services.

3.44 Peak groups such as the Australian Telecommunications Users Group (ATUG) and the Internet Society of Australia believed that the arrangements would be in the best interest of the end users and the NBN as a whole.<sup>36</sup> The Australian Communications Consumer Action Network supported the arrangements on balance, but urged that they be regularly reviewed.<sup>37</sup>

3.45 Some existing network operators and telecommunications service providers disagreed in principle with the provisions, arguing that they would create a new monopoly in the emerging broadband market.<sup>38</sup> Other established network operators recognised the intent of the provisions for the sake of NBN Co's commercial viability, but stated that the arrangements were not well defined and are open to interpretation.<sup>39</sup>

3.46 The Competitive Carriers' Coalition argued in favour of the level playing field arrangements, believing that they would stop Telstra or another provider selecting the most valuable parts of the markets and building profitable islands of vertical integration surrounded by an NBN.<sup>40</sup>

### *Interpretation of an 'altered or upgraded' network*

3.47 A number of submitters, particularly existing network operators, requested that the terminology 'altered or upgraded' in proposed section 141 be better defined so as to make clear the intention of the provisions. NEXTDC, for example, argued that the definitions were ambiguous:

What is an upgrade or an existing network? Is it the upgrading of switches and equipment as is the case in the normal whether it be for maintenance or improvement in technology? What is an extension? Is it having a 1,000km network and extending it a further 10km? Is an extension having fibre out the front of a building and later installing a leadin to a customer?...<sup>41</sup>

3.48 iinet suggested that the level playing field provisions could be more clearly interpreted if amended to specifically refer to 'network units' rather than the broader and indefinite term 'networks':

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36 Internet Society of Australia, *Submission 9*. Similarly ATUG, *Submission 19*.

37 ACCAN, *Submission 11*, p. 5.

38 Internode, *Submission 6*, p. 2. Similarly HaleNET Internet, *Submission 8*, p. 2.

39 Mr T. Dooley, External Legal Representative, Amcom, *Committee Hansard*, 4 March 2011, p. 7.

40 Mr D. Forman, Executive Director, CCC, *Committee Hansard*, 4 March 2011, p. 19.

41 NEXTDC, *Submission 18*, p. 3.

A discrepancy appears in the Access Bill where the term “networks” is referred to in some of the proposed sections of the Telco Act and Competition Act, when the correct term should be “network units”...<sup>42</sup>

3.49 By providing a narrower definition of 'network units' (as defined in section 26 of the *Telecommunications Act 1997*)<sup>43</sup>, iinet believes the intent of the provisions would work more effectively as existing network owners could not '...cherry-pick NBN Co's high-value markets by upgrading relatively small or distinct sections of their networks...' <sup>44</sup>

### ***Possible impact on established networks***

3.50 Established network operators raised concerns that the level playing field arrangements would have an adverse impact on their current operations:

It must be remembered that many network builds are built with some future planning considerations. Therefore the cherry picking and technical standards sections of the proposed legislation have the effect of denying infrastructure based carriers the ability to extract revenue from their investments without any compensation.<sup>45</sup>

3.51 TransACT in particular expressed concern about how the level playing field provisions would impact on its business model:

TransACT is now contracted or under agreement to provide FTTP to approximately 15,000 premises across the ACT providing the residents and businesses with state-of-the-art telecommunications infrastructure.

The addition of the wholesale-only requirement, announced on 20 December 2010, makes it even more difficult for TransACT to continue deploying new fibre networks and competitively compete against NBN Co. The cost to TransACT to separate its wholesale and retail arms would be significant while also creating a major disruption to TransACT's normal business operations.<sup>46</sup>

3.52 TransACT has indicated that it will continue to consult with the Government to ensure that its vision for the NBN does not unduly affect TransACT's business.<sup>47</sup> Officials from the Broadband department also told the committee that 'the government

42 iinet, *Submission 22*, p. 5.

43 The *Telecommunications Act 1997* provides four definitions of the term 'network unit'. iinet proposes using the 'network unit' definition in section 26: a line link that connects distant places in Australia, where the link is at least 500 metres in length.

44 iinet, *Submission 22*, p. 5

45 HaleNET Internet, *Submission 8*, p. 3.

46 TransACT, *Submission 13*, p. 3.

47 TransACT, *Submission 13*, p. 3.

has been consulting industry and is considering whether amendments are required to clarify the operation of the provision.<sup>48</sup>

3.53 Submitters have also raised concerns about the effects that the level playing field provisions will have on competition in the fibre deployment industry. Internode asserts that:

This provision will have the effect of stagnating the development of the online content industry let alone ensuring that people moving into new housing developments face another decade of uncertainty as to the availability of high speed Internet services...

As written, these amendments will have the effect of ensuring no new fibre is deployed in Australia other than by NBN Co and to their unspecified multi-year roll out schedule.<sup>49</sup>

3.54 PIPE Networks also picked up on this point:

Retailers – those who supply to the end user – will have no-one from whom they can obtain those services but NBN Co. In our submission, this is not going to be in the long-term interests of end users or of the development of competition in the telecommunications industry in general.<sup>50</sup>

3.55 Telstra submitted that it should not be necessary for the government to legislate such obligations:

In a competitive or properly regulated market, competitive entry will only occur to the extent that it is efficient – that is, where the market can bear a new entrant.<sup>51</sup>

3.56 PIPE Networks suggested that there would also be substantial segments of the market for which NBN Co services would be unsuitable. They explain that some corporate and government customers will want to acquire services from multiple networks so as to 'not put all of their eggs in the one basket'.<sup>52</sup> Some customers will also require specific dark fibre, low latency fibres that will not be provided by NBN Co.

3.57 PIPE Networks argued that the principles of the level-playing field provisions could still be achieved by less harmful means:

For example, a maintenance or continuation of the universal service obligation levy or something very much like it or, as the opposition have

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48 Mr D. Quinlivan, Deputy Secretary, DBCDE, *Committee Hansard*, 9 March 2011, p. 66.

49 Internode, *Submission 6*, p. 2.

50 Mr D. Clapperton, Legal Counsel, PIPE Networks, *Committee Hansard*, 4 March 2011, p. 2.

51 Telstra, *Submission 16*, p. 14.

52 Mr D. Clapperton, Legal Counsel, PIPE Networks, *Committee Hansard*, 4 March 2011, p. 4.

advocated recently in the lower house, a subsidy provided by the government from the budget.<sup>53</sup>

### **Committee comment**

3.58 The committee acknowledges the concerns of submitters regarding the level playing field provisions and the possible impact on existing networks and businesses. However, the committee notes that some concerns have been overstated as the requirements do not prevent other companies from rolling out fibre networks. Furthermore the provisions do not require network operators to mirror NBN Co's operations or match its terms and conditions. They do however legitimately require them to operate within a comparable regulatory framework so that end-users have access to the same quality services regardless of the network provider.

3.59 The committee recognises that the intent of these provisions is to ensure that companies cannot target lucrative markets to deploy networks whilst leaving the high-cost, low-revenue segments of the market to NBN Co to service. If this cherry picking of the market were to occur, this would undermine NBN Co's ability to meet its objective of providing affordable and uniform access to high speed broadband, to all metropolitan, regional, rural and remote areas.

3.60 The committee notes that the government has been consulting with industry and is considering whether amendments are required to clarify that the focus of these provisions is on the mass market networks.<sup>54</sup> Given the degree of uncertainty perceived by submitters – in particular in relation to the circumstances in which these provisions apply – the committee would expect that the government will be able to give more certainty to the operation of the level playing field provisions.

### **Technology standards**

3.61 Two submitters to this inquiry raised concerns about specifying technological standards in the bill. According to the bill a Layer 2 bitstream service must be an Ethernet bitstream service and a superfast carriage service is defined in technological terms as providing a download speed normally more than 25 megabits per second.<sup>55</sup>

3.62 The Internet Society of Australia submitted that given the pace of technological change in the ICT industry, it is never appropriate to legislate for specific changes as '...technical detail in legislation...may drag on innovation in the future'.<sup>56</sup> According to the Society, Ethernet technologies have only become available and preferred for consumer broadband access in the past few years. They point out

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53 Mr D. Clapperton, Legal Counsel, PIPE Networks, *Committee Hansard*, 4 March 2011, p. 3.

54 Mr D. Quinlivan, Deputy Secretary, DBCDE, *Committee Hansard*, 9 March 2011, p. 65.

55 Telecommunications Legislation Amendment (National Broadband Network Measures—Access Arrangements) Bill 2010, Schedule 1, Part 3.

56 Internet Society of Australia, *Submission 9*, p. 3.

that in the future a new successor to Ethernet may be developed that is more preferable.

3.63 HaleNET posited the possibility that specifying a particular technology choice will severely affect competition and innovation in the retail fibre market.<sup>57</sup>

3.64 Both submitters recommended amending Part 3 of Schedule 1 of the bill to remove the technological specifications. The Internet Society of Australia also calls for a clearer definition of the amendments to Division 5A of Part 21 of the *Telecommunications Act 1997*.<sup>58</sup>

3.65 The Department of Broadband, Communications and the Digital Economy explained that the issue of technical standards:

...is an issue that we are looking at more closely. There is reason to provide some specificity so that there is certainty in the sector, but there are also arguments for flexibility.<sup>59</sup>

### **Committee comment**

3.66 The committee notes the concerns of some submitters about specifying strict, inflexible technical standards in legislation, in particular the requirement concerning layer 2 Ethernet. The committee suggests that the government give further consideration to introducing some flexibility into those requirements.

### **Other matters**

#### ***Application of Freedom of Information Act to NBN Co***

3.67 NBN Co is an incorporated company established under the *Corporations Act 2001*. Corporations Act companies are not normally subject to the *Freedom of Information Act 1982* (FOI Act).<sup>60</sup> Some submissions argued that NBN Co ought to be subject to FOI.<sup>61</sup>

3.68 In this regard the House of Representatives has passed an amendment to the Access Bill proposed by the Australian Greens. The amendment makes NBN Co

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57 HaleNET Internet, *Submission 8*, p. 2.

58 Internet Society of Australia, *Submission 9*, p. 3. HaleNET Internet, *Submission 8*, p. 2.

59 Mr P. Mason, Assistant Secretary, DBCDE, *Committee Hansard*, 9 March 2011, p. 70.

60 Mr D. Quinlivan, Deputy Secretary, DBCDE, *Committee Hansard*, 9 March 2011, p. 73. Mr Quinlivan explained that he was aware of only one exception to the general rule.

61 Internode, *Submission 6*, p. 3; Communications Expert Group, *Submission 7*, p. 5; and ACCAN, *Submission 11*, p. 5.

subject to the FOI Act with a targeted exemption to protect the confidentiality of its commercial activities.<sup>62</sup> The committee supports this amendment.

### *Cost of the NBN*

3.69 Professor Green of the Communications Expert Group suggested in evidence that the NBN could be built at significantly less cost than current estimates.<sup>63</sup> However it should be noted that Professor Green's estimates were based on his experience of developments of up to 3000 premises in Western Australia. In the committee's view, Professor Green is not comparing like with like. It is not possible to extrapolate the cost structures of this one example to the NBN as a whole, for example providing broadband services to regional and remote areas of the country.

3.70 The committee notes that the government's assessment of the cost of building the NBN at around \$43 billion (on the assumption of no deal with Telstra) was confirmed by the McKinsey/KPMG Implementation Study that the government released in May 2010.<sup>64</sup> Furthermore, the detailed NBN Co Corporate Plan, released in December 2010, assessed the required capital expenditure for the NBN, assuming a deal with Telstra, at \$35.9 billion.<sup>65</sup>

3.71 An independent assessment of the NBN Co Corporate Plan by Greenhill Caliburn validated the key assumptions made by NBN Co and found that the plan provides the government with a reasonable basis on which to make commercial decisions about NBN Co. The report found that NBN Co's Corporate Plan...

... has been completed to high professional standards, providing the level of detail and analytical framework that would be expected from a large listed public entity evaluating an investment opportunity of scale.<sup>66</sup>

3.72 Against this background the committee considers that Professor Green's observations about the cost of the rollout of a network need to be confined to networks of a scale with which he has direct experience.

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62 Revised Explanatory Memorandum, National Broadband Network Companies Bill 2010 and Telecommunications Legislation Amendment (National Broadband Network Measures—Access Arrangements) Bill 2010, p. 15. House of Representatives *Hansard*, 1 March 2011, pp 57–59.

63 Prof. W. Green, Director, Communications Expert Group, *Committee Hansard*, 4 March 2011, pp 26–27.

64 McKinsey-KPMG, *Implementation Study for the National Broadband Network*, 5 March 2010, p. 8.

65 NBN Co, *Corporate Plan 2011–2013*, December 2010, p. 23.

66 Greenhill Caliburn, *Review of NBN Co Limited's corporate plan*, February 2011, p. 1, [www.dbcde.gov.au/data/assets/pdf\\_file/0015/132711/Review\\_of\\_NBN\\_Co\\_Limiteds\\_Corporate\\_Plan-Executive\\_Summary.pdf](http://www.dbcde.gov.au/data/assets/pdf_file/0015/132711/Review_of_NBN_Co_Limiteds_Corporate_Plan-Executive_Summary.pdf), (accessed 16 March 2011).



**Recommendation 2**

**3.73** Subject to the amendment passed by the House of Representatives regarding the application of the *Freedom of Information Act 1982* to NBN Co, the committee recommends that the Access Bill be passed.

**Senator Doug Cameron**  
**Chair**

