

# Chapter 2

## Key issues

2.1 As noted in Chapter 1, the bill proposes various amendments to the law relating to telecommunications. The proposed amendments are contained in one schedule to the bill, which comprises eight parts.

2.2 Various aspects of the bill received unqualified support from submitters. The Australian Smart Communities Association, for example, submitted:

The NBN will underpin the continued evolution of new connectivity infrastructure technologies. The ASCA strongly supports all measures that encourage competition for service providers, the ability for NBN to conduct relevant pilots/trials and the opening up of interconnection to listed points on the NBN network.<sup>1</sup>

2.3 Optus also expressed support for various parts of the bill that are 'uncontroversial' in seeking to improve the clarity, certainty and timeliness of decision making by the ACCC and to clarify certain obligations in respect of NBN Co.<sup>2</sup> Similarly, the Australian Communications Consumer Action Network (ACCAN) advised that it supported various proposed amendments that 'will help to clarify and provide certainty to the industry which will ultimately benefit end users'.<sup>3</sup>

2.4 There are, however, parts of the bill about which submitters expressed concern. Of the eight parts to the bill, the submissions received by the committee provided detailed comments on Parts 3, 4, 5, 7 and 8 only. As the committee does not have any findings or recommendations to make that specifically apply to Parts 1, 2 and 6, this chapter describes and considers only the parts commented on by submitters. The explanatory memorandum that accompanied the bill sets out all of the proposed amendments in detail.

2.5 This chapter examines Parts 3, 4, 5, 7 and 8 of the bill in turn. Other matters beyond the scope of the inquiry that were raised in submissions are then noted. The committee's overall conclusion can be found at the end of the report.

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1 Australian Smart Communities Association, *Submission 1*, p. 1.

2 Optus, *Submission 2*, p. 2.

3 Australian Communications Consumer Action Network, *Submission 6*, p. 1.

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## Part 3—Pilots and trials

2.6 The CCA provides that an NBN corporation must not discriminate between access seekers in the supply of declared services, in conducting activities related to the supply of declared services, or in favour of itself.<sup>4</sup>

### *Proposed amendments*

2.7 The explanatory memorandum stated that the application of non-discrimination obligations to pilots and trials 'can act as a practical impediment to product development and also as a disincentive to innovation'. This is because if NBN Co or a carriage service provider wishes to test a new service or technology on the NBN, NBN Co is, at present, required to make the same service or technology available to all of its customers.<sup>5</sup>

2.8 Proposed new section 152F of the CCA would provide that the non-discrimination obligations do not apply to pilots and trials if:

- NBN Co has notified the ACCC of the details of the pilot or trial and has published on its website information about the trial; and
- the pilot or trial does not last longer than 12 months (although the ACCC may agree to a longer timeframe).<sup>6</sup>

2.9 The explanatory memorandum described the notification regime and 12-month time limit as being 'key safeguards' to ensure that 'NBN Co's pilots or trials are focused on promoting innovation and reduce the risk of conduct having significant anti-competitive effects'.<sup>7</sup>

2.10 Another proposed amendment to the CCA contained in this part of the bill is the repeal of Division 6B of Part XIC. This division requires the ACCC to publish explanatory material relating to anti-discrimination provisions. The ACCC developed guidance between 2011 and 2012, with a final guideline published in April 2012.<sup>8</sup> The explanatory memorandum stated that the repeal of Division 6B is intended to 'ensure there can be no divergence between the statutory provisions and such

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4 *Competition and Consumer Act 2010*, ss. 152AXC and 152AXD. Limited exceptions apply, such as where an access provider has reasonable grounds to believe that an access seeker is not creditworthy. Department of Communications and the Arts, *Submission 7*, p. 3; *Competition and Consumer Act 2010*, ss. 152AXC(2), (3).

5 Explanatory Memorandum, pp. 3–4.

6 Schedule 1, Part 3, item 16 (proposed new section 152F); Explanatory Memorandum, pp. 3–4; 58.

7 Explanatory Memorandum, p. 4.

8 See ACCC, 'Non-discrimination under Part XIC', [www.accc.gov.au/regulated-infrastructure/communications/national-broadband-network-nbn/non-discrimination-under-part-xic](http://www.accc.gov.au/regulated-infrastructure/communications/national-broadband-network-nbn/non-discrimination-under-part-xic) (accessed 8 December 2015).

explanatory material'.<sup>9</sup> The Government's intention to repeal the guidance requirement was foreshadowed in its response to the Vertigan Panel.<sup>10</sup>

### *Evidence from industry stakeholders and consumer groups*

2.11 The Australian Smart Communities Association advised that it 'strongly supports' measures that enable NBN Co to conduct relevant pilots and trials.<sup>11</sup>

2.12 Telstra did not comment on pilots and trials in its submission. However, its representatives at the committee's public hearing noted that there 'is an efficiency argument in favour' of the proposed change. Mr William Gallagher, General Counsel of Corporate Affairs at Telstra, stated:

If NBN Co is to be required to run pilots and trials with the entirety of industry each time it seeks to launch or test a new product in the market, there is an obvious cost associated with developing the capability and capacity to do that across potentially all service providers. So there is an efficiency element to it.<sup>12</sup>

2.13 Optus, however, submitted that it was 'sceptical' of the explanatory memorandum's reasoning that the application of non-discrimination obligations to pilots and trials can act as an impediment to product development and a disincentive to innovation.<sup>13</sup> Optus added that it considers that 'the principle of non-discrimination is fundamental to the level playing field credentials of the NBN'. Accordingly, Optus asserted that the principle should 'apply as equally to pilots or trials as it does to NBN Co's ongoing service provision'. Optus argued that the proposed changes could provide a competitive advantage to other retail service providers.<sup>14</sup>

2.14 Optus also questioned whether the proposed amendments 'are consistent with NBN Co's priority which is to roll-out the network and meet its basic coverage and service objectives'. Optus argued that encouraging retail service providers to test a new service or technology on the NBN 'is only likely to distract NBN Co from achieving its core objective of connecting broadband to households'.<sup>15</sup>

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9 Explanatory Memorandum, p. 57.

10 Australian Government, *Telecommunications regulatory and structural reform*, December 2014, [www.communications.gov.au/file/13111/download?token=1HHR3qa3](http://www.communications.gov.au/file/13111/download?token=1HHR3qa3) (accessed 8 December 2015), p. 16

11 Australian Smart Communities Association, *Submission 1*, p. 1.

12 Mr William Gallagher, General Counsel, Corporate Affairs, Telstra, *Proof Committee Hansard*, 5 February 2015, p. 13.

13 Optus, *Submission 2*, p. 6. Macquarie Telecom made a similar point: see *Submission 3*, Attachment 1, p. 2.

14 Optus, *Submission 2*, p. 6.

15 Optus, *Submission 2*, pp. 6–7.

2.15 The Competitive Carriers' Coalition (CCC) argued that the proposed amendments are 'highly risky, unnecessary and supported by no persuasive evidence that there is a problem in existing rules'.<sup>16</sup> It submitted that an 'adequate explanation...or examples' have not been provided to demonstrate that the application of non-discrimination obligations to pilots and trials impinges on NBN Co's ability to conduct its business. However, the CCC is of the view that removal of the obligation presents a clear risk.<sup>17</sup>

2.16 The CCC concluded that the non-discrimination rules are essential for restraining the 'very significant market power' that NBN Co 'is in a position to exercise as it becomes the monopoly provider of fixed line access for more and more households and businesses'. As such, the CCC argued that the requirements should not be changed.<sup>18</sup>

2.17 Optus also recommended that the proposed amendments be omitted from the bill. However, acceptable alternatives for Optus would be either:

- a delay in the application of the proposed amendments until the rollout of the NBN is complete; or
- the re-drafting of the proposed amendments so that NBN Co could limit participation in pilots and trials 'only to the extent that it can demonstrate to the ACCC's satisfaction that it faces practical constraints in offering broader industry participation'.<sup>19</sup>

2.18 ACCAN's submission recommended that the bill be amended to provide the ACCC with powers to reject the switching off of non-discrimination obligations for pilots and trials that the ACCC determines to be anti-competitive.<sup>20</sup> The CCC also questioned the ACCC's ability to act on concerns it may have about the pilots or trials notified to it.<sup>21</sup>

### *Evidence from the department*

2.19 Mr Philip Mason, the Assistant Secretary of the Markets Structure Branch at the Department of Communications and the Arts (the department), explained that the proposed amendments are expected to provide benefits to the following three groups:

- NBN Co—the proposed amendments are intended to 'provide some flexibility for NBN Co' by addressing some of the 'hoops' NBN Co will need to go

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16 Competitive Carriers' Coalition, *Submission 4*, p. 4.

17 Competitive Carriers' Coalition, *Submission 4*, p. 4.

18 Competitive Carriers' Coalition, *Submission 4*, p. 4.

19 Optus, *Submission 2*, p. 7.

20 Australian Communications Consumer Action Network, *Submission 6*, p. 2.

21 Mr David Forman, Spokesperson, Competitive Carriers' Coalition, *Proof Committee Hansard*, 5 February 2016, p. 24.

through to meet the non-discrimination obligations when developing new products or trialling new products.<sup>22</sup> Mr Mason suggested that, as the law currently stands, in certain cases, if 'NBN Co engaged with somebody with a new idea...that would technically be discrimination and that is not lawful under the [NBN Companies] Act.<sup>23</sup>

- Service providers seeking to innovate—Mr Mason stated that the proposed amendments will provide a means for service providers to 'go to NBN Co and say, "We have got a good idea but we want to trial it on your network first"'.<sup>24</sup>
- Consumers—ultimately, consumers are expected to benefit from any innovations that the measure would support.<sup>25</sup>

2.20 In response to the concerns expressed by some industry submitters about this part of the bill, the department submitted that the design of the proposed amendments 'will provide access seekers with time to develop and refine new services, while limiting any first-mover advantage'. The department stressed that the bill includes safeguards to ensure the pilot and trial mechanism is transparent and covers only legitimate pilots or trials for a limited period of time.<sup>26</sup> Mr Mason added that, following the proposed amendments, the notification regime will ensure that 'there would be quite considerable information in the public domain as to what was happening'.<sup>27</sup>

2.21 Mr Mason also emphasised that the bill would only permit pilots and trials, and would not create an opportunity 'for somebody to come up with an idea and for NBN Co to launch that service for that person and for that person to operate it for a honeymoon period and to capture customers'. In response to concerns about such a scenario, Mr Mason stated:

I do not think that actually qualifies as a pilot or a trial. A trial or a pilot is fundamentally about getting an idea and actually seeing if it works. This is

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22 Mr Philip Mason, Assistant Secretary, Market Structure Branch, Department of Communications and the Arts, *Proof Committee Hansard*, 5 February 2016, pp. 30–31.

23 Mr Philip Mason, Department of Communications and the Arts, *Proof Committee Hansard*, 5 February 2016, p. 34.

24 Mr Mason added: The way we understand the current regime works, because of the way the non-discrimination provisions were struck [by Parliament] out in 2010 and 2011, is that that idea would have to be shared with everybody who could potentially use the NBN. We are concerned that that would discourage innovation'. *Proof Committee Hansard*, 5 February 2016, p. 31.

25 Mr Philip Mason, Department of Communications and the Arts, *Proof Committee Hansard*, 5 February 2016, p. 31.

26 Department of Communications and the Arts, *Submission 7*, p. 4.

27 Mr Philip Mason, Assistant Secretary, Market Structure Branch, Department of Communications and the Arts, *Proof Committee Hansard*, 5 February 2016, p. 32.

the way the provisions would work. The ACCC has scope to say, 'We do not think that this is a bona fide pilot or trial,' and to take action.<sup>28</sup>

It is quite clear that this is in relation to pilots and trials, and the ACCC, as the expert regulator—and we have great confidence in the ACCC's competence—can make a judgement that this is not really a pilot or a trial but is a way for you to try to capture the market in advance, and that is not what we are about or what we want to achieve.<sup>29</sup>

2.22 Mr Mason added that the benefit received by the service provider seeking to pilot or trial an innovation would be limited to 'the benefit of trialling, testing, getting it more marketable and getting it more market-ready as a reward for their initiative, as it is'.<sup>30</sup>

#### **Part 4—Access determinations**

2.23 Under the current regulatory regime, an access regime for carriers to access certain facilities owned by other carriers is provided in Parts 3 and 5 of Schedule 1 to the Telecommunications Act. Under Part XIC of the CCA, however, the ACCC may 'declare' a facilities access service, which means the service is regulated under the telecommunications access regime in Part XIC of the CCA and carriers must comply with standard access obligations (SAOs). The SAOs that apply to non-NBN Co providers are referred to as category A SAOs, and the SAOs that apply to NBN Co are known as category B SAOs.

2.24 Where an access provider is subject to the SAOs, they must be complied with on such terms and conditions as are either agreed, set out in a special access undertaking accepted by the ACCC, specified in binding rules of conduct made by the ACCC, or determined by the ACCC. When making an access determination, the ACCC is required to take into account various matters specified in subsection 152BCA(1) of the CCA and may also take into account matters specified in subsection 152BCA(2).

#### ***The proposed amendments***

2.25 The bill includes proposed amendments to the CCA that relate to access determinations applied to NBN Co. Currently, NBN Co is not subject to an access determination—a special access undertaking specifies price and non-price terms and

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28 Mr Philip Mason, Department of Communications and the Arts, *Proof Committee Hansard*, 5 February 2016, p. 31. Later in the hearing, Mr Mason again emphasised that the ACCC can form a view that particular conduct is 'not really a pilot or a trial but is a way for...[a service provider] to try to capture the market in advance', which Mr Masons stated 'is not what we are about or what we want to achieve'. *Proof Committee Hansard*, 5 February 2016, p. 34.

29 Mr Philip Mason, Department of Communications and the Arts, *Proof Committee Hansard*, 5 February 2016, p. 34.

30 Mr Philip Mason, Department of Communications and the Arts, *Proof Committee Hansard*, 5 February 2016, p. 33.

conditions relating to access to NBN Co's fibre, fixed wireless and satellite networks and other related services. The explanatory memorandum advised that the intention is 'to respond to potential future scenarios that might arise'.<sup>31</sup>

2.26 Proposed new subsections 152BCA(2A) and (2B) would provide the following additional matters that must be taken into account by the ACCC when making access determinations:

- the method used by the ACCC to determine terms and conditions it includes in access determinations that apply only to an NBN corporation; and
- the method used by the ACCC to determine terms and conditions it includes in access determinations that do not apply to NBN corporations.

2.27 The explanatory memorandum stated that the proposed amendments are designed to:

...better promote regulatory consistency in the ACCC's approach to setting any access price for an access provider (both NBN corporations and non-NBN corporations). This should ensure that no one access provider is treated more favourably than another.<sup>32</sup>

2.28 To illustrate, the following example was provided in the explanatory memorandum:

...if fixed principles apply to NBN Co, the ACCC would need to consider whether those fixed principles should also apply in respect of future access determinations for other infrastructure providers.<sup>33</sup>

2.29 This part of the bill also includes proposed amendments regarding procedural fairness. Items 18 and 19 would insert new sections 152BCGAA and 152BDAB that will require the ACCC to consult those persons it considers appropriate before making an interim access determination or binding rules of conduct. With respect to interim access determinations, the explanatory memorandum noted that the proposed amendments seek to codify the ACCC's existing approach to consultation.<sup>34</sup> Failure by

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31 Explanatory Memorandum, p. 5. See also ACCC, 'NBN Co – Special Access Undertaking: Project overview', [www.accc.gov.au/regulated-infrastructure/communications/national-broadband-network-nbn/nbn-co-special-access-undertaking](http://www.accc.gov.au/regulated-infrastructure/communications/national-broadband-network-nbn/nbn-co-special-access-undertaking) (accessed 8 December 2015).

32 The explanatory memorandum added that the proposed amendments originate from recommendation 17 of the Vertigan Panel's Statutory Review, which was based on the view that 'the ACCC should, in its approach to access determinations, treat NBN Co and other access providers on a comparable basis'. However, the proposal in the bill differs from the Vertigan Panel's recommendation in some respects; for example, the Vertigan Panel focused on charges in an access determination whereas the provisions in the bill extend the recommendation to 'cover both non-price and price-related terms and conditions and consistency between access determinations generally'. Explanatory Memorandum, pp. 4–5, 61.

33 Explanatory Memorandum, p. 61.

34 Explanatory Memorandum, p. 61.

the ACCC to comply with the consultation requirement will not affect the validity of the decision made.<sup>35</sup>

### *Evidence from industry stakeholders*

2.30 Optus argued that the proposed amendments 'appear to go beyond the specific concerns' raised by the Vertigan Panel regarding the need to ensure that NBN Co does not receive more favourable treatment than other access providers. Optus explained that this is because the proposed amendments would not only ensure that an access provider is not disadvantaged as compared to NBN Co, but they would also require the ACCC to ensure that NBN Co is not disadvantaged compared to other access providers.<sup>36</sup>

2.31 To illustrate its concerns, Optus referred to the ACCC's draft final access determination for fixed line access services. During that consultation process, Optus explained that the ACCC's proposal to reduce legacy copper access prices was 'challenged' by the department 'because of alleged impacts on price relativities with NBN access prices'. If the proposed amendments had applied in this case, in Optus' view:

...it is likely that the ACCC would have to give greater weight to such arguments and its ability to reduce access prices for legacy fixed line services to better reflect the costs of supply would, therefore, be constrained.<sup>37</sup>

2.32 Optus concluded that 'it is difficult to see how access seekers and consumers would benefit from the proposed amendments'. It added:

To the extent that NBN Co issues are relevant to an ACCC pricing decision then it is likely that the ACCC would have regard to that matter. There is in short no need to spell this out in legislation.<sup>38</sup>

2.33 The CCC also questioned the rationale underpinning the amendments. It suggested that the proposed new requirements relating to how the ACCC undertakes its functions 'represent unnecessary red tape at best, an unwelcome injection of uncertainty at worst'. Like Optus, the CCC argued that 'there is no evidence of a problem that needs to be addressed'.<sup>39</sup>

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35 Schedule 1, item 18, proposed new subsection 152BCGAA(2); item 19, proposed new subsection 152BDAB(2).

36 Optus, *Submission 2*, p. 3.

37 Optus, *Submission 2*, p. 4.

38 Optus, *Submission 2*, p. 4.

39 Competitive Carriers' Coalition, *Submission 4*, p. 5.

2.34 The CCC applied similar reasoning to question the proposed amendments relating to procedural fairness. The CCC submitted that:

...the pointlessness of these provisions is clear from the explanatory memorandum, which makes clear that this is already how the ACCC conducts itself and that even if the ACCC does not consult with affected parties, its decisions would not be invalidated by these new provisions.<sup>40</sup>

2.35 The CCC noted that the interim determinations and binding rules of conduct were established 'to allow the ACCC to act decisively and quickly in the context of an industry that had become bogged down in legal conflict and ineffective regulation'.<sup>41</sup>

2.36 Optus and the CCC recommended that the proposed amendments be omitted from the bill. As an alternative option, Optus suggested that the proposed amendment relating to the matters that must be taken into account by the ACCC could be re-drafted. In Optus' view, an acceptable redraft would 'make it clear that the ACCC is required to have regard to consistency between NBN Co and other access providers only in relation to pricing decisions for services that are supplied in the same wholesale market(s) as NBN Co services'.<sup>42</sup>

### *Evidence from the department*

2.37 In response to the concerns expressed by industry stakeholders about the proposed codification of the ACCC's existing practices regarding consultation and the methodology used to determine terms and conditions, the department provided the following explanation of the bill's intent:

The changes proposed by Part 4 aim to achieve a balance between providing industry with greater certainty that the ACCC will follow requirements of procedural fairness, and the real concern that that the regulator's decisions can be gamed with broader industry and economic detriment.<sup>43</sup>

2.38 In relation to the consultation requirement, the department submitted:

The requirement for the ACCC to consult simply codifies an important element of the ACCC's processes when it comes to making a decision in relation to an [interim access determination] or [binding rules of conduct]. These changes are intended to promote confidence in the regulator's decision making processes and will ensure consistency in approach for all access providers. Given that they simply provide some greater certainty that the ACCC will follow minimum procedural fairness requirements, they

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40 Competitive Carriers' Coalition, *Submission 4*, p. 5.

41 Competitive Carriers' Coalition, *Submission 4*, p. 5.

42 Optus, *Submission 2*, p. 4.

43 Department of Communications and the Arts, *Submission 7*, p. 5.

should neither be seen as delaying regulatory decisions nor as adding any additional red tape to access determination processes.<sup>44</sup>

2.39 Mr Mason, an assistant secretary at the department, made the following additional observation:

...there is an argument that some of the measures codify practice the ACCC already undertakes as a matter of course and therefore they do not need to be legislated. While there is some attraction to this view from a regulatory burden perspective, there is also the reality that many of those measures the ACCC does not need to, even though it does. So we do not see a real problem in making clear the government's and—if the bill is passed by the parliament of Australia—the parliament's expectations of the ACCC's conduct.<sup>45</sup>

## Part 5—Special access undertakings

2.40 Section 152CBDA of the CCA contains provisions that apply when a special access undertaking (SAU) is being considered by the ACCC. The section enables the ACCC to suggest to the person who gave the undertaking that they make specified variations to the undertaking. If the variations are made, the ACCC would then consider the varied undertaking as if it was the original undertaking. The intention of the section is 'to avoid a situation where the ACCC has to reject an SAU, resulting in the person who lodged it having to start the whole process again by lodging a new undertaking'.<sup>46</sup>

### *The proposed amendments*

2.41 The proposed amendments in this part would amend section 152CBDA. The proposed amendments are designed to differentiate between variations to the original undertaking that the ACCC specifies are necessary to satisfy it that the undertaking would be reasonable,<sup>47</sup> and other variations that the ACCC suggests are 'desirable'.<sup>48</sup> These proposed amendments respond to recommendations 22 and 23 of the Statutory Review. The explanatory memorandum stated:

The Vertigan panel considered that ACCC notices to vary...[an] SAU should be limited to those changes to the SAU that are necessary to satisfy the ACCC that the SAU would be reasonable. This reflected concerns that some of the variations the ACCC had required during the process of accepting NBN Co's SAU may not, strictly speaking, have been necessary

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44 Department of Communications and the Arts, *Submission 7*, p. 6.

45 Mr Philip Mason, Assistant Secretary, Market Structure Branch, Department of Communications and the Arts, *Proof Committee Hansard*, 5 February 2016, p. 28.

46 Explanatory Memorandum, Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2010, p. 210.

47 Schedule 1, item 24, proposed new subsection 152CBDA(2); Explanatory Memorandum, p. 5.

48 Schedule 1, item 24, proposed new subsection 152CBDA(2B).

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for the ACCC to be satisfied that the SAU was reasonable. The Vertigan panel recommended that a notice to vary an SAU 'should be confined to matters that are, as a matter of fact, essential for the ACCC to be satisfied that the special access undertaking will pass the relevant thresholds for acceptance'.<sup>49</sup>

2.42 The proposed amendments also permit the person who gives a varied SAU in response to the ACCC's notice to include variations that have the same effect or substance as the variations sought by the ACCC but do not use the exact wording.<sup>50</sup>

### *Evidence from industry stakeholders*

2.43 Optus acknowledged that the proposed amendments reflect recommendations of the Vertigan Panel. However, Optus submitted that it 'is unclear what specific problem the changes aim to address', particularly as the variation notice powers 'were only recently put into the CCA'.<sup>51</sup> Optus argued:

There is no evidence that there is a problem with the legislation beyond occasional complaints by those network owners with market power that they need to work hard to satisfy the ACCC that their proposed undertakings are reasonable and promote the long-term interest of end users.<sup>52</sup>

2.44 In advising of its opposition to these proposed amendments, Optus also outlined more explicit concerns. Optus argued that, in its view, the proposed amendments 'are likely to undermine the efficacy of variation powers as a special access undertaking as a regulatory tool', and may result in 'some adverse consequences for the industry and consumers'.<sup>53</sup>

2.45 Optus argued that it is important for the ACCC to 'have the right to be prescriptive' when proposing changes to an SAU.<sup>54</sup> According to Optus, the proposed amendments are 'likely to add to the delay and uncertainty of settling future SAUs and they will almost certainly re-open the scope for regulatory gaming'.<sup>55</sup>

2.46 The CCC also expressed opposition to the proposed amendments. The CCC argued that the process used by the ACCC when it examined NBN Co's SAU demonstrated that the ACCC:

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49 Explanatory Memorandum, p. 5.

50 Schedule 1, item 24, proposed new subparagraph 152CBDA(3)(b)(ii).

51 Optus, *Submission 2*, p. 5.

52 Competitive Carriers' Coalition, *Submission 4*, p. 5.

53 Optus, *Submission 2*, p. 5.

54 Optus, *Submission 2*, p. 5.

55 Optus, *Submission 2*, p. 6.

...is capable of balancing the interests of monopoly network owners with that of the community in resolving enormously complex, wide ranging and long term undertakings applications within the present legislative framework.<sup>56</sup>

2.47 The CCC added that the 'proposed amendments have the effect of shifting flexibility and discretion to the monopoly owners and away from the ACCC'.<sup>57</sup>

### *Evidence from the department*

2.48 The department advised that it disagrees with the assessments of the proposed changes provided by industry stakeholders. The department submitted:

The proposed changes respond to genuine concerns raised by NBN Co and are intended to provide a useful discipline on the regulator. They clarify that when the regulator proposes changes to an SAU to enable it to be accepted, it should identify which changes are essential and which are desirable. The SAU process is complex and resource intensive. This change improves the efficiency and timeliness of the process. Access providers should not be required to implement changes that are not essential to the regulator's decision in relation to whether it will accept or reject an SAU.<sup>58</sup>

2.49 In response to industry's concern that the proposed changes will constrain the ACCC's ability to request changes to an SAU, the department submitted that it considers the proposed changes:

...improve the operation of the framework, by making it clear the ACCC should focus on what is essential, but can also raise changes it considers useful or desirable. Ultimately, the ACCC will still determine the scope and substance of changes required in relation to SAUs and the person submitting the SAU would still need to vary the SAU so that its changes satisfied the object, if not the letter, of the ACCC's requirements.<sup>59</sup>

## **Part 7—NBN corporations**

2.50 This part of the bill contains proposed amendments that would modify the line of business restrictions imposed on NBN Co and the provisions relating to conduct that NBN Co is authorised to engage in for competition law purposes. It is the proposed amendments to NBN Co's line of business restrictions that attracted substantive comment from industry stakeholders.

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56 Competitive Carriers' Coalition, *Submission 4*, pp. 5–6.

57 Competitive Carriers' Coalition, *Submission 4*, p. 6.

58 Department of Communications and the Arts, *Submission 7*, p. 6.

59 Department of Communications and the Arts, *Submission 7*, p. 6.

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### ***Overview of the proposed amendments related to the line of business restrictions***

2.51 The explanatory memorandum noted that the NBN Companies Act sets out fundamental line of business restrictions on NBN Co, such as the obligation on NBN Co to supply services on a wholesale-only basis and restrictions regarding the supply of non-communications goods or services.<sup>60</sup>

2.52 The proposed amendments in the bill would provide that:

- an NBN corporation may dispose of surplus non-communications goods; and
- regulations may be made providing that the restrictions in sections 18, 19 and 20 of the NBN Companies Act on the supply of content services, supply of non-communications goods or services, and investment activities do not apply in the circumstances set out in the regulations.<sup>61</sup>

2.53 With respect to the regulation-making power, the explanatory memorandum stated that the power 'would allow flexible responses to unanticipated circumstances, subject to parliamentary scrutiny', without degrading the bright line conduct rules' that the line of business restrictions impose.<sup>62</sup>

### ***Evidence from industry stakeholders***

2.54 Optus, the CCC and Telstra submitted that they do not object to the proposed amendment that would ensure that NBN Co can dispose of surplus non-communications goods.<sup>63</sup> However, they questioned the proposal to establish a regulation-making power that would remove line of business restrictions in prescribed circumstances.

2.55 Optus argued that it was unclear why the change is required. Optus also expressed concern that the change could be used to 'expand the role of NBN Co into telecommunications markets which are competitive and adequately served by commercial entities'. According to Optus, NBN Co 'is already pushing the boundaries of its remit'.<sup>64</sup>

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60 Explanatory Memorandum, p. 7.

61 Proposed new subsection 22B(2) specifies that the operation of section 9 of the NBN Companies Act, which provides that the supply of eligible services by NBN Co to be on a wholesale basis, is not affected.

62 Explanatory Memorandum, p. 7.

63 Optus, *Submission 2*, p. 7; Competitive Carriers' Coalition, *Submission 4*, p. 6; Mr James Shaw, Director, Government Relations, Telstra, *Proof Committee Hansard*, 5 February 2016, p. 9.

64 Optus, *Submission 2*, p. 7.

2.56 Submitters also suggested that the proposed amendments did not accord with the rationale that underpinned the establishment of NBN Co. Optus argued that NBN Co should remain focused on the purpose for which it was established: to 'address a market failure relating to the provisions of last mile access for high speed broadband services'.<sup>65</sup> The CCC presented the following similar argument:

NBN was created for a very specific reason and to provide very specific services. Once it has rolled out in a location, NBN enjoys a powerful monopoly over access to fixed line communications services to consumers in those locations.<sup>66</sup>

2.57 Telstra argued that the proposed amendments introduce risk in relation to the investment certainty required by businesses that are responding to the NBN.<sup>67</sup> Telstra also questioned how the proposed amendments would operate in practice. Proposed new subsection 22B(2) specifies that the operation of section 9 of the NBN Companies Act, which provides that the supply of eligible services by NBN Co to be on a wholesale basis, is not affected. However, Telstra argued that this provision 'does not address all the ways the proposed amendments could be used to expand the reach of NBN Co's activities'. Telstra noted that the wholesale-only requirement in section 9 only applies to 'eligible services', which are defined in the CCA as being carriage services or services that facilitate a carriage service. Telstra submitted:

The 'non-communications services' or 'non-communications goods' which a regulation made under the amended section 22B could permit NBN Co to supply may not qualify as 'eligible services' and so are not restricted to the wholesale-only rules. Under the proposed amendment, NBN Co could, for example, be authorised to provide systems integration services to large corporates, advice on retail product development by [retail service providers], provide services to digitalise information and manage databases to verticals such as the health sector, or operate data centres.<sup>68</sup>

2.58 Telstra submitted that the Minister 'could override section 20 to permit NBN Co to invest in a third party which supplied retail communications services because the wholesale-only restriction in section 9 only applies to NBN Co and its related bodies corporate or entities NBN Co controls'. That is:

...NBN Co could do indirectly what it is not permitted to do directly by investing in retail providers. While this is already an issue with section 20 where NBN Co's interests fall short of control, section 22B would allow the safeguards that do exist in section 20 to be further weakened.<sup>69</sup>

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65 Optus, *Submission 2*, p. 7.

66 Competitive Carriers' Coalition, *Submission 4*, p. 6.

67 Telstra, *Submission 5*, p. 4.

68 Telstra, *Submission 5*, p. 6.

69 Telstra, *Submission 5*, p. 6.

2.59 Although the regulations would be subject to disallowance by either House of Parliament, Telstra argued that this protection 'is an inadequate substitute for a legislative amendment to change NBN Co's remit'. Telstra commented:

Any such departure from a fundamental aspect of the NBN policy should be fully debated through Parliament. Using the pathway of legislative change to deal with expansion of NBN Co's remit is, as the Explanatory Memorandum notes, more difficult, but given the fundamental significance of this issue, it should be more difficult.<sup>70</sup>

2.60 Telstra suggested that the bill could be re-drafted so that minor adjustments to NBN Co's line of business restrictions can be made as unintended issues emerge. The first change proposed by Telstra is a requirement that, before regulations are made, the Minister must have considered factors 'such as the impact on competition, the legitimate business interest of other providers [and] consistency with the policy of NBN Co being a wholesale only provider'. Only then could regulations be made to 'make an adjustment in NBN Co's scope of business which is of a minor or nonmaterial nature'.<sup>71</sup> The second change proposed by Telstra is to provide that the regulation-making power does not apply to section 20 of the NBN Companies Act (the restriction of investment activities).<sup>72</sup>

2.61 However, at the committee's public hearing, Telstra explained that its chief concern about the proposed changes is 'really the matter of principle' and that Telstra was maintaining the consistency in its view, as expressed when the legislation establishing NBN Co was considered, that the 'current restraints should be even stronger'.<sup>73</sup>

### *Evidence from the department*

2.62 The department's submission acknowledged the concerns raised by industry about the proposed regulation-making power, however, it emphasised that the proposed power is 'limited', and that NBN Co would still be prohibited from supplying retail services and content services.<sup>74</sup> The department added:

The telecommunications sector is highly dynamic. Companies must be able to respond to changes in the market, and where appropriate, flexibility should be available to governments and regulators to facilitate this responsiveness...The regulation making power will provide some flexibility to deal with unintended consequences, should they arise, given the wide range of existing restrictions on NBN Co. The difficulty for

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70 Telstra, *Submission 5*, p. 6.

71 Telstra, *Submission 5*, pp. 6–7.

72 Telstra, *Submission 5*, p. 7.

73 Mr James Shaw, Director, Government Relations, Telstra, *Proof Committee Hansard*, 5 February 2016, p. 12.

74 Department of Communications and the Arts, *Submission 7*, p. 8.

NBN Co in disposing of surplus assets is simply one known identified example; should similar examples be identified in the future the regulation-making power could be used in a public and transparent manner to deal with them, subject to usual Parliamentary scrutiny.<sup>75</sup>

2.63 In a letter to the committee received following the public hearing, Mr Mason responded to the concerns expressed by Telstra about whether the proposed amendments could, in certain instances, enable NBN Co to operate in some retail markets (see paragraphs 2.57–2.58). Mr Mason provided the following advice, which referred to Telstra's example of regulations that would potentially enable NBN Co to provide a retail data centre service:

I think an argument can be made that the proposed regulation-making power could provide scope for an NBN corporation to operate in some retail markets in some instances. This would be where regulations enable NBN Co to provide services that were not 'eligible services' as defined in the *Competition and Consumer Act 2010* (CCA).

This is because such services may not be subject to the overarching wholesale-only restriction in section 9. This could include data centre services, as these are more concerned with the storage and processing of data, as opposed to its transport between points, which is the essence of the definition of an 'eligible service'.<sup>76</sup>

2.64 Continuing with Telstra's example of a retail data centre service, Mr Mason emphasised that, for this to occur, the Government would need to decide that:

- NBN Co could provide data centre services (other than where they are ancillary or incidental to the supply of eligible services, which is already permitted); and
- the service could be provided on a retail basis.<sup>77</sup>

2.65 Mr Mason noted that the regulations could be drafted to make it clear that the retail supply of a service is not permitted.<sup>78</sup> He also repeated the department's earlier evidence that any regulations made would be subject to parliamentary scrutiny and disallowance.<sup>79</sup>

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75 Department of Communications and the Arts, *Submission 7*, p. 8.

76 Mr Philip Mason, Department of Communications and the Arts, Letter to the committee dated 12 February 2016, *Additional Information 1*, p. 1.

77 Mr Philip Mason, Department of Communications and the Arts, *Additional Information 1*, pp. 1–2.

78 Mr Mason noted that 'the proposed regulation-making power requires the regulation to specify the circumstances in which the line of business restrictions in sections 18, 19 and 20 of the NBN Companies Act do not apply'. Mr Philip Mason, Department of Communications and the Arts, *Additional Information 1*, p. 2.

79 Mr Philip Mason, Department of Communications and the Arts, *Additional Information 1*, pp. 1–2.

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## Part 8—Declared services and eligible services

2.66 The proposed amendments in Part 8 of the bill would clarify that 'facilities access services which are supplied under the current definitive agreements between NBN Co and Telstra, and NBN Co and Optus, are not declared services to the extent that they are supplied under those agreements'.<sup>80</sup>

### *Overview of the proposed amendments*

2.67 The explanatory memorandum stated that the proposed amendments:

...will ensure that these agreements, which are designed to facilitate the roll-out of the NBN, will continue to operate in accordance with their existing negotiated terms and conditions, even if the ACCC later declares one or more of the facilities access services which are supplied as part of the agreements. This protection applies for the life of the agreements, thereby giving certainty to the parties concerned on the matters covered.<sup>81</sup>

2.68 The proposed amendments would only apply to the specified agreements that are in force at the commencement of the section (the section would commence on Royal Assent).<sup>82</sup> However, the proposed amendments would also provide that any changes made to the agreements after the amendments commence would not be exempted from the definition of declared service.<sup>83</sup>

2.69 As a result of the proposed amendments relating to declared services, minor changes to definitions and consequential amendments relating to the definition of eligible services are also proposed.<sup>84</sup>

### *Evidence from industry stakeholders*

2.70 The CCC submitted that these amendments appear to be unnecessary. It suggested that the arrangements in the specified agreements would be 'unaffected even if a facilities access service were to be declared and the ACCC made an access determination that was inconsistent with the agreements'.<sup>85</sup> The CCC explained:

Under the law as it now stands, any commercial agreement between parties relating to a declared service takes precedent over any ACCC pricing or access decision. The definitive agreements between NBN, Telstra and Optus constitute commercial agreements. Section 152BCC provides that 'an access determination has no effect to the extent to which it is inconsistent

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80 Explanatory Memorandum, p. 8.

81 Explanatory Memorandum, p. 71.

82 Clause 2; Schedule 1, item 50, proposed new subsection 152AQA(1).

83 Schedule 1, item 50, proposed new subsection 152AQA(2).

84 Schedule 1, items 52–60.

85 Competitive Carriers' Coalition, *Submission 4*, p. 7.

with an access agreement that is applicable to those parties'. All of the relevant agreements would be access agreements as defined in s. 152BE, and s. 152BE(3) makes clear that this is the case even if the relevant service was not a declared service at the time the agreement was made.<sup>86</sup>

### *Evidence from the department*

2.71 In addressing the evidence received by the committee regarding the proposed amendments in Part 8 of the bill, the department highlighted the interaction between the proposed amendments in Part 1 and Part 8. The department submitted:

Part 1 of the Bill proposes changes to the [Telecommunications Act] and the CCA to clarify that if the ACCC declares a facilities access service which is ordinarily captured by the [Telecommunications Act], then that declaration replaces the *ex ante* access rights to that facilities access service under the [Telecommunications Act]. This means that prices and other terms and conditions of access determined by the ACCC will apply as a baseline, rather than the negotiate-arbitrate approach under the [Telecommunications Act]. Industry submissions to the inquiry seem to be generally clear on this point. The interaction between Part 1 of the Bill and Part 8, however, may not be as clear.

Part 8 of the Bill relates to Part 1 of the Bill by providing that any agreements between NBN Co and Telstra, or NBN Co and Optus (collectively, the definitive agreements), are not affected by the proposed change under Part 1. Part 8 also provides that existing arrangements between NBN Co and other providers are not affected by the changes under Part 1. Industry has raised concerns around unnecessary duplication of regulation, noting for example that the existing regulatory hierarchy under Part XIC of the CCA already ensures that access agreements cannot be affected by subsequent access determinations.<sup>87</sup>

2.72 The department continued:

The agreements cited in Part 8 of the Bill do not constitute access agreements. Paragraph 152BE(1)(c) of the CCA qualifies that an access agreement can only be made in relation to a declared service. The facilities access services to which the definitive agreements or other agreements apply are not currently declared services.

The proposed changes therefore ensure that arrangements already established through the definitive agreements, or other existing agreements between NBN Co and another carrier, are unaffected in the event that a facilities access service to which those agreements apply, is captured through future declaration.<sup>88</sup>

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86 Competitive Carriers' Coalition, *Submission 4*, p. 6.

87 Department of Communications and the Arts, *Submission 7*, p. 2.

88 Department of Communications and the Arts, *Submission 7*, p. 3.

## **Other matters**

2.73 Some submissions discussed policy matters that are not addressed by the bill. Telstra, for example, presented an argument for re-introducing merits review of the ACCC's decisions under Part XIC of the CCA.<sup>89</sup> Macquarie Telecom's submission, which relied on its earlier comments to the department on the exposure draft of the bill, questioned the order of precedence in Part XIC.<sup>90</sup>

### ***Committee comment***

2.74 The inquiry has provided an opportunity for submitters to put forward various proposals that they consider have merit. However, the committee was tasked with scrutinising the specific measures contained in the bill, not with undertaking a wide-ranging inquiry into telecommunications law. Accordingly, the committee makes no findings or recommendations about these other proposals beyond noting that they raise questions of policy for the Government to contemplate outside of this inquiry.

### **Committee view**

2.75 This bill outlines several measures that form part of the Government's efforts to reform regulatory arrangements in the telecommunications sector. Many provisions in the bill appear uncontroversial and were unanimously supported by industry. The committee acknowledges, however, that some industry submitters expressed various concerns about particular provisions in the bill.

2.76 In scrutinising the bill, the committee has been mindful that the overarching aim of the changes is the promotion of greater efficiency, transparency, competition and innovation in telecommunications services. Regulatory regimes should also take into account problems that could arise, as well as problems that have been clearly demonstrated.

2.77 The committee considers that the measures in the bill will improve the current regulatory regime by addressing various 'housekeeping' issues and by introducing other sensible amendments that will encourage innovation and improve regulatory processes. For example, the flexibility that the bill will provide to NBN Co to support trials and pilots of new services will encourage innovation, which will ultimately benefit consumers. Fundamentally, the telecommunications regulatory regime should provide incentives for firms to continually drive innovation for the long-term benefit of consumers.

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89 See Telstra, *Submission 5*, p. 2.

90 See Macquarie Telecom, *Submission 3*, Attachment 1, p. 4.

2.78 The additional information about the bill provided by the Department of Communications and the Arts in its evidence to this inquiry addressed the various concerns put to the committee. While the committee is satisfied by the explanations provided, the committee considers it is necessary to specifically comment on the proposed regulation-making power in Part 7.

2.79 There are many instances where it is desirable for the Government to have the flexibility to respond to emerging issues through regulations rather than developing and pursuing amendments to legislation in the Parliament. In relation to the regulations that this bill would enable, the committee notes that any regulations made will be subject to appropriate consultation<sup>91</sup> and parliamentary scrutiny through the disallowance process. The committee also notes that the Senate Standing Committee for the Scrutiny of Bills, which among other things examines bills for provisions that would inappropriately delegate legislative power, did not comment on the bill. The committee is satisfied by the Government's rationale for allowing regulations to be made to address unanticipated circumstances.

### **Recommendation 1**

**2.80 The committee recommends that the bill be passed.**

**Senator Linda Reynolds CSC**  
**Chair**

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91 The *Legislative Instruments Act 2003* (which on or before 5 March 2016 will be renamed the *Legislation Act 2003*) includes a requirement for appropriate consultation before regulations are made.