



Telecommunications Legislation Amendment (National Broadband Network Measures—Access Arrangements) Bill 2010

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Law and Bills Digest Section

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Telecommunications Legislation Amendment (National Broadband Network Measures—Access Arrangements) Bill 2010

Date introduced: 25 November 2010

House: House of Representatives

Portfolio: Broadband, Communications and the Digital Economy

Commencement: Parts 1 and 2 of Schedule 1, if and only if section 3 of the *National Broadband Companies Act 2010* commences, immediately after the commencement, or the day after the Royal Assent, whichever is the later; Part 3 of Schedule 1 on a date to be fixed by Proclamation, but no later than 12 months after the date of the Royal Assent.

Links: The links to the [Bill, its Explanatory Memorandum and second reading speech](#) can be found on the Bills home page, or through <http://www.aph.gov.au/bills/>. When bills have been passed they can be found at the ComLaw website, which is at <http://www.comlaw.gov.au/>.

Purpose

The primary purpose of the Bill is to amend the *Telecommunications Act 1997* (Telecommunications Act) and the *Competition and Consumer Act 2010* (CCA) to introduce new access, transparency and non-discrimination obligations relating to the supply of wholesale services by an NBN corporation.

The Bill is part of a suite of legislation which includes the National Broadband Network Companies Bill 2010 and should be read alongside that Bill.

Background

On 24 February 2010 the Minister for Broadband, Communications and the Digital Economy, Senator Stephen Conroy, and the Minister for Finance and Deregulation, Lindsay Tanner MP, issued exposure drafts of legislation to cover the governance and access arrangements for the NBN Co.¹ NBN Co Limited is a wholly-owned Government Business Enterprise formed to build and operate a wholesale-only national broadband network across Australia. The exposure drafts were released for information and comment by interested parties, in advance of the introduction of the Bills into

1. S Conroy (Minister for Broadband, Communications and the Digital Economy) and L Tanner (Minister for Finance and Deregulation), *Draft legislation released for NBN Co operations*, joint media release, 24 February, 2010, viewed 20 January 2011, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2FJX1W6%22>

Parliament.² The Bill, in its current form, has been drafted in response to some of the submissions from key stakeholders. The matters raised in those submissions are covered in this Bills Digest under the heading ‘Main issues’.

Basis of policy commitment

The report of the Independent Committee of Inquiry into National Competition of August 1993 (known as the Hilmer Report after the Chairman, Fred Hilmer) recommended the implementation of a national competition policy for Australia to improve productivity, increase international competitiveness and to maintain and improve living conditions. Amendments to the (then) *Trade Practices Act 1974* (TPA)³ which came into effect in 1995, established a new legal regime under which firms could be given a right of access to ‘essential facilities’ owned by another firm, when the provision of such a right meets certain public interest criteria.⁴ Further amendments to the TPA in 1997 inserted an access regime specific to telecommunications.⁵

In the lead-up to the 2007 Federal election, the Australian Labor Party (ALP) promised to partner with the private sector to deliver a national broadband network and, in particular, to ‘ensure competition in the sector through an open access network that provides equivalence of access charges and scope for access seekers to differentiate their product offerings’.⁶

Consistent with this promise, and with the long-standing practice of legislating access to declared services, the Bill ‘introduces open access, transparency and non-discrimination measures for NBN corporations’.⁷

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2. Department of Broadband, Communications and the Digital Economy, *National Broadband Network Company Legislation and Access Regime*, viewed 25 January 2011, http://www.dbcde.gov.au/broadband/national_broadband_network/nbn_company_legislation_and_access_regime
 3. Made by the enactment of the *Competition Policy Reform Act 1995*.
 4. The Independent Committee of Inquiry defined an ‘essential facility’ as ‘a monopoly, permitting the owner to reduce output and/or service and charge monopoly prices, to the detriment of users and the economy as a whole. In addition, where the owner of the facility is also competing in markets that are dependent on access to the facility, the owner can restrict access to the facility to eliminate or reduce competition in the dependent markets.’ The Independent Committee of Inquiry, *National Competition Policy*, Australian Government Publishing Service, Canberra, August, 1993, p. 239, viewed 20 January 2011, <http://www.ncc.gov.au/images/uploads/Hilmer-001.pdf>
 5. Made by the enactment of the *Trade Practices Amendment (Telecommunications) Act 1997*.
 6. K Rudd, S Conroy and L Tanner, *New directions for communications: a broadband future for Australia—Building a national broadband network*, Australian Labor Party, March 2007, viewed 25 January 2011, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22library%2Fparty%2FE2KM6%22>
 7. S Conroy, (Minister for Broadband, Communications and the Digital Economy), *NBN legislation introduced into Parliament*, media release, 25 November 2010, viewed 20 January 2011, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2F386094%22>

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Committee consideration

Current consideration

On 10 February 2011, the Selection of Bills Committee resolved to recommend that the Bill be referred to the Environment and Communications Legislation Committee for inquiry and report by 16 March 2011.⁸

In addition, on 9 February 2011, the Scrutiny of Bills Committee published an Alert Digest which commented on certain provisions of the Bill.⁹ Further information about these comments are contained in the 'Key provisions' part of this Bills Digest.

Previous consideration

On 25 June 2008 the Senate established the Select Committee on the NBN (the Committee). The terms of appointment of the Committee were changed on 14 May 2009 in response to a change in the government's policy direction. This effectively allowed the Committee to continue and complete its inquiry into the NBN.¹⁰

The Committee provided four interim reports to the Senate dated 2 December 2008, 12 May 2009, 26 November 2009 and 18 May 2010. The Committee submitted its final report to the Senate on 17 June 2010.¹¹ The fourth interim report contains consideration of this Bill in its draft form. The report states that 'in submissions to the committee, little of the Access Bill was contentious'.¹² The focus of the submitters fell on three issues:

- the scope of the access regime—in particular, whether it should be limited to the NBN Co and an NBN corporation or whether it should apply more broadly so as to capture any asset forming part of the NBN, regardless of whether it is owned by NBN Co, NBN Tasmania, or a wholly-owned subsidiary
- equivalence provisions—in particular, that there were provisions setting out exceptions to the general rule that an NBN corporation could not discriminate between access seekers, and

8. Selection of Bills Committee, *Report No. 1 of 2011*, 10 February 2011, viewed 15 February 2011, http://www.aph.gov.au/senate/committee/selectionbills_ctte/reports/2011/rep0111.pdf

9. Scrutiny of Bills Committee, *Alert Digest No. 1 of 2011*, 9 February 2011, viewed 16 February 2011, <http://www.aph.gov.au/Senate/committee/scrutiny/alerts/2011/d01.pdf>

10. Senate Select Committee on the National Broadband Network, 'Information about the Inquiry', Senate Select Committee website, viewed 28 January 2011, http://www.aph.gov.au/senate/committee/broadband_ctte/info.htm

11. Senate Select Committee on the National Broadband Network, *Final Report*, Commonwealth of Australia, Canberra, 17 June 2010, viewed 28 January 2011, http://www.aph.gov.au/Senate/committee/broadband_ctte/report/index.htm

12. Select Committee on the National Broadband Network, *Fourth Interim Report*, Commonwealth of Australia, Canberra, May 2010, p. 99, viewed 7 February 2011, http://www.aph.gov.au/Senate/committee/broadband_ctte/interim4-report/report.pdf

- the future of the Universal Service Obligation (USO)—that is, some submitters argued that the Access Bill should enhance the (USO) currently applicable to Telstra in relation to telephony services.

The Committee recommended that the Access Bill be amended:

- to provide guidance on what is meant by ‘efficiency’ for the purpose of the equivalence provisions. The amendments should also ensure that volume considerations cannot be counted as matters which ‘aid efficiency’ for the purpose of obtaining an exemption to the non-discrimination obligations on NBN Co,¹³ and
- so that Australian Competition and Consumer Commission (ACCC) pre-approval is required of any agreement to which NBN Co is a party and under which an access seeker is granted access on discriminatory terms on the basis of the ‘efficiency’ exception.¹⁴

Policy position of non-government parties and independents

Coalition

The Coalition actively opposed the *Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Act 2010* and has opposed the NBN in principle since its inception.¹⁵

Australian Greens

Senator Scott Ludlam has stated that the Greens have concerns about pricing and views the Bill as more complex than previous ones, because of the government’s dual role as owner and regulator of the new broadband network:

This would heighten the need to test the assurances of the NBN Co. I don't think we should debate it in February – a bill with ramifications as far-reaching as this should go through the proper processes.¹⁶

13. Ibid., recommendation 21. Note that the final form of the Bill does not contain the recommended amendment.

14. Ibid., recommendation 22. Note that the final form of the Bill does not contain the recommended amendment.

15. Liberal Party of Australia and the Nationals, *Economic Action Plan*, Coalition policy document, Election 2010, viewed 4 February 2011,
<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22library%2Fparty%2FBIOX6%22>

16. General news, ‘Pricing structure another hurdle in the Senate’, *Australian Financial Review*, 30 November 2010, p. 10, viewed 7 February 2011,
<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressclp%2F396727%22>.

Senator Xenophon

It has been reported that Senator Xenophon will vote down the Bill on the back of concerns it could allow NBN Co to give better pricing deals to telecommunications companies such as Telstra stating that:

This taxpayer-funded enterprise needs to be a true level playing field to attract my support. Right now there is scope within legislation that could see larger telcos being granted cheaper access than smaller players, and that is simply not acceptable.¹⁷

Tony Windsor MP and Rob Oakeshott MP

In the aftermath of the 2010 election, independents Tony Windsor and Rod Oakeshott entered into a series of agreements with the ALP to secure power for a Gillard government. It has been reported that:

Ms Gillard's deal with Mr Windsor and Mr Oakeshott will also involve changes to the way the National Broadband Network is built and priced. Under the deal, broadband prices will be the same for households regardless of where they are located. There is also a commitment for fibre to be built in regional areas as a priority and for the NBN to bring forward the introduction of wireless and satellite services to enable immediate access to better broadband in regional areas.¹⁸

Position of major interest groups

The positions of the major interest groups have been extensively canvassed by the Senate Select Committee on the National Broadband Network.¹⁹ Comments of interest groups are included under the heading 'Main issues' below.

Financial implications

According to the Explanatory Memorandum:

these reforms will have a moderate financial impact on administration costs for the ACCC and the ACMA, which will be funded by increasing the carrier licence charges levied by the ACMA

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17. General news, 'Xenophon to block NBN bill', *Australian*, 30 November 2010, p. 5, viewed 20 January 2011, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressclp%2F396494%22>
 18. S Maher, 'Spending bonanza for the bush', *The Australian*, 8 September 2010, p. 6, viewed 20 January 2011, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressclp%2F177314%22>
 19. The submissions to the Select Committee on the National Broadband Network can be viewed at: http://www.aph.gov.au/Senate/committee/broadband_ctte/submissions/sublist.htm and http://www.aph.gov.au/Senate/committee/broadband_ctte/submissions_from_april_2009/sublist.htm and http://www.aph.gov.au/Senate/committee/broadband_ctte/submissions_from_march_2010/sublist.htm

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under the *Telecommunications (Carrier Licence Charges) Act 1997*. This will mean that the proposal has a limited fiscal impact for the Commonwealth.²⁰

Main issues

Universal wholesale price

The agreement between the independents, Tony Windsor MP and Rob Oakeshott MP, and the ALP states that:

For the first time, broadband prices will be the same for households and businesses regardless of where they are located—in the city, in regional Australia or in more remote parts of the country.

- For the first time, the Government will put in place a cross subsidy to achieve a **uniform national wholesale price** so that regional areas can pay the same price as people in the city.²¹

The main issue which arises from this Bill is whether it delivers on that commitment.

Under existing section 152CH of the CCA, the Communications Minister may make a ministerial pricing determination setting out principles dealing with price-related terms and conditions relating to the standard access obligations. According to the Explanatory Memorandum, ‘this existing legislative mechanism could be used, if required, to establish a uniform wholesale pricing obligation for NBN Co’.²²

This has been welcomed by major interest groups. The chief executive of the Australian Communications Consumer Action Network, Teresa Corbin, was reported as stating:

the fixed wholesale fee would force retailers and internet service providers to work harder to earn peoples’ business. As well, access to the network would provide people with a range of services, and retailers were expected to sell more elaborate product ‘bundles’ than they do today.²³

20. Explanatory Memorandum, Telecommunications Legislation Amendment (National Broadband Network Measures—Access Arrangements) Bill 2010, p. 14.

21. Agreement between the Australian Labor Party and the Independent Members (Mr Tony Windsor and Mr Rob Oakeshott), 7 September 2010, paragraph 3.1, Annex B, viewed 21 January 2011, <http://resources.news.com.au/files/2010/09/07/1225915/542989-final-agreement-with-the-independents.pdf>

22. Explanatory Memorandum, op. cit., p. 11.

23. C Yeates and L Battersby, ‘Uniform price prompts hopes of cheaper internet’, *Sydney Morning Herald*, 21 December 2010, p. 7, viewed 7 February 2011, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressclp%2F445605%22>

According to the submission from Optus, the Bill does not deliver on the commitment. It is their view that by bringing the NBN Co under the Part XIC provisions of the CCA, the Bill does not provide any detail about how terms and conditions of access—such as access prices—are set.²⁴

Access pricing

The issue of access pricing is broader than the promise of a universal wholesale price. The Bill sets up a separate pathway through Part XIC of the CCA for an NBN Co. Optus called for clear rules, including a statutory formula, for calculating how access prices for the NBN should be determined on the grounds that

the lack of precision in Part XIC about how access prices should be determined has contributed to a high degree of uncertainty under the present regulatory framework and resulted in divisive regulatory activity and litigation between access providers, access seekers and the regulators.²⁵

The Bill does not include a statutory formula for pricing. Rather the Bill relies on the current process by which the ACCC publishes guides to Telecommunications Access Pricing Principles. For example the Guide to Telecommunications Access Pricing Principles for Fixed Line Services indicates that the ACCC favours the following pricing approaches:

- access pricing should generate prices that are equivalent for all access seekers, such that the ability to compete in downstream markets is based on the cost and quality of the access seeker's operations
- access pricing should allow the access provider to recover its costs, including a normal commercial return on its investments
- access pricing should create incentives for the access provider to incur costs of supply efficiently for example by adopting the most appropriate technology, improving productivity and reducing costs, and
- access pricing should not lead to inefficient duplication, or underuse, of existing infrastructure. It should also encourage existing infrastructure to be duplicated where it is efficient to do so, and should not lead to over-utilisation of existing infrastructure.²⁶

It is not known what the Access Pricing Principles for the National Broadband Network will contain.

24. Optus, *Submission on Draft National Broadband Network Companies Bill 2010 and Draft National Broadband Network Measures—Access Arrangements Bill 2010*, March 2010, p. 16, viewed 27 January 2011, http://www.dbcde.gov.au/_data/assets/pdf_file/0011/127649/Optus.pdf

25. *Ibid.*, p. 17.

26. Australian Competition and Consumer Commission, 'Review of 1997 Guides to Telecommunications Access Pricing Principles for Fixed Line Services', *Discussion paper*, December 2009, p. 17, viewed 7 February 2011, <http://www.accc.gov.au/content/item.phtml?itemId=904478&nodeId=9f16c5fe4266a06c14abfb1c6c0a59e1&fn=Access%20Pricing%20Principles%20Review%20-%20Discussion%20paper.pdf>

Equivalence arrangements

Submissions to the Department of Broadband, Communications and the Digital Economy in response to the draft Bills generally agreed that NBN Co should be able to offer differentiated terms to customers where it aids efficiency, but there was little agreement on exactly what sort of discrimination should be permitted and under what circumstances.²⁷

The response from submitters in respect of the draft legislation favoured arrangements by which NBN Co would be required to offer the same services, on the same terms and conditions, processes and timeframes, and the same information about services, to all access seekers. Although submitters such as Macquarie Telecom considered that this should be set out as a basic principle in this Bill, it is not.²⁸

Rather, the Bill does not seem to offer much guidance or certainty, requiring that an NBN corporation not ‘discriminate between access seekers’.²⁹ However, that obligation is qualified so that discrimination is permissible in a number of circumstances including (but not limited to) where such ‘discrimination aids efficiency and all access seekers with like circumstances have an equal opportunity to benefit from the discrimination’³⁰ or where there is evidence that an access seeker is ‘not creditworthy’.³¹ Whilst these provisions will provide some flexibility they may also add unpredictability for access seekers.

AAPT agreed that ‘permitting discrimination (with ACCC oversight) is the right way forward’. However, AAPT argued that the Bill should ‘limit NBN Co’s ability to discriminate by imposing a cap on the maximum possible price variation between any two access seekers which should be no higher than 5%’.³²

According to the submission by Optus:

The concepts of ‘efficiency’ and ‘like circumstances’ are not defined. Whilst the ACCC is expected to provide guidance on these concepts it is not clear that such guidance will be enforceable. The explanatory memorandum indicates that it is not intended that such flexibility would provide a single access seeker with a ‘systemic’ advantage. However, the drafting does not reflect this statement.

27. Explanatory Memorandum, op. cit., p. 45.

28. Macquarie Telecom, *Submission on Draft National Broadband Network Companies Bill 2010 and Draft National Broadband Network Measures—Access Arrangements Bill 2010*, 15 March 2010, p. 4, viewed 27 January 2011, http://www.dbcde.gov.au/_data/assets/pdf_file/0010/127648/Macquarie_Telecom_Pty_Ltd.pdf

29. **Proposed subsection 152AXC(1)**, CCA.

30. **Proposed subsection 152AXC(4)**, CCA.

31. **Proposed subsection 152AXC(3)**, CCA.

32. AAPT, *Submission on Draft National Broadband Network Companies Bill 2010 and Draft National Broadband Network Measures—Access Arrangements Bill 2010*, undated, p. 5, viewed 7 February 2011, http://www.dbcde.gov.au/_data/assets/pdf_file/0006/127635/AAPT_Limited.pdf

... the concept of 'efficiency' should be clearly defined in the legislation to relate to a 'demonstrable change in the costs to supply of NBN Co on an **Equivalence of Inputs** basis'. Further, 'like circumstances' should also be clearly defined in a way that would prevent a single access seeker gaining a clear commercial advantage on the NBN.³³

Similarly, the Internet Industry Association:

... recommends that the provisions of the Access Bill that permit discrimination where 'discrimination aids efficiency' be deleted. This wide statutory exception to the rule that the NBN cannot discriminate between access seekers appears to provide enormous scope for 'justified' discrimination with the potential to undermine the rule against discrimination and have a major negative impact on competition at the retail level.³⁴

Austar United Communications Limited, too, expressed its concern about permitting discrimination which 'aids efficiency' stating:

The concept [aids efficiency], although attractive from a commercial and competitive perspective, will merely reinforce the status quo and severely reduce the likelihood of market entry by smaller retail players. This will prejudice the development of innovative and competitive communications solutions for consumers in regional Australia and reinforce the existing digital divide. Economies of scale are clearly not available in the less populous regions of Australia. The efficiency concepts envisaged are all ones which can only be offered by retail providers with scale - they clearly discriminate in favour of the existing incumbents, Telstra and Optus.³⁵

In relation to discrimination permitted on the basis of 'creditworthiness' TransACT stated:

A company or organisation's creditworthiness is usually measured by its credit rating, where the credit rating is an assessment of whether it will be able to meet its obligations to bond holders and other investors. Credit rating systems for corporations generally range from AAA or Aaa at the high end to D (for default) at the low end. It may be that a credit rating system is applied for the purpose of differentiation based on creditworthiness, but this should be clearly specified.³⁶

Optus also expressed its concern that an NBN corporation might supply services that were required, or capable of being used, by a single access seeker—such as Telstra. The formulation and offering of

33. Optus, *Submission on Draft National Broadband Network Companies Bill 2010 and Draft National Broadband Network Measures—Access Arrangements Bill 2010*, op. cit., p. 18.

34. Internet Industry Association, *Submission on Draft National Broadband Network Companies Bill 2010 and Draft National Broadband Network Measures—Access Arrangements Bill 2010*, undated, p. 5, viewed 31 January 2011, http://www.dbcde.gov.au/_data/assets/pdf_file/0009/127647/Internet_Industry_Association_IIA.pdf

35. Austar, *Submission on Draft National Broadband Network Companies Bill 2010 and Draft National Broadband Network Measures—Access Arrangements Bill 2010*, 15 March 2010, p. 6, viewed 7 February 2011, http://www.dbcde.gov.au/_data/assets/pdf_file/0007/127636/Austar_United_Communications_Limited.pdf

36. TransACT, *Submission on Draft National Broadband Network Companies Bill 2010 and Draft National Broadband Network Measures—Access Arrangements Bill 2010*, 22 March 2010, p. 6, viewed 27 January 2011, http://www.dbcde.gov.au/_data/assets/pdf_file/0007/127654/TransACT_Communications_Pty_Ltd.pdf

such a service could have major anti-competitive effects because of the cost advantages it might bestow upon a single access seeker. That being the case, Optus argued that an NBN corporation should be limited to providing generic set of voice and high-speed broadband access services.³⁷

Competitive neutrality

The Business Council of Australia expressed its concern that the Bill amends Part XIC of the CCA to create a separate access regime for an NBN corporation on the grounds that:

Competitive neutrality principles agreed by all governments at COAG in 1995 state that government businesses should not enjoy any net competitive advantage simply as a result of their public sector ownership, unless it is demonstrated that the benefits exceed the costs. Competitive neutrality imposes a set of obligations on all Government Business Enterprises (GBEs) in relation to taxation, debt and regulatory neutrality, full cost attribution and setting prices to earn a commercial rate of return.³⁸

Telstra agrees:

The Access Arrangements Bill creates a special ‘NBN Co pathway’ through Part XIC. This separate pathway creates a serious risk of preferential regulation of the NBN Co. The National Competition Principles mandate that Government-owned commercial enterprises should be subject to the same rules and regulations as their competitors. The starting point should be that there is no valid rationale for a bespoke regulatory regime for the Government-owned NBN Co because any such regime will be market distorting.³⁹

Transparency

The Bill contains a general rule that an NBN corporation must not discriminate between access seekers—however, this is qualified by contested exceptions to that rule. The question for some submitters was whether the Bill will provide transparency in circumstances where an access seeker is able to negotiate different terms of access.

Of concern to Optus, was the requirement that NBN must publish information on its website within seven days **after** the day on which it enters into an access agreement which departs from the terms of a standard form of access agreement.⁴⁰ Optus argued that the requirement to publish after the

37. Optus, *Submission on Draft National Broadband Network Companies Bill 2010 and Draft National Broadband Network Measures—Access Arrangements Bill 2010*, op. cit., p. 19.

38. Business Council of Australia, *Submission on Draft National Broadband Network Companies Bill 2010 and Draft National Broadband Network Measures—Access Arrangements Bill 2010*, March 2010, p. 6, viewed 31 January 2011, http://www.dbcde.gov.au/_data/assets/pdf_file/0020/127640/Business_Council_of_Australia_BCA.pdf

39. Telstra, *Submission on Draft National Broadband Network Companies Bill 2010 and Draft National Broadband Network Measures—Access Arrangements Bill 2010*, 15 March 2010, p. 8, viewed 31 January 2011, http://www.dbcde.gov.au/_data/assets/pdf_file/0006/127653/Telstra_Corporation_Limited.pdf

40. These provisions are in **item 67** of Part 1 of the Bill.

agreement is reached allows no opportunity for third-party objection or for legal intervention. As an alternative, Optus submitted that NBN Co should be obliged to publish full copies of all agreements it has entered into with access seekers. Any such agreement should be capable of being declared invalid if objections raised by other access seekers are upheld by the ACCC.⁴¹

Key provisions

General comments

The Bill contains three parts. Part 1 of the Bill makes substantial changes to Part XIC of the CCA which contains the telecommunications access regime. Part 3 of the Bill also amends Part XIC and, in places, further amends the amendments contained in Part 1 of the Bill. The key to understanding Parts 1 and 3 lies in the commencement dates of each. It is intended that Part 1 be enacted before Part 3⁴² which may not actually commence for up to 12 months after the date of Royal Assent.

Amendments to the CCA

Existing telecommunications access regime

The first phase of the development of a more competitive telecommunications industry involved granting limited market entry to new telecommunications carriers along with access rights which were not available to other telecommunications service providers. In addition, the incumbent carrier (Telstra) was subject to antidiscrimination prohibitions which limited its pricing. Thus, the telecommunications access regime has been directed towards providing new telecommunications carriers with access to some of Telstra's existing networks.

The enactment of the *Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Act 2010* will bring about the structural and/or functional separation of Telstra. That, in addition to the NBN Companies Bill (which should be read in conjunction with this Bill), brings about the need for amendment to the access regime to acknowledge the intended presence of NBN corporations in the market.

At present the telecommunications access regime operates as follows:

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41. Optus, *Submission on Draft National Broadband Network Companies Bill 2010 and Draft National Broadband Network Measures—Access Arrangements Bill 2010*, op. cit., p. 19.
 42. Part 3 of the Bill contains provisions which apply where a telecommunications network (other than the NBN) comes into existence or is altered or upgraded after 25 November 2010, to supply or be capable of supplying a superfast carriage service to customers, other than individual government or corporate end-users. In that case, the network must offer a Layer 2 bitstream service.

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- The ACCC may declare carriage services and related services to be **declared services**.⁴³
- Carriers and carriage service providers who provide declared services are required to comply with **standard access obligations** in relation to those services.
- The **standard access obligations** facilitate the provision of access to declared services by service providers in order that service providers can provide carriage services and/or content services.
- The terms and conditions on which carriers and carriage service providers are required to comply with the **standard access obligations** are subject to agreement.
- If agreement cannot be reached, but the carrier or carriage service provider has given an **access undertaking**, the terms and conditions are as set out in the access undertaking.
- If agreement cannot be reached, no access undertaking is in operation, but the ACCC has made **binding rules of conduct**, the terms and conditions are as specified in the binding rules of conduct.
- If agreement cannot be reached, no access undertaking is in operation, and no binding rules of conduct have been made, the terms and conditions are as specified in an **access determination** made by the ACCC.
- A carrier, carriage service provider or related body must not prevent or hinder the fulfilment of a standard access obligation.⁴⁴

Part 1

Part 1 of the Bill amends the existing generic standard access obligations by creating two categories of standard access obligations. Category A standard access obligations which do not relate to an NBN corporation, and category B standard access obligations which do relate to NBN corporations. The existing standard access obligations will become the category A standard access obligations with minor changes to put beyond doubt that they do not relate to NBN corporations.⁴⁵ New provisions are inserted to create the category B standard access obligations which will relate to an NBN corporation. In addition, Part 1 of the Bill will enhance the non-discrimination provisions.

Items 31–37 insert new definitions into existing section 152AC and make consequential amendments to section 152AG to establish the basis for the new categories of standard access obligations. In particular **item 37** provides that the category B standard access obligations—that is, those relating to an NBN corporation—will be contained in **proposed section 152AXB**.

Existing subsection 152AL(3) sets out the process by which the ACCC may, by written instrument, declare that a specific eligible service is a **declared service**. **Item 38** inserts **proposed subsections 152AL(3A) and (3B)**, to exempt an eligible service supplied, or capable of being supplied, by an NBN

43. There is no general right of access to telecommunications services—the ACCC must first ‘declare’ the relevant service (Division 2 Part XIC of the CCA). Upon declaration, standard access obligations (Division 3 Part XIC of the CCA) will apply.

44. Section 152AA, CCA.

45. The difference between the access to NBN corporation carriage services and non NBN corporation carriage services is that there is an additional method by which an NBN corporation carriage service can be ‘declared’.

corporation from the operation of existing subsection 152AL, which contains the process for declaring services. Instead, **item 41** inserts **proposed subsections 152AL(8A)–(8F)** to set out an alternative process by which the ACCC may, by written instrument, declare that an eligible service which is supplied by the NBN corporation is a declared service.

The mechanism by which eligible services provided by an NBN corporation may be declared in **proposed subsection 152AL(8A)** is the same as that set out in subsection 152AL(3) that is:

- the ACCC is to hold a public inquiry under Part 25 of the Telecommunications Act
- the ACCC then prepares a report about the inquiry under section 505 of the Telecommunications Act
- the report is published, and
- declaration occurs if the ACCC is satisfied that the making of the declaration would promote the long time interests of end-users.

However, **proposed subsection 152AL(8A)** goes further. It provides that where the ACCC has made a declaration as a result of the inquiry process, the declared service *'relates to'* the NBN corporation for the purposes of **proposed subsections 152AXB(2)** and **152AXC(7)**. The effect of this provision is to tie the NBN corporation in to the category B standard access obligations and the requirement to supply the declared service on a non-discriminatory basis.

In addition to the making of a formal declaration by the ACCC, there are two other ways that a service that is supplied, or capable of being supplied, by an NBN corporation can be a *'declared service'*. First, under **proposed subsection 152AL(8D)** an NBN corporation may publish a standard form of access agreement on its website setting out the terms and conditions of access to that service. Secondly, under **proposed subsection 152AL(8E)** an NBN corporation may give the ACCC a special access undertaking in relation to a service. The effect of these two provisions, together with **proposed section 152AL(8A)**, is to ensure that the services supplied by, or capable of being supplied by, an NBN corporation will be declared services and so be subject to the controls of Part XIC of the CCA.

Items 47–50 divide existing Division 3 into two separate subdivisions. Subdivision A contains the category A standard access obligations. Subdivision B contains the category B standard access obligations which will relate to an NBN corporation. Of importance are the category B standard access obligations which are contained in **proposed sections 152AXB—152AXD**.

The category B standard access obligations are:

- **First**, where a service of an NBN corporation has been declared, then the NBN corporation must **supply the service** to a service provider, if requested to do so. This obligation is limited. It will not operate to:
 - prevent a service provider who already has access to the declared service from obtaining a sufficient amount of the service to be able to meet their reasonably anticipated requirements

- prevent the NBN corporation from obtaining a sufficient amount of the service to be able to meet its reasonably anticipated requirements or
 - prevent a person from obtaining, by the exercise of a **‘pre-request right’**, a sufficient level of access to the declared service to be able to meet the person’s actual requirements.⁴⁶
- **Second**, if an NBN corporation is a carrier or carriage service provider, and owns or controls one or more facilities (or is a nominated carrier in relation to one or more facilities), then the NBN corporation must **permit interconnection** of those facilities if requested to do so by a service provider. It must also take all reasonable steps to ensure that the interconnection complies with the standard if a standard is in force under section 384 of the *Telecommunications Act 1997*.
 - **Third** if an NBN corporation is a carrier, or carriage service provider, and supplies a declared service by means of **conditional-access customer equipment**,⁴⁷ then if requested to do so by a service supplier, it must **supply any service that is necessary** to enable the service provider to supply carriage services and/or content services by means of the declared service and using the equipment. However, an NBN corporation is not obliged to supply the service by means of conditional-access customer equipment if there are reasonable grounds to believe that:
 - the access seeker would fail, to a material extent, to comply with the terms and conditions on which the NBN corporation supplies the declared service, or
 - the access seeker would fail to protect the integrity of a telecommunications network or the safety of individuals working on, or using, the declared services.

Proposed sections 152AXC⁴⁸ and **152AXD** contain the non-discrimination provisions.

First, **proposed section 152AXC** provides that an NBN corporation which is complying with its category B standard access obligations must not discriminate between access seekers. This prohibition is qualified. The NBN corporation may discriminate against an access seeker in certain circumstances. For example where:

- there are reasonable grounds to believe that the access seeker would fail, to a material extent, to comply with the terms and conditions on which the NBN corporation supplies access to the declared service—for example where there is evidence that an access seeker is not creditworthy⁴⁹
- discrimination aids efficiency and all access seekers with like circumstances have an equal opportunity to benefit from the discrimination

46. The term **‘pre-request right’** is defined in **proposed subsection 152AXB(8)** as a right under a contract that was in force at the time when the request for access to a declared service was made.

47. The term **‘conditional-access customer equipment’** is defined in section 152AC of the CCA as equipment which allows a service provider to determine whether an end-user is able to receive a content service.

48. The Alert Digest by the Scrutiny of Bills Committee drew attention to this section on the grounds that various subsections allow the ACCC to specify exceptions on certain grounds or in specified circumstances. These instruments are not legislative instruments and this is a substantive exemption from the *Legislative Instruments Act, 2003*. However the Scrutiny of Bills Committee considered that the exemption is appropriate.

49. **Proposed paragraph 152AXC(3)(a)**, CCA.

- a written instrument made by the ACCC sets out grounds on which discrimination is permitted.

Importantly, **proposed subsections 152AXC(7)–(9)** provide that an NBN corporation must not discriminate in favour of itself unless it does so on the ground, or in the circumstances specified in a written instrument made by the ACCC.⁵⁰

Second, **proposed section 152AXD** provides that an NBN corporation must not discriminate between access seekers in carrying out any of the related activities which are listed in **proposed subsection 152AXD(1)**. As with the non-discrimination requirements set out in the previous section, there are qualifications and exceptions to the prohibition which provide an NBN corporation with some flexibility in the event that it is carrying out a pilot or trial of a new eligible service or an enhanced declared service.

A **new Subdivision C** of Division 3 is created by the Bill—Compliance with standard access obligations. **Items 51** and **52** have the effect of deeming the rules contained in **proposed sections 152AXC** and **152AXD** to be carrier licence conditions, enforceable by the Federal Court under **proposed subsection 152BB(1AB)**.

Item 57 inserts **proposed subsections 152BC(4A)–(4C)** to make provision for NBN-specific access determinations. Similarly **item 59** inserts **proposed subsections 152BCB(4A)–(4F)** to prohibit the ACCC from making access determinations that relate to any or all of the category B standard access obligations relating to an NBN corporation and which have the effect of discriminating between access seekers. As with the other parts of this Bill, the obligation not to discriminate has exceptions. The ACCC may discriminate when making access determinations where there are reasonable grounds to believe that the access seeker would fail, to a material extent, to comply with the terms and conditions on which the NBN corporation supplies access to the declared service and where the discrimination aids efficiency and all access seekers with like circumstances have an equal opportunity to benefit from the discrimination.

Item 63 amends existing section 152BD which allows the ACCC to make binding rules of conduct for a carrier or carriage service provider. It inserts **proposed subsections 152BD(4A)–(4C)** to create binding rules of conduct which are NBN-specific.

There are some restrictions on this power—the ACCC may not make binding rules of conduct which have any of the effects listed in existing section 152BDA. **Item 65** amends this section to insert **proposed subsections 152BDA(4A)–(4F)**. These subsections will limit the power of the ACCC to make binding rules of conduct about the category B standard access obligations applicable to an NBN corporation which have the effect of discriminating between access seekers. As with the other parts of this Bill there are qualifications on the prohibition against discrimination. The ACCC may make binding rules of conduct which discriminate where there are reasonable grounds to believe

50. **Proposed subsection 152AXC(10)** of the CCA requires that the ACCC first publish a draft of an instrument, invite people to make submissions about the instrument, and then consider those comments before making any instrument under **proposed section 152AXC**.

that the access seeker would fail, to a material extent, to comply with the terms and conditions on which the NBN corporation complies with the relevant obligation, and where the discrimination aids efficiency and all access seekers with like circumstances have an equal opportunity to benefit from the discrimination. There is no definition of the term *'material extent'* in the Bill—so it will be up to the Courts to eventually determine how broadly the term will be applied.

Division 4B of the CCA contains the rules for access agreements between access seekers and carriers or carriage service providers which supply declared services. Existing sections 152BE and 152BEA require that an access agreement between an access seeker and a carrier, or carriage service provider, is given to the ACCC within 28 days after the day on which it is entered into. The same rule applies to a variation of an access agreement. Importantly, there is no obligation on the ACCC to publish the access agreements or any variations to those agreements. **Item 67** inserts **proposed sections 152BEBA–152BEBD** to provide greater transparency. The amendments apply where an NBN corporation has entered into an access agreement which differs in its terms and conditions from those contained in a standard form access agreement, and a special access undertaking or access determination which was in force immediately before the access agreement was entered into. The proposed sections are set out in similar terms to require the NBN corporation to give the ACCC a statement, in the approved form, within seven days:

- identifying the parties to the access agreement
- describing the differences between the agreed terms and conditions and those contained in the standard form of access agreement, special access agreement, or access determination
- including details of any discrimination arising from the agreement
- providing an explanation of the circumstances which justify or authorise the discrimination, and
- in the case of discrimination which aids efficiency, describing what other access seekers must do to receive like treatment.

Proposed section 152BEBD requires the ACCC to maintain an electronic register—the Register of NBN Access Agreement Statements—available for inspection on its website. Under **proposed subsection 152BEBD(5)** the ACCC is empowered to remove certain material from the statement on the Register, if it could reasonably be expected to prejudice commercial interests and that prejudice outweighs the public interest in the publication of the material. **Items 68** and **69** insert amendments to make it a carrier licence condition and a carriage service provider rule respectively, to comply with **proposed sections 152BEBA–BEBC**.

Items 70–74 amend existing section 152CBA to create separate rules for the making of *special access undertakings* (about services which are not declared services) for carriers or carriage service providers who are not NBN corporations and for those that are NBN corporations. Essentially, the separation of the rules is to ensure that non-NBN corporations make special access undertakings which comply with category A standard obligations, whilst NBN corporations make special access undertakings which comply with category B standard access obligations. Importantly, **item 73** inserts **proposed paragraph 152CBA(3C)** which provides that an NBN corporation may include in a special access, an undertaking that it will engage in specified conduct including but not limited to

such matters as: developing a new eligible service, enhancing a declared service, and an activity that is preparatory to the supply of a declared service.

Item 75 amends existing subsection 152CBD(2) to allow the ACCC to accept special access undertakings by either a non-NBN corporation or an NBN corporation (respectively), if it is satisfied that the terms and conditions in the special access undertaking are consistent with the relevant category A or B standard access obligations, and that the terms and conditions are reasonable.

Item 79 inserts two new Divisions into Part XIC of the CCA—Division 6A about the supply of services by NBN corporations, and Division 6B which requires the ACCC to publish explanatory material relating to anti-discrimination provisions on its website. Importantly, **proposed subsection 152CJA(1)** provides that an NBN corporation must not supply an eligible service unless:

- the service has been **declared** by the ACCC under subsection 152AL(8A)⁵¹
- the NBN corporation has formulated a **standard form of access agreement** that relates to access to the service and it has published the standard form of access agreement on its website, or
- a **special access undertaking** has been given by the NBN corporation relating to the service, and such an undertaking is in force.

Under **proposed subsection 152CJA(2)** an NBN corporation which is subject to a category B standard access obligation must formulate, and publish on its website, a standard form of access agreement in relation to a declared service. Once that has occurred, the NBN corporation must enter into an access agreement with an access seeker in the same terms and conditions as those that have been published if the access seeker so requests. However, under **proposed subsection 152CJA(3)**, in the event that the access seeker requests access to a declared service on other terms and conditions, there is nothing to prevent an NBN corporation from granting access on terms other than those in the standard form of access agreement.

Proposed section 152CJB sets out the process for compliance by an NBN corporation with a requirement to provide a service in accordance with a condition of a carrier licence. In the event of a contravention of an obligation under **proposed sections 152CJA** or **152CJB**, **proposed section 152CJE** provides for the Federal Court to make an order, upon application by the ACCC or a person whose interests are affected by the contravention, directing the NBN corporation to either comply with the obligation or to compensate a person who has suffered loss or damage.

Part 3

As already stated, the amendments to Part XIC of the CCA contained in Part 3 of the Bill are additional to the amendments in Part 1.⁵² Part 3

51. See **item 41** of Part 1 of this Bill.

contains specific arrangements for carriers who build or upgrade certain fixed-line superfast access networks after the introduction of the Bill. Carriers must offer a Layer 2 bitstream service⁵³ over such infrastructure and will be subject to access, non-discrimination and transparency obligations in relation to that service based on the same obligations as those applying to NBN Co Limited.⁵⁴

Item 89 introduces the term **‘designated superfast telecommunications network’**. **Items 90** and **92** of Part 3 of the Bill insert new definitions of the terms **‘Layer 2 bitstream service’**, and **‘superfast carriage service’** into the CCA to mirror the definitions inserted into the Telecommunications Act by **items 85** and **86**.

Item 93 inserts **proposed section 152AGA** into Division 2 of Part XIC which relates to declared services. The provision identifies when a telecommunications network is a ‘designated superfast telecommunications network’ for the purposes of Part XIC and reflects the same type of networks that are subject to the Layer 2 bitstream service obligation under the new Part 7 of the Telecommunications Act.⁵⁵ **Item 94** inserts **proposed subsections 152AL(3C)–(3H)** to require the ACCC to declare that a specified Layer 2 bitstream service is a declared service as soon as practicable after the commencement of the subsection.⁵⁶ That declaration has no effect, except to the extent that the Layer 2 bitstream service is supplied using a designated superfast telecommunications network, so that it will be possible for the ACCC to make another declaration under existing subsection 152AL(3) in relation to that service. A declaration under **proposed subsection 152AL(3C)** will remain in force indefinitely and may not be varied or revoked by the ACCC.⁵⁷

Items 99–102 amend Division 3 of Part XIC of the CCA which will contain (after the commencement of the amendments in Part 1 of this Bill) the category A standard access obligations. **Proposed section 152ARA** requires that Layer 2 bitstream services supplied under a category A standard access obligation are to be supplied by a carrier or carriage service provider (other than an NBN

52. The Alert Digest by the Scrutiny of Bills Committee drew attention to the delayed commencement of the amendments in **items 86** and **88** of Part 3 of the Bill. The Alert Digest notes that an explanation for the delayed commencement was provided to the Committee and leaves consideration of the issue to the Senate as a whole.

53. The term **‘Layer 2 bitstream service’** is defined in **item 85** of the Bill which inserts a new definition into existing section 7 of the Telecommunications Act. More information about the operation of the Layer 2 bitstream service is contained in NBN Co Ltd, *NBN Co consultation paper: proposed wholesale fibre bitstream products*, December 2009, viewed 5 January 2011, http://www.nbnco.com.au/wps/wcm/connect/1c18dc00439fe2a58b63ffc5166da634/NBN001_concept_paper_final.pdf?MOD=AJPERES

54. A Albanese (Minister for Infrastructure and Transport), ‘Second reading speech: Telecommunications Legislation Amendment (National Broadband Network Measures—Access Arrangements) Bill 2010’, House of Representatives, *Debates*, 25 November 2010, p. 3754, viewed 18 January 2011, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansard%2F2010-11-25%2F0008%22>

55. See **items 85–88** above.

56. The commencement day is to be no later than 12 months after the day of Royal Assent.

57. **Items 97** and **98** of the Bill.

corporation) on a non-discriminatory basis.⁵⁸ However there are a number of exceptions to this broad prohibition and it is possible to discriminate:

- against an access seeker where there are reasonable grounds to believe that the access seeker would fail, to a material extent, to comply with the terms and conditions of access (for example, where evidence exists that the access seeker is not creditworthy, or where the access seeker has previously failed to comply with terms and conditions of access)⁵⁹
- where the discrimination aids efficiency and all access seekers have an equal opportunity to benefit from the discrimination⁶⁰
- on the grounds or in the circumstances specified in a written instrument made by the ACCC.⁶¹

In addition, where a Layer 2 bitstream service is a declared service and is supplied using a designated superfast telecommunications network, a carrier or carriage service provider supplies or is capable of supplying the service to itself, and the carrier or carriage provider is subject to a category A standard access obligation, then the carrier or carriage provider must not discriminate in favour of itself.⁶² The exception to this rule is that the carrier or carriage provider may discriminate in favour of itself on the grounds or in the circumstance specified in a written instrument made by the ACCC.⁶³

Before the ACCC makes a written instrument setting out the grounds or circumstances in which discrimination may be permitted, it must publish a draft of the instrument on its website, inviting people to make submissions and, having received submissions within the specified time limit, the ACCC must take the submissions into account.⁶⁴

Proposed section 152ARB applies where a Layer 2 bitstream service is a declared service and is supplied using a superfast telecommunications network and the carrier or provider is subject to a category A standard access obligation in relation to that service. In that case, **proposed subsection 152ARB(2)** provides that the carrier or provider must not discriminate between access seekers in relation to any of the matters listed. There are exceptions to the prohibition against discrimination—in particular where the relevant activity relates to a pilot or trial of a new eligible service or an enhanced declared service.⁶⁵

Item 102 inserts **proposed subsection 152BB(1AA)** so that the ACCC, or any person whose interests are affected by an alleged contravention by a carrier or carriage service provider of the prohibitions against discrimination, may institute proceedings in the Federal Court. Where the Federal Court is satisfied that a carrier or carriage service provider has contravened to rule against discrimination,

58. The Scrutiny of Bills Committee made comments about this proposed section in the same terms as proposed section 152AXC. See footnote 49 above.

59. **Proposed subsections 152ARA(2)–(3)**, CCA.

60. **Proposed subsection 152ARA(4)**, CCA.

61. **Proposed subsections 152ARA(5)–(6)**, CCA.

62. **Proposed subsection 152ARA(7)**, CCA.

63. **Proposed subsections 152ARA(8)–(9)**, CCA.

64. **Proposed subsection 152ARA(10)**, CCA.

65. **Proposed subsection 152ARB(3)**, CCA.

the Court may make an order directing that the obligation not to discriminate by complied with, an order directing the carrier or carriage service provider to compensate any other person for loss or damage suffered as a result of the contravention, or any other order that the Court considers appropriate.

Item 103 purports to insert **proposed subsection 152BC(4A)**. This appears to be a minor drafting error as **item 57** in Part 1 of the Bill also inserts **proposed subsection 152BC(4A)**.

The remainder of the Bill inserts provisions into the relevant divisions of Part XIC of the CCA in the same terms as in Part 1 of the Bill. This is designed to ensure that access to a Layer 2 bitstream service, supplied by a carrier other than an NBN corporation, is not granted on a discriminatory basis. The exceptions to this general rule against discrimination, and the rules to be followed if a carrier or carriage service provider of Layer 2 bitstream services which has entered into an access agreement or given a special access undertaking are the same as occur elsewhere in the Bill.

Amendments to the Telecommunications Act

Part 1

Items 1–24 amend the Telecommunications Act to insert references to:

- to the NBN Companies Act
- to the amendments to Part XIC of the CCA as outlined above, and
- optical fibre lines, or facilities used, or for use, in or in connection with optical fibre lines in relation to industry codes or industry standards

The Bill also clarifies the definition of **'national broadband network'**, for the avoidance of doubt.⁶⁶

In particular **item 4** inserts **proposed sections 62D** and **62E** which provide that a carrier licence held by an NBN corporation is subject to the conditions set out in section 152CJC of the CCA and section 37 of the NBN Companies Act. The effect of the amendments is to ensure that an NBN corporation complies with the conditions set out in these provisions, or else be subject to the enforcement provisions of the Telecommunications Act for breach of a carrier licence condition.

Items 5–7 empower the ACCC and the Minister, rather than the ACMA, to issue directions or formal warnings to a carrier which is contravening section 152CJC of the CCA, or sections 37 or 41 of the NBN Companies Act.

66. **Items 22** and **23** of the Bill.

Part 2

The issue of an infringement notice for a contravention of a civil penalty provision is an alternative to instituting court proceedings.⁶⁷ **Item 84** of the Bill amends existing paragraph 572E(4)(b) to allow for infringement notices to be issued in the event of a breach of the following:

- a carrier licence condition or service provider rule as set out in the CCA, and
- a carrier licence condition or service provider rule as set out in the NBN Companies Act (when enacted).

Part 3

Items 85–88 amend the Telecommunications Act by inserting **new Part 7**. Broadly, the new Part prohibits an owner of a network unit⁶⁸ that belongs to a telecommunications network, other than the national broadband network, from supplying a fixed-line carriage service if all of the following circumstances exist:

- the telecommunications network is used, or is capable of being used, to supply a superfast carriage service to customers in Australia⁶⁹
- no Layer 2 bitstream service is available for supply to those customers or prospective customers using the network⁷⁰
- the network came into existence, or was upgraded to be capable of being used to supply a superfast carriage service, after 25 November 2010 and
- the network unit is not used wholly to supply carriage services to a single government or corporate end-user.⁷¹

It is an offence to for a network owner to supply a fixed-line carriage service in the circumstances outlined above. The penalty for a breach of the prohibition is \$2.2m.⁷² However, the Minister may exempt a specified owner or a specified network unit by written instrument, having first consulted with the ACCC and the ACMA.⁷³ The overall effect of the **new Part 7** is to oblige owners of such

67. Section 572E of the Telecommunications Act sets out when an infringement notice may be given. Section 572M provides that the ACMA may formulate guidelines about infringement notices, which must be complied with.

68. The term '**network unit**' is defined in Part 2 of the Telecommunications Act. According to section 25, there are four types of network unit being a single line link connecting distinct places in Australia where the line link meets certain minimum distance requirements; multiple line links connecting distinct places in Australia where the line links meet certain minimum distances requirements; a designated radiocommunications facility; and a facility specified in a Ministerial determination.

69. The term '**superfast carriage service**' is defined in **proposed subsection 141(10)** as a carriage service supplied with a line with a download speed of more than 25 megabits per second.

70. The term '**Layer 2 bitstream service**' is defined in **item 85** of the Bill. See footnote 53 above.

71. **Proposed section 141**, Telecommunications Act.

72. **Proposed subsection 141(4)** provides that the penalty is 20 000 penalty units. Each penalty unit is equivalent to \$110.

73. **Proposed subsections 141(5)–(9)**, Telecommunications Act.

network units to supply a layer 2 bitstream service if the network unit is used to supply or is capable of being used to supply superfast carriage services.

Item 88 of the Bill inserts a **new Division 5A** into Part 21 of the Telecommunications Act. **Proposed section 389A** authorises the ACMA to determine, by legislative instrument, technical standards relating to Layer 2 bitstream services. **Proposed section 389B** requires a carrier or carriage service provider to comply with such a standard. Where there is a failure to comply with the technical standard, or a person takes action to aid, abet, or conspire with others to effect a failure to comply with the technical standard, it is a breach of a civil penalty provision (contained in Part 31 of the Telecommunications Act). Provisions allowing the Minister to exempt a specified carried or a specified carriage service provider from this requirement are contained in **proposed subsections 389B(4)–(7)** in similar terms to those contained in **proposed section 141**.

Concluding comments

As already stated, the ALP promised to deliver a national broadband network which would be ‘an open access network that provides equivalence of access charges and scope for access seekers to differentiate their product offerings’.⁷⁴

This Bill makes significant changes to the provisions of Part XIC of the CCA to create specific rules for the supply of services by an NBN corporation, and a new category of standard access obligations for an NBN corporation. It also provides that an NBN corporation cannot discriminate against access seekers, but there are exceptions to the prohibition—particularly where discrimination aids efficiency. Ultimately, it will be up to the Courts to determine how broadly the exception is to be applied.

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74. K Rudd, S Conroy and L Tanner, *New directions for communications: a broadband future for Australia—Building a national broadband network*, op. cit.

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