



KordaMentha

**NBN Co Limited  
Corporate Governance Review**

8 August 2014

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## A. Executive Summary

### Introduction

1. KordaMentha has been engaged to provide a limited review of NBN Co Limited (**'NBN Co'**) in respect of:
  - a. NBN Co's governance, management and the accountability of its Board and officers, from its inception, in April 2009, to the change of government, on 18 September 2013;
  - b. Whether accurate and timely information about NBN outcomes has been provided at all times to Parliament and taxpayers. (**'Corporate Governance Review'**)
2. The details of the scope of the limited review are provided later in this report. This summary addresses the findings relating to the following:
  - a. Compliance with the Commonwealth Government Business Enterprise Governance and Oversight Guidelines October 2011 (**'GBE Guidelines'**);
  - b. Carriage of information
  - c. Procurement contracts
3. Our limited review involved, amongst other things, interviews of current and former NBN Co. Board, management and staff. Appendix E of this report is a list of the 25 persons requested to be interviewed, the 15 whom declined and the 10 whom accepted.
4. We observed the rules of procedural fairness or "natural justice" by providing a draft of this report to the current and former Board Members<sup>1</sup> and requesting their comments<sup>2</sup>. Comments we agreed with resulted in a modification to the body of this report. Comments we disputed or considered not relevant are included in full at Appendix F onwards of this report, together with our commentary as to why we did not consider a modification was required or appropriate.

### NBN Co Background

5. On 7 April 2009, the then Government announced the creation of a wholesale-only, open-access communications network, the National Broadband Network (**'NBN'**), aimed at delivering high-speed broadband and telephony services to the nation.<sup>3</sup> This represented the largest infrastructure project ever to be undertaken in Australia.<sup>4</sup>
6. The Government formed NBN Co as a Government Business Enterprise (**'GBE'**) to carry out the NBN project.
7. The Strategic Review summarised the progress of NBN Co from inception through to December 2013 as follows:
  - a. *Establishing a functioning organisation with 2,956 staff located in six offices across Australia;*
  - b. *Planning, designing, and commencing rollout of the FTTP network;*
  - c. *Negotiating and securing a complex long term contract with Telstra Corporation Ltd (Telstra) for the provision of a significant portion of the required infrastructure, concluding the Singtel Optus Pty Ltd and other Optus entities (Optus) Hybrid Fibre Coaxial (HFC) Agreement, and obtaining the approval of the Australian Competition and Consumer Commission (ACCC) for both agreements;*

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<sup>1</sup> Two Board Members declined to be provided with the Draft Report.

<sup>2</sup> Board Members were given a period of three [3] weeks to provide their comments on the Draft Report.

<sup>3</sup> NBN Co Strategic Review Report December 2013, page 10

<sup>4</sup> NBN Co Strategic Review Report December 2013, page 10

- d. Developing a supply chain and entering into supply arrangements with over 1,200 suppliers;
  - e. Developing a Wholesale Broadband Agreement (WBA) and signing up a number of Retail Service Providers (RSPs);
  - f. Developing a Special Access Undertaking (SAU); and
  - g. Securing a managed services agreement for interim satellite and completing contracts for the construction and deployment of two purpose-built NBN Co satellites.<sup>5</sup>
8. The Strategic Review, having set out the achievements that NBN Co had made, went on to conclude<sup>6</sup>:
- a. The current Corporate Plan was “*extremely optimistic and very unlikely to be achieved*”.
  - b. The Revised Outlook indicated that the fibre rollout project will take three years longer to complete than indicated in the Corporate Plan (June 2024 compared with June 2021).
  - c. The Revised Outlook estimated that Capital Expenditure will increase from \$37.4 billion to \$55.9 billion, and peak funding<sup>7</sup> will increase from \$44.1 billion to \$72.6 billion.
  - d. It is highly unlikely that debt funding will be available from a third party financier in the near to mid-term in the absence of a Government guarantee.

### NBN Co Boards

9. NBN Co was a “start-up” entity in 2009 and it has grown rapidly since then. The business has gone through a number of phases over the prior four year period. There have been a number of Boards during that period; for ease of reference we have identified the following phases:

**Table 1 NBN Co Boards**

Description	Period	Comment
<b>“Interim Board”</b>	April 2009 – July 2009	This Board constituted various civil servants and was an “interim board” whilst the “full board” was selected.
<b>“2009 Board”</b>	July 2009 – June 2012	This represents the period when the first “full” board was appointed and Mr Young was appointed Chair.
<b>“2012 Board”</b>	July 2012 – March 2013	July 2012 represented the end of the initial three year appointments for the 2009 Board Members. Three directors finished their appointments in July and August 2012. Three new directors were appointed during the first six months of this period.
<b>“2013 Board”</b>	March 2013 – September 2013	Covers the period from when Ms McKenna was appointed Chair through to the change of government.

<sup>5</sup> NBN Co Strategic Review Report, December 2013, page 11

<sup>6</sup> NBN Co Strategic Review Report, December 2013, pages 11-12

<sup>7</sup> Peak funding “...consists of equity funding plus net debt as at the end of the year for which total funding is at its peak.” NBN Co Strategic Review Report, December 2013, page 17

## Key Findings and Recommendations

10. Corporate governance focuses on the conduct of, and relationships between, the board of directors, management and the company shareholders.<sup>8</sup> There is no single model of good corporate governance<sup>9</sup> and NBN Co's corporate governance is assessed primarily against the GBE Guidelines.
11. Our key findings and recommendations are set out below.

### Compliance with the GBE Guidelines

#### *Board Composition<sup>10</sup>*

12. Each of the NBN Co directors since inception were skilled and experienced individuals.
13. However our conclusion is that the mix of skills and experience of these individuals was not appropriate for a company of the nature, scale and complexity of NBN Co.
14. The necessary scale and complexity of NBN Co's activities, especially in its initial years contributed to a heavy workload for directors. Monthly board papers were regularly in excess of 500 pages, with directors attending over 150 hours of meetings in both 2011 and 2012. Even a board with the exactly the right mix of skills would have struggled with the volume and complexity of the NBN Co board papers. We understand the current NBN Co board papers have been considerably shortened and focus on key strategic issues.
15. The two documented external Board Performance Assessments<sup>11</sup> both identified that the mix of individuals was not appropriate for a company of the nature, scale and complexity of NBN Co. Overall, the NBN Co Boards have been described to us as having a "lack of dirt under the fingernails", i.e. they had a collective lack of deep operational experience and insight in areas critical to success of NBN Co. There was a relative lack of:
  - a. experience in GBEs / working with government
  - b. telecommunications industry experience
  - c. construction and major infrastructure building experience
  - d. financial accounting and controls experience
16. Whilst some assessments of the skill mix of the Boards were undertaken, they were not mapped to the key strategic risks of NBN Co to ensure that the relative weighting and focus of skills were appropriate to the needs of NBN Co. Furthermore the skill assessment was binary in nature i.e. a director was considered to either have a skill or not, rather than measuring the extent of their specific relevant experience.

#### *Board Performance Assessment<sup>12</sup>*

17. The Board completed Annual Board Performance Assessments from 2011 to 2013, however no Board minutes, papers or similar official written records of the content of such reviews were apparently retained for 2011 and 2012.

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<sup>8</sup> *IFSA Guidance Note No.2.00*

<sup>9</sup> OECD Principles of Corporate Governance, Preamble p11-13, <http://www.oecd.org/corporate/oecdprinciplesofcorporategovernance.htm> [accessed 15 May 2014]

<sup>10</sup> Clauses 2.7 and 2.8 of the GBE Guidelines

<sup>11</sup> 2011 Board Performance Assessment conducted by Heidrick & Struggles and the 2013 Board Performance Assessment conducted by Johnson

<sup>12</sup> Clause 2.17 of the GBE Guidelines

18. The Chair provided written confirmation to the Shareholder Ministers each year that the assessments had occurred. However, in 2011 the Chair did not mention whether there were any areas of concern and in 2012 and 2013 the Chair confirmed that there were “*no areas of concern*” despite evidence to the contrary. The assessment in 2012 was undertaken internally by the Chair and in 2011 and 2013 externally by consultants, however the 2013 consultants were not independent as they were previously engaged to identify Board candidates. In addition, NBN Co has not published its process for such performance assessments on its website as required under the Board Charter<sup>13</sup>.
19. Whilst not required under the current GBE Guidelines, we recommend that future GBE Board Performance Assessments should be undertaken:
- for, and report directly to, the Shareholder Ministers, so they can assess whether any of the comments or issues raised in such reviews are “areas of concern”; and
  - by an independent external party.

#### *CEO Succession Planning<sup>14</sup>*

20. There is very limited evidence of a formal Chief Executive Officer (‘CEO’) succession plan being implemented and maintained by the Board prior to the commencement of Project North in around May 2013. Annual assurances were not provided by the NBN Co Board to the Shareholder Ministers in writing, although it is possible such assurances were provided orally.

#### *CEO Performance Assessment<sup>15</sup>*

21. Whilst not required by the current GBE Guidelines, we recommend that GBEs conduct annual CEO Performance Assessments against predetermined criteria and a written record of its content is officially presented to the Board and retained.
22. The Board lacked effective management and evaluation of the Chief Executive Officer (‘CEO’) as follows:
- There were no specific Key Performance Indicators (‘KPIs’) identified for the CEO, other than the overall one of delivering on the Corporate Plan.
  - The first assessment of the CEO, by the then Chair, was a limited review and occurred approximately from October 2012 through to February 2013, more than three years after the CEO’s appointment. The Chair orally presented the assessment to the Board, however no Board minutes, papers or similar official written records of its content were retained.
  - The 2013 Board took a more robust approach to the evaluation of the CEO. The second assessment of the CEO, by the then new Chair, took place in May 2013. It was a more detailed and formal assessment that measured the CEO’s performance against certain objectives. The Chair provided the written assessment to the Board which was retained. At this time, the Board also specifically addressed, in a formal manner, the question of succession planning for the CEO position..

#### *Strategic Risk Analysis<sup>16</sup>*

23. Whilst a formal risk register was established, we consider the Board did not devote enough time to the identification of the strategic risks associated with the NBN roll-out and ensuring enough focus was placed on proactive management of these key strategic risks.

<sup>13</sup> Clause 13.1 of the NBN Co Board Charter

<sup>14</sup> Clause 2.11 of the GBE Guidelines

<sup>15</sup> CEO Performance Assessments are not required by the GBE Guidelines

<sup>16</sup> Clauses 4.14 and 4.15 of the GBE Guidelines

### Other issues

24. We recommend that the Shareholder Ministers should consider having supplementary, GBE specific, guidelines for individual GBEs, especially for any new GBE set up in the future. For example, in respect of NBN Co we would recommend there should be more specific guidance on the requirements for the identification and management of strategic risks. This in turn may require enhanced capabilities within the Shareholder Ministers' departments to manage and evaluate the GBEs against such specific further requirements.
25. Other than the matters identified above, there were a number of relatively minor elements of the GBE Guidelines which were not fully complied with, as follows:
  - a. Executive Chair until March 2010<sup>17</sup>
  - b. Director and CEO Appointment Letters<sup>18</sup>
  - c. CEO Appointment and Replacement<sup>19</sup>
  - d. Director Independence<sup>20</sup>
  - e. Planning & Reporting<sup>21</sup>

### Carriage of Information

26. A major issue for any GBE, and the NBN Co in particular, has been – and will continue to be – the extent of the interactions with Shareholder Ministers and their departments. Whilst there is clearly a sense of frustration within the NBN Co about being “under the political microscope” it is inevitable that this was and will always be the case.
27. Trying to ensure that the primary formal and informal communication between the Shareholder Ministers and the NBN Co was through the Chairman, rather than through the CEO was an ongoing area of frustration for the NBN Co Board<sup>22</sup>. This situation appears to have arisen from, or at least have been exacerbated by the fact that the CEO and the Chair were, initially, one and the same person.
28. In light of the large volume of communication from NBN Co, this limited review has focussed on the following four aspects of NBN Co's activities:
  - a. Corporate Plans
  - b. Premises Passed including Service Class 0
  - c. Satellite Premises Covered
  - d. “Value” of Telstra Definitive Agreements

### Corporate Plans

29. Under the GBE Guidelines<sup>23</sup>, each GBE is required prepare a Corporate Plan. In December 2010, NBN Co released its first Corporate Plan, the 2011-2013 Corporate Plan, which outlined its long-term business case and set rollout targets for the three years from 1 July 2010 to 30 June 2013. In August 2012, NBN Co released its second Corporate Plan, the 2012-2015 Corporate Plan, for the three years from 1 July 2012 to 30 June 2015.

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<sup>17</sup> Clause 2.7b of the GBE Guidelines

<sup>18</sup> Clause 2.3 of the GBE Guidelines

<sup>19</sup> Clauses 2.8b and 2.10 of the GBE Guidelines

<sup>20</sup> Clause 2.4 of the GBE Guidelines

<sup>21</sup> Part 3 of the GBE Guidelines

<sup>22</sup> BM 56 21 March 2013, Item 3

<sup>23</sup> Section 3.3 of the GBE Guidelines

30. The NBN Strategic Review concluded that the second Corporate Plan was “*extremely optimistic and very unlikely to be achieved*”.<sup>24</sup>
31. The issues with the Board composition, Board assessment, CEO performance assessment and strategic risk assessment all contributed to this outcome.
32. The Corporate Plans communicated to the Shareholder Ministers and their departments were consistent with the information provided by management of NBN Co to the Board. However it was noted in the 2013 Board Performance Assessment conducted by Johnson that the Board sought to test with management the assumption under-pinning the 10 year roll-out schedule – a key assumption of the Corporate Plan - and it notes that “*this proved difficult given the policy directions from Ministers and the attitude of the CEO*”.
33. Under Section 3.6 of the GBE Guidelines

*All corporate plans and subsequent updates, reports or supplementary information are confidential to the Minister(s), their advisers and departments.*
34. However, it was decided to make the Corporate Plan a publically available document. This reduced the usefulness of the document in communicating to the Shareholder Ministers and their departments the strategic risks and their potential impact on the key financial and operating results of NBN Co. Neither of the finalised Corporate Plans provide any meaningful sensitivity analysis, particularly around the effects of delays in the brownfield roll-out or the inability to achieve the future cost efficiencies assumed in the second Corporate Plan compared with the actual costs incurred to that time.
35. Whilst certain supplementary material was provided to the Shareholder Ministers and their departments did provide some sensitivity analyses, the length and structure of that analysis meant it would have been difficult for the recipient of such information to fully appreciate the potential interaction and magnitude of the key strategic risks for NBN Co.

*Premises Passed including Service Class 0*
36. A key metric of the progress of the NBN roll out, which was focussed on by both NBN Co and the Shareholder Ministers, was Premises Passed. The Strategic Review considered that there was a:

*relentless focus on the metric of Premises Passed as the single most important determinant of corporate success, rather than a balanced view including Premises Serviceable (i.e. a premises that is available to be connected).*<sup>25</sup>
37. Service Class 0, which are included as part of Premises Passed, are those premises passed by the active network, but for which a service cannot currently be ordered from a telephone or internet service provider because additional work is required.
38. Service Class 0 should not be included. It is not until March 2013 that the NBN Co Board was provided with regular updates on these issues. It does not appear that this issue was deliberately withheld from the Shareholder Ministers by the NBN Co Board.

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<sup>24</sup> NBN Co Strategic Review Report, December 2013, page 12

<sup>25</sup> NBN Co Strategic Review Report, December 2013, page 37

### Satellite Premises Covered

39. The figures which NBN Co has provided for premises “covered” or “passed” for the Interim Satellite Service (**ISS**) were actually the estimated number of premises who may fulfil the ISS eligibility criteria rather than the number customers able to use the system. The NBN Co media releases and other information clearly identifies that the figure of 250,000, whilst included under the heading “Premises/lots passed” and added to the figures for premises/lots passed for Brownfield and Greenfield sites, was actually “Coverage indicates estimated number of eligible end-users provided by DBCDE”<sup>26</sup>.
40. Whilst the exact number of users who will, from a physical and technical perspective, be able to use to the ISS is dependent on the mix of locations and usage patterns of the various users, the modelling within NBN Co has identified that the likely technical maximum users of the ISS is approximately 48,000. Therefore 48,000 users is the appropriate figure to report, not 250,000 users.
41. The nature of the 250,000 figure and the true potential number of users of the ISS (i.e. 48,000) were known to the Shareholder Ministers and their departments. The current management of NBN Co now reports Premises Activated for Satellite (43,369 as at 25 May 2014) but does not include any amount for Premises Passed/Covered in respect of Satellite.

### “Value” of the Telstra Definitive Agreements

42. We have considered whether NBN Co’s characterisation and quantification of the costs to NBN Co of the Telstra Definitive Agreements (**Telstra DAs** or **DAs**) was appropriately clear.
43. NBN Co and Telstra entered into a Financial Heads of Agreement (**FHoA**) in June 2010 and the DAs were signed in June 2011. The DAs were approved by the Australian Competition and Consumer Commission (**ACCC**) and came into effect in March 2012.
44. Most of the public announcements regarding the ‘value’ of the Telstra DAs focused on the net present value (**NPV**) of the agreements to Telstra, in after tax dollars as at 30 June 2010, which was estimated to be \$9.0 billion. Whilst not publically disclosed by either Telstra or NBN Co, the nominal value of the Telstra DA payments, of approximately \$90 billion was communicated to the Department of Broadband, Communications and the Digital Economy (**DBCDE**) no later than April 2011.

### Contract procurement

45. The contract procurement processes adopted by NBN Co appear appropriate. The Strategic Review undertook a detailed review of purchasing payments and did not identify any inappropriate material spending.<sup>27</sup>
46. We have not identified any significant or unusual contracts entered into during the Caretaker Period.
47. Specific questions were raised regarding the apparent engagement of Bespoke Approach, a corporate advisory firm which specialised in lobbying. Bespoke Approach were not directly engaged by NBN Co. However they were contracted to provide advice and assistance to the majority of the past and present Non-Executive Directors of the NBN Co Board through Herbert Smith Freehills under the *Funding Directors’ Access to Independent Advice Policy*.

<sup>26</sup> <http://www.nbnco.com.au/about-us/media/news/nbnco-meets-revised-end-of-year-fibre-rollout-target.html> [accessed 2 June 2014]

<sup>27</sup> NBN Co Strategic Review Report, December 2013, page 12

## B. Scope and limitations

### Scope of work

#### Corporate Governance Review

48. KordaMentha has been engaged to provide a limited review of NBN Co in respect of:
- NBN Co's governance, management and the accountability of its Board and officers, from its inception to the change of government, on 18 September 2013;
  - Whether accurate and timely information about NBN outcomes has been provided at all times to Parliament and taxpayers.
49. The specific elements of the Corporate Governance Review are outlined in the Statement of Work issued by NBN Co dated 16 December 2013. In summary, the key elements include:
- Review of policies, procedures and practices around Corporate Governance in NBN Co and the extent to which these, and the implantation of these, have complied with:
    - The GBE Guidelines; and, to the extent consistent with the GBE Guidelines;
    - The ASX Corporate Governance Principles ('**ASX Principles**'); and
    - The Australian Standard 8000:2003 "Corporate governance - Good governance principles" ('**Australian Standard**').
  - Analysis of what the Senior Executives knew, what they told the Board, and what the Senior Executives and the Board told Federal Government.
  - Analysis of information the Senior Executives and/or the Board released publicly (including via the NBN Co website).
  - Review of NBN Co contract procurement arrangements.
  - Identification of vendors for further analysis with Internal Audit.

#### Independent Audit of NBN Policy Process

50. The scope of the Corporate Governance Review is different from, and separate to, that of the 'Independent audit of the NBN policy process' announced by The Hon Malcolm Turnbull MP Minister for Communications on 7 March 2014:

*The Government has appointed Mr Bill Scales AO to conduct an independent audit of the public policy process that led to the [NBN].*

....

*The independent audit will investigate the advice, decisions and policy processes that led to the [NBN] policy and establishment of NBN Co.*

*The terms of reference provided to Mr Scales are attached (Appendix A).*

....

*Mr Scales will report to the Government within four months of today's appointment.*

*The audit is in addition to a review of governance within NBN Co that is being conducted by KordaMentha.*

*Appendix A: TERMS OF REFERENCE: INDEPENDENT AUDIT OF THE NBN PUBLIC POLICY PROCESS*

*The Minister for Communications and the Minister for Finance will appoint an individual to conduct an independent audit into the public policy process that resulted in the establishment of [NBN Co].*

*The audit is to cover the period from April 2008 (when the Australian Government issued a request for proposals for a national broadband network solution) to May 2010 (when the implementation study for the [NBN] was released).<sup>28</sup>*

## Sources of information

51. The information set forth in this report has been obtained from publicly available information and the records provided by Management and employees of NBN Co, including but not limited to the information made available to us via the Board Portal, Government Portal and electronic data extracted for the purposes of the Corporate Governance Review. We have also obtained information through discussions and interviews with current and former members of the NBN Co Board, Executive Committee and management. In many instances, we have necessarily relied on the representations of these parties and individuals, however we have sought, as far as possible, to obtain more than one source of reference for key findings.
52. The statements and opinions contained in this report are given in good faith. However, in the preparation of this report, we have relied upon the accuracy and completeness of information provided by the above parties and individuals.

## Limitations

53. The report has been prepared by KordaMentha with care and diligence.
54. The issues considered during this review have been specifically limited to the matters set out in the Statement of Work issued by NBN Co dated 16 December 2013.
55. We have no responsibility to update this report for events or circumstances occurring after the date of this report, apart from any responsibility which arises as a result of any subsequent arrangement. Any information or statements provided in this report are solely the responsibility of the parties providing the information, forecasts, projections or statements and we have not independently verified such information, or statements. Accordingly, we accept no responsibility for the accuracy of the information contained in this report.
56. Unless otherwise stated, all figures included in this report are expressed in Australian dollars and have not been adjusted for the time value of money.
57. This report has been prepared solely for the use of Department of Communications and Department of Finance whom may disclose some or all of this report, without requiring our prior written consent, as they see fit, including, but not limited to, NBN Co and the general public. The decision to implement any or all of the recommendations that arise from this Engagement, or to take or refrain from taking any actions pursuant to the conclusions in this report, is entirely at the discretion of NBN Co.

## Glossary of terms

58. A glossary of terms is attached at Appendix A.

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<sup>28</sup> [http://www.minister.communications.gov.au/malcolm\\_turnbull/news/independent\\_audit\\_of\\_the\\_nbn\\_policy\\_process#.U3Q8VJ5--70](http://www.minister.communications.gov.au/malcolm_turnbull/news/independent_audit_of_the_nbn_policy_process#.U3Q8VJ5--70) [accessed 15 May 2014]

## C. Background

### NBN Co

59. The NBN Co legal entity (ACN 136 533 741 Limited) was formally created on 9 April 2009 and changed its name to NBN Co Limited on 29 July 2009.
60. NBN Co is a wholly-owned Commonwealth company that has been prescribed as a GBE. As such it is subject to the Commonwealth Authorities and Companies Act 1997 ('**CAC Act**'), the Corporations Act 2001 and the GBE Guidelines. In addition, NBN Co has voluntarily adopted the ASX Principles<sup>29</sup>.
61. NBN Co is represented by two Shareholder Ministers – currently the Minister for Communications<sup>30</sup> and the Minister for Finance<sup>31</sup>.

### Key Dates

62. A timeline of key dates since NBN Co's inception to the change in government is attached at Appendix B.

### What is Corporate Governance?

63. It is useful to consider the question of what is "corporate governance"?
64. The Investment and Financial Services Association Limited ('**IFSA**') states<sup>32</sup>:

*Corporate Governance concerns the conduct of the board of directors and the relationships between the board, management and shareholders.*

The Governance Institute of Australia ('**Governance Institute**') states<sup>33</sup>:

*There is not one conclusive definition of corporate governance. [The] Governance Institute, for example, defines it in these terms:*

*Governance encompasses the system by which an organisation is controlled and operates, and the mechanisms by which it, and its people, are held to account. Ethics, risk management, compliance and administration are all elements of governance.*
65. The Governance Institute also states the following organisations provide useful definitions of governance:
  - a. ASX Corporate Governance Council<sup>34</sup>:

*The phrase "corporate governance" describes "the framework of rules, relationships, systems and processes within and by which authority is exercised and controlled within corporations. It encompasses the mechanisms by which companies, and those in control, are held to account."*<sup>35</sup>
  - b. Organisation for Economic Co-operation and Development ('**OECD**')<sup>36</sup>:

<sup>29</sup> As stated in the NBN Co 2009-2010 Annual Report and thereafter.

<sup>30</sup> Previously the Minister for Broadband, Communications and the Digital Economy

<sup>31</sup> Previously the Minister for Finance and Deregulation

<sup>32</sup> IFSA Guidance Note No.2.00 Corporate Governance: A Guide for Fund Managers and Corporations, [http://www.fsc.org.au/downloads/file/IFSAGuidanceNotes/2GN\\_2\\_Corporate\\_Governance\\_2009.pdf](http://www.fsc.org.au/downloads/file/IFSAGuidanceNotes/2GN_2_Corporate_Governance_2009.pdf) [accessed 2 June 2014]

<sup>33</sup> <http://www.governanceinstitute.com.au/knowledge-resources/governance-foundations/> [accessed 15 May 2014]

<sup>34</sup> <http://www.asx.com.au/documents/asx-compliance/cgc-principles-and-recommendations-3rd-edn.pdf> [accessed 15 May 2014]

<sup>35</sup> Justice Owen in the HIH Royal Commission, The Failure of HIH Insurance Volume 1: A Corporate Collapse and Its Lessons, Commonwealth of Australia, April 2003 at page xxxiv. <http://www.hihroyalcom.gov.au/finalreport/index.htm> [accessed 15 May 14]

<sup>36</sup> OECD Principles of Corporate Governance, Preamble p11, <http://www.oecd.org/corporate/oecdprinciplesofcorporategovernance.htm> [accessed 15 May 2014]

*Corporate governance involves a set of relationships between a company's management, its board, its shareholders and other stakeholders. Corporate governance also provides the structure through which the objectives of the company are set, and the means of attaining those objectives and monitoring performance are determined.*

66. Furthermore, the OECD states<sup>37</sup>:

*Good corporate governance should provide proper incentives for the board and management to pursue objectives that are in the interests of the company and its shareholders and should facilitate effective monitoring.*

....

*There is no single model of good corporate governance.*

67. Pursuant to the scope of work agreed<sup>38</sup>, NBN Co's corporate governance is to be reviewed and assessed in terms of compliance with:

- a. The GBE Guidelines (refer to paragraph 68 below); and, to the extent consistent with the GBE Guidelines;
- b. The ASX Principles (refer to paragraph 71 below); and
- c. The Australian Standard (refer to paragraph 75 below).

## GBE Guidelines

68. The GBE Guidelines applicable to NBN Co since its inception (**'Previous GBE Guidelines'**) were revised in October 2011, from June 1997<sup>39</sup>, with the key changes relevant to NBN Co set out at Appendix D of this report.

69. The GBE Guidelines is a policy document that provides a framework for defining the Australian Government's working relationship with its GBEs and the various responsibilities of the parties to that relationship. The document forms part of the overall corporate governance framework under which GBEs operate and as such complements the CAC Act and, for GBEs that are Commonwealth companies, their constitution and the Corporations Act 2001 (Corporations Act).<sup>40</sup>

70. The following GBE Guidelines particularly refer to the relationship between the Government and the GBE and Corporate Governance:

*1.6 The Commonwealth's ownership interest is generally represented by two 'Shareholder Ministers'. The Shareholder Ministers are the Responsible Minister (that is the Minister responsible for the GBE) and the Finance Minister. The Finance Minister is generally the sole Shareholder Minister for those GBEs within the Finance portfolio.*

*1.7 The key principles underpinning the GBE Guidelines are:*

- a. *Shareholder Ministers exercise strategic control consistent with their accountability to the Parliament and the public.*
- b. *Shareholder Ministers set clear objectives for GBEs.*
- c. *The directors of a GBE develop the business strategies and handle the day-to-day management policies.*

<sup>37</sup> OECD Principles of Corporate Governance, Preamble p11-13, <http://www.oecd.org/corporate/oecdprinciplesofcorporategovernance.htm> [accessed 15 May 2014]

<sup>38</sup> Refer paragraph 48 of this report

<sup>39</sup> Governance Arrangements for Commonwealth Government Business Enterprises (June 1997)

<sup>40</sup> Australian Government, 'Review of Commonwealth Government Business Enterprises Governance and Oversight Guidelines', Discussion Paper, March 2011, page 2

- d. The directors of a GBE ensure that:
- i. the GBE's activities are conducted so as to seek to minimise any divergence of interests between the GBE and the shareholders;
  - ii. GBEs are managed in the best interests of the entity as a whole; and
  - iii. GBEs and their officers maintain the highest standards of integrity, accountability and responsibility.
- e. Required standards of disclosure are satisfied. In particular consistent with directors' responsibilities under the CAC Act, regular and timely disclosure is to be made by GBEs of information:
- i. which may affect the value of the GBE;
  - ii. which may influence government decisions in relation to the GBE; or
  - iii. in which the government has a legitimate interest.
- f. Information is produced for the Shareholder Minister(s) and the community according to the highest standards;
- g. Where appropriate, information enables ready comparison with other relevant information.
- h. The Shareholder Minister(s) must be consulted on matters of significance.
- 2.2 Boards have ultimate responsibility for the performance of the GBE, and are fully accountable for this to the Shareholder Minister(s). Boards should implement effective governance frameworks to support their role and responsibilities, and report on their implementation in the Annual Report.<sup>41</sup>

## ASX Principles

71. Whilst the ASX Principles are not applicable to NBN Co, it has voluntarily adopted them, as detailed in its 2009-2010 Annual Report and thereafter. Since that time, the following versions of the ASX Principles have been applicable:
- ASX Corporate Governance Principles and Recommendations 2nd Edition (released August 2007)
  - ASX Corporate Governance Principles and Recommendations 2nd Edition with 2010 Amendments (released June 2010) ('**ASX Principles 2<sup>nd</sup> Edition**')
72. The current version is:
- ASX Corporate Governance Principles and Recommendations 3rd Edition (released 27 March 2014, effective first full financial year commencing on or after 1 July 2014) ('**ASX Principles 3<sup>rd</sup> Edition**')
73. The ASX Principles set out general principles and specific recommendations intended to give effect to these principles, as well as explanatory commentary in relation to both the principles and the recommendations.
74. Given the relevant time period of the Corporate Governance Review, the 2<sup>nd</sup> Edition of ASX Principles are considered, however the 3<sup>rd</sup> Edition has been presented given that they will be the applicable version adopted by NBN Co going forward.

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<sup>41</sup> The second sentence of GBE 2.2 was introduced in October 2011

## Australian Standard

75. The Australian Standard is not applicable to NBN Co, and it has not voluntarily adopted it to date.

76. The Australian Standard:

*...recognizes that there are general laws in place regulating how to comply with good governance principles. The intention is not to cut across the law, but enhance the legislation. If there is any doubt as to a potential conflict between the law and this Standard, seek professional advice.*

*This Standard complements existing guidelines produced by IFSA<sup>42</sup> and the ASX Corporate Governance Council. It is suggested that the reader refer to these guidelines where appropriate.*

77. The Australian Standard defines corporate governance as<sup>43</sup>:

*The system by which entities are directed and controlled.*

*NOTE: Corporate governance addresses the issues arising from the interrelationships between boards of directors, such as interaction with senior management, and relationships with the owners and others interested in the affairs of the entity, including regulators, auditors, creditors, debt financiers and analysts.*

*Definitions of corporate governance are many and varied. There is no one global applicable definition but some useful statements include:*

*'Corporate governance is concerned with improving the performance of companies for the benefit of shareholders, stakeholders and economic growth. It focuses on the conduct of, and relationships between, the board of directors, managers and the company shareholders.'<sup>44</sup>*

*'Corporate governance generally refers to the processes by which organizations are directed, controlled and held to account. It encompasses authority, accountability, stewardship, leadership, direction and control exercised in the organization.'<sup>45</sup>*

*This definition is based upon the OECD's definition.*

78. Furthermore, the Australian Standard states<sup>46</sup>:

*There is no single model of corporate governance i.e. the 'one size fits all' approach has been rejected by the OECD which instead advocates the need for pluralism, flexibility and adaptability in corporate governance. The OECD has stated:*

*'To remain competitive in a changing world, corporations must innovate and adapt their corporate governance practices so that they can meet new demands and grasp new opportunities'.*

*While there is no single model of good corporate governance, there are a number of common elements that underlie good corporate governance.*

*Section 2 of this Standard provides a blueprint for developing and implementing a system for achieving good governance while Section 3 provides a series of good governance principles that build on the common elements of corporate governance. These principles have been formulated to embrace the different models of corporate governance that entities may wish to adopt.*

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<sup>42</sup> IFSA Guidance Note No. 2.00

<sup>43</sup> Section 1.5.1 of the Australian Standard

<sup>44</sup> IFSA Guidance Note No.2.00

<sup>45</sup> Australian National Audit Office, 1999

<sup>46</sup> Section 1.6 of the Australian Standard

## Board of Directors

79. A timeline and biographies of NBN Co's Board of Directors from inception to the change in government are set out at Appendix C.
80. The Board's powers, roles and responsibilities are set out in the Constitution and Charter.
81. NBN Co's first Constitution was dated 8 April 2009 and was revised on 22 June 2009, 5 August 2009, 16 November 2011 and 22 February 2013. It sets out the Company's objects and the Board and CEO's powers.
82. NBN Co's first Board Charter was dated 26 April 2012 and revised on 29 July 2013. In summary the Charter addresses:
  - a. *the nature of NBN Co as both a company limited by shares and a government business enterprise (GBE), and the reporting and disclosure obligations that are imposed on the Board:*
  - b. *the role and responsibilities of the Commonwealth as represented by its Shareholder Ministers:*
  - c. *the role and responsibilities of the Board:*
  - d. *the delegation of responsibilities to committees of the Board and to Management, including that group of managers reporting directly to the Chief Executive Officer (CEO) forming the Executive Committee (Exco) and matters reserved to the Board:*
  - e. *the composition of the Board:*
  - f. *Board process, including the role of the Chairman, Deputy Chairman and Company Secretary:*
  - g. *the Board's Code of Conduct: and*
  - h. *review of the performance of the Board.*<sup>47</sup>

## Board Committees

83. To assist in the performance of its responsibilities, the Board has established a number of Board Committees, being the:
  - a. Audit Committee, established on 13 August 2009
  - b. Communication Committee, established on 21 April 2011 and dissolved on 24 April 2013
  - c. Contracts (formerly Implementation) Committee, established on 16 July 2010
  - d. Nominations Committee, established on 11 February 2011
  - e. People and Performance Committee, established on 11 September 2009<sup>48</sup>

### Audit Committee

84. The Audit Committee assists the Board in satisfying itself that NBN Co and its subsidiaries are complying with their financial management and reporting obligations under the Commonwealth Authorities and Companies Act 1997 and the Corporations Act 2001 and provides a forum for communication between the Board, senior managers and auditors (internal and external) of NBN Co. The Committee supervises the preparation of periodic financial statements of NBN Co to comply with its financial reporting requirements, the effective management of financial risks, significant changes in accounting policies, the maintenance of effective and efficient internal and external audit processes, auditor independence and performance and compliance with laws and regulations by NBN Co.<sup>49</sup>

<sup>47</sup> Clause 1.2 of NBN Co Board Charters signed 26 April 2012 and 29 July 2013

<sup>48</sup> 2012-2013 NBN Co Annual Report page 74-76

<sup>49</sup> 2012-2013 NBN Co Annual Report page 74-76

## Communications Committee

85. This Communications Committee was formally dissolved by the Board at the Board meeting held on 24 April 2013 effective from that date. Prior to its dissolution, the Committee assisted the Board in fulfilling its governance responsibilities by supervising the external communications of the company and of its subsidiaries to all stakeholders other than Retail Service Providers.<sup>50</sup>

## Contracts (formerly Implementation) Committee

86. The Contracts Committee has oversight of procurement and major contracts in all areas of NBN Co except Information Technology and Human Resources. The role of the Committee is limited to monitoring and supporting the management processes connected with procurement in NBN Co.<sup>51</sup>

## Nominations Committee

87. Through the Board, the Committee provides the Shareholder Ministers with recommendations on Board composition, the appointment and re-election of directors, preferred candidates for CEO and succession planning for directors and the CEO.<sup>52</sup>

## People and Performance Committee

88. The People and Performance Committee ('PPC') assists the Board in fulfilling its governance responsibilities in relation to establishing people management and remuneration policies for NBN Co and its subsidiaries, including the nomination and removal of the CEO and performance targets for the CEO.<sup>53</sup>

## Board and Committee Meetings

89. The number of Board and Committee meetings and the hours spent<sup>54</sup> at these meetings is summarised in the table below.

**Table 2 Number of Board and Committee Meetings<sup>55</sup>**

	2009		2010		2011		2012		2013	
	# Meetings	Hours	# Meetings	Hours	# Meetings	Hours	# Meetings	Hours	# Meetings	Hours
Board Meeting	17	79	12	87	14	89	11	79	14	75
Board Strategic Planning Meeting							1	9	1	7
Non-Executive Directors' Board Meeting									2	5
Out of Session Board Meeting			2	2	1	1	2	2	8	10
Board Circulating Resolution	4	-	3	-			2	-	3	-
<b>Board subtotal</b>	<b>21</b>	<b>79</b>	<b>17</b>	<b>89</b>	<b>15</b>	<b>91</b>	<b>16</b>	<b>91</b>	<b>28</b>	<b>97</b>
Implementation/Contracts Committee Circulating Resolution									1	-
Audit Committee Meeting	2	2	5	5	5	8	5	10	6	13
People and Performance Committee Meeting	1	-	7	8	5	12	4	12	7	10
Implementation/Contracts Committee Meeting			5	14	9	26	7	24	4	11
Nominations Committee Meeting					6	5	2	1	2	1
Communications Committee Meeting					4	10	7	19	1	2
<b>Total</b>	<b>24</b>	<b>81</b>	<b>34</b>	<b>116</b>	<b>44</b>	<b>152</b>	<b>41</b>	<b>156</b>	<b>49</b>	<b>134</b>

<sup>50</sup> 2012-2013 NBN Co Annual Report page 74-76

<sup>51</sup> 2012-2013 NBN Co Annual Report page 74-76

<sup>52</sup> 2012-2013 NBN Co Annual Report page 74-76

<sup>53</sup> NBN Co Annual Report page 74-76 and the PPC Charter signed 6 Nov 2009, 28 May 2012, 22 Mar 2013, 6 May 2013

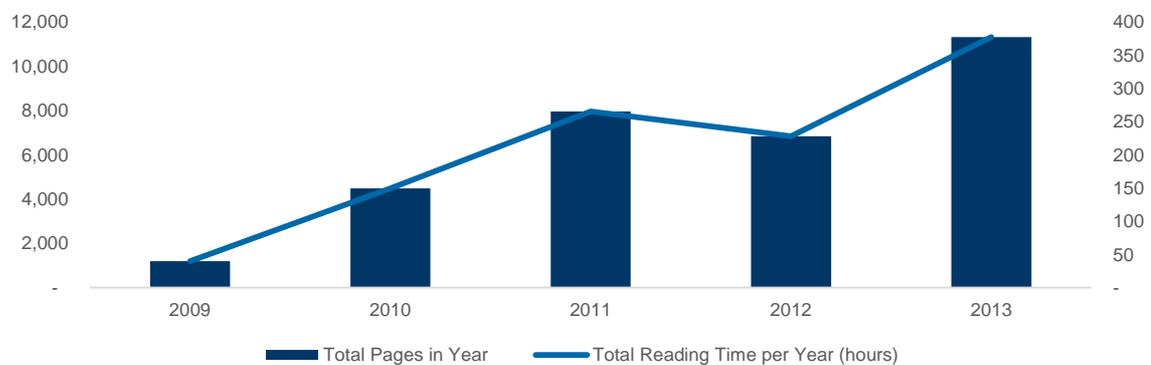
<sup>54</sup> Hours spent has been determined from the start and end times recorded in the minutes (hours spent could not be determined for meetings with missing minutes and for circulating resolutions)

<sup>55</sup> The figures for 2013 are for the whole of the calendar year, rather than through to 18 September 2013

90. The necessary scale and complexity of NBN Co’s activities, especially when it was a start-up company, has led to a very heavy workload for the various Boards. As can be seen from the above table, during 2011 and 2012 there were over 150 hours per year of meetings, the equivalent of approximately 20 working days of meetings. In addition to meetings of the Board and its various committees, the Board members would be required to read the various Board Papers.
91. The volume of the NBN Co Board papers has been described as “incredible”.
92. The total pages of Board Papers and the estimated reading time for each year is summarised in the table below.

**Table 3 Number of Board Paper pages and estimated reading time**

**Total Pages and Reading Time per Year**



93. For 2011, for example, there were approximately 590 Board Papers provided to the Board Members for the main Board meetings<sup>56</sup> (excluding the various Board Committees), which consisted of approximately 8,000 pages. Whilst these papers were, appropriately, provided to directors through a Board Portal, if they had been printed out and provided to them it would have consisted of approximately 16 lever-arch files of papers.
94. We have estimated that, on a conservative assumption of two minutes per page this would have equated to approximately 265 hours or 35 working days of reading.
95. In addition to attending these meetings, and reading these Board Papers, the non-executive directors (many of whom have other directorships) need to spend time meeting with Exco as well as potentially with other directors and stakeholders in related industries.
96. This highlights the significant time requirements imposed on the NBN Co Directors. The need, as identified in the 2011 Board Performance Assessment conducted by Heidrick & Struggles<sup>57</sup> to “using first principles to dig into an issue rather than being able to simply jump to the conclusion through content knowledge”<sup>58</sup>, put even more pressure on the NBN Co Board members and limited their effectiveness.

<sup>56</sup> Including Board Strategic Planning Meetings, Non-Executive Directors’ Board Meetings, Out of Session Board Meetings, Board Circulating Resolutions

<sup>57</sup> Refer to paragraph 149 onwards of this report

<sup>58</sup> Letter from Stephen A. Miles, Vice Chairman, Heidrick & Struggles to Harrison Young, Chairman of NBN Co on 5 January 2012

## CEO and Exco

97. In addition to its powers of delegation to committees, NBN Co's Board Charter states that:

### 3.2 CEO

*(a) The Board has delegated many of its powers to the CEO and may modify or revoke such a delegation at any time.*

*(b) The CEO is responsible for implementing strategic objectives, policies, the Corporate Plan and budget of NBN Co approved by the Board and has the additional responsibilities set out in rule 12.2 of the Constitution.*

*(c) The CEO has delegated some of his powers to the members of Exco.*

98. According to NBN Co's Annual Reports<sup>59</sup>, members of Exco have additional responsibilities in sponsoring the delivery of major projects.

99. Mr Michael Quigley ('**Mr Quigley**'), was appointed CEO from 20 July 2009 and Executive Director from 24 July 2009 until announcing his resignation on 12 July 2013, effective from 3 October 2013. He was also appointed Interim Executive Chair from 24 July 2009 to 15 March 2010.

100. Mr Quigley, was not a member of any of the Board Committees but attended the Contracts (formerly Implementation) Committee, Communications Committee and People and Performance Committee as a guest with no entitlement to vote.

## Policies

101. Policies provide the principles and agreed actions for complying with various legal and regulatory obligations, including the GBE Guidelines, for conducting the business of NBN Co. Since NBN Co's inception in April 2009, 75 policies have been finalised and lodged into the NBN CO intranet. Relevant policies have been reviewed, and implementation thereof, for the purposes of assessing NBN Co's corporate governance and compliance with GBE Guidelines.

## Caretaker Conventions, Period and Processes

102. The Corporate Governance Review covers the period from NBN Co inception to the change of government on 18 September 2013 following the election on 7 September 2013.

### Caretaker Conventions

103. It is established practice in Australia that during the period preceding an election for the House of Representatives, the incumbent government assumes a 'caretaker role' which involves a series of practises in which the government avoids:

- a. Making major policy decisions that are likely to commit an incoming government;
- b. Making significant appointments; and
- c. Entering major contracts or undertakings.<sup>60</sup> ('**Caretaker Conventions**')

104. The Caretaker Conventions are, as the name implies, conventions, and are not legally binding rules<sup>61</sup>.

105. The GBE Guidelines do not specifically address the Caretaker Conventions. They do however note:

<sup>59</sup> 2010-2011 NBN Co Annual Report and thereafter

<sup>60</sup> Department of the Prime Minister and Cabinet, Guidance on Caretaker Conventions, 2013, page 1

<sup>61</sup> Department of the Prime Minister and Cabinet, Guidance on Caretaker Conventions, 2013, page 1

...the government expects GBE boards to establish and maintain a code of conduct for directors, employees and contractors and ensure that GBE's, in undertaking their business, avoid activities that could give rise to questions about their political impartiality. For example, GBE's should not make direct or indirect political donations or participate in activities sponsored or in support of partisan political causes.<sup>62</sup>

106. The December 2010 Statement of Expectations states:

*During election campaigns, the Government expects NBN Co to abide by the Caretaker Conventions as advised by a relevant Departmental Secretary.*<sup>63</sup>

### Caretaker Period

107. The caretaker period begins at the time the House of Representatives is dissolved when an election has been called and continues until the result of the election has been determined, or, if there is a change of government, until the new government is appointed.<sup>64</sup> ('Caretaker Period')

108. The recent Caretaker Period:

- a. commenced on Monday 5 August 2013 at approximately 5.30pm (on the dissolution of the House of Representatives); and
- b. ended on Wednesday 18 September 2013 at approximately 11am when the incoming Coalition government was sworn in.

### Caretaker Processes

109. NBN Co set up the following processes during the recent Caretaker Period<sup>65</sup>:

- a. Responsibilities for business practices<sup>66</sup>, which set out:
  - i. The criteria for business decisions during the Caretaker Period; and
  - ii. Responsible persons for business practices during the Caretaker Period.
- b. Responsibilities for external communications<sup>67</sup>. It stated, amongst other things:

*All communications during the Caretaker Period to be reviewed to ensure they comply with the Conventions. Communications should only refer to factual/operational information relating to decisions already announced at the date that the Caretaker Period commenced...All external communications during the Caretaker Period to be reviewed by the proposed 'Caretaker review group' ...*

- c. Formation of a Caretaker Review Group ('CRG')<sup>68</sup> which:

*...is to be headed by Ian McAuley (Senior Advisor, Government Relations)...The CRG would also comprise Christopher Wilcox (Advisor, Government Relations), Cathy Jamieson (Manager Channel Communications) and Rhonda Griffin (Manager Communications). The CRG would seek and log subject matter expert advice (including legal advice from the NBN Co Legal Team with guidance from the Chief Legal Counsel, Justin Forsell) where required. The CRG would be convened on a weekly basis or as required during the Caretaker Period...The CRG would be a clearing house accountable for receiving and assessing all relevant business practices...*

<sup>62</sup> GBE Guidelines clause 2.5

<sup>63</sup> Statement of Expectations, page 12

<sup>64</sup> Department of the Prime Minister and Cabinet, Guidance on Caretaker Conventions, 2013, page 1

<sup>65</sup> BM 55 21 Feb 13, Item 25

<sup>66</sup> BM 55 21 Feb 13, Item 25 Attachment 1

<sup>67</sup> BM 55 21 Feb 13, Item 25 Attachment 2

<sup>68</sup> BM 55 21 Feb 13, Item 25 Attachment 3

110. We consider that these processes were appropriate and adequate for NBN Co to appropriately consider, and take advice as appropriate, on those procurement, contractual and other decisions during the Caretaker Period which may have implications in respect of the Caretaker Guidelines.

## D. Compliance with the GBE Guidelines

### Introduction

111. This section sets out the detailed findings arising from reviewing policies, procedures and practices around Corporate Governance in NBN Co and the extent to which these, and the implementation of these, have complied with the GBE Guidelines, and, to the extent consistent with the GBE Guidelines, the ASX Principles and the Australian Standard.

### Detailed Findings

112. The following table sets out the GBE Guidelines that we have assigned a risk/compliance rating of Medium or High. The remaining/unlisted GBE Guidelines were assigned a risk/compliance rating of Low or not applicable.

**Table 4 Compliance with GBE Guidelines**

Rating	Issue	GBE Guideline	ASX Principles 2 <sup>nd</sup> Edition	ASX Principles 3 <sup>rd</sup> Edition	Australian Standard	Para Ref.
High	Board Composition	2.7, 2.8	Principle 2 Rec 2.2	Principle 2 n/a	3.2.3.1(f), 3.2.6, 3.5	114
High	Board Performance Assessment	2.17	Principle 2 Rec 2.4, 2.5	Principle 1 Rec 1.6 Principle 2 Principle 2.1	2.4.4, 3.2.5.1	143
High	CEO Succession Planning	2.11	n/a	Principle 2 Rec 2.1	3.2.3.2 (a)	172
High	CEO Performance Assessment	n/a	Principle 1 Rec 1.1	Principle 1 Rec 1.1	3.2.3.1 (h)	179
High	Managing Risks	4.14	Principle 7 Rec 7.1-7.3	Principle 7 Rec 7.1-7.4	3.2.3.1 (d), 3.3.3 (f)	198
Medium	Executive Chair	2.7b	Principle 2 Rec 2.2, 2.3	Principle 2 Rec 2.5	3.2.4 (b)	207
Medium	Director and CEO Appointment Letters	2.3	Principle 1 Rec 1.1	Principle 1 Rec 1.3	2.2.2 (e)	212
Medium	CEO Appointment and Replacement	2.8b, 2.10	Principle 1 Rec 1.1	Principle 1 Rec 1.1	3.2.3.1 (h)	216
Medium	Director Independence	2.4	n/a	Principle 2, Rec 2.3	3.2.4 (c)	225
Medium	Planning & Reporting	Part 3	n/a	n/a	3.3.1, 3.3.2, 3.3.3	237

113. The following table sets out the risk/compliance rating definitions.

**Table 5 Risk/Compliance definitions**

Rating	Definition
High	Significant strategic implications for Corporate Governance
Medium	Moderate compliance or related implications for Corporate Governance
Low	Low compliance implications for Corporate Governance

## Board Composition

114. GBE Guidelines state:

*2.7 GBE boards are to comprise directors with an appropriate mix of skills, who are to be appointed on the basis of their individual capacity to contribute to the board, having an appropriate balance of relevant skills (such as commerce, finance, accounting, law, marketing, workplace relations, management and other skills relevant to the GBE's operations) to enable them to contribute to the achievement of the GBE's objectives.*

- a. Boards should draw on outside expertise where necessary to augment their own skills.*
- b. The Chair shall not also be an executive of the GBE, unless otherwise agreed by the Shareholder Minister(s).*
- c. The appointment of departmental officers to GBE boards may only be considered in exceptional circumstances, having regard to their possession of the skills referred to above, any potential conflicts of interest that might arise and the particular circumstances of the GBE (such as GBEs in winding-down mode). In such cases, the appointed departmental officers are expected to act in the best interests of the GBE when there is a divergence between the interest of the GBE and those of the government.*

*2.8 The Chair shall head a board committee, which shall provide the Shareholder Minister(s), though the board with recommendations on board composition and membership.*

- a. The Chair shall, following consultation with the Shareholder Minister(s), develop an annual board plan which includes:*
  - The medium term aims in relation to board composition, taking into account the strategic objectives of the GBE;*
  - A forecast of likely board vacancies; and*
  - An assessment of the skill and diversity requirements for the board in the context of the strategic requirements of the GBE and government policy objectives regarding diversity in board composition.*
- b. The Chair shall write to the Shareholder Minister(s) at least three months prior to a vacancy arising on the board or in the role of CEO.*
  - Through the Chair, the board should advise the Shareholder Minister(s) about its preferred candidate for the position of CEO. The CEO is directly accountable to the board and it is expected that potential candidates would be identified through public advertising or executive search processes.*
  - Following consultation with the Shareholder Minister(s), the board may provide, through the Chair, a shortlist of candidates for board vacancies.*
  - Additional processes for identifying board candidates such as public advertising or the use of executive search processes may be undertaken by agreement with the Shareholder Minister(s), to help ensure appointments are drawn from the best possible field of candidates.*
  - Chairs may recommend the reappointment of an existing director where this is sought by the director and where appropriate (i.e. based on evidence of good performance, where the tenure falls within the requirements set out in legislation applying to the GBE and where the term has not been excessive).*

- All recommendations for appointment should have regard to government policy on fostering a governance culture that embraces diversity in the composition of boards with the objective of achieving the Government’s target of 40% of Government board members to be women, 40% of board members to be men, and the remaining 20% of positions to be held by either women or men, with this target to be achieved by 2015.

2.9 The Shareholder Minister(s) may elect to appoint a candidate not proposed by the Chair.

115. Clauses 2.8a and b were not in the Previous GBE Guidelines but were inserted into the current GBE Guidelines when these were revised in October 2011<sup>69</sup>.

116. ASX Principles and the Australian Standard state:

**Table 6 ASX Principles and the Australian Standard – Board composition**

ASX Principles 2 <sup>nd</sup> Edition	ASX Principles 3 <sup>rd</sup> Edition	Australian Standard
<p><b>Principle 2: Structure the board to add value.</b> Companies should have a board of an effective composition, size and commitment to adequately discharge its responsibilities and duties.</p>	<p><b>Principle 2: Structure the board to add value.</b> A listed entity should have a board of an appropriate size, composition, skills and commitment to enable it to discharge its duties effectively.</p> <p><i>Recommendation 2.2: A listed entity should have and disclose a board skills matrix setting out the mix of skills and diversity that the board currently has or is looking to achieve in its membership.</i></p> <p><i>Commentary: Having a board “skills matrix” is a useful tool that can help identify any gaps in the collective skills of the board that should be addressed as part of a listed entity’s professional development initiatives for directors (see recommendation 2.6) and in its board succession planning.</i></p> <p><i>Disclosing the mix of skills and diversity that a board currently has or is looking to achieve in its membership is useful information for investors and increases the accountability of the board on such matters. The disclosure need only be made collectively across the board as a whole, without identifying the presence or absence of particular skills by a particular director. Commercially sensitive information can be excluded.</i></p>	<p><b>3.2.6 Board skills</b></p> <p>The board should ensure that, collectively, it has the appropriate level of skills and experience required to properly fulfil its responsibilities.</p> <p>The board should review the mix of skills and experience of its members on a regular basis and ensure that it has operational or technical expertise relevant to the operation of the entity (including policy skills and executive and leadership experience).</p> <p>Where the small size of the entity precludes this outcome, the board should make arrangements for ready access to such skills where they are not available.</p> <p>Directors should also have the appropriate personal qualities such as loyalty, honesty, the courage to ask tough questions, etc.</p> <p><b>3.2.3 Board responsibilities</b></p> <p>3.2.3.1 General</p> <p>The Governance Policy should specify the responsibilities of the board, which include those set out in Clauses 3.2.3.2 and 3.2.3.3 and the following:</p> <p>...</p> <p>(f) The boards should adopt the most effective structure that best assists the governance process. The structure of each board will be determined mainly by the characteristics of each individual entity. Factors such as history, culture and ownership structure have significant impact on the board composition.</p> <p>....</p>

<sup>69</sup> Refer to Appendix D of this report for details of the changes between the two sets of GBE Guidelines.

ASX Principles  
2<sup>nd</sup> Edition

ASX Principles  
3<sup>rd</sup> Edition

Australian Standard

3.5 THE RESPONSIBILITIES OF  
SHAREHOLDERS

...

Shareholders have certain rights and obligations which include the following:

...

(e) Shareholders should take a positive interest in the composition of boards of directors with particular reference to—

(i) concentrations of decision making power; and

(ii) the appointment of a core of independent directors of appropriate calibre and experience.

(f) Shareholders should take a positive interest in the structure of boards and, in particular, the appointment of appropriate committees of the board—especially the audit committee.

(g) Shareholders in listed companies should take a positive interest in the performance of the board and should exercise their votes on the election of directors in an informed manner.

...

117. A timeline and biographies of NBN Co's directors from inception to the change in government is set out at Appendix C.
118. In a normal corporate setting the board itself is responsible for its composition and ongoing regeneration. The GBE Guidelines introduced the concept of an "annual board plan"<sup>70</sup> which includes consideration of whether there is a suitable mix of skills within the Board. However the 2009 Board was constituted by the Shareholder Ministers<sup>71</sup> under the Previous GBE Guidelines, which had no such specific requirement. We have not had access to the criteria used for the selection of the 2009 Board and therefore cannot comment on the extent that the criteria were appropriate and the extent that the members of that Board met the criteria.
119. There is no doubt that each of the members of the various NBN Co Boards as they were constituted throughout this period were high calibre directors. However, whilst the individual "ingredients" were of the highest quality, our conclusion, supported by the two documented external Board Performance Assessments<sup>72</sup>, is that the mix of those ingredients was not appropriate for a company of the nature, scale and complexity of NBN Co.
120. The lack of the appropriate mix of skills – in particular a lack of content knowledge - meant that *"Directors were using first principles to dig into an issue rather than being able to simply jump to the conclusion through content knowledge. This was compounded by the fact that many Directors had limited operational experience, limited government entity expertise and a first-time Chief Executive."*<sup>73</sup>

<sup>70</sup> Clause 2.8a of the GBE Guidelines

<sup>71</sup> The Interim Board was constituted using various civil servants from the relevant Departments whilst the Interim Board was being selected and appointed. The mix of skills and experience of the members of the Interim Board would seem to have been appropriate for the short-term, interim nature of their appointment.

<sup>72</sup> 2011 Board Performance Assessment conducted by Heidrick & Struggles and the 2013 Board Performance Assessment conducted by Johnson

<sup>73</sup> Letter from Stephen A. Miles, Vice Chairman, Heidrick & Struggles to Harrison Young, Chairman of NBN Co on 5 January 2012

121. Clause 2.7b of the GBE Guidelines states that the “*Chair shall not also be an executive of the GBE, unless otherwise agreed by the Shareholder Minister(s).*” The ASX Principles also recommend that a board should be led by an independent chairman who should not also be the CEO of the company<sup>74</sup>. Contrary to this recommendation, the first Chair of NBN Co was Mr Quigley, the CEO. This continued from 24 July 2009 until 15 March 2010. Having an executive Chairman, whilst not ideal, is understandable as an interim measure whilst an independent Chairman is being sought. However it appears to have caused difficulties in the later patterns of communication between the Chair, the CEO and the Shareholder Ministers, as identified in the 2011 Board Performance Assessment conducted by Heidrick & Struggles:

*The challenge for the Board of Directors is to be influential when you have a primary shareholder, the government, which deals frequently with the Chief Executive Officer.*<sup>75</sup>

122. Overall the Boards were collectively described to us as having a “lack of dirt under the fingernails” which referred to the relative lack of deep operational experience in four particular elements where we consider the mix of the skills of the various Boards was not ideal for a company of the nature, scale and complexity of NBN Co.

*a. Relative lack of experience in GBEs / working with government*

123. Whilst the Interim Board had a wealth of government experience, the subsequent NBN Co Boards were relatively inexperienced in the operations of government departments, particularly in the high pressure environment associated with such a politically sensitive GBE as NBN Co. This is illustrated by the observation that there is a perception that NBN Co considered (at least prior to March 2013) the Departments as “*an annoying interference*”<sup>76</sup>. Initially the 2009 Board had some experience in GBEs and working with government through Mr Doug Campbell AM (**‘Mr Campbell’**), Executive Director of NBN Co from 5 August 2009 to 7 December 2010. Mr Campbell previously worked as a senior executive at Telstra when it was still a GBE and his role with Telstra Country Wide required liaison with all levels of Government.

124. Both the April 2012 and April 2013 skills assessments<sup>77</sup> talk about the “*Skill/Area of Experience*” of “*Appreciating how governments operate*”. Whilst we don’t know exactly what was considered in that assessment, it would appear that it doesn’t focus on the specific issue of managing a stakeholder such as a Shareholder Minister; at what point should the Board be pushing back against formal and informal requests from governmental departments, as well as the ACCC as a regulator and arm of the government, and at what point should the Board be seeking input, direction and decisions from the Shareholder Ministers and their departments. This requires more than simply an understanding of how governments operate.

<sup>74</sup> Principle 2 and related Recommendations of the ASX Principles

<sup>75</sup> Letter from Stephen A. Miles, Vice Chairman, Heidrick & Struggles to Harrison Young, Chairman of NBN Co on 5 January 2012

<sup>76</sup> 2013 Board Performance Assessment conducted by Johnson, refer to paragraph 159 onwards of this report

<sup>77</sup> Letter dated 12 April 2012 from the Chair, Mr Young, to Shareholder Ministers re ‘NBN Co Board of Directors appointments and reappointments’

Letter dated 16 April 2013 from the Chair, Ms McKenna, to Shareholder Ministers re 2013 ‘Annual Board Plan’.

*b. Relative lack of telecommunications industry experience*

125. Whilst some of the directors had some telecommunications experience, the 2009 Board Director with the strongest telecommunications experience was probably Mr Campbell, who was on the 2009 Board only through to 7 December 2010. Mr Campbell had 48 years of telecommunications experience, 30 years in Canada and 18 years at Telstra in a number of senior executive roles. He was subsequently replaced by Mr Clement Doherty who also had specific telecommunications industry experience. Mr Quigley's experience at Alcatel was from the particular perspective of an equipment supplier to the telecommunications industry; a useful perspective but not the same as direct experience from within a telecommunications company.
126. The 2013 Board Performance Assessment conducted by Johnson<sup>78</sup> identified that “[v]irtually all of the people we spoke to at the Board, management and shareholders level believed that the Board would benefit from greater telecoms experience”.

*c. Relative lack of construction and major infrastructure building experience*

127. The April 2012 and April 2013 skills assessments<sup>79</sup> identified a number of board members who were said to have construction management and safety skills and experience (three in 2012 and five in 2013).
128. Interestingly the April 2013 skills assessment included Mr Quigley as having such skills, but he was not included in the comparable list for 2012, and the conclusion of the Johnson 2013 Board Performance Assessment report states (in connection with the significant performance issues with the brownfields roll out) that the “*Board took the view that the CEO did not have the necessary skills for this phase of the process, and as a result initiated a search for a replacement.*”
129. The relative lack of construction skills was exacerbated because Ms Diane Smith-Gander (**Ms Smith-Gander**), who appears to have had strong skills and experience in this area, was (entirely appropriately from a corporate governance perspective) “*unable to participate in many important discussions on the brownfields roll-out issues due to the conflict of interest caused by her position on the Transfield Services Board.*”<sup>80</sup>

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<sup>78</sup> Refer to paragraph 159 onwards of this report

<sup>79</sup> Letter dated 12 April 2012 from the Chair, Mr Young, to Shareholder Ministers re ‘NBN Co Board of Directors appointments and reappointments’

Letter dated 16 April 2013 from the Chair, Ms McKenna, to Shareholder Ministers re 2013 ‘Annual Board Plan’.

<sup>80</sup> 2013 Board Performance Assessment conducted by Johnson

*d. Relative lack of financial accounting and controls experience*

130. The April 2012 skills assessment<sup>81</sup> identified that of the 2009 Board directors who were staying on, only Mr Terry Francis (**Mr Francis**) was appropriately skilled in “Control and accounting”, whilst Mr Young and Mr Francis had the required level of skills in “other financial expertise, including understanding of markets”. The control and accounting skills of Mr Gene Tilbrook (**Mr Tilbrook**), or any other skills, were not identified in that skills assessment as he did not wish to be reappointed at the end of his term<sup>82</sup>. Mr Tilbrook previously worked at Wesfarmers Ltd as Financial Controller for approximately five years and during his time at NBN Co, served as the Chair of the Audit Committee. The similar April 2013 skills assessment<sup>83</sup> identified that in addition to Mr Francis, control and accounting skills of an appropriate level were also held by Mr Brad Orgill (**Mr Orgill**) and Ms Smith-Gander. Mr Orgill was new to the Board for the second review. Ms Smith-Gander was on the Board for both assessments however was not considered to have sufficient skills in ‘control and accounting’ for the first review, whereas for the second she was. We do not know the criteria used to assess whether an individual had sufficient skills and experience, and as discussed below, the result is a “yes” or a “no” rather than a scaled assessment of the skills of an individual in that area.
131. The 2013 Board Performance Assessment conducted by Johnson also concluded that “stronger accounting knowledge and experience” would have enhanced the board performance.
132. The Australian National Audit Office (**ANAO**)<sup>84</sup> states that “at least one member of the committee should have sound accounting or related financial management experience and/or qualifications, with a comprehensive understanding of accounting and auditing standards.” None of the members of the NBN Co’s Audit Committee<sup>85</sup> had this depth of understanding (based on the biographies of directors at Appendix C of this report).

### Board’s Assessment of Skills Required

133. Although the Chair completed Annual Board Plans, only the 2012 and 2013 plans included an assessment of skill and diversity requirements:
- Letter dated 16 December 2011 from the Chair, Mr Young, to the Shareholder Ministers re ‘Board Renewal Notification’*
134. This letter identified that the term of appointment for four of the Board members would come up for renewal in August 2012. Two of these, Mr Peter Hay (**Mr Hay**) and Mr Tilbrook, had indicated they would be prepared to relinquish their roles at an earlier stage if it suited the board renewal process.
135. The letter states that Johnson Partners have been retained to advise on potential candidates for these positions.
136. Whilst the letter references the government’s policy for fostering diversity, there is no specific discussion of the particular skills which would be required from the potential candidates.
- Letter dated 12 April 2012 from the Chair, Mr Young, to Shareholder Ministers re ‘NBN Co Board of Directors appointments and reappointments’*
137. In this letter Mr Young sets out the key skills which the Board considers it required.

<sup>81</sup> Letter dated 12 April 2012 from the Chair, Mr Young, to Shareholder Ministers re ‘NBN Co Board of Directors appointments and reappointments’

<sup>82</sup> Mr Tilbrook was non-executive director of NBN CO from 5 August 2009 to 4 August 2012

<sup>83</sup> Letter dated 16 April 2013 from the Chair, Ms McKenna, to the Shareholder Ministers re 2013 ‘Annual Board Plan’

<sup>84</sup> ANAO’s Public Sector Audit Committees Better Practice Guide, [http://www.anao.gov.au/~media/Files/Better%20Practice%20Guides/PS\\_AuditCommitteesBPG.pdf](http://www.anao.gov.au/~media/Files/Better%20Practice%20Guides/PS_AuditCommitteesBPG.pdf). [accessed 30 May 2014]

<sup>85</sup> Based on the NBN Co Annual Reports - Mr Francis, Mr Orgill, Ms Smith-Gander, Mr Tilbrook, Mr Doherty and Mr Hay

138. Mr Young confirmed that Mr Hay and Mr Tilbrook had indicated they did not wish to be reappointed. Ms Siobhan McKenna (**Ms McKenna**) and Ms Smith-Gander did want to be reappointed and Mr Young recommended this should be done.
139. They undertook an analysis of the specific skills assessed as being possessed by the various board members. This was, as discussed further below, on a binary basis. This identified that there was a lack of major corporate and regulatory legal experience and limited operational experience and it was suggested that the two replacement directors should have these skills and one of them should be in a position to chair the Audit Committee going forward.

*Letter dated 16 April 2013 from the Chair, Ms McKenna, to the Shareholder Ministers re 2013 'Annual Board Plan'*

140. The letter included a similar assessment and of the skill and diversity requirements for the NBN Co Board. The comments about our concerns with this process are therefore the same
141. It concluded that the NBN Co Board needs *“an additional Director who is a qualified accountant or other financial professional who can bring financial and accounting experience to the table and in particular, serve on NBN Co’s Audit Committee”*.
142. There were three problems with the skills assessments undertaken:
- They were binary in their assessment of skills – a director either had or did not have the skill of *“knowledge of the telecoms industry”*. In reality there are many aspects of the telecoms industry, and it would be entirely possible for a director to have significant experience of one aspect (say the development and management of the telecoms regulatory environment), but have little, if any, knowledge of the operational aspects of information technology in telecoms. Similarly, a number of directors had some experience of how governments operates, but that doesn’t mean they had the specific skills required to manage a Shareholder Minister and/or their department in the context of a large, start-up GBE operating in a regulated industry where the regulation was still being negotiated. A “richer” skills assessment would also have overlaid the timing of acquiring such skills and experience as well as whether the individuals had the right type of *“sectoral skills”*.
  - They placed no emphasis on some of the “softer” skills required of the board members to enable their other skills and experience to be fully applied in the context of the board as a whole and the in interactions with the Exco.
  - They treated all potentially required skills as being of equal importance. There was no explicit assessment of the strategic risks and imperatives for NBN Co and the need to ensure that the skills and experience were weighted accordingly.

## Board Performance Assessment

143. GBE Guidelines state:

*2.17 On an annual basis the GBE board as a whole will assess its performance; and the board will assess the performance of the Chair. Chairs are expected to provide written confirmation to the Shareholder Minister(s) that this process has been followed and raise any areas of concern with the Shareholder Minister(s) as required.*

144. Clause 2.17 was not in the Previous GBE Guidelines and was inserted in October 2011 into the current version. Refer to Appendix D of this report for the key changes to the GBE Guidelines.
145. The Board Charter, in addition to requiring the Board to review its performance<sup>86</sup>, states:

<sup>86</sup> NBN Co Board Charter clause 13.1

### 13.2 Disclosure of performance review process

The Board will be caused to be published on the NBN Co website the process for evaluating the performance of the Board, the Committees and individual Directors.

146. ASX Principles and the Australian Standard state:

**Table 7 ASX Principles and the Australian Standard – Board Performance Assessment**

ASX Principles 2 <sup>nd</sup> Edition	ASX Principles 3 <sup>rd</sup> Edition	Australian Standard
<p><b>Principle 2: Structure the board to add value.</b> Companies should have a board of an effective composition, size and commitment to adequately discharge its responsibilities and duties.</p> <p><u>Recommendation 2.4:</u> The board should establish a nomination committee.</p> <p>[Selected] Commentary: Responsibilities of the committee should include recommendations to the board about: ... • the development of a process for the evaluation of the performance of the board, its committees and directors</p> <p><u>Recommendation 2.5:</u> Companies should disclose the process for evaluating the performance of the board, its committees and individual directors.</p> <p>[Selected] Commentary: The performance of the board should be reviewed regularly against appropriate measures.</p>	<p><b>Principle 1: Lay solid foundations for management and oversight.</b> A listed entity should establish and disclose the respective roles and responsibilities of its board and management and how their performance is monitored and evaluated.</p> <p><u>Recommendation 1.6:</u> A listed entity should: (a) have and disclose a process for periodically evaluating the performance of the board, its committees and individual directors; and (b) disclose, in relation to each reporting period, whether a performance evaluation was undertaken in the reporting period in accordance with that process.</p> <p>Commentary: The board performs a pivotal role in the governance framework of a listed entity. It is essential that the board has in place a formal and rigorous process for regularly reviewing the performance of the board, its committees and individual directors and addressing any issues that may emerge from that review. The board should consider periodically using external facilitators to conduct its performance reviews. A suitable non-executive director (such as the deputy chair or the senior independent director, if the entity has one), should be responsible for the performance evaluation of the chair, after having canvassed the views of the other directors. When disclosing whether a performance evaluation has been undertaken the entity should, where appropriate, also disclose any insights it has gained from the evaluation and any governance changes it has made as a result.</p> <p><b>Principle 2: Structure the board to add value.</b> A listed entity should have a board of an appropriate size, composition, skills and commitment to enable it to discharge its duties effectively.</p> <p><u>Recommendation 2.1:</u> The board of a listed entity should: (a) have a nomination committee ....</p> <p>[Selected] Commentary: The role of the nomination committee is usually to review and make recommendations to the board in relation to: ..... • the development and implementation of a process for evaluating the performance of the board, its committees and directors;</p>	<p><b>2.4.4 Review</b> A review of the elements of the system of governance is necessary on a regular basis to ensure that it remains effective in meeting shareholder and/or other stakeholders' requirements. Boards should periodically evaluate themselves and their individual members against pre-established performance criteria.</p> <p><b>3.2.5 Board appointments</b> <b>3.2.5.1 General</b> ... The collective performance of the board, and of individual directors, should be periodically assessed. This could be done using key performance indicators developed for the purpose but may also include peer reviews and/or ministerial reviews in the case of government entities.</p>

147. The Board completed Annual Board Performance Assessments from 2011 to 2013, however no Board minutes, papers or similar official written records of the content of such reviews were retained for 2011 and 2012. The Chair provided written confirmation to the Shareholder Ministers each year that the assessments had occurred. However, in 2011 the Chair did not mention whether there were any areas of concern and in 2012 and 2013 the Chair confirmed that there were “no areas of concern” despite evidence to the contrary. The assessment in 2012 was undertaken internally by the Chair and in 2011 and 2013 externally by consultants, however the 2013 consultants were not independent as they were previously engaged to identify Board candidates. In addition, NBN Co has not published its process for such performance assessments on its website as required under the Board Charter.

148. The details follow:

*2011 Board Performance Assessment conducted by Heidrick & Struggles*

149. By letter dated 12 April 2012, the Chair, Mr Young advised the Shareholder Ministers, amongst other things, that:

*In compliance with [the GBE Guidelines], I am writing to:*

- *confirm that the Board of NBN Co has assessed its own performance and that of its Chair;*

....

*The Board assessment process was facilitated by Mr. Stephen Miles, Vice Chairman of Heidrick & Struggles.*

*Mr Miles interviewed every member of the Board and several members NBN Co’s senior management integrated their comments, provided an overall assessment to the Board, and had one-on-one feedback sessions with each Director and with me.*

150. Mr Young did not mention any areas of concern in his letter (as required under the GBE Guidelines); this might imply that no areas of concern had been identified.

151. Mr Stephen A. Miles (**‘Mr Miles’**) of Heidrick & Struggles orally delivered his assessment to the Board on 9 December 2011 at Board Meeting (**‘BM’**) 44 (Agenda Item 11). The minutes state:

*2011 Board Performance Review*

*Mr Miles joined the Board meeting at 8.25 am for Agenda item 11.*

*Decision*

*The Board noted the oral report provided by Mr Miles and that Mr Miles will conduct one on one briefing conversations with individual Directors in the near future.*

*Mr Miles left the meeting at 9.50 am.*

152. No Board papers, minutes or similar written official record was retained of Mr Miles’ assessment. However, from the electronic data provided, a letter from Mr Miles to Mr Young dated 5 January 2012.<sup>87</sup> states, amongst other things:

*Dear Harrison,*

*I wanted to provide you and the Board of Directors with the findings from our 2011 Board Evaluation.*

...

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<sup>87</sup> Letter from Stephen A. Miles, Vice Chairman, Heidrick & Struggles to Harrison Young, Chairman of NBN Co on 5 January 2012

*The entity and its governance is something that is new and evolving over time through experience and learning. The challenge for the Board of Directors is to be influential when you have a primary shareholder, the government, which deals frequently with the Chief Executive Officer.*

...

*Typically, when investors are forming a Board for a start-up company, they staff it exclusively with Directors who have tremendous content knowledge to ensure that both the company and the Board have the knowledge base to move very quickly when there are few processes or procedures in place. As a company scales, the Board often moves to a balance between content and process expertise. The NBN Board did not have this luxury and **was formed mainly with Directors who have process expertise, which slowed some processes down early on as Directors were using first principles to dig into an issue rather than being able to simply jump to the conclusion through content knowledge.** This was compounded by the fact that many Directors had limited operational expertise, limited government entity expertise and a first-time Chief Executive. (emphasis added)*

153. The letter suggests that the composition of the 2009 Board was unusual in that it did not include the appropriate mix of skills, particularly the necessary “content knowledge” one would have expected for the tasks required to be dealt with by the NBN Co Board.
154. This is consistent with our assessment, which includes consideration of comments from those Board members and others we interviewed.
155. It is unclear whether this letter was shared with the rest of the Board and/or with the Shareholder Ministers.

#### *2012 Board Performance Assessment conducted by Mr Young*

156. By letter dated 29 October 2012, the Chair, Mr Young advised the Shareholder Ministers that:

*In accordance with Section 2.17 of the [GBE Guidelines], I write to confirm that the Board of Directors of NBN Co has conducted a review of its performance, including the performance of the Chair. No areas of concern arose that are required to be raised with the Shareholder Ministers.*

*I would be pleased to discuss this further in person if you so desire.*

157. The 2012 Board Performance Assessment was apparently completed by the Chair himself, Mr Young as noted at BM 52 (Agenda Item 6b) on Friday, 12 October 2012:

*2012 Board Performance Review — status update*

*The Chairman presented the outcomes of the 2012 effectiveness review of the Board and its Committees. The Board provided input and resolved that the Chairman should write to [the Shareholder Ministers] to advise of the effectiveness review.*

158. No Board minutes, papers or similar official written records were retained of Mr Young’s assessment<sup>88</sup>.

#### *2013 Board Performance Assessment conducted by Johnson*

159. By letter dated 30 September 2013, the Chair, Ms McKenna advised the Shareholder Ministers that:

*In accordance with section 2.17 of the [GBE Guidelines]... I write to confirm the Board of Directors of NBN Co has conducted its 2013 review of its performance, including the performance of the Chair. No areas of concern arose that are required to be raised with the Shareholder Ministers.*

<sup>88</sup> As Mr Young has declined to be interviewed we have been unable to discuss with him whether others were involved in this review and/or whether a written record of the assessment exists.

160. The 2013 Board Performance Assessment was conducted by Johnson as noted at BM 62 (Agenda Item 4c) on 20 September 2013:

*Board Performance Review 2013- Status Update*

*Decision*

*The Board noted the five final reports by Johnson dated September 2013 titled:*

- *NBN Co Board Performance Review*
- *Board Effectiveness review - Audit Committee Confidential Report*
- *Board Effectiveness review - Contracts Committee Confidential Report*
- *Board Effectiveness review - Nominations Committee Confidential Report*
- *Board Effectiveness review - People and Performance Committee Confidential Report*

161. Johnson's findings are contained in five [5] separate reports<sup>89</sup> as listed above and despite the Chair advising that there were "no areas of concern", Johnson identified a series of issues, including:

**a. Impact of "policy directions from Ministers and the attitude of the CEO"**

162. The review identifies that the Board sought to test with management the assumption under-pinning the 10 year roll-out schedule – a key assumption of the Corporate Plan. However it notes that "*this proved difficult given the policy directions from Ministers and the attitude of the CEO*".

**b. Quality of management**

163. The review made findings about the capability of management in relation to the brownfields roll-out, the largest single part of the Corporate Plan.

**c. Skills of directors**

164. The review identifies that there were a number of areas where the people they had interviewed had concluded that the Board would benefit from greater telecoms and stronger accounting knowledge and experience.

165. Furthermore it identifies that the Board could benefit from having additional government experience and that any additional members added to the Board should be experienced Directors.

**e. Risk management**

166. The review identifies that a number of directors and executives felt that NBN Co would benefit from more work in managing the four major risks facing the company; safety, scalability of IT systems, financial risk as a consequence of the long dated nature of the project subject to the S curve and failure of the operating model to deliver the brownfield roll-out program.

167. It also identifies that a number of the most senior roles did not have obvious succession plans in place.

**f. Communication with the Shareholder Minister Departments**

168. The Departments felt that historical reporting had been poor, and felt that there was a cultural issue with NBN Co regarding the Departments as an "*annoying interference*".

169. Apparently the NBN Co Board decided that these issues were not "areas of concern" which should be notified to the Shareholder Ministers. It is unclear whether the details of the Johnson review(s) were shared with the Shareholder Ministers.

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<sup>89</sup> Covering the Board, the Audit Committee, the Contracts Committee, the Nominations Committee and the People & Performance Committee.

170. Johnson were previously engaged to undertake a search for candidates for the 2012 Board. We consider that the party undertaking a Board Performance Assessment should not have been involved in sourcing members of the board as this has the potential for inherent conflicts of interest going forward (i.e. it would be difficult for a consultant to say that the style, skills or experience of a board member were not appropriate if the consultant had previously recommended that individual as being suitable for the very board position which is now being evaluated).
171. Whilst not required under the current GBE Guidelines, we recommend that future GBE Board Performance Assessments should be undertaken:
- for, and report directly to, the Shareholder Ministers, so they can assess whether any of the comments or issues raised in such reviews are “areas of concern”; and
  - by an independent external party.

### CEO Succession Planning

172. GBE Guidelines states:

*2.11 Boards are to implement and maintain a succession plan for CEO positions and to provide an annual assurance to the Shareholder Minister(s) that this is the case.*

173. This requirement was included, for the first time, in October 2011.

174. The Charter of NBN Co’s Nominations Committee establishes that:

*The Committee will assist the Board to provide an annual assurance to the Shareholder Ministers that the Board has implemented and maintained a CEO succession plan.<sup>90</sup>*

175. ASX Principles and the Australian Standard state:

**Table 8 ASX Principles and the Australian Standard – CEO Succession Planning**

ASX Principles 2 <sup>nd</sup> Edition	ASX Principles 3 <sup>rd</sup> Edition	Australian Standard
	<p><b>Principle 2: Structure the board to add value.</b>  <i>A listed entity should have a board of an appropriate size, composition, skills and commitment to enable it to discharge its duties effectively.</i></p> <p><u>Recommendation 2.1:</u> <i>The board of a listed entity should:</i>            (a) <i>have a nomination committee ....</i></p> <p><i>[Selected] Commentary: The role of the nomination committee is usually to review and make recommendations to the board in relation to:</i>            ...            • <i>ensuring there are plans in place to manage the succession of the CEO and other senior executives.</i>            ...</p>	<p><b>3.2.3.2 Companies</b>  <i>Responsibilities of the board relating to companies include the following:</i>            (i) <i>The board should approve ... succession plans for the chief executive officer and senior management.</i></p> <p>...</p>

176. There is very limited evidence of a formal CEO succession plan being implemented and maintained by the Board prior to the commencement of Project North (discussed below) in around May 2013 (nearly four years after his appointment). Annual assurances were not provided by the NBN Co Board to the Shareholder Ministers in writing, although it is possible such assurances were provided orally.

<sup>90</sup> NBN Co Nominations Committee Charter 2012, 3.5(a)

177. There is only a single documented Board discussion of proactive CEO succession planning (rather than actually seeking a replacement), that being item 7 of the 4<sup>th</sup> Nominations Committee meeting on 5 July 2011, the committee papers of which identify, inter alia, five potential candidates for NBN Co's CEO role, with three of those candidates described as 'ready now'.
178. In May 2013 the NBN Co Board commenced Project North which involved the engagement of recruitment firm Egon Zehnder to assist NBN Co to identify a successor to Mr Quigley. The Minutes of the PPC 6 May 2013 meeting at which Egon Zehnder's appointment was confirmed identified that the timeframe of the engagement would allow the Caretaker Conventions to be observed, and that NBN Co's PPC had considered options for interim coverage of the CEO role.

### CEO Performance Assessment

179. The GBE Guidelines do not refer to the performance assessment of the CEO, however we consider that this is required as part of the succession planning for the CEO role, as well as through the voluntary adoption of the ASX Principles by NBN Co.
180. Despite being no requirement in the GBE Guidelines, the PPC Charter establishes its responsibility for:

*Monitoring, reviewing and making recommendations to the Board regarding the key accountabilities of the CEO and members of Exco, including corporate goals and objectives;*

*Specifically in relation to the CEO and any other Executive Director, annually evaluating and recommending to the Board the remuneration arrangements and performance targets and assessing performance against those targets.<sup>91</sup>*

181. ASX Principles and the Australian Standard state:

**Table 9 ASX Principles and the Australian Standard – CEO Performance Assessment**

ASX Principles 2 <sup>nd</sup> Edition	ASX Principles 3 <sup>rd</sup> Edition	Australian Standard
<p><b>Principle 1: Lay solid foundations for management and oversight</b> Companies should establish and disclose the respective roles and responsibilities of board and management.</p> <p><b>Recommendation 1.1:</b> Companies should establish the functions reserved to the board and those delegated to senior executives and disclose those functions.</p> <p><i>[Selected] Commentary: Usually the board will be responsible for:</i> .... vi) monitoring senior executives performance and implementation of strategy</p>	<p><b>Principle 1: Lay solid foundations for management and oversight</b> A listed entity should establish and disclose the respective roles and responsibilities of its board and management and how their performance is monitored and evaluated.</p> <p><b>Recommendation 1.1:</b> A listed entity should disclose: (a) the respective roles and responsibilities of its board and management; and (b) those matters expressly reserved to the board and those delegated to management.</p> <p><i>[Selected] Commentary: Usually the board of a listed entity will be responsible for:</i> .... v) overseeing management's implementation of the entity's strategic objectives and its performance generally; ....</p>	<p><b>3.2.3.1 General</b> The Governance Policy should specify the responsibilities of the board, which include.... ... (h) The board should appoint the chief executive officer and evaluate his or her ongoing performance against predetermined criteria.</p>

182. The Board lacked effective management and evaluation of the CEO as follows:

<sup>91</sup> PPC Charter signed 28 May 2012, 22 Mar 2013, 6 May 2013, paragraph 3.2(c) and (d)

- a. There was no performance contract or KPIs identified for the CEO, other than the overall one of delivering on the Corporate Plan.
- b. The first assessment of the CEO by the then Chair, My Young, was a limited review and occurred approximately from October 2012 through to February 2013, more than 3 years after the CEO's appointment. The Chair orally presented the assessment to the Board, however no Board minutes, papers or similar official written records of its content were retained.
- c. The second assessment of the CEO, by the then Chair, Ms McKenna, took place in May 2013. It was a more detailed and formal assessment that measured the CEO's performance against certain objectives. The Chair provided the written assessment to the Board which was retained. At this time, the Board also specifically addressed, in a formal manner, the question of succession planning for the CEO position.

183. The details follow:

#### *Lack of KPIs*

184. The Circulating Directors' Resolution of NBN Co's Interim Board pursuant to which Mr Quigley was employed as CEO notes that performance KPIs were to be agreed as soon as reasonable.<sup>92</sup> Despite this, there is no evidence of individual KPIs having been agreed upon or reviewed after Mr Quigley's appointment as CEO in 2009 through to his departure in 2013. The resolution also stated that annual performance assessments of the CEO were to be conducted by the Chair or lead non-executive director.<sup>93</sup>
185. Based on the information contained in NBN Co's Annual Reports, during his tenure as CEO, Mr Quigley was either not eligible for, or elected not to participate in, NBN Co's Short Term Incentive ('STI') program (and its associated KPIs) and was therefore not paid any incentives aside from his base salary.
186. Although there were no specific KPIs identified for the CEO, it appears he was required to deliver overall on the Corporate Plan, based on an email from Ms Smith-Gander to the Chair, Mr Young, dated 2 July 2012 which stated:

*There is an argument that we don't have a clear performance contract with Mike. I am sure his response will be "that's the Corporate Plan what I put in it I intend to deliver." That's fine by me. I suggest that we write a letter that says "thanks for a good year. we note the corporate targets as underpinning the sti are not achieved and that going forward we regard the corporate plan as the performance contract between us".*

187. Given the scale, complexity and far reaching nature of the Corporate Plan, and in particular that it necessarily covers such a long period of time, we consider that it would have been appropriate for KPIs to have been proactively identified and set by the Board against which the CEO's performance could have been measured.

#### *First CEO Assessment Review conducted by Mr Young*

188. The first assessment of the CEO by the Chair, Mr Young, was commenced in approximately October 2012 through to February 2013, more than three years after Mr Quigley's appointment as CEO. Based on electronic data provided, this was a limited review, confined to ad hoc discussions and email exchanges. It was in the nature of a self-evaluation by the CEO on 3 October 2012, followed up with a narrative form review of the CEO by Mr Young dated 17 January 2013. Mr Young orally reported on the assessment to the Board as recorded in the minutes of BM 55 on 21 February 2013:

<sup>92</sup> NBN Co Circulating Directors' Resolution 'Employment of CEO' dated 17 July 2009

<sup>93</sup> NBN Co Circulating Directors' Resolution 'Employment of CEO' dated 17 July 2009

*The Chairman...briefed the Board on the completion of the annual review of the Chief Executive Officer's performance.*

189. No Board minutes, papers or similar official written record of the assessment's content were retained.

*Second CEO Assessment Review conducted by Ms McKenna*

190. Ms McKenna replaced Mr Young as Chair on 15 March 2013. Ms McKenna was a member of the PPC Committee, which, on 26 April 2013, discussed the 'CEO Performance Review' (Agenda Item 2). Ms Smith-Gander, the then Chair of the PPC, provided an overview of the committee's responsibilities to review the performance of the CEO (as outlined in the PPC Charter), and of the past processes that had been in place to review the CEO's performance. An extract of the minutes state:

*The Committee discussed the past process for the reviews [of the CEO] noting that they:*

- *Had been conducted by the previous Chairman of the Board [Mr Young];*
- *Were based on a process which gave opportunity for NEDs to provide input which had been given and noted some performance shortfalls;*
- *Generally incorporated a written summary retained by the Chairman<sup>94</sup> and communicated orally to the CEO and the Board;*
- *Included a face to face performance discussion between the Chairman and the CEO;*
- *Included a debrief of the performance discussion to the Board by the Chairman; ....*

*It was agreed it would be useful to have documentation for the Committee to understand the process and content of the Performance Review undertaken for the last performance period (end June 2012).*

*Resolved:*

*The Chairman of the Committee will circulate documentation of the performance review and circulate to the members of the Committee.*

191. We have been unable to identify more details regarding the above issues, including the documentation agreed to be circulated by the Chair of the Committee, Ms Smith-Gander.

192. The PPC went on to discuss 'CEO Current Objectives' (Agenda Item 3) and an extract of the minutes state:

*An interim review of CEO performance year to date will be undertaken by the Chairman [Ms McKenna] for presentation to the next meeting of the Committee.*

193. Ms McKenna drafted a CEO Performance Review and presented it to the PPC meeting on 3 May 2013. The minutes state:

*Item 3 - CEO Performance Review*

*The Committee approved the draft interim performance review prepared by the Chairman of the Board [Ms McKenna] and agreed that the Chairman of the Board would circulate the assessment to the full Board, seeking input and requesting approval at the NED session scheduled for Monday 6 May 2013.*

194. The appraisal approved at the PPC meeting was provided to the Non-Executive Directors ('NED') in advance of the NED Board meeting on 6 May 2013. At the meeting, the NED resolved to approve the appraisal and that the Chair should schedule a discussion with the CEO to discuss it.

195. We are unable to determine whether the discussion between Mr Quigley and Ms McKenna occurred.

<sup>94</sup> We have not been provided with copies of these documents, which were apparently not provided to the Company Secretary, however it may be the electronic document dated 17 January 2013 referred to at paragraph 188 above.

196. Mr Quigley announced his resignation as CEO on 12 July 2013.

197. Whilst not required by the current GBE Guidelines, we recommend that GBEs conduct annual CEO Performance Assessments against predetermined criteria and a written record of its content is officially presented to the Board and retained.

### Managing Risks

198. GBE Guidelines that:

*4.14 GBE Boards are responsible for managing risks. Boards should therefore establish processes and practices within the GBE to manage all risks associated with the GBE's operations.*

*4.15 GBE boards should keep the Shareholder Minister(s) informed of risk management strategies by outlining them in corporate plans and progress reports, and other reports when necessary as outlined in paragraph 3.3. In addition, and unless otherwise qualified because of circumstances applying to a particular GBE, corporate plans and progress reports should contain a statement from the board that the GBE has appropriate risk management policies and practices in place and that adequate systems and expertise are being applied to achieve compliance with those policies and procedures.*

199. The ASX Principles and the Australian Standard state:

**Table 10 ASX Principles and the Australian Standard – Managing Risks**

ASX Principles 2 <sup>nd</sup> Edition	ASX Principles 3 <sup>rd</sup> Edition	Australian Standard
<p><b>Principle 7: Recognise and manage risk</b> Companies should establish a sound system of risk oversight and management and internal control.</p> <p><i>Recommendation 7.1: Companies should establish policies for the oversight and management and management of material business risks and disclose a summary of those policies.</i></p> <p><i>Recommendation 7.2: The board should require management to design and implement the risk management and internal control system to manage the company's material business risks and report to it on whether those risks are being managed effectively. The board should disclose that management has reported to it as to the effectiveness of the company's management of its material business risks.</i></p> <p><i>Recommendation 7.3: The board should disclose whether it has received assurance from the chief executive officer (or equivalent) and the chief financial officer (or equivalent) that the declaration provided in accordance with section 295A of the Corporations Act is founded on a sound system of risk management and internal control and that the system is operating effectively in all material respects in relation to financial reporting risks.</i></p>	<p><b>Principle 7: Recognise and manage risk</b> A listed entity should establish a sound risk management framework and periodically review the effectiveness of that framework.</p> <p><i>Recommendation 7.1: The board of a listed entity should:</i> (a) have a committee or committees to oversee risk, each of which: (1) has at least three members, a majority of whom are independent directors; and (2) is chaired by an independent director, and disclose: (3) the charter of the committee; (4) the members of the committee; and (5) as at the end of each reporting period, the number of times the committee met throughout the period and the individual attendances of the members at those meetings; or (b) if it does not have a risk committee or committees that satisfy (a) above, disclose that fact and the processes it employs for overseeing the entity's risk management framework.</p> <p><i>Recommendation 7.2: The board or a committee of the board should:</i> (a) review the entity's risk management framework at least annually to satisfy itself that it continues to be sound; and (b) disclose, in relation to each reporting period, whether such a review has taken place.</p> <p><i>Recommendation 7.3: A listed entity should disclose:</i> (a) if it has an internal audit function, how the function is structured and what role it performs; or (b) if it does not have an internal audit function, that fact and the processes it employs for evaluating and continually improving the effectiveness of its risk management and internal control processes.</p> <p><i>Recommendation 7.4: A listed entity should disclose whether it has any material exposure to economic, environmental and social sustainability risks and, if it does, how it manages or intends to manage those risks.</i></p>	<p><b>3.2.3.1 General</b> The Governance Policy should specify the responsibilities of the board, which include ...the following: ... d) The board should ensure that risks facing the entity have been identified, assessed and that the risks are being properly managed. ...</p> <p><b>3.3.3 Government entities</b> The board/agency management should ensure that the annual report provides performance information that demonstrates accountability for the expenditure of public monies and for the efficient and effective operation of the entity. To do this, the annual report should— ... (f) discuss risks, strategies and external operating environment.</p>

200. The first time that risk as a topic was specifically addressed by the Board was on 11 September 2010, when it was noted that the Audit Committee had raised, in its inaugural meeting the previous day, whether the Audit Committee was responsible for all risks. The Board resolved as follows:

*The Audit Committee to deal with Financial Risk only. That the CFO be made responsible for Risk Management generally and that risk issues come directly to the Board from the executive management team. The Company to consider forming a Risk Operational Committee as and when appropriate and review how risk fits with audit and program management.<sup>95</sup>*

201. Corporate Risks can be considered to consist of three major categories:

- a. Internal Risks (sometimes referred to as “preventable risks”) - these types of risk (e.g. Health and Safety, employees acting in an inappropriate, unethical or illegal manner) are often managed using a rules-based compliance approach.
- b. Strategic Risks – these are the risks the company accepts or rejects to seek to obtain superior returns from its strategy. Whilst “internal” or “preventable” risks are often framed in negative terms (i.e. days lost through accidents), strategic risks can have both upside and downside flavours. It is equally bad to miss out an upside opportunity (risk) as it is to not avoid a downside risk.
- c. External Risks –those risks which are beyond the control of the company, for instance natural disasters and major economic shifts.

202. Many of the risk papers and reports have been focused on the “preventable” risks and we consider that the Board was not actively involved in the identification, consideration and management of the strategic risks faced by NBN Co.

203. For instance, it appears that NBN Co’s risk management strategies related to the roll-out (construction) of the network were inadequate. While NBN Co was diligent in entering into construction contracts which mitigated its construction risk and transferred risk to the Design Partners, there was apparently an absence of recognition that NBN Co bore the ultimate responsibility for the construction of the network. See also the comments above regarding management’s capabilities regarding the brownfield roll-out.

204. NBN Co’s risk management policy, whilst described as being an enterprise-wide risk management, was largely a “bottom up” risk register which, understandably focussed on the internal risks. It appears that, from this perspective, the risk management processes within NBN Co worked well.

205. Procedurally, NBN Co’s Corporate Plans include a statement that is a variation of the statement required by GBE Guideline 4.15, that being<sup>96</sup>:

*NBN Co has established an enterprise-wide risk management system to facilitate the identification of significant business risks and implementation of appropriate risk mitigation or treatment plans and monitoring processes. The system is built upon the premise that all employees have responsibility for risk management in their job areas.*

206. The statement required by GBE Guideline 4.15 was included in only some of NBN Co’s Quarterly Reports from December 2011 with the statement excluded from the June and September 2013 Reports.

<sup>95</sup> Item 7, Page 5 of the Board Minutes for 10 September 2010

<sup>96</sup> NBN Co 2011-2013 Corporate Plan Section 12.1 on page 14 and 2012-2015 Corporate Plan Section 10.1 on page 83

## Executive Chair

207. GBE Guidelines state:

*2.7b The Chair shall not also be an executive of the GBE, unless otherwise agreed by the Shareholder Minister(s).*

208. ASX Principles and the Australian Standard state:

**Table 11 ASX Principles and the Australian Standard – Executive Chair**

ASX Principles 2 <sup>nd</sup> Edition	ASX Principles 3 <sup>rd</sup> Edition	Australian Standard
<p><b>Principle 2: Structure the board to add value.</b> Companies should have a board of an effective composition, size and commitment to adequately discharge its responsibilities and duties.</p> <p><i>Recommendation 2.2:</i> The chair should be an independent director.</p> <p><i>Recommendation 2.3:</i> The roles of chair and chief executive officer should not be exercised by the same individual.</p>	<p><b>Principle 2: Structure the board to add value.</b> A listed entity should have a board of an appropriate size, composition, skills and commitment to enable it to discharge its duties effectively.</p> <p><i>Recommendation 2.5:</i> The chair of the board of a listed entity should be an independent director and, in particular, should not be the same person as the CEO of the entity.</p> <p><i>[Selected] Commentary:</i> Good governance demands an appropriate separation between those charged with managing a listed entity and those responsible for overseeing its managers. Having the role of chair and CEO exercised by the same individual is unlikely to be conducive to the board effectively performing its role of challenging management and holding them to account.</p>	<p><b>3.2.4 Board independence</b> Independence issues relating to the board include the following: NOTE: Independence of board members is not applicable to all entities.</p> <p>...</p> <p>(b) The board chairperson should be independent of management (unless there are compelling reasons due to the nature of the entity to the contrary).</p> <p>....</p>

209. Mr Quigley was appointed as the Executive Chair of NBN Co on 24 July 2009 and retained that position until the appointment of Mr Young on 15 March 2010. Based on his Curriculum Vitae ('CV') as provided in the NBN Co Annual Reports, Mr Quigley appears to have had no experience as the Chair of a Board of Directors, and limited experience as a director of companies of the scale of NBN Co<sup>97</sup>.

210. The issue of whether the CEO and Chair role should be separated was first raised by the Board on 11 September 2009 when the Board discussed the need to differentiate the Chair and the CEO<sup>98</sup>.

211. Whilst it is perhaps understandable that the first Chair would be an executive Chair, the length of time before Mr Young was appointed, and the understandably significant extent of communication between Mr Quigley and the Shareholder Ministers during that time appears to have led to difficulties at later stages.

## Director and CEO Appointment Letters

212. GBE Guidelines state:

*2.3 Board members have their fiduciary and other duties drawn to their attention by the Shareholder Minister(s) in, or with, correspondence offering appointment, and are to fully accept the individual responsibility this places on them.*

<sup>97</sup> As Mr Quigley has declined to be interviewed as part of this process we have not been able to fully explore the exact extent of his prior board experience and have therefore relied on his CV as provided in the NBN Co Annual Reports

<sup>98</sup> BM 12 11 September 2009, Item 11

a. Appointment letters for all directors and Chief Executive Officers (CEOs) should include the following:

- i. director powers and duties (attaching a link to the CAC Act and the GBE Guidelines);
- ii. a copy of the GBE's constitution or enabling legislation (which would include the circumstances in which an office of director becomes vacant);
- iii. general public sector performance and accountability obligations, including that the GBE may be subject to Parliamentary scrutiny and audit processes;
- iv. information on the operations of the GBE, full details of their legislative obligations, their public sector accountability obligations and directors' responsibilities, and outlining the circumstances in which the GBE will bear the cost of directors obtaining independent professional advice in carrying out their duties;
- v. the term of appointment and remuneration arrangements (with particular reference to Remuneration Tribunal arrangements); and
- vi. reference to Directors and Officers insurance arrangements, confidentiality of information and board decisions, conflict of interest matters, and induction arrangements.

b. Directors are to formally respond to the letter of appointment within 30 days of receipt and provide an undertaking to advise the Shareholder Minister(s) if there is any change in circumstances that might impact on their ability to be a director.

213. Clauses 2.3a) and b) were not in the Previous GBE Guidelines and were inserted in October 2011 into the current version. Refer to Appendix D of this report for the key changes to the GBE Guidelines.

214. ASX Principles and the Australian Standard state:

**Table 12 ASX Principles and the Australian Standard – Director Appointment Letters**

ASX Principles 2 <sup>nd</sup> Edition	ASX Principles 3 <sup>rd</sup> Edition	Australian Standard
<p><b>Principle 1: Lay solid foundations for management and oversight</b> Companies should establish and disclose the respective roles and responsibilities of board and management.</p> <p><u>Recommendation 1.1:</u> Companies should establish the functions reserved to the board and those delegated to senior executives and disclose those functions.</p>	<p><b>Principle 1: Lay solid foundations for management and oversight.</b> A listed entity should establish and disclose the respective roles and responsibilities of its board and management and how their performance is monitored and evaluated.</p> <p><u>Recommendation 1.3:</u> A listed entity should have a written agreement with each director and senior executive setting out the terms of their appointment.</p>	<p><b>2.2.2 Governance Policy</b> ... An entity's Governance Policy can take a number of forms, dependent upon what best meets the needs of the individual entity. For example, an entity may like to consider including one or more of, but not limited to, the following documents as part of their Governance Policy: ... (e) Letters of appointment for board members.</p>

ASX Principles 2 <sup>nd</sup> Edition	ASX Principles 3 <sup>rd</sup> Edition	Australian Standard
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*[Selected] Commentary: ... It is also appropriate that directors clearly understand corporate expectations of them.*

*To that end, formal letters upon appointment for directors setting out the key terms and conditions relative to that appointment are useful.*

*Suggestions for the contents of the letter are contained in Box 1.1.*

215. During the relevant time period<sup>99</sup>:

- a. Two [2] of the eight [8] re/appointment letters from Shareholder Ministers to Directors did not cover all elements prescribed in GBE 2.3a.<sup>100</sup>
- b. Three [3] of the eight [8] re/appointed Directors did not respond formally to appointment letters within 30 days providing the required undertaking as follows:
  - i. Current Director: Alison Lansley, appointment as Non-Exec director 7 December 2012.
  - ii. Former Director: Mr Francis, reappointed as Non-Exec director 22 December 2012.
  - iii. Former Director: Mr Quigley, reappointment as Exec Director 15 March 2013.

## CEO Appointment and Replacement

216. The GBE Guidelines state:

*2.8 The Chair shall head a board committee, which shall provide the Shareholder Minister(s), though the board with recommendations on board composition and membership.*

*b. The Chair shall write to the Shareholder Minister(s) at least three months prior to a vacancy arising on the board or in the role of CEO.*

*i) Through the Chair, the board should advise the Shareholder Minister(s) about its preferred candidate for the position of CEO. The CEO is directly accountable to the board and it is expected that potential candidates would be identified through public advertising or executive search processes.*

*2.10 Any decision to appoint the CEO as a director is at the discretion of the Shareholder Minister(s) and the CEO recruitment and succession arrangements undertaken by the board should reflect this.*

217. Clause 2.10 was not in the Previous GBE Guidelines and was inserted in October 2011 into the current version.

218. ASX Principles and the Australian Standard state:

<sup>99</sup> Director re/appointments after GBE Guidelines issued in Oct 11 to the end of the relevant time period (change of government on 18 September 2013)

<sup>100</sup> Two (2) appointment letters (Mr Brad Orgill – appointment as Director 5 Aug 12 and Dr Kerry Schott – appointment as Director 28 September 2012) did not make reference to induction arrangements.

**Table 13 ASX Principles and Australian Standard – CEO Appointment and Replacement**

ASX Principles 2 <sup>nd</sup> Edition	ASX Principles 3 <sup>rd</sup> Edition	Australian Standard
<p><b>Principle 1: Lay solid foundations for management and oversight</b> Companies should establish and disclose the respective roles and responsibilities of board and management.</p> <p><u>Recommendation 1.1:</u> Companies should establish the functions reserved to the board and those delegated to senior executives and disclose those functions.</p> <p>[Selected] Commentary: Usually the board will be responsible for: .... ii) appointing and removing the CEO, or equivalent; .....</p>	<p><b>Principle 1: Lay solid foundations for management and oversight</b> A listed entity should establish and disclose the respective roles and responsibilities of its board and management and how their performance is monitored and evaluated.</p> <p><u>Recommendation 1.1:</u> A listed entity should disclose: (a) the respective roles and responsibilities of its board and management; and (b) those matters expressly reserved to the board and those delegated to management.</p> <p>[Selected] Commentary: Usually the board of a listed entity will be responsible for: .... iii) appointing, and when necessary replacing, the CEO; ....</p>	<p><b>3.2.3 Board responsibilities</b> <b>3.2.3.1 General</b> The Governance Policy should specify the responsibilities of the board, which include... the following: ... (h) The board should appoint the chief executive officer and evaluate his or her ongoing performance against predetermined criteria.</p>

219. NBN Co's Constitution states that, following consultation with the Commonwealth, the Board has the power to appoint and terminate the CEO.<sup>101</sup>
220. Egon Zehnder conducted the search for NBN Co's first CEO, with Mr Quigley ultimately selected. Contract negotiations with Mr Quigley were handled by the then Secretary of the Department of Prime Minister and Cabinet, on behalf of the board of NBN Co, with direct support from Egon Zehnder and Meyer Vandenburg, lawyers for NBN Co at the time.
221. Mr Quigley was appointed as CEO (and initially Executive Chair) of NBN Co effective 20 July 2009 by Circulating Directors' Resolution of the Interim Board on 17 July 2009. The resolution includes the key employment terms of the role, which refer to performance KPIs to be agreed as soon as reasonable, and for annual performance reviews to be conducted by the Chair or lead non-executive director<sup>102</sup>.
222. The minutes of the meeting of NBN Co's Board on 27 July 2009 note that a resolution of shareholders appointing Mr Quigley as Executive Chair has been signed and would be provided to the NBN Co as soon as possible<sup>103</sup>.
223. The Hon Lindsay Tanner MP and Senator The Hon Stephen Conroy wrote to the interim Board of NBN Co to advise of Mr Quigley's appointment as a director and interim Executive Chair of the Board of NBN Co. The (undated) letter notes that "[w]e understand that the Board has resolved to employ Mr Quigley as a permanent Chief Executive Office of the Company, following consultation with the Government".

<sup>101</sup> Clauses 12.1.1 and 12.3.1 of the Constitution of NBN Co last updated 22 February 2013

<sup>102</sup> NBN Co Circulating Director's Resolution 'Employment of CEO' dated 17 July 2009

<sup>103</sup> BM 09, 27 July 2009, Agenda Item 6, page 5

224. As previously discussed earlier in this report at paragraph 178, the minutes of the PPC held on 6 May 2013 recorded the commencement of Project North which involved the engagement of Egon Zehnder to assist NBN Co to search for a replacement CEO to Mr Quigley.

## Director Independence

225. The GBE Guidelines state:

*2.4 Boards should continue to regularly monitor the ongoing independence of each director and the board generally to ensure that they continue to exercise unfettered and independent judgement. The board should ensure that a director does not have any interests that derogate from carrying out the role intended with diligence and care.*

226. Clause 2.4 was not in the Previous GBE Guidelines and was inserted in October 2011 into the current version.

227. ASX Principles and the Australian Standard state:

**Table 14 ASX Principles and Aus. Standard – Director Independence**

ASX Principles 2 <sup>nd</sup> Edition	ASX Principles 3 <sup>rd</sup> Edition	Aus. Standard
	<p><b>Principle 2: Structure the board to add value</b>  <i>A listed entity should have a board of an appropriate size, composition, skills and commitment to enable it to discharge its duties effectively.</i></p> <p><b>Recommendation 2.3</b>  <i>A listed entity should disclose:</i></p> <p><i>(a) the names of the directors considered by the board to be independent directors;</i></p> <p><i>(b) if a director has an interest, position, association or relationship of the type described in Box 2.3 but the board is of the opinion that it does not compromise the independence of the director, the nature of the interest, position, association or relationship in question and an explanation of why the board is of that opinion; and</i></p> <p><i>(c) the length of service of each director.</i></p>	<p><b>3.2.4 Board independence</b>  <i>Independence issues relating to the board include the following:</i></p> <p>...</p> <p><i>(c) Where a director becomes aware of a conflict of interest or note, that member should formally declare the conflict and accept the guidance of the board. The Board Protocol should have clear procedures.</i></p> <p>...</p>

228. NBN Co has the following policies relating to director independence:

- Conflicts of Interest (Directors and Officers) Policy, first approved at BM 38 on 17 June 2011
- External Securities (Declaration of Private Interests) Policy, first approved at BM 21 on 17 March 2010
- Insider Trader Policy, first approved at BM 38 on 17 June 2011

229. Although the Board substantively complied with GBE 2.4, the following two exceptions exist in relation to the External Securities (Declaration of Private Interests) Policy.

230. Firstly, in relation to 'Disclosure of Interests in Relevant Securities', the policy states:

*Prior to appointment to the Board of NBN Co, each Director must provide a Director's Declaration in the attached form, setting out details of his or her direct and indirect interests in Relevant Securities and those of certain associates of the Director, along with any other interests which may conflict. [emphasis added]*

231. All directors appointed near or post the External Securities Policy approval (March 2010) did not comply with the policy since they did not provide a Director's Declaration prior to appointment, as shown in the following table.

**Table 15 Late Director's Declarations**

Name	Role	Date Appointed	Date of Director's Declaration
Harrison Young	Non- Exec Chair	15-Mar-10	08-Nov-10
Richard Turchini	Non-Exec Director	14-Sep-11	24-May-12
Brad Orgill	Non-Exec Director	05-Aug-12	19-Nov-12
Kerry Schott	Non-Exec Director	28-Sep-12	20-Oct-12
Alison Lansley	Non-Exec Director	07-Dec-12	07-Aug-13

232. However, all NBN Co directors since March 2010 (including those listed in the table above) provided similar declarations to the Shareholder Ministers prior to their appointments being considered. The declarations required by the Commonwealth and NBN Co appear to represent a potentially unnecessary duplication. Therefore, we recommend that the process of assuring the independence of directors prior to appointment via Director's Declarations be coordinated by the Shareholder Ministers and NBN Co to remove any such duplication.

233. Secondly, in relation to 'Notification of Dealings in Relevant Securities', the policy states:

*Other than in respect of Excluded Dealings, Directors are required to notify NBN Co of their intended dealings in Relevant Securities (including dealings in Relevant Securities which are not held directly but over which the relevant Director has control) not less than three days prior to such intended dealings. This should be done by written notice to the Company Secretary of NBN Co outlining:*

- *the name of the security holder;*
- *the Instruments involved;*
- *the proposed date of dealing;*
- *the type of proposed transaction (purchase, sale, etc.); and*
- *the number of Instruments involved.*

*Following completion of the proposed dealing, the Director in question must provide confirmation to the company secretary that the dealing has occurred.*

234. Ms Smith-Gander recorded several changes to her direct and indirect holdings in Transfield shares in her Director's Declarations and an email to the Company Secretary.<sup>104</sup>

235. The Transfield shares were "Relevant Securities"<sup>105</sup> according to the policy at the date they were first listed on Embargoed Securities "Register"<sup>106</sup> on 12 May 2012.

<sup>104</sup> Ms Smith-Gander's Directors Declarations dated 13 March 2012, 25 May 2012 and 11 July 2013 and email to Company Secretary dated 16 July 2013

<sup>105</sup> "Relevant Securities" means any Instrument issued by a Potentially Conflicting Body, or by a third party in respect of a Potentially Conflicting Body. An entity is a "Potentially Conflicting Body" if a holding of Instruments in respect of that entity may cause a conflict between the director's personal interests (constituted by that holding) on the one hand, and the Directors' duties to NBN Co on the other hand. Without limiting that term, a "Potentially Conflicting Body" may include: telecommunications companies and other NBN access seekers; suppliers of goods or services to NBN Co; shareholders or likely shareholders in NBN Co; any entity designated as such by the Board from time to time; and any entity in respect of which an Director acquires price sensitive information from time to time in his or her capacity as an Director, including any entity named on the Register from time to time.

<sup>106</sup> "Register" means the confidential, non-exhaustive list maintained by NBN Co and accessible by the Company Secretary, of the names of entities that have entered into contracts with NBN Co or its subsidiaries.

236. Ms Smith-Gander did not comply with the policy since she apparently did not provide the advance notifications of intended dealings in Transfield shares required from 12 May 2012.

### Planning and Reporting

237. The GBE Guidelines, in Part 3 Planning & Reporting, have requirements relating to the form and content of the following reporting:

- a. Corporate Plans
- b. Statement of Corporate Intent ('**SCI**')
- c. Annual Reports
- d. Quarterly Progress Reports

238. ASX Principles and the Australian Standard state:

**Table 16 ASX Principles and Australian Standard – Planning and Reporting**

ASX Principles 2 <sup>nd</sup> Edition	ASX Principles 3 <sup>rd</sup> Edition	Australian Standard
		<p><b>3.3.1 General</b></p> <p><i>The system of governance should ensure that timely and accurate disclosure is made on all material matters regarding the entity, including the ownership, governance, financial situation and performance of the entity. Disclosure should include, but not be limited to, material information on—</i></p> <ul style="list-style-type: none"> <li><i>(a) the financial and operating results of the entity;</i></li> <li><i>(b) the entity's objectives;</i></li> <li><i>(c) major share ownership and voting rights;</i></li> <li><i>(d) members of the Board and key executives, and their remuneration;</i></li> <li><i>(e) material foreseeable risk factors;</i></li> <li><i>(f) material issues regarding employees and other stakeholders;</i></li> </ul> <p><i>and</i></p> <ul style="list-style-type: none"> <li><i>(g) governance structures and policies.</i></li> </ul> <p><i>Information should be prepared, audited and disclosed in accordance with high quality standards of accounting, financial and non-financial disclosure, and audit.</i></p> <p><i>An annual audit should be conducted by an independent auditor in order to provide an external and objective assurance on the way in which financial statements have been prepared and presented.</i></p> <p><i>Channels for disseminating information should provide for fair, timely and cost-efficient access to relevant information by users.</i></p> <p><b>3.3.2 Companies</b></p> <p><i>The board of directors of a listed company should prominently and clearly disclose, in a separate section of its annual report its approach to corporate governance. This should include an analysis of the corporate governance issues specific to the entity so that public investors understand how the entity deals with those issues.</i></p> <p><b>3.3.3 Government entities</b></p> <p><i>The board/agency management should ensure that the annual report provides performance information that demonstrates accountability for the expenditure of public monies and for the efficient and effective operation of the entity.</i></p> <p><i>To do this, the annual report should—</i></p> <ul style="list-style-type: none"> <li><i>(a) report objectives that are clear and measurable;</i></li> <li><i>(b) focus on results and outcome;</i></li> <li><i>(c) discuss results against expectations, including community social obligations;</i></li> <li><i>(d) explain changes over time;</i></li> <li><i>(e) provide evidence of value for money; and</i></li> <li><i>(f) discuss risks, strategies and external operating environment.</i></li> </ul>

239. Under Section 3.6 of the GBE Guidelines

*All corporate plans and subsequent updates, reports or supplementary information are confidential to the Minister(s), their advisers and departments.*

240. Despite this requirement, both of NBN Co's Corporate Plans (2011-2013 and 2012-2015) were published publicly via its website.<sup>107</sup> This is contrast to the other six GBEs which have not made their Corporate Plans publicly available.<sup>108</sup>

241. It appears the Shareholder Ministers decided to make NBN Co's Corporate Plan a publically available document based on an undated letter from The Hon. Stephen Mr Conroy to the Chair, Mr Young, which states:

*As you are aware, the Government has recently considered the outstanding recommendations of the NBN Implementation Study and other policy matters. The purpose of this letter is to communicate to NBN Co the Government's decisions in relation to these outstanding recommendations to enable NBN Co to revise its Corporate Plan and Business Case and provide a final version to Government by close of business Wednesday, 15 December 2010. **The Government expects to publicly release a version of these documents shortly thereafter.** Therefore we would be grateful if NBN Co could also provide us with a version that removes matters of commercial sensitivity and that you consider is suitable for public release. (emphasis added)*

*It will be important that there is close consultation over the next week between NBN Co and the Government, via our Chiefs of Staff, to finalise the arrangements for the public release of NBN Co's Business Case.*

*The Government will formally advise NBN Co of its policy objectives for the NBN through a Statement of Expectations, which is also expected to be publicly released.*

242. In relation to both Corporate Plans, NBN Co provided the Shareholder Ministers and their departments with confidential commercially sensitive supplementary material.

243. NBN Co's reporting (listed at paragraph 237 above and the supplementary Corporate Plan material) has broadly complied with the remaining GBE Guidelines in Part 3 with some minor technical exceptions as follows:

- a. The absence in the Corporate Plans of comments on the dividend policy of NBN Co in accordance with Guideline 3.3a.vi;
- b. The absence in the Corporate Plans of the KPIs across the period set out in Guideline 3d. KPIs were incorporated into the Quarterly Reports following a letter received from the Shareholder Ministers on 26 June 2012;
- c. A lack of specific appropriate commentary on any emerging issues and risks or changes to risk factors that might have a material impact on performance and details of strategies for managing any material risks that were not identified in the Corporate Plan in the Quarterly Reports as required by Guideline 3.10d until the December 2010 report; and
- d. The absence of the statement required by Guideline 4.15 that NBN Co has appropriate risk management policies and practices in place and that adequate systems and expertise are being applied to achieve compliance with those policies and procedures in the majority of the Quarterly Reports.

<sup>107</sup> <http://www.nbnco.com.au/about-us/corporate-plan.html> [accessed 30 May 2013]

<sup>108</sup> This is based on an internet search of the following GBEs: Commonwealth Authorities (Australian Government Solicitor, Australian Postal Corporation, Defence Housing Australia) and Commonwealth companies (ASC Pty Ltd, Australian Rail Track Corporation Limited, Medibank Private Limited).

244. There are currently seven GBEs with a wide range of activities<sup>109</sup>. NBN Co is, and will be, one of the largest GBEs and is also, because of its start-up nature and range and scale of activities, significantly more complex than any of the other GBEs. The complexity and nature of NBN Co's activities raises the question as to whether the GBE Guidelines were and are sufficient for the NBN Co. We recommend that the Shareholder Ministers should consider having supplementary, GBE specific, guidelines for individual GBEs, especially for any new GBE set up in the future. For example, in respect of NBN Co we would recommend there should be more specific guidance on the requirements for the identification and management of strategic risks. This in turn may require enhanced capabilities within the Shareholder Ministers' departments to manage and evaluate the GBEs against such specific further requirements.

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<sup>109</sup> Three Commonwealth Authorities (Australian Government Solicitor, Australian Postal Corporation, Defence Housing Australia) and four Commonwealth companies (ASC Pty Ltd, Australian Rail Track Corporation Limited, Medibank Private Limited and NBN Co Limited).

## E. Carriage of Information

### Introduction

245. This section sets out the detailed findings arising from analysis of:

- a. what the Senior Executives knew, what they told the Board, and what the Senior Executives and the Board told Federal Government; and
- b. information the Senior Executives and/or the Board released publicly (including via the NBN Co website).

### GBE Guidelines

246. In relation to NBN Co's carriage of information, the GBE Guidelines state:

*3.19 The directors of a Commonwealth authority GBE or a Commonwealth company GBE are required to keep the Shareholder Minister(s) informed of the operations of the GBE and its subsidiaries and should follow a disclosure principle which is similar to the continuous disclosure requirements of the Australian Stock Exchange listing rules.*

- a. *Should a GBE become aware of any information that may have a material effect on its value and/or performance, that information must be provided immediately to the Shareholder Minister(s).*
- b. *Directors are required to provide such other information in relation to the GBE's operations as the Shareholder Minister(s) require(s), within the time limits set by the Minister(s).*

247. In addition, the GBE Guidelines, in Part 3 Planning & Reporting, have requirements relating to the form and content of the following reporting:

- a. Corporate Plans
- b. Statement of Corporate Intent
- c. Annual Reports
- d. Progress Reports

248. The SCI states under the heading Disclosure:

*The company will maintain regular reporting to its Shareholder Ministers and as a Government-owned company is publicly accountable and subject to Parliamentary scrutiny through the Joint Standing Committee on the NBN (JCNBN), Senate committees and other Parliamentary inquiries, and to audit by the Auditor General.*

### Communications Committee

249. The Board established the Communications Committee to assist with supervising the external communications of NBN Co to all stakeholders other than RSPs<sup>110</sup>.

250. The Communications Committee Charters note that such stakeholders would include<sup>111</sup>:

- a. Consumers or end-users of the NBN, whether they be households or firms;

<sup>110</sup> Communications Committee Charters approved at BM 46 held on 16 March 2012 item 10 and BM 55 held on 21 February 2013 item 11 page 3.

<sup>111</sup> Communications Committee Charters approved at BM 46 held on 16 March 2012 item 10 and BM 55 held on 21 February 2013 item 11 page 3.

- b. Government bodies and offices (federal, state and local);
- c. All media – both reactive and proactive; and
- d. Third party organisations and individuals who would have an interest in the development of the NBN.

## Detailed Findings

251. In light of the volume of communication from NBN Co, this limited review has focussed on the following four aspects of NBN Co's activities:

- a. Corporate Plans
- b. Premises Passed including Service Class 0
- c. Satellite Premises Covered
- d. "Value" of the Telstra DAs

252. In addition to the reporting documents listed above at paragraph 247 above, the following materials were reviewed:

- a. NBN Co media releases
- b. Federal Government media releases
- c. Letters to and from the Shareholder Ministers
- d. Board papers and minutes
- e. Written electronic communications between the Board and Senior Executives and the Board and the Federal Government.
- f. Comments from interviews conducted<sup>112</sup>

253. These materials indicate that there was consistent communication between NBN Co and the Shareholder Ministers in relation to the four key aspects of NBN Co's activities.

254. These matters were generally communicated to the Shareholder Ministers promptly once the Board became aware of any such issue.

## Corporate Plans

255. Under the GBE Guidelines<sup>113</sup>, each GBE is required prepare a Corporate Plan. In December 2010 NBN Co released its first Corporate Plan, the 2011-2013 Corporate Plan, which outlined its long-term business case and set rollout targets for the three years from 1 July 2010 to 30 June 2013. In August 2012, NBN Co released its second Corporate Plan, the 2012-2015 Corporate Plan, for the three years from 1 July 2012 to 30 June 2015.

256. The NBN Co Strategic Review concluded that the second Corporate Plan was "*extremely optimistic and very unlikely to be achieved*".<sup>114</sup>

257. The Corporate Plan communicated to the Shareholder Ministers and their departments was consistent with the information provided by management of NBN Co to the Board. However it was noted in the 2013 Board Performance Assessment conducted by Johnson that the Board sought to test with management the assumption under-pinning the 10 year roll-out schedule – a key assumption of the Corporate Plan - and it notes that "*this proved difficult given the policy directions from Ministers and the attitude of the CEO*".

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<sup>112</sup> Refer to Appendix E of this report

<sup>113</sup> Section 3.3 of the GBE Guidelines

<sup>114</sup> NBN Co Strategic Review Report, December 2013, page 12

258. Under clause 3.6 of the GBE Guidelines:

*All corporate plans and subsequent updates, reports or supplementary information are confidential to the Minister(s), their advisers and departments.*

259. However, it appears that the Shareholder Ministers decided to make the Corporate Plan a publically available document. This reduced the usefulness of the document in communicating to the Shareholder Ministers and their departments the strategic risks and their potential impact on the key financial and operating results of NBN Co. Neither of the finalised Corporate Plans provide any meaningful sensitivity analysis, particularly around the effects of delays in the brownfields roll-out or the inability to achieve the future cost efficiencies assumed in the second Corporate Plan compared with the actual costs incurred to that time.

260. Whilst certain supplementary material was provided to the Shareholder Ministers and their departments did provide some sensitivity analyses, the length and structure of that analysis meant it would have been difficult for the recipient of such information to fully appreciate the potential interaction and magnitude of the key strategic risks for NBN Co.

### Premises Passed including Service Class 0

261. The December 2013 Strategic Review found that NBN Co had suffered from a “relentless focus on the metric of Premises Passed as the single most important determinant of corporate success, rather than a balanced view including Premises Serviceable (i.e. a premises that is available to be connected), and Premises Activated”<sup>115</sup>.

262. The difficulty with the focus on Premises Passed is in some ways explained by Service Class 0. Service Class 0 premises are premises passed by the active network, but for which a service cannot currently be ordered from a telephone or internet service provider because additional work is required. The additional work may include additional cabling for multi-dwelling units such as an apartment block, which may require additional interactions with body corporates and may not actually be physically possible at a reasonable cost, and therefore generally NBN Co is unable to provide a timeframe for the connection of these premises.

263. NBN Co has also experienced difficulty with Service Class 1 premises, which are those Premises Passed for which no ‘Drop’ or ‘Network Terminating Device’ is in place. A large number of these premises have suffered extended delays in connecting to the NBN due to the existence of underground lead-in conduits requiring unblocking, repair or the requirement for additional civil works.

264. The concept of the Service Classes was incorporated into NBN Co’s Operations Manual during 2011 and formed part of the Wholesale Broadband Agreement<sup>116</sup>.

265. NBN Co’s Quarterly Reports, which are provided to the Shareholder Ministers, did not at any stage prior to September 2013 break down the number of Premises Passed into the Service Classes. The first mention of Service Class 0 in the Quarterly Reports is in the report for the three months ended 30 September 2013, which notes that of the 227,483 FTTP Brownfields premises, 73,506 were classified as Service Class 0.

266. None of NBN Co’s publicly available Annual Reports mention the Service Classes. Premises Passed is disclosed in NBN Co’s 2011 to 2013 Annual Reports.

267. The importance of Premises Passed to NBN Co’s operations and culture is evident from both its internal and external reporting.

<sup>115</sup> NBN Co Strategic Review Report, December 2013, p.37

<sup>116</sup> NBN Co Operations Manual 30 November 2011 Document number NBN-NO-MNL-0001

268. Each Corporate Plan deals extensively with Premises Passed<sup>117</sup> (and Premises Connected) but none mention the Service Classes. The first 'Corporate Key Performance Indicator' included in NBN Co's Quarterly Reports was FTTP Brownfields Premises Passed<sup>118</sup>. The first metric disclosed in NBN Co's Program Management Reports is Premises Passed.
269. This focus in NBN Co's early years on Premises Passed is understandable given NBN Co's initial emphasis on construction of the network and the use of the term generally in the industry<sup>119</sup>. In all likelihood the difficulties that NBN Co experienced in constructing the lead-ins or drops to Premises Passed properties and complications with multi-dwelling units, which form a large proportion of Service Class 0 properties, were largely unforeseen prior to construction commencing.
270. Although the Corporate Plans, PMRs and Quarterly Reports also deal with Premises Connected (or Activated) the lack of disclosure regarding the serviceability of Premises Passed obscured the true progress of the network rollout and the potential for future revenue because of the work required to bring Service Class 0 and 1 properties to a state where an active service could be sought by the end user. The existence of these Service Classes also assists in explaining the low take up rates in some areas where the fibre rollout has passed. For example, at 30 September 2013 91.5% of Premises Passed in the Northern Territory were classified as Service Class 0. At that date, the Northern Territory had only four Premises Connected to the NBN, whilst at the same date in WA, 70.8% of Premises Passed were classified as Service Class 0.
271. Externally, these issues of 'serviceability' were not fully made clear to the public prior to NBN Co publishing the Weekly Rollout Metric Reports on 30 October 2013. These reports separately disclose 'Premises Serviceable' from Premises Passed. Premises Serviceable is defined as Premises Passed less Service Class 0 premises. Given the difficulties NBN Co has experienced connecting Service Class 1 premises, it is arguable whether the definition of these premises as 'serviceable' is correct.
272. It is not clear when the scale and nature of the problem with Service Class 0 became apparent to the NBN Co Board. Internally, the Program Management Reports did not commence reporting on Service Class 0 until 3 July 2012<sup>120</sup> and on all of the Service classes until 29 April 2013<sup>121</sup>. It appears that the PMRs were distributed to the Exco and other Level B Executives, but were not specifically distributed to the Board Members.
273. The first mention of Service Class 0 in a Board Paper is in September 2012, when it was 2,605 of 29,432 premises passed at that stage (8.9%). From June 2013 the level of Service Class 0 was over 30% of Premises Passed.
274. It is not until March 2013 that the NBN Co Board was provided with regular updates from the PMRs as part of the CEO's Report. A summary of the Premises Passed and Service Class 0 information presented in these updates to the Board is set out in the table below:

**Table 17 CEO Report updates to NBN Co Board on Premises Passed & Service Class 0**

Date	Premises Passed	Service Class 0	Service Class 0 % of Premises Passed <sup>122</sup>	Board reference
04-Sep-12	29,432	2,605	8.9%	BM 51 - Item 17 -Attachment 1 - Program Plan - update.pdf
11-Mar-13	47,508	5,428	11.4%	BM 56 - Item 05_a_ - Attachment 1 - Deployment Measures Week 10 dated 11 March 2013.pdf

<sup>117</sup> See for example, NBN Co Corporate Plan 2011-2013 pages 15, 16, 19, 77, 78, 83, 110, 115, 133 and 134

<sup>118</sup> NBN Co Progress Report for the nine months ended 31 March 2011 page 12

<sup>119</sup> Email from The Hon. Malcom Turnbull to Ms McKenna 13 May 2013

<sup>120</sup> Program Management Report released 3 July 2012

<sup>121</sup> Program Management Report released 29 April 2013 as part of the 'Brownfield's Premises Passes - Class '0' Status Report' included in that and subsequent Program Management Reports

<sup>122</sup> This calculation was not presented in the information provided to the Board

Date	Premises Passed	Service Class 0	Service Class 0 % of Premises Passed <sup>122</sup>	Board reference
15-Apr-13	68,191	18,832	27.6%	BM 57 - Item 07_a_ - Chief Executive Officers Report _Program Management Report - Week 15 dated 15 April 2013_.pdf
22-Apr-13	68,378	18,957	27.7%	BM 57 - Item 07_a_ - Chief Executive Officer_s Report _Program Management Report - Week 16 dated 22 April 2013_.pdf
20-May-13	75,682	20,687	27.3%	BM 58 - Item 08_a_ - Attachment 1 - Program Management Report - 20 May 2013.pdf
27-May-13	78,798	21,194	26.9%	BM 58 - Item 08_a_ - Attachment 1 - Program Management Report - 27 May 2013.pdf
17-Jun-13	109,860	34,107	31.0%	OSMB - Item 03 - Program Management Report - Week 24.pdf
01-Jul-13	163,515	55,724	34.1%	BM 59 - Item 08_a_ - Program Management Report Week 26 as at 1 July 2013.pdf
08-Jul-13	168,733	56,590	33.5%	BM 59 - Item 08_a_ - Program Management Report Week 27 as at 8 July 2013.pdf
12-Aug-13	190,009	59,837	31.5%	BM 61 - Item 05_b_ - Roll out Summary _Brownfield Production Profile_.pdf
19-Aug-13	194,079	61,743	31.8%	BM 61 - Item 05_b_ - Roll out Summary _Brownfield Production Profile_ updated 19 August 2013.pdf
09-Sep-13	206,214	64,031	31.1%	BM 62 - Item 05_b_ - Roll out Summary _Brownfield Production Profile_.pdf

## Satellite Premises Covered

275. On 11 January 2013 NBN Co announced the achievement of a year-end premises constructed commenced or completed target of 758,000. Of this amount, the Satellite coverage was 250,000 premises covered.<sup>123</sup>

276. On 1 July 2011 NBN Co announced the launch of the ISS. The service was described as “for residents, small businesses and indigenous communities in rural and remote Australia who can’t currently access broadband services comparable to those available in metropolitan area”<sup>124</sup>. This press release did not include information regarding the capacity or coverage of the ISS.

277. Initially it was estimated that the number of eligible premises would be 165,000, however in about November 2012 this estimate was revised, based on “analysis and experience with the [DBCDE] Service Locator Tool and the service qualification rules” to 250,000 premises.<sup>125</sup>

278. An internal management email chain regarding the ‘Program Management Report Week 46 / 2012’ stated that:

*This increase was anticipated when the Quarterly Targets were put together. The FRSS coverage assumptions have been revised recently based on analysis and experience with the DBCDE Service Locator Tool and the service qualification rules. As a result of this analysis the coverage for the FRSS is expected to increase from 165,000 premises to 250,000 premises.*

279. In a NBN Co media release dated 4 July 2013, the figure for satellite coverage is described as being the “estimated number of eligible end-users provided by DBCDE”.<sup>126</sup>

280. No information has been located which provides further information about how the DBCDE has calculated the number of eligible end-users.

<sup>123</sup> <http://www.nbnco.com.au/about-us/media/news/achieved-year-end-target.html> [accessed 10 June 2014]

<sup>124</sup> <http://www.nbnco.com.au/about-us/media/news/nbnco-launches-interim-satellite-service-for-remote-australians.html> [accessed 2 June 2014]

<sup>125</sup> Email dated 22 November 2012 from Adrian Inch to Angus Begg RE: Program Management Report Week 46/2012

<sup>126</sup> <http://www.nbnco.com.au/about-us/media/news/nbnco-meets-revised-end-of-year-fibre-rollout-target.html> [accessed 2 June 2014]

281. Whilst the exact number of users who will, from a physical and technical perspective, be able to use to the ISS is dependent on the mix of locations and usage patterns of the various users, the modelling within NBN Co has identified that the likely technical maximum users of the ISS is approximately 48,000. Therefore 48,000 users is the appropriate figure to report, not 250,000 users.
282. The nature of the 250,000 figure and the true potential number of users of the ISS (i.e. 48,000) were known to the Shareholder Ministers and their departments. The current management of NBN Co now reports Premises Activated for Satellite (43,369 as at 25 May 2014) but does not include any amount for Premises Passed/Covered in respect of Satellite.

### “Value” of the Telstra DAs

283. We have considered whether NBN Co’s characterisation and quantification of the costs to NBN Co of the Telstra DAs was appropriately clear.
284. The FHoA between NBN Co and Telstra was announced in June 2010, and the Telstra DAs in June 2011.
285. There were changes between the FHoA and the Telstra DAs, both in terms of the volume of infrastructure requirements and the pricing of some of those requirements, for example, for the lead-in conduits<sup>127</sup>.
286. On 23 June 2011 Telstra made a market announcement<sup>128</sup> to the effect that the Telstra DAs have a June 2010 post-tax NPV to Telstra of approximately \$11 billion, comprised of \$9 billion of payments by NBN Co and \$2.0 billion of Government payments, the components of which were:

**Table 18 Telstra DAs**

Component	Post tax NPV (\$'bn)	Discount rate	Cash flow modelling period
Disconnection payments and LICs	4.0	10%	10 years
Infrastructure payments	5.0	10%	Average of 30 years
<b>NBN Co payments</b>	<b>9.0</b>		
TUSMA Services	0.7	8%	Up to 20 years
Housing Estate Fibre Provision Responsibilities	0.3	10%	Ongoing
Other government commitments	1.0	10%	Various over scheduled 10 year rollout
<b>Government payments</b>	<b>2.0</b>		
<b>Approximate post-tax NPV of agreements</b>	<b>11.0</b>		

*Table source: Telstra ASX announcement 23 June 2011*

287. Subsequent media reports have referred to the “value to Telstra” as being \$11.2 billion<sup>129</sup>. Documents sourced internally to NBN Co make reference to a figure of \$11.7 billion, however it is unclear whether this is comparing like with like.
288. Internal NBN Co analysis in November 2013 estimated that the NBN Co payments, which were initially estimated to have a June 2010 after tax NPV to Telstra of \$9.0 billion, were likely to have a value to Telstra of approximately \$8.8 billion on a like for like basis.
289. NBN Co disclosed its obligations to Telstra in its 2010-2011 Annual Report as a contingent liability<sup>130</sup>:

<sup>127</sup> NBN Co Board Presentation – Telstra Transaction 15 April 2011

<sup>128</sup> Telstra ASX Announcement ‘Telstra signs NBN Definitive Agreements’ dated 23 June 2011, <http://www.asx.com.au/asxpdf/20110623/pdf/41zclc1lvjs25r.pdf>

<sup>129</sup> See, for example, [http://www.afr.com/p/business/companies/telstra\\_billions\\_stay\\_in\\_bank\\_until\\_Oj6siG8PlyVksLrdllBqqM](http://www.afr.com/p/business/companies/telstra_billions_stay_in_bank_until_Oj6siG8PlyVksLrdllBqqM)

<sup>130</sup> NBN Co 2010-2011 Annual Report, page 71

*NBN Co and Telstra Corporation Limited (Telstra) announced on 23 June 2011 that binding Definitive Agreements had been entered into that would provide access to certain Telstra infrastructure (comprising ducts, pits, lead-in conduits, rack spaces in exchanges and dark fibre) and deliver the progressive disconnection of premises from Telstra's copper and HFC networks (except for certain pay TV services). The Definitive Agreements have been attributed (by Telstra) an approximate net present value after tax of \$9 billion assessed at June 2010, from the payments to be made over time by NBN Co.*

290. NBN Co's Annual Reports (which are publicly available) make reference only to Telstra's estimate of the post-tax NPV of the payments in its hands, being \$9.0 billion in 2011. There has been no public disclosure of the nominal amount of the payments by NBN Co.
291. However various documents sent from NBN Co to the Shareholder Ministers did identify the nominal amounts to be paid to Telstra of approximately \$98.8 billion, and this was communicated to DBCDE in April 2011 in a partially redacted copy of a Management Report to NBN Co Limited Board of Directors on the Telstra DA and the Optus HFC Subscriber Agreement<sup>131</sup>.

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<sup>131</sup> Management Report to NBN Co Limited Board of Directors dated 16 April 2011, page 91.

## F. Procurement Contracts

### Introduction

292. This section sets out the detailed findings arising from reviewing NBN Co contract procurement arrangements and identification of vendors for further analysis.

### Detailed Findings

293. During the Caretaker Period, the Caretaker Conventions have established the practise that the incumbent government avoids:

- a. Making major policy decisions that are likely to commit an incoming government;
- b. Making significant appointments; and
- c. Entering major contracts or undertakings.<sup>132</sup>

294. The recent Caretaker Period:

- a. commenced on Monday 5 August 2013 at approximately 5.30pm (on the dissolution of the House of Representatives); and
- b. ended on Wednesday 18 September 2013 at approximately 11am when the incoming Coalition government was sworn in.

295. According to records provided to KordaMentha by NBN Co, during that time NBN Co entered into around 500 contracts and a further 115 contracts were proposed to be entered into<sup>133</sup>.

296. Using this information we undertook an analysis of all accounts payable invoices and payments recorded in Oracle to the vendors identified in the contract listing and compared those amounts with previous periods to identify whether the amounts spent or committed to during the Caretaker Period represented new undertakings or a continuation of existing relationships. Based on this preliminary analysis several vendors were identified for further review.

297. While some of the contracts entered into and payments made during the Caretaker Period involved significant monetary commitments or amounts, the majority of these would appear to relate to the ongoing rollout of the NBN in accordance with the existing Corporate Plan, or ongoing commitments with existing vendors.

298. This is consistent with NBN Co's intended 'business as usual' approach to its business practises during the Caretaker Period, which was described to be:

*[T]he carrying out or giving effect to activities or commitments that are within the scope of the Corporate Plan in effect at the time... and are consistent with the efficient operation of NBN Co.*<sup>134</sup>

299. The Strategic Review commented that:

*The Independent Assessment (based on a forensic investigation) found that no material issues exist within the accounts of NBN Co.*<sup>135</sup>

<sup>132</sup> Department of the Prime Minister and Cabinet, Guidance on Caretaker Conventions, 2013, page 1

<sup>133</sup> Caretaker Contract Listing\_20131114\_FINAL.xlsx

<sup>134</sup> BM 55 21 Feb 13, Item 25 Attachment 1

<sup>135</sup> NBN Co Strategic Review Report, December 2013, page 12

## Bespoke Approach

300. In July 2013, several press articles discussed the engagement of Bespoke Approach, a corporate advisory and lobbying firm, by the NBN Co Board.

301. Under the Freedom of Information Act the following information was released:

*In the calendar years 2012 and 2013 up to 19 July 2013, NBN Co did not engage Bespoke Approach. Rather, the company paid \$113,743.70 excluding GST to Hebert Smith Freehills in relation to disbursements to Bespoke Approach. Herbert Smith Freehills was engaged to assist almost all of NBN Co's past and present non-executive directors. Hebert Smith Freehills informed NBN Co that Bespoke Approach's engagement ended on or about 19 July 2013.*

302. Bespoke Approach's key personnel are the former Liberal Party foreign minister Alexander Downer, former Liberal staffer Ian Smith and former Labor minister Nick Bolkus.

303. The Funding Directors' Access to Independent Advice Policy (first approved at BM 13 dated 2 October 2009) sets out the circumstances Directors may obtain independent advice at the Company's expense. The Policy states:

- a. *A Director is entitled to seek independent professional advice (including but not limited to legal, accounting and financial advice) at the Company's expense on any matter connected with the discharge of his or her responsibilities as a director of the Company.*
- b. *The right to request or receive Funded Advice does not extend to advice concerning matters of a personal or private nature including, for example, matters relating to the Director's contract of employment with the Company (in the case of an executive Director) or extend to any advice concerning a dispute between the Director and the Company, except where the dispute is in relation to the objects, powers and best interests of the Company.*

304. At BM 57 on 24 April 2013, the Board Paper for Agenda Item 23 recommends that:

*The Board resolves to:*

- a. *Retain, on the terms set out at Attachment 1, Herbert Smith Freehills (HSF) to advise NBN Co's past and present Non-Executive Directors (NEDs) pursuant to the Funding Directors Access to Independent Advice Policy (FDAIA Policy).*
- b. *Retain through HSF, on the terms set out in Attachments 2 and 3 respectively, John Connolly & Partners Pty Limited (JCP) and Bespoke Approach Pty Limited (Bespoke) also pursuant to the FDAIA Policy.*

305. The Board Paper provides the following background:

*As instructed by the NEDs, HSF has also engaged, confidentially, under legal professional privilege, JCP, public relations advisors and Bespoke, a media training consultancy, to provide input in relation to strategy and stakeholder management that aims to support the NEDs overall legal strategy.*

306. Attachment 3 was a letter dated 21 March 2013 setting out the Retainer of Bespoke Approach from Herbert Smith Freehills, it states:

*We act for the directors of NBN Co Limited (the Directors) in relation to potential issues that may be raised regarding the Board of NBN Co Limited by the Shadow Minister for Communications and Broadband as part of the Opposition's review of broadband options in Australia.*

*This letter is to confirm your retainer by Herbert Smith Freehills (HSF) to provide strategic input and direction in relation to our advice and representation of the Directors in this matter.*

...

*We will discuss the scope of your engagement as the matter develops. In summary, we anticipate that you will assist us to provide advice to our client by providing strategic input in relation to stakeholder management and by developing a plan which aims to support our client's overall legal strategy.*

307. In relation to the responsibility of fees, the letter states:

*Although the Directors will be responsible for payment of your fees, we would be grateful if you would direct your invoices to our office.*

308. The minutes of BM 57 record the following in relation to Agenda Item 23:

*The Chairman informed the Board of the retention of:*

*Herbert Smith Freehills to advise the Non-Executive Directors of the Board; ....*

309. Whilst the provision of legal advice to Non-Executive Directors is not something which one would expect to be an on-going aspect of NBN Co's (or any other GBE's) business, the procurement processes in respect of this engagement appear appropriate in the circumstances.

## Appendix A Glossary of terms

Term	Definition
ACCC	Australian Competition and Consumer Commission
ANAO	Australian National Audit Office
Australian Standard	Australian Standard 8000:2003 "Corporate governance - Good governance principles"
ASX Principles	ASX Corporate Governance Principles and Recommendations
ASX Principles 2 <sup>nd</sup> Edition	ASX Corporate Governance Principles and Recommendations 2 <sup>nd</sup> Edition with 2010 Amendments (released June 2010)
ASX Principles 3 <sup>rd</sup> Edition	ASX Corporate Governance Principles and Recommendations 3 <sup>rd</sup> Edition (released 27 March 2014, effective first full financial year on or after 1 July 2014)
BM	Board Meeting
Caretaker Conventions	During the period preceding an election for the House of Representatives, the incumbent government assumes a 'caretaker role' which involves a series of practises in which the government avoids: <ol style="list-style-type: none"> <li>Making major policy decisions that are likely to commit an incoming government;</li> <li>Making significant appointments; and</li> <li>Entering major contracts or undertakings.</li> </ol>
Caretaker Period	The time the House of Representatives is dissolved when an election has been called and continues until the result of the election has been determined, or, if there is a change of government, until the new government is appointed.
CEO	Chief Executive Officer
Corporate Governance Review	Services described in the Statement of Work issued by NBN Co dated 16 December 2013
Corporations Act	Corporations Act 2001
CRG	Caretaker Review Group
CV	Curriculum Vitae
DBCDE / BCDE	The Department of Broadband, Communications and the Digital Economy / Broadband, Communications and the Digital Economy
Exco	Executive Committee
FHoA	Financial Heads of Agreement
Governance Institute	The Governance Institute of Australia
GBE	Government Business Enterprise
GBE Guidelines	Commonwealth Government Business Enterprise Governance and Oversight Guidelines (October 2011)
IFSA	The Investment and Financial Services Association Limited
ISS	Interim Satellite Service
JCNBN	Joint Standing Committee on the NBN
KPIs	Key Performance Indicators
Ms Smith-Gander	Ms Diane Smith-Gander
Mr Francis	Mr Terry Francis
Mr Hay	Mr Peter Hay
Ms McKenna	Ms Siobhan McKenna
Mr Miles	Mr Stephen A. Miles
Mr Orgill	Mr Brad Orgill
Mr Quigley	Mr Michael Quigley

<b>Term</b>	<b>Definition</b>
Mr Tilbrook	Mr Gene Tilbrook
Mr Young	Mr Harrison Young
NBN	National Broadband Network
NBN Co	NBN Co Limited
NED	Non-Executive Directors
NPV	Net present value
OECD	Organisation for Economic Co-operation and Development
PPC	People and Performance Committee
Previous GBE Guidelines	Governance Arrangements for Commonwealth Government Business Enterprises (June 1997)
SCI	Statement of Corporate Intent
Telstra DAs or DAs	Telstra Definitive Agreements

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## Appendix B Key Dates

### 2009

07-Apr-2009	Government Joint Media Release issued - 'New National Broadband Network'
08-Apr-2009	ACN 136 533 741 Limited Constitution issued
09-Apr-2009	ACN 136 533 741 Limited incorporated
22-Jun-2009	ACN 136 533 741 Limited Constitution revised
29-Jul-2009	ACN 136 533 741 Limited changed its name to NBN Co Limited
05-Aug-2009	NBN Co Limited Constitution issued
01-Sep-2009	Letter from the Minister of Finance re GBE Guidelines
21-Sep-2009	2008-2009 NBN Co Annual Report released

### 2010

06-May-2010	NBN Implementation Study released
20-Jun-2010	NBN Co and Telstra reach Heads of Agreement
05-Oct-2010	2009-2010 NBN Co Annual Report released
20-Dec-2010	2011-2013 NBN Co Corporate Plan released
20-Dec-2010	Government's Statement of Expectations released

### 2011

23-Jun-2011	NBN Co and Telstra sign binding Definitive Agreements
16-Sep-2011	2010-2011 NBN Co Annual Report
01-Oct-2011	GBE Guidelines reissued
18-Oct-2011	NBN Co 12 Month Rollout Plan released
16-Nov-2011	Board Constitution reissued

### 2012

28-Feb-2012	Telstra's Structural Separation Undertaking accepted
29-Mar-2012	NBN Co 3 Year Rollout Plan released
26-Apr-2012	NBN Co Board Charter reissued
06-Aug-2012	2012-2015 NBN Co Corporate Plan released
14-Sep-2012	2011-2012 NBN Co Annual Report released
09-Oct-2012	2012-2015 NBN Co Statement of Corporate Intent released
09-Oct-2012	NBN Co Stakeholder Charter released

## 2013

22-Feb-2013	Board Constitution reissued
29-Jul-2013	Board Charter reissued
05-Aug-2013	Dissolution of the House of Representatives / Caretaker Period commences
13-Aug-2013	2012-2013 NBN Co Annual Report released
07-Sep-2013	Federal election held
18-Sep-2013	Change of Federal government / Caretaker Period ends

# Appendix C Board of Directors

## Timeline



This represents the period when the first 'full' board was appointed and Harrison Young was Chairman



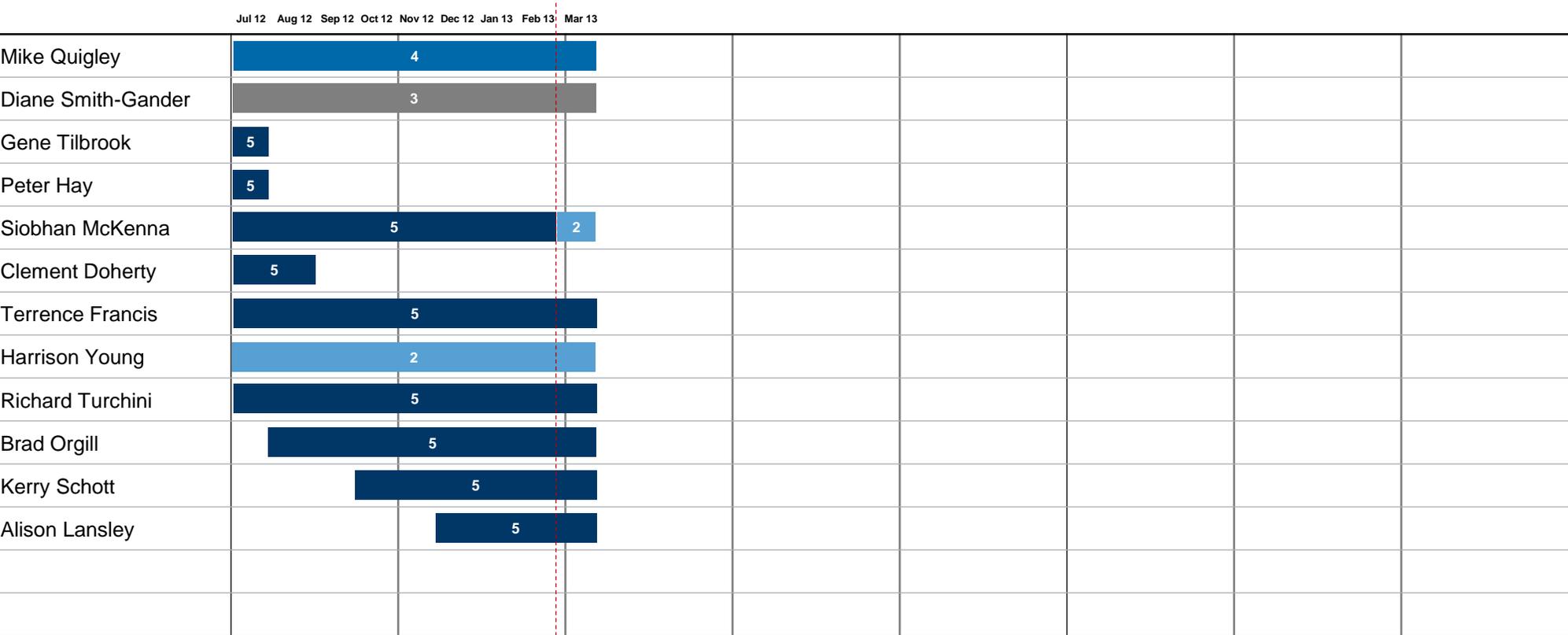
# Board of Directors

'Second Board' July 2012 – March 2013



KordaMentha

July 2012 represented the end of the initial three year appointments for the Initial Board Members. Three directors finished their appointments in July and August 2012. Three new directors came on board during the first six months of this period



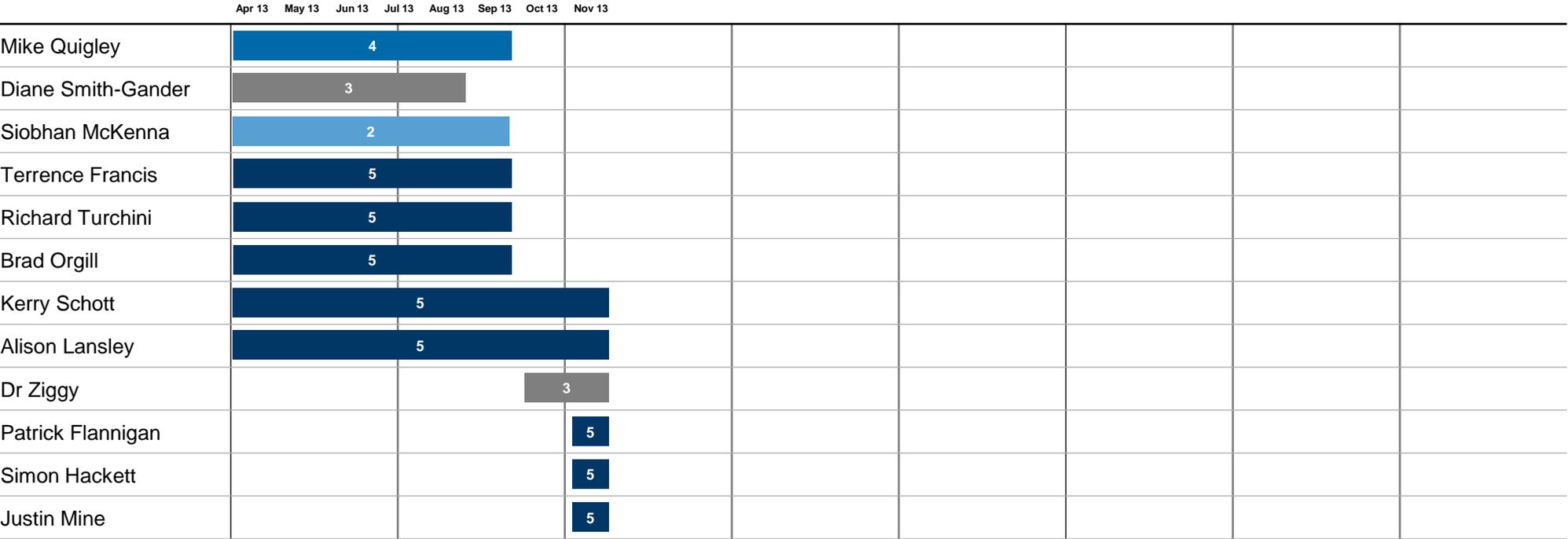
# Board of Directors

'McKenna Board' March 2013 – September 2013



KordaMentha

Covers the period from when Harrison Young resigned as Director and Chairman through to the change of government



## Bios/CVs

### Interim Board (excluding Mr Quigley)

#### **David Martine – Non-Executive Director - 9 Apr 09 to 05 Aug 09**

David Martine is a senior executive within the Commonwealth Department of the Treasury, currently responsible for the oversight of financial system policy issues. He has previous experience in advising Government on budget and fiscal strategy, along with oversight of Government Business Enterprises.<sup>136</sup>

#### **David Yarra PSM – 9 Apr 09 to 05 Aug 09**

David Yarra is a career public servant of 34 years with experience in the preparation of the Commonwealth Budget, overseeing major government asset sales and as a director of a number of Government Business Enterprises.<sup>137</sup>

#### **James Cameron – 09 Apr 09 to 05 Aug 09**

James Cameron joined the Australian public service in 1991 and has worked across a number of policy areas, including small business, industry research and development, telecommunications, broadcasting, information and communications technology, the arts and sport.<sup>138</sup>

#### **Martin Hoffman – 06 July 09 to 05 Aug 09**

Martin Hoffman joined the Australian Public Service in March 2009 in the Department of Prime Minister & Cabinet as Executive Co-ordinator, Strategic Policy & Implementation. Mr Hoffman previously had an extensive private sector career in digital media and technology sector, most recently as Chief Executive Officer and a director of the mobile social networking services company MOKO mobi Ltd. Mr Hoffman is a director and the honorary treasurer of the Garvan Institute of Medical Research.<sup>139</sup>

### Full Board

#### **Michael Quigley - Executive Director 24 Jul 09 to 03 Oct 13, Interim Chair 24 Jul 09 to 14 Mar 10**

Michael Quigley holds a Bachelor of Science and Bachelor of Engineering (Hons) (UNSW). Mr Quigley's early career was in the area of research and development and technical management before becoming responsible for Alcatel's business in Australia and New Zealand. Mr Quigley has held a number of senior positions in Alcatel, including Chief Operating Officer and then President and Chief Executive Officer of Alcatel USA, President of Alcatel's Fixed Communications Group in Paris, responsible for infrastructure products, including network switches and optical communications systems, and President and Chief Operating Officer of Alcatel. Mr Quigley will remain a director of the Prince of Wales Medical Research Institute.<sup>140</sup>

#### **Peter Hay - Non-Executive Director 05 Aug 09 to 4 Aug 12**

Peter Hay is a former Chief Executive Officer of law firm Freehills. Previously, he practiced company law with a particular expertise in mergers and acquisitions. He spent much of 1993 to 1999 advising governments and government-owned enterprises on industry reform and preparing for and implementing energy sector privatisation.<sup>141</sup>

<sup>136</sup> 2008-2009 NBN Co Annual Report pages 2-3

<sup>137</sup> 2008-2009 NBN Co Annual Report pages 2-3

<sup>138</sup> 2008-2009 NBN Co Annual Report pages 2-3

<sup>139</sup> 2008-2009 NBN Co Annual Report pages 2-3

<sup>140</sup> 2008-2009 NBN Co Annual Report page 3

<sup>141</sup> 2008-2009 NBN Co Annual Report page 3

#### **Doug Campbell AM - Executive Director 05 Aug 09 to 7 Dec 10**

Doug Campbell holds a Bachelor of Engineering in Civil Engineering and had 30 years' experience in Canada in telecommunications. Mr Campbell held a number of senior positions over 18 years in Telstra Corporation including the Group Managing Director of Network and Technology for 6 years and the Group Managing Director of Wholesale Services. He was the key architect and Group Managing Director of the Telstra Country Wide Division until 2006. Mr Campbell was awarded an Order of Australia in 2006 for his service to business and to the community, particularly as a contributor to the development of communications services in regional and remote areas of Australia. He was also awarded the Charles Todd Medal as Communicator of the Year in 2003.<sup>142</sup>

#### **Siobhan McKenna - Non-Executive Director 05 Aug 09 to 03 Oct 2013, Chair 5 Mar 13 to 03 Oct 13**

Siobhan McKenna holds a Bachelor of Economics (Hons) from the ANU and a Master of Philosophy (International Relations) from Cambridge University. Ms McKenna is a Commissioner of the Productivity Commission; she has focused on business regulation since being appointed to the Commission (initially as an Associate Commissioner) in June 2007. Ms McKenna is also the Managing Partner of Illyria, a media-focused investment company. Previously, Ms McKenna was a Partner at McKinsey & Company, an international management consulting firm, where she provided advice to companies on productivity matters and the development of effective regulatory strategies.<sup>143</sup>

#### **Diane Smith-Gander - Non-Executive Director 05 Aug 09 to 02 Sep 13**

Diane Smith-Gander was previously the head of Westpac Banking Corporation's Business & Technology Solutions & Services Division. Before re-joining Westpac, Ms Smith-Gander was a partner with McKinsey & Company in the USA where she led major transformation projects with a focus on post-merger integration (including IT integration) and organisational restructuring. Between 1990 and 2000 she worked for Westpac in a range of executive level roles. Prior to 1990, she worked in Sydney and Hong Kong for PA Consulting Group, focusing on performance improvement for retail financial institutions. Ms Smith-Gander is a board member of Basketball Australia and a past chairperson of the Australian Sports Drug Agency.<sup>144</sup>

#### **Gene Tilbrook - Non-Executive Director 05 Aug 09 to 04 Aug 12**

Gene Tilbrook previously worked for Wesfarmers Limited, a major Australian-listed company with diversified interests, as Finance Director from 2005 to 2009. Prior to that, he was Director Business Development. Mr Tilbrook was involved in many of the transactions that made Wesfarmers a successful diversified group, as well as corporate planning, information technology and project financing. Mr Tilbrook is also a councillor of Curtin University of Technology and the Australian Institute of Company Directors, Western Australia Division; and a member of the boards of the Perth International Arts Festival and Committee for Perth.<sup>145</sup>

#### **Clement Doherty – Non-Executive Director 22 Dec 09 to 14 Aug 12**

Clement Doherty is Chairman of Like Minded Individuals, an early stage technology investor. He retired as a Director of McKinsey in 1996, where he led the Asia-Pacific Telecommunications, Electronics, Media & Multimedia Sector and was jointly responsible for the Global Telecommunications Sector. Mr Doherty was interim CIO of ResMed during 2006. He is a Director of Swimming Australia and an Advisory Board member of the Centre for Policy Development, the Australian Innovation Research Centre and Network Insight Group. Mr Doherty is also a Member of the Australian Statistical Advisory Council.<sup>146</sup>

<sup>142</sup> 2008-2009 NBN Co Annual Report page 3

<sup>143</sup> 2008-2009 NBN Co Annual Report page 4

<sup>144</sup> 2008-2009 NBN Co Annual Report page 4

<sup>145</sup> 2008-2009 NBN Co Annual Report page 4

<sup>146</sup> 2009-2010 NBN Co Annual Report page 14

#### **Terrence Francis – Non-Executive Director 22 Dec 09 to 03 Oct 13**

Terrence Francis commenced his career in infrastructure and mine design and project management. This was followed by over 20 years in corporate finance including as Senior Vice President and CEO of Bank of America in Australia, Executive Director of Deutsche Bank Australia and Vice President of Continental Illinois National Bank. Over the past 10 years he has work as a Non-Executive Director and advisor to government, especially in project financing and delivery. He is currently a Board member of the Emergency Services Telecommunications Authority, ANZ Specialist Asset Management Limited and Boom Logistics Limited. He is a fellow of the Australian Institute of Company Directors, the Institute of Engineers Australia and the Financial Services Institute of Australasia.<sup>147</sup>

#### **Harrison Young - Chair 15 Mar 10 to 14 Mar 13**

Harrison Young is a Director of the Commonwealth Bank of Australia and serves on the Court of Directors of the Bank of England. He is also Chairman of Better Place (Australia) Pty Limited. Mr Young has significant investment banking and regulatory experience in Australia, Asia and the USA. From 1997 to 2003 he was a Managing Director and Vice Chairman of Morgan Stanley Asia, based on Hong Kong, and in 2007 retired as Chairman of Morgan Stanley Australia. From 1995 to 1997, Mr Young was based in Beijing as Chief Executive of China International Capital Corporation, a joint venture investment bank in which Morgan Stanley has an investment. From 1991 to 1994 he was a senior officer of the Federal Deposit Insurance Corporation in Washington DC. Mr Young is Deputy Chairman of Asialink and of the Asia Society AustralAsia Centre and a Director of the New York-based Financial Services Volunteer Corps.<sup>148</sup>

#### **Richard Turchini - Non-Executive Director 14 Sep 11 to 23 Sep 13**

Richard Turchini is a civil engineer who has more than 40 years' experience in the construction industry. He retired from the construction firm Leighton Contractors in 2003, leaving his position as Company Director and General Manager for New South Wales and the ACT. From 2005 to mid-2010 Mr Turchini was Managing Director of Baulderstone, a construction company that employs more than 1,300 people across Australia. Mr Turchini is also an honorary Director of Infrastructure Partnerships Australia.<sup>149</sup>

#### **Bradley Orgill - Non-Executive Director 5 Aug 12 to 03 Oct 13**

Bradley Orgill worked for the UBS group and its global investment bank for 22 years. He retired in 2008 as Chairman of UBS Australia having previously been CEO and/or UBS Country Head in each of Australia, Hong Kong, China and Singapore. From 1998-2005 he concurrently was Head of the Asia and then Asia/Japan/Australia Equities business, UBS's largest in Asia Pacific and from 2006-2008 he was a member of the UBS Group Managing Board. Post retirement, Mr Orgill has completed a Masters degree in Environmental Science & Law, travelled extensively, been involved in philanthropic and think tank activities and chaired a task force (2010-2011) to examine the \$16 billion Building the Education Revolution GFC stimulus program. He currently represents the Commonwealth on the Queensland Reconstruction Authority Board and is a member of the Regional Development Australia Fund advisory panel. Mr Orgill is a past member of the BCA and past Board member of AFMA.<sup>150</sup>

<sup>147</sup> 2009-2010 NBN Co Annual Report page 14

<sup>148</sup> 2009-2010 NBN Co Annual Report page 14

<sup>149</sup> 2010-2011 NBN Co Annual Report page 22

<sup>150</sup> 2011-2012 NBN Co Annual Report page 47

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**Dr Kerry Schott - Non-Executive Director 28 Sep 12 to Date**

Kerry Schott is the project director of the proposed sale of the New South Wales government owned electricity generating plants. Dr Schott completed her role as CEO of the Commission of Audit for the NSW Government in early 2012, was managing director and CEO of Sydney Water from 2006 to 2011 and before that was Deputy Secretary, NSW Treasury. She spent 15 years as an investment banker, including as managing director of Deutsche Bank and Executive Vice President of Bankers Trust Australia. During this time she specialised in privatisation, restructuring and infrastructure provision. Early in her career she worked as an economic policy adviser with the Reserve Bank of Australia, the Commonwealth Government and as an academic at University College London and at Oxford University. She is Chairman of Moorebank Intermodal Company, a member of the TCorp Board in NSW and the Infrastructure Australia Board, a Patron and Board member of Infrastructure Partnerships Australia and, a member of the Whitlam Institute Board.<sup>151</sup>

**Alison Lansley - Non-Executive Director 7 Dec 12 to Date**

Alison Lansley was a partner in the Mergers and Acquisitions practice of Mallesons Stephen Jaques for over 16 years. She is a non-executive director of Schools First Australia and heads the Victorian Regional Council of Redkite. She has previously served on a number of boards and authorities, including the Melbourne 2006 Commonwealth Games Corporation, the Takeovers Panel, the Financial Services Institute of Australasia and the national listing committee of the Australian Stock Exchange.<sup>152</sup>

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<sup>151</sup> 2012-2013 NBN Co Annual Report page 48

<sup>152</sup> 2012-2013 NBN Co Annual Report page 47

## Appendix D Key changes to GBE Guidelines

1. The GBE Guidelines have been applicable to NBN Co since its inception; initially the June 1997 GBE Guidelines and the revised GBE Guidelines from October 2011. The key changes relevant to NBN Co were as follows:
  - a. Increase the frequency at which the Shareholder Ministers will consider the mandate of NBN Co (from 'about every three years' to annually): clause 1.11;
  - b. Require the Board to implement effective governance frameworks to support their role and responsibilities, and report of implementation in the Annual Report: clause 2.2;
  - c. Require certain content for new Chief Executive Officer (CEO) and director appointment letters: clause 2.3(a);
  - d. Require new directors to provide an undertaking to advise the Shareholder Ministers of a change in circumstances that might impact on their ability to be a director: clause 2.3(b);
  - e. Require the Board to continually regularly monitor the ongoing independence of each director and the Board; clause 2.4;
  - f. Require the Board to establish and maintain a code of conduct: clauses 2.5 and 2.6;
  - g. Require the Chair to develop an annual board plan and write to the Shareholder Minister(s) at least three months prior to a vacancy arising on the board or in the role of CEO: clause 2.8(a) and (b);
  - h. Stipulate that any decision to appoint the CEO as a director is at the discretion of the Shareholder Minister(s): clause 2.10;
  - i. Require the Board to implement and maintain a CEO succession plan and provide an annual assurance that such a plan is in place: clause 2.11;
  - j. Limit the term of non-executive directors and the Chair to two terms of three years and three terms of three years respectively, but allow for appointments beyond such terms on a case-by-case basis: clause 2.13;
  - k. Require directors to immediately inform the Chair where their continuing to be a director could embarrass NBN Co or the Shareholder Ministers: clause 2.15(b);
  - l. Require the Board to develop and implement an appropriate induction and development program for directors: clause 2.16;
  - m. Require the Board to assess its performance and the Chair and the Chair to provide written confirmation to the Shareholder Minister(s) that this process has been followed and raise any areas of concern: clause 2.17;
  - n. Extend the ambit of reportable information from that which may have a material effect on NBN Co's value to that which may have a material effect on NBN Co's value and/or performance: clause 3.19(a);
  - o. Modify NBN Co's reporting obligations to Shareholder Ministers to include urgent initiatives (which are to be treated as 'notifiable significant events'), a requirement to notify Shareholder Ministers prior to entering into any identified business opportunities (meaning and including new business ventures, major contracts and capital raising proposals) and unless otherwise agreed, a requirement to notify business cases outlining new proposals: clauses 3.22 – 3.23;
  - p. Require NBN Co to conduct 'annual strategic meetings' to which the Shareholder Ministers are invited: clause 3.26; and

- q. Require the Chair (in the context of developing an annual board plan), the Board (in the context of recommending candidates for Board or CEO vacancies) and NBN Co (when making appointments of executive, management and senior staff) to have regard to the government policy on fostering a culture that embraces diversity, with the objective of achieving 40% female, 40% male and 20% female or male board membership by 2015: clauses 2.8 and 5.1(d).<sup>153</sup>

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<sup>153</sup> Australian Government, 'Review of Commonwealth Government Business Enterprises Governance and Oversight Guidelines', Discussion Paper, March 2011 and NBN Co Board Paper for Agenda Item 22, Board Meeting No. 43 – Friday, 11 November 2011

## Appendix E Interviews requested

### NBN Co - Corporate Governance Review Interviews

Requested by the Department of Communications 07-Mar-14

Requested by KordaMentha 28-Jan-14

Requested by KordaMentha 24-Mar-14

Name	Organisation	Role/s	Interview requested	Response	Interview date
Robin Payne	4. Current NBN Co ExCo	Chief Financial Officer	28-Jan-14	Accepted	29-Jan-14
Ian McAuley	8. Current NBN Co staff	Senior Advisor, Government Relations	28-Jan-14	Accepted	29-Jan-14
Justin Forsell	8. Current NBN Co staff	Chief Legal Counsel	28-Jan-14	Accepted	29-Jan-14
Clement Doherty	1. Former NBN Co Board Member	Non-Executive Director	07-Mar-14	Accepted	25-Mar-14
Brad Orgill	1. Former NBN Co Board Member	Non-Executive Director	07-Mar-14	Declined	
Doug Campbell AM	1. Former NBN Co Board Member	Executive Director	07-Mar-14	Declined	
Diane Smith-Gander	1. Former NBN Co Board Member	Non-Executive Director / Deputy Chair	07-Mar-14	Declined	
Gene Tilbrook	1. Former NBN Co Board Member	Non-Executive Director	07-Mar-14	Declined	
Harrison Young	1. Former NBN Co Board Member	Non-Executive Director / Chair	07-Mar-14	Declined	
Peter Hay	1. Former NBN Co Board Member	Non-Executive Director	07-Mar-14	Declined	
Richard Turchini	1. Former NBN Co Board Member	Non-Executive Director	07-Mar-14	Declined	
Siobhan McKenna	1. Former NBN Co Board Member	Non-Executive Director / Chair	07-Mar-14	Declined	
Terrence Francis	1. Former NBN Co Board Member	Non-Executive Director	07-Mar-14	Declined	
Mike Quigley	1. Former NBN Co Board Member/Former NBN Co ExCo	Chief Executive Officer / Executive Director	07-Mar-14	Declined	
Kerry Schott	2. Current NBN Co Board Member	Non-Executive Director	07-Mar-14	Accepted	14-Mar-14
Alison Lansley	2. Current NBN Co Board Member	Non-Executive Director	07-Mar-14	Declined	
Patrick Flannigan	2. Current NBN Co Board Member/Former NBN Co ExCo	Non-Executive Director	07-Mar-14	Declined	
Jean-Pascal Beaufret	3. Former NBN Co ExCo	Chief Financial Officer	07-Mar-14	Accepted	09-Apr-14
Mike Kaiser	3. Former NBN Co ExCo	Head of Quality	07-Mar-14	Declined	
Ralph Steffens	3. Former NBN Co ExCo	Chief Operations Officer	07-Mar-14	Declined	
Dan Flemming	3. Former NBN Co ExCo	Acting Head of Construction	07-Mar-14	Declined	
Kevin Brown	4. Current NBN Co ExCo	Chief HR Office / Head of Corporate Services	24-Mar-14	Accepted	25-Mar-14
Debra Connor	8. Current NBN Co staff	Company Secretary	24-Mar-14	Accepted	26-Mar-14
Adrian Inch	8. Current NBN Co staff	Board Liaison	24-Mar-14	Accepted	26-Mar-14
Greg Willis	9. Former NBN Co staff	Head of Program Management	24-Mar-14	Accepted	26-Mar-14

## Appendix F Feedback on the Draft Report

### NBN Co - Corporate Governance Review

#### Draft Report Feedback

#	Director	Draft Report offered	Draft Report accepted	Feedback provided	Form of feedback	Date of feedback	Feedback not included in the body of the Report
1	Alison Lansley	Yes	Yes	Yes	Joint Letter	04/08/2014	Refer Appendix G
2	Richard Turchini	Yes	Yes				
3	Siobhan McKenna	Yes	Yes				
4	Harrison Young	Yes	Yes				
5	Peter Hay	Yes	Yes				
6	Diane Smith-Gander	Yes	Yes				
7	Terrence Francis	Yes	Yes				
8	Gene Tilbrook	Yes	Yes				
9	Brad Orgill	Yes	Yes				
10	Michael Quigley	Yes	Yes	Yes	Email	16/07/2014	Refer Appendix H
11	Doug Campbell AM	Yes	Yes	Yes	Letter	04/08/2014	"No Comments"
12	Clement Doherty	Yes	No			Na	
13	Kerry Schott	Yes	No			Na	

- Board Members were given a period of three weeks to provide their comments on the Draft Report.
- Comments we agreed with resulted in a modification to the body of this report. Comments we disputed or considered not relevant are included in full in the Appendices following.
- The following nine Board Members provided written comments jointly by letter dated 4 August 2014:
  - Mr Peter Hay
  - Ms Diane Smith-Gander
  - Mr Gene Tilbrook
  - Ms Siobhan McKenna
  - Mr Terrence Francis
  - Mr Harrison Young
  - Mr Richard Turchini
  - Mr Brad Orgill
  - Ms Alison Lansley
- Their letter is reproduced in full at Appendix G since none of their comments resulted in a modification to our report as we considered they were either of a general nature, reiterated or confirmed comments made in the Draft Report, difference of opinion and/or were not relevant.
- Mr Michael Quigley also provided written comments by letter dated 4 August 2014. His letter is reproduced in full, except for one paragraph, at Appendix H. Except for the one paragraph, we considered the remaining comments were either unnecessary details, difference of opinion and/or not relevant.
- Mr Doug Campbell responded with "no comments."

## Appendix G Letter from nine previous and current non-Executive Board Members

Mr Owain Stone  
Partner  
KordaMentha Pty Ltd  
Level 24, 333 Collins Street  
Melbourne 3000  
ostone@kordamenta.com

4 August 2014  
By email

Dear Mr Stone

This letter is sent on behalf of each of the undersigned current and former non-executive directors of NBN Co Limited (**NBN Co**).

We refer to your letter of 10 July 2014 and thank you for providing us with copies of KordaMentha's draft report of the same date (**Draft Report**), recording its "limited review" of the corporate governance of NBN Co. We confirm your agreement to reproduce a copy of this letter in an Appendix to the final version of your report.

We note the scope and limitations of KordaMentha's engagement set out in Section B of the Draft Report, and proceed on the basis that your findings are subject to those limitations. In the time provided for our review of the Draft Report it has not been possible to address every matter of detail.

While we generally disagree with the findings in the Draft Report, and consider a number of them to be unsupported by the facts, we do agree with your acknowledgement that each director of NBN Co has been a skilled and experienced individual.

As directors of NBN Co, we have each acted with care and diligence. From the first appointment of any of us, the board of NBN Co (**Board**) cultivated a culture of continuous feedback. This practice applied to all directors, including executive directors, laying a solid foundation for monitoring the performance of the Board.

As acknowledged in the Draft Report, the Board had a heavy workload. Amongst other matters, in an environment of evolving policy, directors oversaw the:

- preparation and implementation of detailed Corporate Plans;
- negotiation of the Telstra Definitive Agreements; and
- establishment from scratch and evolution of the organisation and operations of NBN Co.

As acknowledged in the Draft Report, NBN Co maintained a formal risks register that was frequently reviewed and updated. The Board devoted significant time to strategic risks and, in particular, the related risks of time delays and cost overruns. A review of Board and committee agendas indicates that all key strategic risks including time delays, cost overruns, technological obsolescence, regulatory change, pricing and cherry-picking issues were considered on a timely basis.

We interacted as required with Shareholder Ministers and other Department officials. The Board often received their written instructions and they on occasion attended Board meetings. We promptly disclosed information regarding NBN Co to Shareholders Ministers and their Departments.

Yours sincerely

Peter Hay  
Diane Smith-Gander  
Gene Tilbrook  
Siobhan McKenna  
Terry Francis  
Harrison Young  
Rick Turchini  
Brad Orgill  
Alison Lansley

## Appendix H Letter from Mr Quigley dated 4 August 2014

[For ease of reference we have changed the paragraph references below to correspond with the relevant paragraph in the Final Report]

### **Response to Draft KordaMentha Report on NBN Co Corporate Governance Review**

#### **Report Paragraph 7:**

This paragraph omits a number of significant items of progress. A more comprehensive list of NBN Co's progress, to the end of September 2013, is given below:

1. Built from scratch a company of close to 3000 people with all of the processes and systems needed to function as a wholesale telecommunications company.
2. Successfully launched an Interim Satellite service, which was more popular than had been anticipated.
3. Designed and contracted a Long Term Satellite solution that was on schedule and on budget for services beginning in mid 2015.
4. Designed and was deploying a 4G, Fixed Wireless network.
5. Designed and was deploying a Transit Network to support all access technologies. This project was on budget and on schedule for completion by 2015.
6. Designed, developed and deployed fully functioning OSS/BSS systems that had been proven to function at scale.
7. Designed and established a National Test Facility and a Network Operations Centre.
8. Successfully designed, developed and launched a suite of Products covered by a Wholesale Broadband Agreement which were signed by many Retail Service Providers.
9. Developed a 27-year Special Access Undertaking, which was subsequently accepted by the ACCC. This was unprecedented.

*Mr Quigley's Letter of 4 August 2014 cont.*

10. Built a Greenfields fibre capability that could complete more than 30 new developments a week, anywhere in the country.
11. Built a Customer Connect capability that had connected more than 100k end users and which was rapidly growing the ability to deal with the exceptionally high take-up rates that were being experienced.
12. While the construction phase of the Brownfields fibre rollout experienced difficulties these problems were being overcome while preserving the integrity of NBN Co's financial plan.

It should be noted that any one of the projects NBN Co was undertaking; Satellite, Fixed Wireless, Brownfields, Greenfields, the Transit Network, a major OSS/BSS development, a new wholesale product and pricing structure plus a 27-year SAU, would be a major challenge for even a mature Telco.

NBN Co was doing it all simultaneously, while building a company from a standing start.

**Report Paragraph 8:**

The projections quoted in this paragraph are based on a "Revised Outlook" prepared after September 2013, which aims to inflate the projected costs and timescales by extrapolating start-up costs and times for the duration of the NBN rollout while ignoring all designed and planned savings in costs and time.

The NBN Co Board and Management Team prepared and submitted to the Government a draft Corporate Plan in June 2013. In that draft Corporate Plan the end of the Brownfields fibre Construction Period was anticipated to be June 2021.

Events such as the difficulties associated with the construction of the Brownfields fibre Local and Distribution Network (LN/DN) exacerbated by the extended stoppage in Telstra remediation of ducts and pits, due to the asbestos issue, caused a delay of at least 6 months to the June 2021 anticipated construction completion.

*Mr Quigley's Letter of 4 August 2014 cont.*

While this delay was a very serious matter it is not uncommon for large Telco projects. The NBN Co management team had extensive experience in large Telco projects both in Australia and overseas and understood that large, technically complex projects usually follow similar trajectories.

For example, Telstra's Future Mode of Operation or FMO, which provided a major upgrade of Telstra's network and associated systems, or the building of an Optical Submarine cable and repeater facility at Port Botany in Sydney or the AT&T, FTTN U-Verse project, which was one of the first major rollouts of an IPTV service by the largest US Telco, all followed similar trajectories.

They were all big ambitious projects and they all experienced start-up problems, which resulted in significant delays in the first few years.

But the causes of the problems were uncovered, they were tackled and they were fixed.

For almost all large Telco projects progress is ultimately better than expected once the start-up issues have been resolved.

The NBN was no different, except that it was not one project, but a number of very large projects being undertaken concurrently while the company was being built. It was also the vehicle for a major industry restructure.

By September 2013 NBN Co had resolved many problems and was ramping itself into a scale rollout. It had done so for the Transit project, the Satellite projects, the Greenfields Fibre rollout, the OSS/BSS and the Fixed Wireless project.

The remaining significant problems were with the Brownfields construction and Brownfields Customer Connection projects. Actions had been initiated prior to September 2013, which would have seen these remaining problems resolved - without allowing any large increases in costs to the financial plans of NBN Co.

Increases in construction costs for the LN/DN component of the Brownfields construction was offset by the identified and planned cost reductions in the LN/DN architecture and technology. This is normal practice in running any large project or business. Cost increases in one area are offset by identified cost reductions in another area.

*Mr Quigley's Letter of 4 August 2014 cont.*

However, these identified and planned cost reductions in the Brownfield's fibre build have been discounted in the "Revised Outlook" which was carried out after September 2013.

It was of considerable surprise to NBN Co's Technical, Operational and Financial senior management, which was in place in September 2013, that these planned cost reductions with their positive impact on construction times were discounted in the "Revised Outlook". The senior management of NBN Co had all seen similar cost reduction plans yield massive benefits in previous projects and so had a high degree of confidence that the application of this progressive cost, time and quality improvement methodology would have yielded significant benefits in the NBN project. These benefits were already in place for the NBN Co, Satellite, Greenfields fibre, OSS/BSS, and Fixed Wireless projects and had been initiated for the NBN Co Brownfields project.

**Report Paragraph 26:**

I disagree that there was a sense of frustration within NBN Co about being "under the microscope". The senior management knew a GBE that is responsible for the expenditure of large amounts of money must be held accountable and be prepared to answer very detailed questions.

There was however, a sense of frustration amongst the senior management regarding the deliberate distortion of facts.

**Report Paragraph 36:**

The Strategic Review, which was held after September 2013, was mistaken in its opinion that "there was a relentless focus on the metric of Premises Passed as the single most important determinant of corporate success."

There was a relentless focus on a range of parameters, including premises passed (or covered) and connected by all technologies – Brownfields fibre, Greenfields fibre, Fixed Wireless and Satellite.

*Mr Quigley's Letter of 4 August 2014 cont.*

It is, of course, true that an increased focus was placed on Brownfields premises passed when problems were identified with the Brownfields construction process.

**Report Paragraph 38/261-274:**

NBN Co introduced the terminology "Service Class 0" to make it clear to those who were reviewing the NBN Co website that while a premise may be passed it may not yet have a lead-in to the premise.

To say that those premises that were Service Class 0 should not be included within the definition of Premises Passed is not the normal industry practice both in Australia and overseas. In fact many Telcos do not routinely install a lead-in until the end user orders a service.

**Report Paragraph 39/40/275:**

NBN Co reported on both the number of Premises Covered (that is; satisfying the eligibility criteria defined by DBCDE and therefore qualified to order an Interim Satellite service) and Premises Activated. NBN Co also made it clear that due to existing satellite capacity constraints a maximum of 48,000 end users could be activated.

**Report Paragraph 44/283:**

The use of Net Present Value (NPV) based on a June 2010 base for evaluating the agreements with Telstra was entirely appropriate and in line with accounting practice. The total dollar amounts paid to Telstra over the 30 year agreement period measured in Nominal dollars is obviously greater than the corresponding NPV value. The same is true of the NBN Co construction costs saved and the increased NBN Co revenues generated by the deal with Telstra.

The comparisons of the costs of the deal (DA payments) and the benefits of the deal (construction avoided and increased revenue) were all done in NPV terms to allow a realistic comparison in 2010 dollars. A comparison could have been done in Nominal dollars with an obviously much larger NPV cost to NBN Co and a much larger net benefit to NBN Co.

*Mr Quigley's Letter of 4 August 2014 cont.*

It is worth noting that the value of the Telstra deal to NBN Co increased after the deal was completed as a result of the increased costs of construction. The value of the construction avoided by completing the Telstra deal increased.

**Report Paragraph 125:**

The statement in this paragraph that “Mr Quigley’s experience at Alcatel was from the particular perspective of an equipment supplier....” is incorrect. Alcatel was an equipment, systems and services provider. Alcatel provided complex software systems including Operation and Business Support Systems (OSS/BSS) and provided a range of services from Product Definition through Network Planning to Network Construction and Network Operations. Many customers around the world made extensive use of Alcatel’s Systems and Services.

In particular, AT&T appointed Alcatel USA as the “Integrator” for its FTTN IPTV rollout while I was the CEO of Alcatel USA.

NBN Co’s Chief Operating Officer also had extensive design, construction and operations experience in fixed line networks while with Colt in Europe and with BT in the UK.