



National Broadband Network Companies Bill 2010

Brian Dalzell
Economics Section

Paula Pyburne
Law and Bills Digests Section

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National Broadband Network Companies Bill 2010

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House: House of Representatives

Portfolio: Broadband, Communications and the Digital Economy

Commencement: Sections 1 and 2, on the day of the Royal Assent; Sections 3 to 101 and Schedules 1 and 2, on the day after 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 and have received Royal Assent they can be found at the ComLaw website, which is at <http://www.comlaw.gov.au/>.

Purposes

The National Broadband Network Companies Bill 2010 (the Bill) establishes a regulatory framework for ownership, governance and operation of the National Broadband Network Company Limited (NBN Co) and its subsidiary corporations.¹ The Bill also:

- limits NBN Co to operating as a wholesale-only telecommunications company in terms of the services and goods it supplies, as well as the investments it makes
- establishes Ministerial powers to require the functional separation, and transfer, or divestment of assets
- clarifies that the Minister may make licence conditions, including to require NBN Co to provide or not to provide, specified services
- establishes reporting obligations on NBN Co once it is no longer wholly Commonwealth-owned, and enables the making of regulations to set limits on private control of NBN Co post-privatisation
- provides for anti-avoidance² obligations of NBN Co
- provides for powers of the Federal Court to grant injunctions
- provides that NBN Co is not a public authority
- provides that NBN corporations are not subject to the *Public Works Committee Act 1969*
- provides for the Parliamentary Joint Committee on the ownership of NBN Co to be established for the specific purpose of examining a Productivity Commission report into the National Broadband Network (NBN) and reporting its findings to Parliament

1. Explanatory Memorandum, National Broadband Network Companies Bill 2010, pp. 1-2.

2. Basically, NBN Co must not enter into or carry out a scheme for the purpose of avoiding the application of any provision of the Act.

- provides that the Government must retain full ownership of NBN Co until the NBN rollout is complete, and
- provides that the eventual sale of NBN Co will depend on:
 - the Communications Minister making a declaration that the NBN is built and fully operational
 - the Productivity Commission conducting an inquiry into and reporting on regulatory, budgetary, consumer and competition matters relating to the NBN
 - a Parliamentary Joint Committee considering the findings of that report
 - the Finance Minister making a disallowable declaration that conditions are suitable to sell NBN Co, and
 - Parliament not disallowing that declaration.³

This Bill is a companion to the Telecommunications Legislation Amendment (National Broadband Network Measures—Access Arrangements) Bill 2010 and should be read in conjunction with that Bill.⁴

NBN Co financial heads of agreement with Telstra

On 20 June 2010, the Government announced that NBN Co had entered into a financial heads of agreement with Telstra. Under this agreement, the structural separation of Telstra into its wholesale and retail arms would occur via progressive migration of customer services from Telstra's copper and pay-TV cable networks, to the new wholesale-only monopoly network to be built and operated by NBN Co. The agreement between NBN Co and Telstra will provide for:

- the reuse of suitable Telstra infrastructure, including pits, ducts and backhaul fibre, by NBN Co, and
- the progressive migration of customers from Telstra's copper and pay-TV cable networks, to the new wholesale-only fibre network to be built and operated by NBN Co.⁵

On 10 February 2011, the Gillard Government announced that Telstra and NBN Co had finalised key commercial terms to allow for the more efficient rollout of the NBN. The Government and Telstra have also reached in-principle agreement on the package of measures announced by the

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3. National Broadband Network Companies Bill 2010 and the Department of Broadband, Communications and the Digital Economy (DBCDE), *NBN legislative framework*, DBCDE website, viewed 21 February 2011, http://www.dbcde.gov.au/broadband/national_broadband_network/nbn_legislative_framework
 4. P Pyburne, 'Telecommunications Legislation Amendment (National Broadband Network Measures—Access Arrangements) Bill 2010', Bills Digest, no. 63, 2010–11, Parliamentary Library, Canberra, 28 February 2011, viewed 9 March 2011, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillsdgs%2F589584%22>
 5. K Rudd (Prime Minister), L Tanner (Minister for Finance and Deregulation) and S Conroy (Minister for Broadband, Communications and the Digital Economy), *Agreement between NBN Co and Telstra on the rollout of the National Broadband Network*, joint media release, 20 June 2010, viewed 28 January 2011, http://www.minister.dbcde.gov.au/media/media_releases/2010/060

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Government last year to facilitate the transition to the NBN. The Government, Telstra and NBN Co are now working to finalise the detailed commercial documentation. When asked to comment on this announcement, Optus' CEO was reported as saying that 'it is imperative that we have full transparency of the agreements to ensure that no compromises are made that will provide Telstra with an unfair market advantage'.⁶

Telstra will commission an independent expert report for its shareholders to consider, and the Australian Competition and Consumer Commission (ACCC) will also scrutinise the terms as part of its consideration of Telstra's structural separation undertaking.⁷

Further background information

Further background information relating to the history of the NBN and the telecommunications sector more broadly is contained in the following Bills Digests:

- Telecommunications Legislation Amendment (Fibre Deployment) Bill 2010,⁸ and
- Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2010.⁹

Basis of policy commitment

To design, build and operate the broadband network required under the Government's NBN policy, the Government established NBN Co on 9 April 2009 as a wholly-owned Commonwealth company under the *Commonwealth Authorities and Companies Act 1997*. NBN Co was tasked with implementing the Government's NBN initiative which comprises the following national objectives:

- connect homes, schools and workplaces with optical fibre (fibre to the premises or FTTP), providing broadband services to Australians in urban and regional towns with speeds of 100 megabits per second (Mbps), extending to towns with a population of around 1 000 or more people
- use next generation wireless and satellite technologies that will be able to deliver 12Mbps or more to people living in more remote parts of Australia

6. M Freri, 'Show us your Telstra deal, Optus tells NBN Co', www.itwire.com, 10 February 2011, <http://www.itwire.com/it-policy-news/government-tech-policy/45033-show-us-your-telstra-deal-optus-tells-nbn-co>, viewed 24 February 2011.

7. S Conroy (Minister for Broadband, Communications and the Digital Economy), *Major step forward for Government - Telstra - NBN Co agreement*, media release, 10 February 2011, viewed 11 February 2011, http://www.minister.dbcde.gov.au/media/media_releases/2011/131

8. B Dalzell and K Magarey, *Telecommunications Legislation Amendment (Fibre Deployment) Bill 2010*, Bills Digest, no. 144, 2009–10, Parliamentary Library, Canberra, 13 May 2010, viewed 3 February 2011, <http://www.aph.gov.au/Library/pubs/bd/2009-10/10bd144.pdf>

9. B Dalzell and P Pyburne, *Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2010*, Bills Digest, no. 45, 2010–11, Parliamentary Library, Canberra, 18 November 2010, viewed 15 March 2011, <http://www.aph.gov.au/library/pubs/bd/2010-11/11bd045.pdf>

- provide fibre-optic transmission links connecting cities, major regional centres and rural towns
- be Australia's first national wholesale-only, open-access broadband network
- be built and operated on a commercial basis by a company established at arm's length from the government and involve private sector investment, and
- be expected to be rolled-out, simultaneously, in metropolitan, regional and rural areas.¹⁰

NBN Co's objectives can be summarised as follows:

- the network should be designed to provide an open-access, wholesale-only, national network, covering all premises
- the technologies utilised should be fibre to 93 per cent of premises (including 'greenfields' developments), fixed wireless to four per cent of premises (delivering at least 12Mbps), and satellite to three per cent of premises
- the pricing principles to be employed should ensure uniform, national wholesale pricing accessible on non-discriminatory terms, and
- the network expected rate of return should be in excess of current public debt rates.¹¹

NBN Co has designed a layer 2 network to satisfy the four objectives set out above.¹² Once NBN Co's corporate plan is approved by Government, NBN Co will commence full-scale build and operation of the network.¹³

Committee consideration

Previous committee consideration

On 25 June 2008, the Senate established the Select Committee on the NBN (the NBN Committee) to inquire into, and report on, the Government's proposal to partner with the private sector to upgrade

10. National Broadband Network Company (NBN Co), 'NBN Business Case Summary', NBN Co website, 24 November 2010, viewed 28 January 2011, <http://www.nbnco.com.au/wps/wcm/connect/5b05280044cfe6e9803289c72ea64545/NBN+Co+Business+Case+Summary.PDF?MOD=AJPERES&CACHEID=5b05280044cfe6e9803289c72ea64545>

11. *ibid.*, pp. 7-8.

12. According to NBN Co website, Layer 2 bitstream product will enable retail service providers to innovate and develop new services; viewed 3 March 2010, <http://www.nbnco.com.au/wps/wcm/connect/main/site-base/main-areas/our-network/fibre-wireless-and-satellite/> See also Market Clarity, 'Demystifying Layer 2 and Layer 3 VPNs', Market Clarity website, 15 June 2006, viewed 28 January 2011, <http://www.marketclarity.com.au/freebies/DemystifyingLayer2andLayer3VPNs.pdf>

13. NBN Co, *NBN Business Case Summary*, op. cit., pp. 7-8. In the first year of operation, NBN Co's corporate plan primarily relates to network design.

parts of the existing network to fibre, in order to provide minimum broadband speeds of 12Mbps to 98 per cent of Australian homes and businesses, on an open-access basis.¹⁴

On 7 April 2009, the Rudd Government announced that it had terminated the previous Request for Proposals process, replacing it with an initiative that would [initially aim to] connect 90 per cent of Australian homes, workplaces and schools with FTTP, connecting all other premises in Australia with next generation wireless and satellite technologies, ensuring every Australian house, school and workplace has access to fast and affordable broadband.¹⁵

Consequently, on 14 May 2009, the Senate revised the terms of appointment of the NBN Committee, reflecting the change in the Government's policy direction and allowing the NBN Committee to effectively continue to complete its inquiry.¹⁶

The NBN Committee has since provided four interim reports to the Senate dated 2 December 2008, 12 May 2009, 26 November 2009 and 18 May 2010.¹⁷ The NBN Committee submitted its final report to the Senate on 17 June 2010.¹⁸ The final report had only one recommendation:

Recommendation 1

Notwithstanding that the committee, for reasons detailed in its fourth Interim report, recommended that the government abandon its NBN proposal in its current form, the committee acknowledges that the government is proceeding with its NBN proposal and accordingly recommends:

2.90 That the government provide the public with:

- the calculations and underlying workings that were used by the Lead Advisor to generate its total cost estimates for building the NBN; and
- a comprehensive statement of what are or will be the alleged and predicted benefits of the government's NBN project.

2.91 That the government commission a rigorous cost-benefit analysis of its NBN project, or at least in the first instance, accept Professor Henry Ergas' generous offer to conduct a cost-benefit analysis free of charge.¹⁹

14. Further information about the Senate Select Committee on the National Broadband Network is available at: http://www.aph.gov.au/Senate/committee/broadband_ctte/index.htm

15. Ibid.

16. 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

17. The contents of the Fourth Interim report are discussed under the heading 'Main issues—legal'.

18. 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

19. Ibid., p. vii.

Current committee consideration

On 16 November 2010 the Minister for Infrastructure and Transport, Mr Anthony Albanese MP, referred an inquiry to the House of Representatives Standing Committee on Infrastructure and Communications.²⁰ The Committee was requested to inquire into, and report on, **the role and potential of the NBN** and to report by August 2011.²¹

On 10 February 2011, the Senate jointly referred the National Broadband Network Companies Bill 2010 and the Telecommunications Legislation Amendment (National Broadband Network Measures-Access Arrangements) Bill 2010 to the Senate Standing Committee on Environment and Communications for inquiry and report.²² That Committee is due to report by 17 March 2011.

Future committee consideration

On 1 March 2011 a Joint Committee chaired by Independent MP Rob Oakeshott to inquire into and report on the **rollout of the NBN** was announced.²³ Its 16 members will include seven Government and Coalition members, and two crossbenchers.²⁴ The Joint Committee is to provide progress reports to both Houses of Parliament and to shareholder Ministers on the following matters every six months, commencing on 31 August 2011:

- the rollout of the NBN
- the achievement of take-up targets (including premises passed and covered and services activated) as set out in NBN Co.'s Corporate Plan released on 20 December 2010 as revised from time to time
- Network rollout performance including service levels and faults
- the effectiveness of NBN Co. in meeting its obligations as set out in its Stakeholder Charter
- NBN Co's strategy for engaging with consumers and handling complaints
- NBN Co's risk management processes, and
- any other matter pertaining to the NBN rollout that the committee considers relevant.

20. Further information about the House Standing Committee on Infrastructure and Communications *Inquiry into the role and potential of the National Broadband Network* is available at:

<http://www.aph.gov.au/house/committee/ic/NBN/index.htm>

21. Ibid.

22. Further information about the Senate Standing Committee on Environment and Communications inquiry into the Bills is available at: http://www.aph.gov.au/Senate/committee/ec_ctte/nbn_bills/info.htm

23. A Albanese (Minister for Infrastructure and Transport), 'National Broadband Network Committee', House of Representatives, *Hansard*, p. 35, 1 March 2011, viewed 15 March 2011, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansard%2F2011-03-01%2F0065%22>

24. General news, 'Oakeshott leads NBN committee', *Adelaide Advertiser*, 2 March 2011, p. 25, viewed 9 March 2011, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressclp%2F591816%22>

In addition, Part 3, Division 3 of the Bill provides that the Commonwealth must retain total ownership of NBN Co until such time as:

- a declaration is made by the Communications Minister that the NBN is built and fully operational
- the Productivity Commission has concluded an inquiry into certain specified matters relating to the NBN and NBN Co
- the Parliamentary Joint Committee on the ownership of NBN Co (established by the Bill) has examined the report of the Productivity Commission inquiry (this examination may deal with any matter appearing in, or arising out of that report), and
- the Finance Minister has declared that conditions are suitable for entering into and carrying out of, an NBN sale scheme.²⁵

The Parliamentary Joint Committee on the **ownership of NBN Co** which is established under Part 3, Division 3 of the Bill will cease to exist once it has reported its findings, in relation to the Productivity Commission report, to both Houses of the Parliament.

Policy position of non-government parties/independents

Comments from non-government parties in relation to the Bill have been primarily concerned with transparency and control issues. This is because the Bill, as introduced, provides:

- NBN Co is not a 'public authority'²⁶ and so is not subject to requests for information under the *Freedom of Information Act 1982* (Fol Act)²⁷
- NBN Co is not subject to the *Public Works Committee Act 1969*,²⁸ and
- clarifies that the Minister may make licence conditions, including requiring NBN Co to provide, or not provide, specified services.²⁹

The Coalition

However, since its introduction, some 19 amendments to the Bill were moved by Malcolm Turnbull MP in the House of Representatives.³⁰ In particular, those amendments sought to make NBN Co subject to the Fol Act and to the *Public Works Committee Act 1969*.

25. DBCDE, *NBN Legislative Framework*, op. cit.

26. **Proposed clause 95** of the Bill.

27. On 19 January 2011, a spokeswoman for Communications Minister Stephen Conroy told the Communications Day that "NBN Co is a body corporate incorporated under the Corporations Act, established for a public purpose, and for this reason is not a prescribed authority. As such it is not subject to the Fol Act 1982", see: M Sandev, 'Libs, Greens lash NBN Co Fol exemption, vow to fight on', *Communications Day*, issue no. 3906, 19 January 2011, pp. 3-4.

28. **Proposed clause 96** of the Bill.

29. DBCDE, *NBN Legislative Framework*, op. cit.

Mr Turnbull has strongly argued that NBN Co should not be excluded from the operation of the FoI Act:

This is not a private company that the Government has taken an investment in; this is a company that was established for the sole purpose of fulfilling a government policy ... the Government, when it came into office, said that every major infrastructure project would be subject to a rigorous cost-benefit analysis. And it said it would open up Freedom of Information laws and it would provide greater scrutiny. And yet with this, the biggest infrastructure project in our history, there is no analysis being allowed; there is no Productivity Commission inquiry ... And beyond the Freedom of Information Act the Government is endeavouring to exempt this, the biggest public work in our history, from any scrutiny by the Public Works Committee. So this is a government that is desperately trying to avoid anybody having a look into the economics, the feasibility, the, you know, the whole strategy of the national broadband network.³¹

Of those 19 proposed amendments none was passed.³²

It should be noted that the Australian Greens moved an amendment to the companion Bill (Telecommunications Legislation Amendment (National Broadband Network Measures–Access Arrangements) Bill in the House of Representatives designed to ensure that NBN Co is subject to the FoI Act.³³ That amendment was passed.³⁴ Notably, the amendment seeks to ensure that even information about NBN Co's commercial activities will be able to be accessed under the FoI Act.

In addition to the proposed amendments to the Bill, Mr Turnbull moved a motion on 1 March 2011 to disallow Public Works Committee Amendment Regulations 2010 (No. 1), which would exempt NBN Co from scrutiny by the Parliamentary Standing Committee on Public works, was defeated.³⁵

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30. The text of the amendments and the supplementary Explanatory Memorandum can be viewed on the Bill home page:
<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillhome%2Fr4495%22>
 31. 'Greens join Turnbull in calling for NBN to be subject to FoI', *Exchange Daily*, issue no. 465, 20 January 2011, pp. 2-3.
 32. Australia, House of Representatives, *Votes and proceedings*, vol. 28, p. 373, 1 March 2011, viewed 15 March 2011, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fvotes%2F2011-03-01%2F0015%22>
 33. The text of the amendment can be viewed on the Bill home page:
<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillhome%2Fr4496%22>
 34. Australia, House of Representatives, *Votes and proceedings*, vol. 28, p. 374, 1 March 2011, viewed 16 March 2011, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fvotes%2F2011-03-01%2F0016%22>
 35. Australia, House of Representatives, *Votes and proceedings*, vol. 28, p. 370, 1 March 2011, viewed 15 March 2011, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fvotes%2F2011-03-01%2F0013%22>

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Senator Steve Fielding, Senator Nick Xenophon and the Australian Greens

Senator Fielding has previously supported the NBN initiative in principle³⁶ and voted (along with the Greens and Senator Xenophon) to pass the *Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Act 2010*.³⁷ He is reported as saying that there is no reason not to support the development of the National Broadband Network.³⁸

Senator Nick Xenophon also opposed the exemption from the FoI Act. He is reported as having said:

The irony is that something that is supposed to open up communications in this country is exempt from laws which communicate its internal workings.³⁹

In addition to the amendments made by the Australian Greens to the companion Bill, the additional comments made by the Australian Greens in the Fourth Interim Report of the Select Committee on the National Broadband Network are relevant.⁴⁰ In particular, it was considered necessary to mitigate the risks that NBN Co would no longer act in the interests of consumers once it has been privatised:

As a private, profit-driven monopoly, it will have no incentive to continually upgrade its infrastructure and services, or to continue to service new premises in sparsely populated and therefore uneconomic areas, or to keep the public informed of its service performance. If privatisation is to proceed, regulation of the sort detailed in these recommendations will certainly be needed ... the Greens remain of the view that the only truly effective means of safeguarding against these risks is to keep this monopoly in public hands where it can be run exclusively for the benefit of end users.⁴¹

Financial implications

In relation to the financial implications of the Bill, the Explanatory Memorandum states:

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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36. B Symons-Brown, 'Senator Steve Fielding backs NBN', *On-line News*, 24 November 2010, viewed 1 March 2011, <http://www.news.com.au/breaking-news/senator-fielding-backs-nbn/story-e6frfku0-1225960425478>
37. S Fielding and N Xenophon, 'Votes: Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2010', Senate, *Debates*, 26 November 2010, p. 2377, viewed 4 February 2011, <http://www.aph.gov.au/hansard/senate/dailys/ds261110.pdf>
38. National Broadband Network website, 'Fielding, Xenophon back Telstra split bill', viewed 4 March 2011, <http://nationalbroadbandnetwork.net.au/2010/11/fielding-xenophon-back-telstra-split-bill/>
39. L Wilson, 'Push to put NBN under FoI law', *The Australian*, 19 January 2011, viewed 30 January 2011, <http://www.theaustralian.com.au/national-affairs/push-to-put-nbn-under-foi-law/story-fn59niix-1225990598923>
40. Select Committee on the National Broadband Network, *Fourth Interim Report*, Commonwealth of Australia, Canberra, May 2010, p. 145, viewed 4 February 2011, http://www.aph.gov.au/senate/committee/broadband_ctte/interim4-report/report.pdf
41. Ibid.

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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.⁴²

The Explanatory Memorandum thus limits consideration of the financial implications of the Bill to the immediate administrative costs for the ACCC and the Australian Communications and Media Authority (ACMA).

However, should the Bill be passed, there are broader and more important flow-on financial implications which the Explanatory Memorandum does not address.

First, the Bill mandates conditions for the termination of Commonwealth ownership of the NBN via an NBN Co sale scheme. By itself, the sale of the Commonwealth's equity in the NBN would affect the Commonwealth's headline cash flow, but would not affect the underlying Budget deficit because the sale would be a conversion of equity into cash. However, depending on the eventual sale price, the Commonwealth may incur a loss, turn a profit or break even. Whichever occurs, there will be consequences for the Budget—although it is not possible to speculate at this early stage whether those consequences will be positive or negative.

Secondly, the NBN represents the 'largest publicly funded infrastructure project in Australia's history'.⁴³ Forecasts in the *NBN Co Corporate Plan 2011-2013* indicate that cumulative NBN funding requirements will peak at a total of \$40.89 billion, comprising \$27.5 billion in government funding (equity injections) and \$13.39 billion in NBN Co-issued debt funding, by financial year (FY) 2021.⁴⁴ NBN Co's Corporate Plan recognises the risk that NBN Co may not be able to raise the required amount on global debt markets.⁴⁵ If NBN Co cannot raise the amount, the level of government funding which is required will increase.

42. Explanatory Memorandum, op. cit., p. 14.

43. National Broadband Network Company (NBN Co), 'History', NBN Co website, viewed 28 January 2011, <http://www.nbnco.com.au/wps/wcm/connect/main/site-base/resources/about-nbn-co/history-of-nbnco/>

44. Peak Funding corresponds to peak total funding requirement over the period FY2011-FY2021. It includes assumed interest costs for debt funding, and therefore refers to levered funding. It is expressed in nominal terms, that is, funding at the time it is forecast to be incurred. After FY2021, the total amount of government funding is forecast to decrease as NBN revenue streams provide a mechanism for repayments of equity over time. As an example, in FY2023, total government funding is forecast to be \$25.154 billion, in contrast to the peak total amount of \$27.5 billion. See the National Broadband Network Company (NBN Co), 'Corporate Plan 2011-2013', NBN Co website, 17 December 2010, p. 24 and p. 135, viewed 28 January 2011, <http://www.nbnco.com.au/wps/wcm/connect/eea11780451bd3618ebfef15331e6bbb/101215+NBN+Co+3+Year+GBE+Corporate+Plan+Final.pdf?MOD=AJPERES>

45. National Broadband Network Company (NBN Co), 'Corporate Plan 2011-2013', NBN Co website, 17 December 2010, p. 24 and p. 135, viewed 28 January 2011, <http://www.nbnco.com.au/wps/wcm/connect/eea11780451bd3618ebfef15331e6bbb/101215+NBN+Co+3+Year+GBE+Corporate+Plan+Final.pdf?MOD=AJPERES>

The Government case for the NBN

Through the NBN, the Government aims to bring affordable, high speed broadband to every home, school, hospital and business in Australia, no matter where they are located. The Government NBN policy states that Australia currently relies on an ageing copper telecommunications network to connect most homes to the internet. As a result, broadband performance is falling behind. In the Government's view, high-speed broadband is essential for Australia's economy, future growth and international competitiveness.

To meet these objectives, the NBN will seek to achieve up to 100 times faster speeds than many people experience today, through an infrastructure program involving the laying of fibre-optic cabling to at least 90 per cent of Australian households, schools and businesses. The remaining premises will be connected via a combination of next generation high-speed wireless and satellite technologies delivering broadband speeds of 12 megabits per second or more.

Among the benefits the Government claims for the NBN are universal access, higher productivity, and jobs. In addition, there will be social benefits, for example, in the case of health:

Medical expertise need not be affected by distance. It will be real and immediate with face-to-face contact across Australia and the world. High-speed broadband has the ability to change the way health care is delivered to Australians, no matter where they live. The NBN will improve existing services like tele-radiology, tele-psychiatry and remote patient monitoring and enable remote consultations via videoconference, remote and/or real time of diagnosis of tests and scans and the high-speed secure transfer of medical imaging and patient records.⁴⁶

There are also expected to be benefits for business:

The increased speed and performance that the NBN offers will enable a new generation of richer, premium applications. Professional service businesses, such as architects, graphic designers and sound engineers, will be able to send larger image and audio files, such as 3D and geo-spatial models, and more people will be able to work remotely. The NBN will also enable more widespread use of smart technologies in electricity, irrigation, health, transport and small business ... The rollout of a very high speed national broadband network provides an unprecedented opportunity for Australian businesses to transform their innovation practice in terms of realising cost-savings, productivity, extending market reach and introducing brand new types of products and services.⁴⁷

The Government sees the NBN as a solution to Australia's current telecommunications challenges, in particular, that Australian broadband is slow and expensive compared to other Organisation for Economic Co-operation and Development (OECD) countries. Out of the 30 OECD countries, Australia is the third most expensive in terms of monthly subscription prices and 16th in terms of broadband

46. National Broadband Network website, viewed 4 March 2011, <http://www.nbn.gov.au/content/who-does-nbn-benefit>

47. Ibid.

penetration. A report by the Centre for International Economics outlined the ability of broadband to lift national economic output by 1.4 per cent after five to six years. Just like the road, rail and electricity infrastructure that crosses the country, the Government claims that the NBN will set up the vital infrastructure for communications for future generations.⁴⁸

Main issues—economic

Telecommunications economics and the Bill

The Hilmer Report, (named after the Chair, Professor Fred Hilmer) is one of the cornerstones of modern competition policy in Australia.⁴⁹ In Chapter 10, the Hilmer Report acknowledged that public monopolies, as Telstra was then, commonly controlled facilities that had natural monopoly characteristics. In Telstra's case this included, at least, the copper wires running from customer premises to the Telstra exchange. The Hilmer Report recommended that all Australian Governments adopt a set of principles aimed at ensuring that public monopolies are subject to appropriate restructuring including the ownership separation of natural monopoly and potentially competitive activities.⁵⁰ The restructuring of Telstra was finally achieved by the enactment of the *Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Act 2010*. This is the context for the following section which examines the **economics** of the NBN.

Wholesale-only provision—vertical structural separation

Introduction

'Structural separation' refers to the splitting of a company into component parts that were previously integrated into one company. This Bill provides for a wholesale-only NBN business model so that wholesale and retail functions, which would normally be conducted by a single vertically-integrated firm (such as Optus and Telstra), are separated.⁵¹ The intention is that the NBN will

48. Department of Broadband, Communications and the Digital Economy (DBCDE), *National Broadband Network – Overview*, DBCDE website, May 2010, viewed 16 February 2011, http://www.dbcde.gov.au/data/assets/pdf_file/0005/110012/National-Broadband-Network-Overview-fact-sheet.pdf

49. F Hilmer, M Raynor, G Taperell, *National Competition Policy: Report by the Independent Committee of Inquiry*, Australian Government Publishing Service, Canberra, August 1933, viewed 9 March 2011, <http://ncp.ncc.gov.au/docs/Hilmer-001.pdf>

50. Economics Section, *Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009*, Bills Digest, no. 63, 2009–10, Parliamentary Library, Canberra, 11 December 2009, viewed 9 March 2011, <http://www.aph.gov.au/library/pubs/bd/2009-10/10bd063.pdf>

51. Vertical separation should be distinguished from vertical integration. Vertical integration refers to the degree to which a firm owns its upstream suppliers and/or downstream buyers. There are two forms of vertical integrations. Backward vertical integration refers to a situation where a firm controls subsidiaries that produce (some of) the

supply wholesale-only services to a large number of separate retail firms that will utilise the fibre-optic network infrastructure of the NBN.⁵²

The problem which arises is that there does not appear to be sufficiently convincing evidence in either the theoretical or empirical literature in support of the view that vertical separation generates *net* benefits, that is, the costs imposed by vertical separation are likely to be greater than the benefits attained.⁵³ Rather, much of the literature cautions against vertical separation. The question to be asked then, is whether the model posed by the Bill of a wholesale only NBN Co will create the **economic** benefits which the Government anticipates.

The literature offers compelling theoretical arguments which seem to be borne out by empirical evidence, both in the telecommunications sector and the electricity sector which shares many common features with telecommunications.⁵⁴ . For example, a New Zealand study found:

Structural separation between network and retail functions is increasingly being mandated in the telecommunications sector to countervail the market power of incumbent operators. Experience of separation in the electricity sector offers insights for telecommunications. Despite apparent competitive benefits, the costs of contracting increase markedly when short-term focused electricity retail operations are separated from longer-term generation infrastructure investments (which require large up-front fixed and sunk cost components). The combination of mismatches in investment horizons, entry barriers, and risk preference and information asymmetries between generators and retailers leads to thin contract markets, increased hold-up risk, perverse wholesale risk management incentives, and bankruptcies ... In both sectors, competition between vertically integrated providers appears more likely to efficiently and sustainably induce both investment and competition than separation.⁵⁵

inputs used in the production of its products. Forward vertical integration describes a situation where a firm controls distribution centres and retailers where its products are sold. In the case of telecommunications, vertical integration appears to be the more logical and resilient structure, and is more likely to give rise to a business structure capable of producing outcomes such as greater efficiency, lower prices, greater investment, technological innovation and greater consumer benefits than vertical separation.

52. Where two intermediate goods and services are complements in the production of the final good or service, these two goods are said to be in a vertical relationship. For example, the ownership of the copper fixed-line telecommunications network and the provision of retail internet services are complimentary to the provision of internet services and are therefore in a vertical relationship. By contrast, where two intermediate goods are substitutes in the production of the final goods, they are in a horizontal relationship. For example, copper-fixed-lines and hybrid fibre coaxial cable are substitutes in the provision of retail internet service provision and are therefore in a horizontal relationship.
53. See for example, RW Crandall, JA Eisenach and RE Litan, 'Vertical separation of telecommunications networks: evidence from five countries', *Working Draft*, September 2009, viewed 24 February 2011, http://www.iml.com.au/IML/pdf/news/NBNSep-Brookings_Separation_paper_September2009.pdf
54. Ibid; See B Howell, R Meade and S O'Connor, 'Structural separation versus vertical integration: lessons for telecommunications from electricity reforms', New Zealand Institute for the Study of Competition and Regulation Inc, April 2009, viewed 24 February 2011, http://www.iscr.org.nz/f505,14787/14787_Separation_vs_VI_in_Electricity_and_Telecomms_April09.pdf
55. Ibid.

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Further, following an assessment of mandatory vertical separation in the telecommunications market in five OECD countries: Australia, Italy, New Zealand, Sweden, and the United Kingdom, an article published in the 2010 *Federal Communications Law Journal* concluded that:

There is both theoretical and empirical support for the proposition that forced vertical separation of telecommunications networks will reduce economic efficiency, slow innovation, and impede performance in markets where it is imposed ... the evidence shows no increase in either investment or broadband penetration in nations that have mandated vertical separation; indeed, the evidence suggests that vertical separation has impeded the rollout of next generation networks.⁵⁶

The position overseas

The experiences of the United States (US) telecommunications companies in the 1980's and those of Brazil are instructive in examining the effects of vertical structural separation in the telecommunications sector.⁵⁷

US experience

In 1984, the US structurally separated AT&T, the vertically-integrated incumbent monopoly, with a view to greater efficiency, lower prices, consumer benefits and more rapid development of telecommunications. Recent research by Professor Eli Noam, a director at the Columbia Institute for Tele-Information (CITI) at Columbia University and professor of economics and finance at Columbia Business School, indicates that this policy failed. Twenty-five years later, market concentration in the United States has returned to high levels, with a market structure not much different to Canada's, where vertical separation of the incumbent did not take place prior to privatisation.⁵⁸

Professor Noam explains that the reason for this resulting US market structure '... was not ineffective or captured policymaking by lawmakers and legislators, but rather the fundamental economics of telecommunications networks.'⁵⁹

56. RW Crandall, JA Eisenach and RE Litan, 'Vertical separation of telecommunications networks: evidence from five countries', *Federal Communications Law Journal*, vol 62, 2010, p. 538, viewed 24 February 2011, http://www.law.indiana.edu/fclj/pubs/v62/no3/7-%20CRANDALL_FINAL.pdf

57. Brazil has also separated its telecommunications company into several regional companies and one long-distance company. In Brazil as in the US, there are plans to allow re-integration between these local companies and long-distance companies (OECD, 2001: 40).

58. EM Noam, 'Did AT&T die in vain? An empirical comparison of AT&T and Bell Canada', *Federal Communications Law Journal*, vol. 61, no. 1, 2008, pp. 119-132, viewed 18 February 2011, p.131. http://www.elinoam.com/eli/at%26t_bell_canada.pdf

59. See for example, RW Crandall, JA Eisenach and RE Litan, 'Vertical separation of telecommunications networks: evidence from five countries', *Working Draft*, op. cit.

Noam argues that the failure of vertical separation was that it tried too hard to be perfect and conceptual, and to follow legal and economic theories that did not take into account either the extraordinary dynamism of the sector, or the extraordinary resiliency of the legal teams sent to battle by competitors to block each other. In short, the degree and quality of the vertical separation was not informed by and reflexively tailored in response to an appreciation of market realities.

While Noam remains a supporter of separation, he suggests that a better solution would have been to reduce the size of the incumbent, perhaps by cutting it up into four large regional firms—each vertically-integrated and free to enter all lines of business. Competition would have been opened through regulation and antitrust proceedings and, ultimately, structural separation was not necessary.⁶⁰

OECD view

A 2001 OECD paper entitled '*Structural separation in regulated industries*' notes that the OECD countries, in the two decades prior to 2001, saw industries served by vertically-integrated, regulated monopolies. These monopolies, through a combination of structural reforms (such as the liberalisation of the Australian telecommunications sector) and regulatory controls (such as access regimes) were subsequently opened to competition, whereby new entrant firms competed in sections of industry that were previously closed to competition. The benefits of this competition, in the forms of innovation, customer responsiveness, productivity, and lower prices have, in most cases, been clear.⁶¹

However, in relation to telecommunications, the OECD paper states that in industries with two-way networks such as telecommunications:

Separation (of vertically integrated monopolies) into smaller vertically-integrated companies enhances the potential for competition without sacrificing economies of scope. More generally, choosing the most appropriate approach requires balancing the benefits from competition and reduced regulation against separation costs and the loss of economies of scope ... In the telecommunications industry, incentives to interconnect can be enhanced, without loss of economies of scope, by separation into regional vertically integrated monopolies.⁶²

This view supports Noam's 2008 findings in relation to the AT&T experience. The OECD view does not support the reintroduction of a nationwide, vertically-separated monopoly which is likely to

60. Ibid.

61. Organisation for Economic Co-operation and Development (OECD), *Structural Separation in regulated industries: report by the secretariat*, OECD, Directorate for Financial, Fiscal and Enterprise Affairs Committee on Competition Law and Policy, 10 April 2001, p. 49.

62. Ibid. Economies of scope refer to the reduction in average costs that result from a firm supplying more than one service (such as both broadband and telephone services). Thus a firm that supplies broadband alone would face higher average costs than a firm supplying both broadband and telephone services. In other words, economies of scope are achieved when the average total cost of production decreases as a result of increasing the number of different goods produced.

involve ongoing separation costs and loss of economies of scope through dynamics that are detailed in the following section.

The experience of the electricity sector

Vertical separation has been more common in the electricity industry than in telecommunications. Consequently, the effects of vertical separation in the electricity sector have been examined more often. The electricity industry experience offers potential lessons for vertical separation in the telecommunications sector.

According to a recent article, vertical integration (rather than separation) in the electricity sector is rapidly re-emerging in response to failing wholesale-retail contracts between vertically-separated firms and their retail providers. These failings have manifested themselves in, among other things, poor wholesale price and quantity risk management, forestalled investment, and company failures.⁶³

With respect to telecommunications, the article noted that, while each country case needs to be considered individually, on the whole:

Structural separation in telecommunications is likely to suffer from a number of the same key problems that complicate contracting in separated electricity sectors as well as its own industry specific problems. Furthermore, as in electricity, vertical (re-)integration in telecommunications is likely to be a preferable solution to separation for resolving problems arising from asymmetric information and for sustaining retail competition.

... while the aims of separation are sound, integration may in fact better serve their achievement. Although on-the-ground evidence at this stage is limited, it is expected that ongoing sector experience will serve to confirm these predictions. In the meantime, policy makers would well be advised to consider them as key points of concern when considering imposing structural reforms.⁶⁴

These findings if applied to the wholesale-only operations of the NBN Co as proposed by this Bill suggest that poor (relatively high) wholesale prices, forestalled investment, and excessive retail competition that undermines contracting investment and ultimately durable retail competition are possible. Whilst lower broadband penetration was found to have occurred as well, it is unlikely that will be experienced in Australia given the legal and policy foundations of the NBN Co.

63. B Howell, R Meade and S O'Connor, 'Structural Separation versus vertical integration: lessons for telecommunications from electricity reforms', *Telecommunications Policy*, vol. 34, no. 4, 2010, pp. 392-393, viewed 16 November 2010, http://www.sciencedirect.com/science?_ob=MIimg&_imagekey=B6VCC-50B5WFK-1-1&_cdi=5951&_user=4962121&_pii=S0308596110000571&_origin=search&_coverDate=08%2F31%2F2010&_sk=999659992&view=c&wchp=dGLzVtz-zSkzS&md5=bbe3400b6ceca2fbdf222276c05e7beb&ie=/sdarticle.pdf

64. *Ibid.*, p. 393.

Some empirical evidence

International experience and the associated research are not supportive of structural separation as a means by which to stimulate competitive infrastructure investment, increase broadband penetration, and reduce prices.

While not identical to the Australian experience, Crandall and Sidak examined the effectiveness of structural separation of incumbent local exchange carriers in the United States in stimulating competition.⁶⁵ They found that while competitive local exchange carriers (CLECs) collectively had gained considerable market share since the passage of the *Telecommunications Act of 1996*, many new entrants had stumbled or failed.

Government-owned telecommunications monopolies

Over the past three decades, there has been a global move away from government-owned telecommunications monopolies via privatisation and liberalisation of telecommunications sectors (where liberalisation has mainly concerned the introduction of competition into a sector). The evidence indicates that reform of telecommunications markets has produced net benefits to society. These benefits were driven by competition. Benefits comprised greater operating efficiencies that resulted in lower prices and technological innovation that produced better services and applications.

Previous Australian government telecommunications monopolies

The history of government involvement in the Australian telecommunications sector and the resulting outcomes help explain the move away from government-owned, fixed-line monopolies.

Government intervention in telecommunications markets, particularly with respect to legislatively-mandated government monopolies, resulted in operations that were not productively efficient, and ultimately, relatively high prices. Further, operations were vulnerable to political capture resulting in resource allocation for political rather than market purposes, and subject to an overall conflict of interest between the government as both owner and regulator.⁶⁶

That being the case, it has been suggested that:

The NBN risks repeating this pattern and taking the industry back 30 years to a time when meeting demand was influenced by government preference and ministerial favour rather than

65. RW Crandall and JG Sidak, 'Is structural separation of incumbent local exchange carriers necessary for competition?', *Yale Journal on Regulation*, vol. 19, 2002, p. 335, viewed 16 November 2010, http://www.criterioneconomics.com/pdfs/gsidak_pdfs/Is-Structural-Separation-of-Incumbent-Local-Exchange-Carriers-Necessary-for-Competition.pdf

66. I Martin, 'The promised land: costs and benefits of the NBN vision', *Telecommunications Journal of Australia*, vol. 60, no. 2, 2010, p. 30.18, viewed 28 January 2011, <http://www.tja.org.au/index.php/tja/article/view/39/html>

by market demand, prices were poorly related to cost and demand, costs were inflated by the effect of Government protection of its core investment and telecommunications policy development, legislation and regulation were constrained by the priority to protect poorly evaluated investment decisions.⁶⁷

Proposed monopoly

The reason for these concerns would appear to be based on the fact that a de-facto fixed-line monopoly will be created when Telstra's fixed-line infrastructure and subscribers (including cable internet subscribers) are absorbed by the NBN. This monopoly position would be further solidified should the NBN ultimately incorporate Optus' cable internet subscribers.

In addition, any threat of a 'cherry-picker' levy imposed on firms who enter the wholesale market via their own fixed-line infrastructure investments in commercially-viable areas, will dissuade competitive market entry, leaving the NBN as the predominant wholesale service provider.⁶⁸

A further disincentive to invest in duplicate infrastructure would be provided via an access regime which facilitates relatively inexpensive access to network infrastructure.⁶⁹

In defence of the proposed NBN monopoly, the NBN Co's chief executive, when asked how a government-controlled monopoly can improve competition, stated that:

The wholesale network should be a monopoly, because to build duplicate access networks makes little sense. To build a collection of disparate access networks would be almost as bad.

So who should own the wholesale network? If it is in private hands, you would expect the management of the wholesale company to strive to maximise shareholders returns. We should

67. Ibid.

68. Department of Broadband, Communications and the Digital economy (DBCDE), *National Broadband Network Implementation Study*, Commonwealth of Australia, 5 March 2010, p. 465, viewed 11 February 2011, http://www.dbcde.gov.au/broadband/national_broadband_network/national_broadband_network_implementation_study

On 25 November 2010, the Business Spectator reported that the Government had scrapped a controversial part of its telecommunications legislation aimed at levying potential competitors to the NBN. The legislation has been altered so that it obligates competitors to only provide internet at comparable speeds with the NBN.

Business spectator, 'Govt scraps NBN competitor levy: report', Business Spectator website, viewed 11 February 2011, <http://www.businessspectator.com.au/bs.nsf/Article/Govt-scraps-NBN-competitor-levy-report-pd20101125-BJ4SY?opendocument&src=rss>

69. The access regime is contained in the Part XIC of the *Competition and Consumer Act 2010*. That regime will be amended and strengthened by the companion to this Bill—Telecommunications Legislation Amendment (National Broadband Network Measures—Access Arrangements) Bill 2010.

not expect national interests, including the guarantee of good service to rural and remote communities, to be top of the priority list.⁷⁰

The arguments raised in defence of a reintroduced government-owned fixed-line monopoly raise a number of issues. They are at odds with concerns that the OECD raised in its recent publication, *'OECD Economic Surveys: Australia 2010'*.⁷¹

In addition, telecommunications economics supports the argument that the core impediment in the Australian telecommunications sector is the concentrated ownership of the fixed-line network infrastructure, the solution to which is increased infrastructure-based competition, not less.⁷² The reason that fixed-line infrastructure-based competition has lagged behind that of mobile telecommunications is likely to be, at least in part, due to the effect of the access regime on investment incentives.⁷³

Comments

Currently, the Australian telecommunications sector is subject to Telstra's concentrated ownership of the fixed-line infrastructure. This infrastructure is subject to an access regime, which provides competitors access at prices that are set by the regulator the ACCC.

It has been argued—and there is empirical evidence to lend support to the proposition—that the access regime may operate as a disincentive for competitors to build their own infrastructure in order to compete with Telstra. This is because it is cheaper for those competitors to gain access to the incumbent's infrastructure at the regulated prices, rather than compete via investment in their own infrastructure.⁷⁴ This in turn provides a disincentive for the incumbent (Telstra) to maintain and invest in their own fixed-line infrastructure. The effects of the access regime have, at least in part, produced results that are in stark contrast to the experience in the mobile telecommunications sector, which has not been subject to such an access regime.

The NBN risks extending the current market structure of concentrated ownership of network infrastructure, subject to an access regime. The access regime is likely to provide a disincentive for competitors to build their own competing fixed-line infrastructure since they have relatively cheap access to the existing incumbent infrastructure. The access regime could also provide a disincentive

70. M Quigley, *2010 Charles Todd Memorial Oration*, NBN Co website, 18 August 2010, viewed 28 January 2011, http://www.nbnco.com.au/wps/wcm/connect/804cc30043c4d9058ea7bfe9aa898a42/NBNCo_CharlesToddOrationEO.NBNCo_18August2010.pdf?MOD=AJPERES

71. Organisation for Economic Cooperation and Development (OECD), *OECD Economic Surveys: Australia 2010*, OECD Publishing, November 2010, vol. 2010/21, supplement 3, pp. 107-108, viewed 16 November 2010, http://www.oecd-ilibrary.org/economics/oecd-economic-surveys-australia-2010_eo_surveys-aus-2010-en

72. Committee for Economic Development of Australia (CEDA), *Australia's broadband future: four doors to greater competition*, CEDA, Melbourne, 2008, viewed 28 January 2011, <http://www.ceda.com.au/research/current-topics/research/2009/11/growth-report/growth60.aspx>

73. H Ergas, *Wrong number: resolving Australia's telecommunications impasse*, Allen & Unwin, Crow's Nest, 2008.

74. H Ergas, *Regulating Australian telecommunications: past errors, future challenges*, op. cit., p. 3.

for the incumbent (NBN) to maintain and invest in its own fixed-line infrastructure, particularly after privatisation.⁷⁵

Any consequences of failure to pass

The Government's policy agenda with respect to the NBN in 2011 includes the passing of this Bill and the Telecommunications Legislation Amendment (National Broadband Network Measures – Access Arrangements) Bill 2010. Before the non-binding financial heads of agreement can be put to Telstra shareholders, the two remaining pieces of legislation need to be passed. Without a shareholder-approved agreement with Telstra, the NBN would not operate in the market as the sole fixed-line monopoly and this would increase the probability that the NBN would fail to operate on a commercial basis.

Legislative background

The legislative process designed to establish and govern the NBN through its operation and ownership by NBN Co, most recently involved the enactment of the *Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Act 2010*. That Bill received assent on 15 December 2010.

On 24 February 2010, the Government issued an exposure draft of the Bill and its companion Bill⁷⁶—Telecommunications Legislation Amendment (National Broadband Network—Access Arrangements) Bill 2010.⁷⁷

On 25 November 2010, the Minister for Broadband, Communications and the Digital Economy, Senator Stephen Conroy (the Minister), introduced the two Bills in their final form into the Parliament.⁷⁸ These Bills are designed to ensure that the NBN operates as a wholesale-only company that will provide services to retailers on an open and equivalent basis.⁷⁹

75. For a more detailed discussion of this argument see B Dalzell and P Pyburne, *Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2010*, Bills Digest, no. 45, 2010-11, Parliamentary Library, Canberra, 2010, 18 November 2011, <http://www.aph.gov.au/library/pubs/bd/2010-11/11bd045.pdf>

76. The text of the two draft Bills can be viewed at: http://www.dbcde.gov.au/funding_and_programs/national_broadband_network/nbn_company_legislation_and_access_regime

77. L Tanner (Minister for Finance and Deregulation) and S Conroy (Minister for Broadband, Communications and the Digital Economy), *Draft legislation released for NBN Co Operations*, media release, 24 February 2010, viewed 3 March 2011, http://www.minister.dbcde.gov.au/media/media_releases/2010/011

78. P Pyburne, Telecommunications Legislation Amendment (National Broadband Network—Access Arrangements) Bill 2010, op. cit.

79. S Conroy (Minister for Broadband, Communications and the Digital Economy), *NBN legislation introduced into Parliament*, media release, 25 November 2010, viewed 11 February 2011, http://www.minister.dbcde.gov.au/media/media_releases/2010/101

Position of major interest groups

The Government also received more than 20 submissions on the exposure draft of the Bill.⁸⁰ In addition, the NBN Committee, which prepared four interim reports to the Senate, made comments in relation to the draft version of the Bills in its fourth interim report.⁸¹

In addition the Senate Standing Committee on Environment and Communications received 24 submissions to its inquiry.⁸²

The views of the major interest groups are canvassed under the heading 'Main issues—legal', below.

Main issues—legal

Wholesale only

Just as the main issue from an economic perspective is the wholesale-only character proposed for NBN corporations, it is also the main issue from a legal perspective. That is, whether this Bill does reflect the Government's promise that NBN Co will operate on a wholesale-only basis.

The draft version of the Bill specified that an NBN corporation must only supply an eligible service to a carrier or a service provider. However subclause 9(2) provided that the Minister had the discretion to exempt a specified eligible service.

Each of the major interest groups which submitted comments in respect of the draft Bills expressed concern about this provision on the grounds that it had the capacity to undermine an NBN corporation's wholesale-only purpose. For example, Optus argued that this provided:

NBN Co with significant scope to operate as a retail service provider of telecommunications or content services [which] represents a significant and deeply worrying step-back from the Government's clear commitment to operate the NBN Co as a wholesale-only provider.⁸³

80. The text of the submissions can be viewed at:

http://www.dbcde.gov.au/funding_and_programs/national_broadband_network/nbn_company_legislation_and_access_regime/national_broadband_network_company_legislation_and_access_regimesubmissions_on_exposure_drafts_of_legislation

81. Select Committee on the National Broadband Network, *Fourth Interim report*, Commonwealth of Australia, 18 May 2010, viewed 8 March 2011, http://www.aph.gov.au/Senate/committee/broadband_ctte/interim4-report/index.htm

82. The text of each of the submissions can be accessed at:

http://www.aph.gov.au/Senate/committee/ec_ctte/nbn_bills/index.htm

83. Optus, *Submission on Draft National Broadband Network Companies Bill 2010 and Draft National Broadband Network Measures—Access Arrangements Bill 2010*, March 2010, p. 3, viewed 8 March 2011,

http://www.dbcde.gov.au/_data/assets/pdf_file/0011/127649/Optus.pdf

AAPT considered that ‘the ability for the Communications Minister to grant NBN Co a wholesale only exemption should be further limited if not removed altogether’.⁸⁴ The Business Council of Australia agreed on the grounds that significant uncertainty would be created if Ministerial discretion is legislated—with the potential to lower private investment, a less efficient market and detrimental outcome for business and household users of telecommunications products.⁸⁵

The clause was not uniformly criticised however. The Fourth Interim report of the NBN Committee set out the positions of both the critics and supporters of the provision. Amongst those who supported the inclusion of the clause was the Australian Telecommunications Users Group (ATUG). The spokesperson for ATUG considered that the inclusion of clause 9 in the draft Bill was ‘a good thing for the prospects of future innovation and services delivery over the NBN’.⁸⁶

Exemptions for utilities

The Bill, as introduced, is different from the draft. The rules about the operation of NBN corporations state that the supply of services is to be on a wholesale basis. The exemptions from the rule that an NBN corporation must supply services on a wholesale basis are enunciated in proposed clauses 10–16 of the Bill and the Ministerial discretion has been removed. These clauses now provide that the exemptions refer to specific utilities.

The submissions to the Senate Standing Committee on Environment and Communications are largely in favour of these exemptions. The Australian Communications Consumer Action Network (ACCAN) stated that it supported exemptions which allow utilities to have direct and ready access to the NBN for ‘smart’ services on the grounds that it would assist ‘utilities in supplying essential services which are in the public interest’.⁸⁷

Similarly, the Energy Networks Association (ENA) strongly supported proposed clauses 9, 11 and 12 of the Bill which contain an exemption that allows electricity and gas supply bodies to purchase wholesale services from NBN Co. ENA stated that in its view:

84. AAPT, *Submission on Draft National Broadband Network Companies Bill 2010 and Draft National Broadband Network Measures—Access Arrangements Bill 2010*, undated, p. 2, viewed 8 March 2011, http://www.dbcde.gov.au/_data/assets/pdf_file/0006/127635/AAPT_Limited.pdf

85. 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. 3, viewed 10 March 2011, http://www.dbcde.gov.au/_data/assets/pdf_file/0020/127640/Business_Council_of_Australia_BCA.pdf

86. Select Committee on the National Broadband Network, *Fourth Interim Report*, op. cit., p. 87.

87. Australian Communications Consumer Action Network, *Submission on National Broadband Network Companies Bill 2010 and Draft National Broadband Network Measures—Access Arrangements Bill 2010*, February 2011, pp. 3–4, viewed 15 March 2011, <https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=e19e2076-beac-40ba-939e-abdd0cc4bc54>

Maintenance of this exemption is very important to the ability of electricity and gas network businesses to meet 21st century expectations around affordability, reliability and quality of energy supplies.⁸⁸

During the debate on the Bill in the House of Representatives, Malcolm Turnbull MP moved amendments to delete clauses 10–16 and to more clearly define the wholesale-only basis of NBN corporations. However, these amendments were defeated.⁸⁹

Restrictions to level of services to be supplied

Some of the submitters expressed concern that the Bill did not restrict the types of services that an NBN corporation could offer.

Optus acknowledged the statements by the CEO of NBN Co, Mike Quigley, that NBN Co will seek to limit its role in the value chain by offering a limited set of access services, specifically Layer 1 and Layer 2 access services. However, Optus was critical that there are no proposed legislative restrictions on NBN Co offering services at Layer 3 and above. Optus recommended that the wholesale only requirement should be implemented by restricting an NBN corporation to supplying services to licensed carriers only and supplying services at Layer 2 or below.⁹⁰

Telstra echoed that view stating that an NBN corporation ‘should operate at the lowest meaningful network layer’.⁹¹

On the other hand, ATUG expressed a wish for a ‘reserve power’ for the Minister to require NBN to provide these higher level wholesale services if the market does not, in fact, develop a suitable range of higher level wholesale services.⁹²

The NBN Committee took the view that NBN Co should be wholesale-only and should not be permitted to supply services higher than layer 2.⁹³ However, the Bill does not specify that this is the case.

88. Energy Networks Association, *Submission on National Broadband Network Companies Bill 2010 and Draft National Broadband Network Measures—Access Arrangements Bill 2010*, February 2011, p. 1, viewed 15 March 2011 <https://senate.aph.gov.au/submissions/committees/viewdocument.aspx?id=4edb8765-31d1-4d2a-b7dc-01%2F0015%22>

89. Australia, House of Representatives, *Votes and proceedings*, no. 28, 1 March 2011, p. 373, viewed 10 March 2011, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fvotes%2F2011-03-01%2F0015%22>

90. Optus, op. cit., p. 8.

91. Telstra, op. cit., p. 8.

92. Australia Telecommunications User Group, *Submission on Draft National Broadband Network Companies Bill 2010 and Draft National Broadband Network Measures—Access Arrangements Bill 2010*, March 2010, p. 6, viewed 10 March 2011, http://www.dbcde.gov.au/_data/assets/pdf_file/0009/127638/Australian_Telecommunications_Users_Group_ATUG.pdf

Universal Service Obligation

The Universal Service Obligation (USO) is an obligation placed on universal service providers to ensure that standard telephone services, payphones and prescribed carriage services are reasonably accessible to all people in Australia on an equitable basis, wherever they reside or carry on business. Telstra is currently the sole universal service provider by virtue of its ownership of the ubiquitous copper network.⁹⁴ As already stated, the copper network is to be acquired by NBN Co from Telstra under the financial heads of agreement.

Telstra's submission on the draft Bill raises the issue of the USO, pointing out that the draft Bills 'conspicuously neglect the need for NBN Co, as the proposed future ubiquitous network owner, to provide the necessary support to enable regulatory obligations to be fulfilled by downstream providers, such as the USO'.⁹⁵

In the context of the level of services which NBN corporations will supply, the NBN Committee considered that 'if a competitive market for the supply of unbundled layer 3 services does not develop, a USO should be considered to address the failure especially in regional and remote areas'.⁹⁶

This Bill does not include a USO for NBN Co. However, once the process of transferring the Telstra copper wire network to NBN Co is underway the matter will need to be resolved legislatively.

Ownership of NBN Co

During the build phase

Clause 19 of the draft Bill provided that the Commonwealth must retain a 51 per cent equity stake in NBN Co during the build and roll-out of the NBN.

In response to concerns expressed by submitters, the equivalent provision (**proposed section 45**) in this Bill requires Commonwealth ownership of NBN Co until the NBN is built and fully operational.

93. Select Committee on the National Broadband Network, *Fourth Interim Report*, op. cit., p. 89.

94. Senate Select Committee on the National Broadband Network, *Final Report*, op. cit., p. 18.

95. Telstra, op. cit., p. 10.

96. Select Committee on the National Broadband Network, *Fourth Interim Report*, op. cit., p. 89.

At the privatisation phase

Both the draft Bill and this Bill do provide that the NBN Co must take all reasonable steps to ensure that an ‘unacceptable private ownership and control situation’ does not exist (**proposed section 70**). However this term is not defined in the Bill and its meaning will be contained in regulations.

AAPT submitted that there was insufficient transparency about private ownership in the Bill, preferring that the Bill provide that retail service providers should not be permitted to hold equity in NBN Co or, in the alternative that retail service providers holdings of ordinary shares in NBN Co should be limited to a maximum level of 20%.⁹⁷

Macquarie stated that in its view ‘the relevant underlying objective ... is to prevent Telstra or any other retail service provider from gaining ownership or control of NBN Co’. Macquarie strongly advocated that this be more directly reflected in the Bill.⁹⁸

Meaning of ‘built and fully operational’

The draft Bill provided (at clause 21) that the Commonwealth majority ownership provisions would terminate when the Communications Minister declared ‘that, in his or her opinion, the national broadband network should be treated as **‘built and fully operational’**’. Subclause 22(5) of the draft Bill set out those matters to which the Communications Minister must have regard in deciding whether to make the declaration. The NBN Committee considered that this provision should be amended so that a declaration cannot be made unless the NBN covers 90 per cent of Australians with services of 100 Mbps, and the remaining 10 per cent of Australians with services of at least 12 Mbps. In addition, the NBN Committee considered the Communications Minister’s declaration should be a legislative instrument.⁹⁹

Proposed subclause 48(5) of this Bill does list those matters to which the Communications Minister must have regard in making that declaration. However the suggested amendment has not been made and the provision that the declaration is not a legislative instrument has been retained.¹⁰⁰

Anti avoidance provisions

The Bill contains anti-avoidance provisions to ensure that an NBN corporation does not enter into any agreement, arrangement, understanding, promise or undertaking for the sole or dominant purpose of avoiding the application of this act, when enacted.

97. AAPT, op. cit., p. 4.

98. 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 10 March 2011, http://www.dbcde.gov.au/data/assets/pdf_file/0010/127648/Macquarie_Telecom_Pty_Ltd.pdf

99. Senate Select Committee on the National Broadband Network, *Final Report*, op. cit., pp. 91–92.

100. **Proposed subclause 48(8)** of the Bill.

Importantly this is not a blanket prohibition, nor is it an offence provision. That being the case, if an NBN corporation does enter into any such arrangement, then it will be up to the Communications Minister or the Finance Minister to make an application to the Federal Court for an injunction.

Key provisions

Part 1—Preliminary

Part 1 of the Bill contains the objects of the act (when enacted), a simplified outline of the operation of the act and relevant definitions. In particular, the main objects of the act (when read together with Part XIC of the *Competition and Consumer Act 2010*) are stated as being:

- to provide a regulatory framework for NBN corporations that promotes the long-term interests of end-users of carriage services or of services provided by means of carriage services to ensure that NBN Co remains in Commonwealth ownership until certain specified events have occurred, and
- to provide a framework for restrictions on private ownership or control of NBN Co.

Amongst the definitions are the terms **‘Communications Minister’** and **‘Finance Minister’**. It is important to note that the Bill sets out certain procedures to be followed by one or both of the Ministers, particularly in relation to the functional separation of NBN corporations.

Part 2—Operations of NBN corporations

Rules about operations of NBN corporations

The term **‘NBN corporations’** is defined in **proposed clause 1 of Schedule 1** as including NBN Co, NBN Tasmania and a company over which NBN Co is in a position to exercise control. Importantly **proposed subclause 1(3)** exempts from this definition a company that is retail carriage service provider provided that first, NBN Co is in a position to exercise control over the company and secondly, any matters specified in regulations are satisfied. That exemption commences at the time that NBN Co starts to exercise control over the company. The exemption ceases at the end of 12 months after that time, or when NBN Co ceases to be in a position to exercise control of the company—whichever is the earlier. This provision will ensure that if NBN Co is engaged in a joint venture with another company, that company will be bound by the same rules as those which bind NBN Co.

According to **proposed clause 9**, an NBN corporation must not supply an eligible service¹⁰¹ to another person unless the other person is a carrier or a service provider. This clause ensures that an NBN

101. **Proposed clause 5** defines **‘eligible service’** as having the same meaning in section 152AL of the CCA. That section provides that an **‘eligible service’** is a listed carriage service (within the meaning of the *Telecommunications Act*

corporation will only supply services on a wholesale basis. **Proposed clauses 10–16** contain exemptions to this general prohibition for various utilities. **Proposed clauses 17–19** set out further prohibitions so that NBN Co must not supply a content service or a non-communications service to another person, and must not supply goods to another person unless those goods are in connection with the supply of an eligible service by an NBN corporation.

In addition, an NBN corporation is restricted in its investment activities. **Proposed clause 20** specifically lists the limitations on the investments an NBN corporation may make, including, but not limited to, not investing the money of the NBN corporation unless that investment is related to the supply, or prospective supply, of eligible services.

Functional separation of NBN corporations

Proposed clauses 23–32 set out the steps to be taken, and the time limits to be complied with, to bring about the functional separation of an NBN corporation, should that be required.¹⁰² Division 3 of Part 2 of the Bill is included so that there is a clear process before the event, should an NBN corporation need to be functionally separated in the future. It operates as follows:

- **Step 1:** after consulting the Finance Minister, the Communications Minister may determine, in writing, *'functional separation principles'* which apply to a specified NBN corporation. **Proposed subclause 24(2)** sets out the minimum requirements for those principles including that the NBN corporation should maintain two or more specified business units, and should maintain arm's length functional separation between the specified business units.
- **Step 2:** in addition, the Ministers may make a determination—called a *'functional separation requirements determination'*—which may deal with the manner in which the functional separation principles are to be implemented. If the Ministers do make such a determination, it must come into force within 90 days of the determination about functional separation principles in Step 1.¹⁰³
- **Step 3:** an NBN corporation must, within 90 days after a functional separation requirements determination (in Step 2) comes into force, give the Ministers a draft functional separation undertaking (called the *'original undertaking'*). Whilst the Ministers may allow for the original undertaking to be given in a longer period, specified in writing, they have no duty to allow a longer period or, having specified a longer period to vary that period, whether requested by the NBN corporation or by any other person.¹⁰⁴

1997) or a service that facilitates the supply of a listed carriage service (within the meaning of that Act) where the service is supplied, or is capable of being supplied, by a carrier or a carriage service provider (whether to itself or to other persons).

102. Explanatory Memorandum, op. cit., p. 75.

103. **Proposed clause 25** of the Bill.

104. **Proposed clause 26** of the Bill.

- **Step 4:** once the original undertaking has been given, the Ministers must undertake a consultation process.¹⁰⁵ The process involves publishing a notice on the Department's website setting out the original undertaking and inviting persons to make submissions in relation to that undertaking. Those submissions are to be received within 14 days of the date of publication and are, in turn, to be published on the Department's website. In addition, the Ministers are to give the ACCC a copy of the notice and ask the ACCC to provide advice about the original undertaking within 44 days of the date the notice was published. Notably it is not a requirement that the ACCC provide its advice within that time limit, and it could well take longer.
- **Step 5:** the Ministers must take into account the submissions received, and the advice given by the ACCC, in making a decision about the original undertaking. The Ministers have three options. First, to approve it. Secondly, to vary it and then approve the variation. Thirdly, to deem that the NBN corporation has given a 'replacement undertaking' and to approve the replacement undertaking.¹⁰⁶

If the Ministers intend to make a decision to vary or replace the original undertaking, they must give the NBN Corporation a notice setting out the proposed variation or the replacement undertaking and invite it to make submissions within 14 days after the notice is given.

- **Step 6:** as soon as practicable after the decision is made, the Ministers must notify the NBN corporation of the decision in writing.

Proposed clause 28 requires the Ministers to use their best endeavours to make their decision within six months of the date that the original undertaking was given. It would appear though, that much will depend on whether the ACCC does provide its advice within 44 days, whether the Ministers require any clarification of any matters by the ACCC and the number and complexity of the submissions.

Once the decision is made under proposed subclause 27(2), the undertaking becomes final and may not be withdrawn: **proposed clause 29**. It may, however, be varied at the request of the NBN corporation or another person, or on the initiative of the Ministers. In that instance the consultation process as outlined in Step 4 above must be undertaken—unless the proposed variation is of a minor nature.¹⁰⁷

Importantly, none of the determinations made by the Ministers under **proposed clauses 23–32** is a legislative instrument.

105. **Proposed subclauses 27(3)–(5)** of the Bill.

106. **Proposed subclause 27(2)** of the Bill.

107. **Proposed clause 30** of the Bill.

Divestiture of assets by NBN corporations

Proposed clauses 33 and **34** contain empower the Minister to direct an NBN corporation to dispose of assets or to transfer assets. In either case, the direction must be in writing, specifying the assets to be disposed of or transferred and the period in which the disposal or transfer must be effected. **Proposed subclauses 33(2)** and **34(3)** set out those matters about which the Ministers must have regard before making such a direction. These include whether the direction will promote the long-term interests of end-users of carriage services or of services provided by means of carriage services, and any advice received from the ACCC.

It is **proposed clause 35** that allows the Ministers to require the ACCC to provide them with advice within a specified period about the disposal or transfer of assets of an NBN corporation.

Where the Ministers give a written direction to an NBN corporation to dispose of or transfer assets, the NBN corporation must comply with the direction.¹⁰⁸

Part 3—Ownership and control of NBN Co

Part 3 of the Bill contains provisions about the ownership and control of NBN Co. **Proposed clauses 44–46** contain the provisions which ensure that the Commonwealth owns and controls the NBN Co in its entirety during the build phase.

How to terminate the Commonwealth ownership provisions

Proposed clauses 47–51 specify all the conditions which must be satisfied before the Commonwealth ownership provisions can be terminated.

First, before 30 June 2018, the Communications Minister must either declare that the national broadband network is built and fully operational or declare that the period of up to 12 months, starting on the date of the declaration is a *'pre-termination period'*. During that period, the Communications Minister must either declare a subsequent *'pre-termination period'* of up to 12 months or declare that the national broadband network is built and fully operational. The effect of **proposed clause 48** is that from 30 June 2018, the Communications Minister must make a declaration at least annually having regard to the extent to which the national broadband network has been built and is operational, matters relating to the security of the national broadband network, and any other relevant matters. The declaration must be tabled in each House of the Parliament within 15 sitting days of that House after the date it was made, along with a statement that the Commonwealth ownership provisions continue to operate. However the declaration is not a legislative instrument and is not subject to disallowance under the *Legislative Instruments Act 2003*.

108. **Proposed subclauses 33(4)** and **34(5)** of the Bill.

Secondly, once the Communications Minister has made a declaration that the national broadband network is **'built and fully operational'**, the Productivity Minister must refer those matters prescribed in **proposed subclause 49(2)** to the Productivity Commission for inquiry.¹⁰⁹

That inquiry and the resultant report must have regard to all the matters listed in **proposed subclause 49(4)** including, but not limited to, equity of access to broadband carriage services, competition in communications markets, whether NBN Corporation has a substantial degree of power in any telecommunication market, the technology used in connection with the national broadband network and the need for maintenance, replacement and upgrading of that technology used in the network. The Productivity Minister may make a written determination about any other matter which is also to be considered by the Productivity Commission. That determination is a legislative instrument, but it is not subject to the disallowance provisions in the *Legislative Instruments Act 2003*.

Schedule 2 of the proposed act provides for the appointment of a Parliamentary Joint Committee on the Ownership of NBN Co in the event that a report of the Productivity Commission (prepared in accordance with proposed clause 49) is tabled in the House of Representatives.¹¹⁰

The **third** condition which must be satisfied before Commonwealth ownership provisions can be terminated is that the Parliamentary Joint Committee on the Ownership of NBN Co must report to both Houses on its examination of the Productivity Commission report. Once that has occurred, the Finance Minister may declare in writing that the conditions are suitable for the entering into and carrying out of an **'NBN Co sale scheme'**. That declaration must be made having regard to the matters which are prescribed in **proposed subclause 50(3)**. The declaration is not a legislative instrument. However, proposed **subclauses 50(4)–50(7)** set out a procedure by which it is to be tabled in both Houses and can be disallowed by the Parliament. If neither House passes a resolution disallowing the declaration, it comes into effect on the day immediately after the last day on which such a resolution could have been made. Under **proposed clause 51** that is also the day on which the Commonwealth ownership provisions are terminated.

Sale of Commonwealth shares in NBN Co

Only when the Commonwealth ownership provisions which are outlined above have ceased to have effect can an NBN Co sale scheme be carried out.¹¹¹ **Proposed clause 54** defines the term **'NBN Co sale scheme'** as a scheme to achieve the transfer of the whole or part of the Commonwealth equity in NBN Co to another person or persons. The Finance Minister may make a written determination (which is not a disallowable instrument under the *Legislative Instruments Act 2003*) setting out the

109. According to **proposed clause 5** of the Bill, the Productivity Minister is the Minister administering the *Productivity Commission Act 1988*.

110. The Parliamentary Joint Committee on the ownership of NBN Co is to consist of five Senators appointed by the Senate and five members of the House of Representatives appointed by that House.

111. **Proposed clause 53** of the Bill.

rules to be complied with. **Proposed subclause 54(5)** sets out a list of possible activities which an NBN sale scheme may involve. They include:

- the issue of securities in NBN Co, share transfers, cancellations and buybacks and redemptions of redeemable preference shares held by the Commonwealth
- payment by NBN Co of a dividend, reducing NBN Co's share capital or the return of capital by NBN Co
- the use of *'sale-scheme hybrid securities'* by designated companies, and Commonwealth guarantees in relation to those securities¹¹²
- securities lending arrangements, and
- modifying NBN Co's constitution.

The Explanatory Memorandum describes *'sale-scheme hybrid securities'* as 'a broad classification for a group of securities that combine both debt and equity'.¹¹³ Under **proposed clause 55**, *'sale-scheme hybrid securities'* fall into two categories—those that will, or may, be redeemed in exchange for a share or shares in NBN Co and those which will, or may, be converted to, or exchanged for, a share in NBN Co. In any case, the *'sale-scheme hybrid securities'* may be issued in or outside Australia and may be in Australian currency or another currency. **Proposed clause 56** provides that, for the range of transactions prescribed in that section, the Commonwealth will be exempt from payment of stamp duty or other tax which would otherwise be payable under a law of a State or Territory.

Either the NBN Co or a member of the Board¹¹⁴ may, on their own initiative, assist the Commonwealth in relation to the NBN Co sale scheme. However, in that case, the Ministers may, by written notice, give directions to the NBN Co or a member of the Board about the exercise of their respective powers: **proposed subclauses 59(5)–(6)**. A failure by the NBN Co or a member of the Board to comply with that written direction is a ground for obtaining an injunction under the provisions in Part 6 of the Bill. In addition, the Ministers may request the NBN Co to provide assistance with the NBN Co sale scheme, specifying the manner and form of the assistance which is required.¹¹⁵ **Proposed clauses 66–67** regulate the use, and protection, of information obtained from NBN Co or the board under proposed clause 59. Essentially the Commonwealth, or an associated person, may use or disclose the information for a purpose in connection with the formulation, entering into, or carrying out of an NBN co sale scheme.¹¹⁶ However, the Finance Minister may enter into an agreement with NBN Co or with one or more the members of board to protect information

112. The term *'security'* in this Bill has the same meaning as it does in Chapter 7 of the *Corporations Act 2001*.

113. Explanatory Memorandum, p. 97.

114. The term *'Board'* is defined in **proposed clause 5** of the Bill as the board of directors of NBN Co.

115. **Proposed subclauses 59(3)–(4)** of the Bill.

116. *'Associated person'* is defined in **proposed subclause 66(6)** of the Bill as a Minister; a person who holds an office under, or is employed by, the Commonwealth; a person engaged under the *Public Service Act 1999*; or a person who performs services on behalf of the Commonwealth in connection with the NBN Co sale scheme or the Commonwealth's capacity as a shareholder in NBN Co.

obtained under proposed clause 59 if that information would substantially prejudice NBN Co's commercial interests.

Alteration of NBN Co constitution

Proposed clauses 64–65 are about the alteration of the NBN Co constitution if the alteration relates to the formulation, entering into, or carry out of an NBN Co sale scheme.

Proposed clause 65 permits the Ministers to alter the NBN Co constitution by legislative instrument where the effect of the alteration is to reduce Commonwealth rights and privileges in any of the ways listed in **proposed paragraph 65(1)(b)**. An alteration to the constitution may be made more than once. Before making such a legislative instrument, the Ministers must consult with the members of the board. Any alteration to the constitution which is carried out in this way does not constitute a breach of a provision of the *Corporations Act 2001*.

Private ownership and control of NBN Co

Division 3 of Part 3 of the Bill provides for the making of regulations about two specific topics:

- an unacceptable private ownership or control situation, and
- an NBN Co ownership or control matter.

Unacceptable private ownership or control situation

Proposed clause 69 provides that the term '**unacceptable private ownership or control situation**' will be defined in regulations. Those regulations must be made only after consultation by the Communications Minister with the ACCC and may confer a power on the ACCC to make a decision of an administrative character about whether an unacceptable private ownership or control situation has arisen.

The regulations, once they are in place, have two effects. **First**, NBN Co must take all reasonable steps to ensure that an unacceptable private ownership or control situation does not exist in relation to NBN Co. NBN Co commits an offence if it engages in conduct which contravenes this prohibition.¹¹⁷

Second, where an '**unacceptable private ownership or control situation**' does exist then the Communications Minister, the ACCC or the NBN Co may make application to the Federal Court for orders:

117. The penalty for the contravention of the prohibition in **proposed clause 70** of the Bill is 500 penalty units, being \$55 000.

- directing the disposal of shares
- restraining the exercise of any rights attached to shares
- prohibiting or deferring the payment of any sums due to a person in respect of shares that the person holds, or
- that any exercise of rights attached to shares be disregarded.¹¹⁸

The purpose and effect of these, or any other orders made by the Federal Court under **proposed subclause 71(4)**, is to ensure that the unacceptable private ownership or control situation ceases to exist.

NBN Co ownership or control matter

Proposed clause 72 introduces the concept of an ***'NBN Co ownership or control matter'*** which is:

- an unacceptable private ownership or control situation, or
- the question of whether an unacceptable private ownership or control situation has existed, is in existence, or will exist.

Proposed subclause 72(1) provides for regulations to be made requiring a person to keep and retain records relevant to an ***'NBN Co ownership or control matter'*** or requiring a person to provide information to the Communications Minister, the ACCC or NBN Co that is relevant to ***'NBN Co ownership or control matter'***.

In addition, regulations under **proposed clause 72** may confer discretionary powers on the Communications Minister or the ACCC, for example the regulations may require NBN Co to give the Communications Minister, within the period and in the manner specified in the notice, specified information about an ***'NBN Co ownership or control matter'***.

These powers are in addition to the record keeping and disclosure rules which already exist in Division 6 of Part XIB and the ACCC's information gathering powers in section 155 of the *Competition and Consumer Act 2010*.

Part 4—Reporting obligations

The provisions of this Part **will not apply** if the NBN Co is a wholly-owned Commonwealth company.¹¹⁹ In that case, the reporting obligations which are contained in the *Commonwealth Authorities and Companies Act 1997* (CAC Act) will apply.¹²⁰

118. **Proposed clause 71** of the Bill.

119. **Proposed clause 78** of the Bill. The term ***'wholly-owned Commonwealth company'*** is defined in section 34 of the CAC Act as a Corporations Act company that the Commonwealth controls. However, it does not include a company that is a subsidiary of a Commonwealth authority or Commonwealth company.

The provisions in Part 4 **will apply** as soon as the Commonwealth transfers a part of its ownership of the NBN Co to another party. The main features of the reporting obligations are:

- the Ministers may give the NBN Co a written direction requiring that it give specified financial statements for a specified period. The Board of the NBN Co must comply with the direction, must provide the financial statements in accordance with any written guidelines given by the Ministers within two months of the end of the period to which the statement relates: **proposed clause 79**
- the Board must (subject to qualifications set out in written guidelines by the Ministers) immediately give written particulars to the Ministers if they propose to do any of the things prescribed in **proposed subclause 80(1)**. These include, but are not limited to, acquiring or disposing of a significant shareholding in a company, or a significant business, and commencing or ceasing a significant business activity
- the Board must prepare a corporate plan to cover each NBN corporation for a period of not less than three years and not more than five years. The corporate plan must include the matters which are prescribed in **proposed subclause 82(6)**. The Board must give the corporate plan to the Ministers at least once a year, and keep the Ministers informed about any changes to the corporate plan—including a matter which may affect the achievement of the plan.¹²¹

The provisions in Part 4 **cease to apply** on the *'majority interest sale day'*—that is, on the day declared by the Communications Minister, that the Commonwealth is no longer the majority shareholder in the NBN Co.¹²² Although that declaration will be a legislative instrument, the disallowance provisions of the *Legislative Instruments Act 2003* will not apply.¹²³

Part 5—Anti-avoidance

Part 5 of the Bill contains anti-avoidance provisions to ensure that the NBN corporation does not enter into any agreement, arrangement, understanding, promise or undertaking for the sole or dominant purpose of avoiding the application of this act, when enacted: **proposed clause 86**.¹²⁴

Part 6—Injunctions

This Part of the Bill sets out the powers of the Federal Court to grant injunctions and interim injunctions upon application by the Ministers. These powers are broad and include:

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120. Information about financial reporting and accounting policy is available on the Department of Finance and Deregulation website: <http://www.finance.gov.au/financial-reporting-and-accounting-policy/index.html>
121. Under **proposed clause 83** of the Bill, where the Board fails to comply with any of the provisions in Part 4, the Ministers may apply to the Federal Court for an injunction under Part 6 of the Bill.
122. **Proposed clause 85** of the Bill.
123. **Proposed subclause 85(3)** of the Bill.
124. In the event of a contravention of **proposed clause 86** of the Bill, the Ministers may apply to the Federal Court for an injunction under Part 6 of the Bill.

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- a grant of injunction to do a thing where a person has refused or failed to do a thing, where that refusal or failure is, or would be, a contravention of the act (when enacted):
 - whether or not it appears to the Court that the person intends to refuse or fail to do that thing again, or
 - if an injunction is not granted, it is likely that the person will refuse or fail to do the thing again¹²⁵
- a grant of injunction to restrain the person from engaging in certain conduct:
 - whether or not it appears that the person would engage in that conduct again, or continue to engage in that conduct, or
 - if an injunction is not granted, the person is likely to engage in conduct of that kind.¹²⁶

Part 7—Miscellaneous

Part 7 contains miscellaneous provisions including:

- for the avoidance of doubt, clarification that the NBN Co is not a public authority and the Public Works Committee Act 1969 does not apply : **proposed clauses 95–96**
- the Communications Minister may delegate his or her powers under the act (when enacted) to the Secretary of the Department or an SES employee of the Department: **proposed subclause 99(1)**¹²⁷
- the Finance Minister may delegate his or her powers under the act similarly, to the Secretary of the Department or an SES employee of the Department: **proposed subclause 99(2)**¹²⁸
- if the operation of the act (when enacted) or the regulations results in an acquisition of property from a person in accordance with section 51(xxxi) of the Constitution, **proposed section 100** provides that the Commonwealth is liable to pay a reasonable amount of compensation to the person.¹²⁹

Concluding comments

The Bill provides that NBN corporations will operate on a wholesale-only basis. The discussion above outlines a number of economic and legal issues which arise from that status.

125. **Proposed subclauses 88(1) and 91(2)** of the Bill.

126. **Proposed subclauses 88(2) and 91(1)** of the Bill.

127. The exception to this is that the Communications Minister may not delegate his or her powers under proposed clause 48 of the Bill—the power to declare that the national broadband network should be treated as built and fully operational.

128. The exception to this is that the Finance Minister may not delegate his or her powers under proposed clause 50—the power to declare that the conditions are suitable for an NBN Co sale scheme.

129. **Proposed clauses 33 and 34** of the Bill relate to directions to divest or transfer asset of an NBN corporation.

The Bill delivers a staged process to limit the activities of NBN corporations during the build phase and a staged process which will create some transparency as NBN corporations move towards private ownership. Whilst the processes involve considerable consultation and public inquiry—by the Productivity Commission and by the Parliamentary Joint Committee on the Ownership of NBN Co— they are also lengthy and there is a danger that the telecommunications market will change during the course of the process.

The key issue is whether it will be possible for one or more telecommunications companies to purchase a stake in the privatised NBN Co, thereby obtaining a competitive advantage. Although the Bill contains provisions which will ensure that the NBN Co must take all reasonable steps to ensure that an ‘unacceptable private ownership or control situation does not exist’, the detail of what is ‘unacceptable’ remains unknown.

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