

# Chapter Five

## The exposure drafts: NBN Co Bill

### Introduction

5.1 On the same day the Government announced that it would establish a company (NBN Co Ltd) to build and operate a new super-fast National Broadband Network, it also foreshadowed that it would introduce legislation establishing:

- governance, ownership and operating arrangements for the wholesale only NBN company; and
- the access regime to facilitate open access to the NBN for retail level telecommunications service providers.<sup>1</sup>

5.2 That announcement was made on 7 April 2009. Over ten months later, on 24 February 2010, the Minister finally released exposure drafts of the foreshadowed legislation.<sup>2</sup> The two drafts released were the:

- National Broadband Network Companies Bill 2010 (the 'NBN Co Bill'); and
- Telecommunications Legislation Amendment (National Broadband Network Measures—Access Arrangements) Bill 2010 (the 'Access Bill').

5.3 Explanatory Notes for the exposure drafts were also circulated.

5.4 The Government has stressed that the exposure drafts of the legislation are just that – drafts – and that they have been issued 'to facilitate consideration of the proposed legislation prior to it being introduced into Parliament'.<sup>3</sup> The Government has also stated that it is 'willing to consider amendments to the legislation if compelling arguments are put forward'.<sup>4</sup>

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1 Commonwealth of Australia, *National Broadband Network: Regulatory Reform for the 21<sup>st</sup> Century Broadband*, Discussion Paper, 7 April 2009, p. 2, [www.dbcde.gov.au/\\_data/assets/pdf\\_file/0006/110013/NBN\\_Regulatory\\_Reform\\_for\\_the\\_21st\\_Century\\_Broadband\\_low\\_res\\_web.pdf](http://www.dbcde.gov.au/_data/assets/pdf_file/0006/110013/NBN_Regulatory_Reform_for_the_21st_Century_Broadband_low_res_web.pdf), accessed 26 April 2010.

2 The Hon. Lindsay Tanner MP, Minister for Finance and Deregulation, and Senator the Hon. Stephen Conroy, Minister for Broadband, Communications and the Digital Economy, 'Draft legislation released for NBN Co Operations', Joint press release, 24 February 2010, [www.minister.dbcde.gov.au/media/media\\_releases/2010/011](http://www.minister.dbcde.gov.au/media/media_releases/2010/011), accessed 26 April 2010. During the ten months of delay, the committee called for the Government to bring forward this legislation. For example, recommendation 3 of the committee's *Third Report* in November 2009 called for the Government to 'expediently bring forward the legislation that will provide the governance and funding framework for the NBN Co Ltd'.

3 *Explanatory Notes for Exposure Drafts of Bills*, p. 1.

4 *Explanatory Notes for Exposure Drafts of Bills*, p. 1.

5.5 Simultaneous with the committee's inquiry, the Department has undertaken its own consultation process on the exposure drafts of the legislation. At the time of writing, the Department had not published the 20 submissions it had received.<sup>5</sup> The committee's expectation is that once the bills have been finalised and introduced into Parliament, they will be subject to further, and comprehensive, scrutiny by a standing legislative committee of the Senate.

5.6 For that reason the committee has restricted itself to highlighting the key areas of concern raised in submissions to it. The remainder of this chapter addresses matters raised in relation to the NBN Co Bill. Chapter six addresses the Access Bill.

## **NBN Co Bill**

### ***General outline***

5.7 In broad terms, the NBN Co Bill provides for:

- the operations of NBN Co, including rules about the supply of services by NBN Co and its wholly owned subsidiaries (Part 2);<sup>6</sup>
- the ownership and control of NBN Co, including that it is to be a Commonwealth majority owned company during the rollout of the NBN but that once the NBN is declared 'built and fully operational' by the Communications Minister, the Commonwealth must sell its remaining equity in NBN Co within the following five years unless that period is extended by the Finance Minister (Part 3). This Part of the Bill also provides for what constitutes 'unacceptable private ownership or control' situations and the consequences to apply;<sup>7</sup> and
- miscellaneous matters, including that NBN Co is not a public authority, that it may be wound up in accordance with the *Corporations Act 2001* (Cth), and that the Communications Minister and the Finance Minister may delegate all or any of their Ministerial powers and functions under the Act (Part 7).<sup>8</sup>

5.8 Submissions to the committee were quite focussed as to the key areas of contention. They related to:

- whether NBN Co would be restricted to supplying only wholesale services, what would constitute the appropriate service, to whom that service could be supplied, and the circumstances in which any exemptions should apply;

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5 Mr Philip Mason, Assistant Secretary, NBN and Fibre Rollout Regulation, Department of Broadband, Communications and the Digital Economy, *Committee Hansard*, Canberra, 15 April 2010, p. 70.

6 NBN Co Bill, Part 2.

7 NBN Co Bill, Part 3.

8 NBN Co Bill, Part 7.

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- the merit of the cessation of majority Commonwealth ownership and the implications of this event occurring;
  - the comprehensiveness of provisions governing the terms of private ownership and control; and
  - other additional matters not currently provided for in the NBN Co Bill and which it was proposed the NBN Co Bill should be amended to address.

### ***Wholesale only services***

5.9 In Part 2, clause 9, the Bill provides that NBN Co must only supply services to 'a carrier' or 'a service provider'. The terms 'carrier' and 'service provider' are defined as having the same meanings as in the *Telecommunications Act 1997*.<sup>9</sup> In effect, this restricts NBN Co to supplying services to either a holder of a carrier license,<sup>10</sup> or a 'carriage service provider' or 'content service provider'.<sup>11</sup> A 'carriage service provider' is a person who supplies or proposes to supply a listed carriage service to the public (meaning the carriage of communications between two end users each of whom is outside the immediate circle of the supplier of the service).<sup>12</sup> A 'content service provider' is a person who uses or proposes to use a listed carriage service to supply a content service to at least one end user who is outside the immediate circle of the supplier of the content.<sup>13</sup>

5.10 After providing that NBN Co can only supply services to carriers or service providers, clause 9 immediately provides for an exemption. Subclause (9)2 enables the Communications Minister to, by legislative instrument, exempt a specified service from the scope of subclause 9(1) 'subject to such conditions (if any) as are specified in the exemption'.<sup>14</sup> In effect this would enable NBN Co to supply a specified service to persons other than carriers, carrier service providers or content service providers, subject to conditions specified by the Minister.<sup>15</sup> One example given in the Explanatory Notes is an exemption allowing NBN Co to offer services directly to certain end-users, for example, government agencies.<sup>16</sup> The Minister is obliged to consult with the ACCC before exempting a service.<sup>17</sup>

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9 NBN Co Bill, cl 5.

10 *Telecommunications Act 1997* (Cth), s 7, 'carrier'.

11 *Telecommunications Act 1997* (Cth), ss 7, 'service provider', 86.

12 *Telecommunications Act 1997* (Cth), ss 87, 88.

13 *Telecommunications Act 1997* (Cth), s 97.

14 NBN Co Bill, cl 9.

15 NBN Co Bill, cl 9.

16 *Explanatory Notes for Exposure Drafts of Bills*, p. 4.

17 NBN Co Bill, cl 9(4).

5.11 There was considerable confusion amongst submitters as to three principal aspects of the operation of clauses 9 and 10.

- First, concerning the operation of subclause 9(1): to whom would NBN Co ordinarily be able to supply services. Specifically, who would qualify as a 'service provider' for the purpose of obtaining services from NBN Co.
- Second, concerning the operation of subclause 9(2): what would the exemption in subclause 9(2) enable the Communications Minister, and consequently NBN Co, to do?
- Third, concerning the operation of clause 10: the extent to which the exemption to the prohibition on NBN Co supplying content services undermined the extent to which NBN Co will be a 'wholesale only' company consistent with the Government's stated policy objectives.

5.12 Some submitters commented that the Ministerial exemption provisions could potentially enable NBN Co to provide retail services to end-users. Others expressed the belief that, particularly in regards to subclause 9(2), it would merely enable NBN Co to provide Layer 3 services (which are effectively wholesale services) to companies other than telcos and should be exercised in the event that a competitive wholesale market for the supply of these services does not develop.<sup>18</sup> Submitters differed in the extent to which they supported the Ministerial power and the circumstances in which it might be exercised.

#### *Critics of clauses 9 and 10*

5.13 The Business Council of Australia interpreted clauses 9 and 10 and the provision for Ministerial exemption, as potentially allowing NBN Co to 'offer fully integrated wholesale services and direct supply to end-users'.<sup>19</sup> It continued that the provisions:

...therefore allows NBN Co. to expand its product offer further into the value chain, a significant departure from both the original policy intent and from the understanding in the industry and wider community about the NBN Company's function and operation in the market.

The change in policy has no obvious supporting rationale nor an assessment of the net benefits from this greater level of government intervention in the market. It is also puzzling that the government would take action to remove vertical integration in the fixed line sector only to then replicate the same integrated structure within a government business. Furthermore, the suggested ministerial discretion lacks proper safeguards and will create uncertainty for competing private investors as long as it is in place.

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18 Ms Rosemary Sinclair, Chair, Australian Telecommunications Users Group, *Committee Hansard*, Canberra, 15 April 2010, p. 14.

19 Business Council of Australia, *Submission 107*, p. 5.

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The expansion of NBN Company's scope of operations and the inclusion of ministerial discretion should be removed from the draft legislation.<sup>20</sup>

5.14 The Western Australia Chamber of Commerce and Industry similarly argued that it is 'essential to ensure NBN Co does not operate in the retail market where it could provide preferential treatment to its own retail services to the detriment of competition'.<sup>21</sup>

5.15 Optus was typical of the attitudes of incumbent retail internet and telecommunications service providers such as AUSTAR United Communications<sup>22</sup> and iiNet,<sup>23</sup> when it criticised the Ministerial exemption provision in clauses 9 and 10 as being contrary to the policy rationale for the NBN Co:

For the NBN to fully realise its potential Optus has always maintained that the NBN would need to be true to the Government's clear commitment that it will be operated as a structurally separated, wholesale-only operation on genuine open access arrangements. Such an approach would avoid the well documented problems we have witnessed in the current fixed line market structure. Moreover, a regime built on these principles has the potential to set a platform for a highly competitive retail market to emerge which in turn is likely to lead to affordable high-speed broadband services and high take-up by businesses and consumers.<sup>24</sup>

5.16 Based on those policy arguments, Optus submitted that, because it believes that the Bill 'provides NBN Co with significant scope to operate as a retail service provider of telecommunications or content services', it represents 'a significant and deeply worrying step-back from the Government's clear commitment to operate the NBN Co as a wholesale-only provider'.<sup>25</sup> Optus therefore proposed:

The draft Bill should be amended to remove the discretion of the Minister to make any exemptions to NBN Co's ability to operate as a wholesale-only provider of telecommunications and content services...

NBN Co should be restricted to supplying services at Layer 2 and below.<sup>26</sup>

5.17 In a separate submission, Primus argued that instead of removing the Ministerial exemption power in clause 9, there should be clarification and circumscription of its potential use:

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20 Business Council of Australia, *Submission 107*, p. 5.

21 Western Australia Chamber of Commerce and Industry, *Submission 115*, p. 2.

22 AUSTAR United Communications Ltd, *Submission 116*, pp 5–6.

23 Mr Stephen Dalby, Chief Regulatory Officer, iiNet Ltd, *Committee Hansard*, Melbourne, 14 April 2010, pp 16–17.

24 Optus, *Submission 114*, p. 3.

25 Optus, *Submission 114*, p. 3.

26 Optus, *Submission 114*, p. 4.

Firstly, there is a lack of detail about when the Communications Minister could make such a determination. Primus suggests the Government establish specific criteria or guidance around the making of such a determination.<sup>27</sup>

The other concern of Optus and other incumbent internet service providers was the extent to which non-carriers could be characterised as 'service providers' and therefore be eligible, even in the absence of the exercise of Ministerial discretion, to acquire services from NBN Co. Optus submitted that 'NBN Co should be restricted to supplying services to carriers only'.<sup>28</sup> Primus argued that:...to ensure a wholesale arrangement is not artificially constructed to undermine the 'wholesale only' principle, the Government should impose further rules defining when a 'carrier or service provider' can acquire services from NBN Co. For example, a company should actively provide services to the end-user market and have a standing offer available for acceptance in order to be characterised as a service provider.<sup>29</sup>

5.18 iiNet also submitted that, if retained, the definition of a 'service provider' needs clarification because:

If I was Wesfarmers or the Department of Defence or some other large corporation that had the skills and the resources internally to develop their own telecommunications services for internal corporate use, what is stop them going out and putting a jingle up that says 'I'm a wholesale customer'?<sup>30</sup>

5.19 Consumer and end-user advocacy groups were divided in their attitudes to clauses 9 and 10 of the NBN Co Bill. The Internet Society of Australia (ISOC-AU) recommended that the exemption powers be abolished. In the alternative, ISOC-AU submitted that, if retained, 'the need for such exemptions should be made clear, and the section significantly tightened so that exemption can be made only in very limited, specific circumstances and where such a significant change to the wholesale access only policy can be justified'.<sup>31</sup> The Australian Communications Consumer Action Network (ACCAN) recommended that NBN Co operate solely as a wholesale provider and the exemption powers, which might allow it to operate retail services, be removed from the Bill.<sup>32</sup>

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27 Primus Telecom Australia, *Submission 117*, p. 4.

28 Optus, *Submission 114*, p. 4.

29 Primus Telecom Australia, *Submission 117*, p. 4.

30 Mr Stephen Dalby, Chief Regulatory Officer, iiNet Ltd, *Committee Hansard*, Melbourne, 14 April 2010, pp 16–17.

31 Internet Society of Australia (ISOC-AU), *Submission 118*, pp 3–4.

32 Australian Communications Consumer Action Network, *Submission 121*, p. 6.

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*Supporters of clauses 9 and 10*

5.20 On the other hand, Ms Rosemary Sinclair, Chair of the Australian Telecommunications Users Group (ATUG) explained that in her view, commentary such as that of Optus, was 'misunderstanding' the purpose of clauses 9 and 10 and that it was in fact a good thing for the prospects of future innovation and service delivery over the NBN:

I do not know whether it is the lawyer in me, but I read the whole thing, so when I got to clause 9...after having read the definitions—clause 1, 2, 3, up to 8—and read it in the context of all the previous statements that say NBN is going to be a wholesale only company, I say, 'Okay, that means that there's the potential for NBN to offer wholesale type services to other than telcos.' I think that is a good prospect because I think that one of the problems that we have is that, if we do not have that kind of reserve power, we are actually limiting the prospects for innovation to the existing communications sector. From where I sit, the prospects for innovation are going to come from outside that sector.<sup>33</sup>

5.21 However, Ms Sinclair also indicated that, although supportive of proposed clauses 9 and 10, ATUG considers the current definition of customers of NBN to be insufficient:

ATUG would like to see the definition of customers of NBN broadened to include businesses and government agencies who wish to use NBN broadband to deliver services to their customers or clients eg Health Department, Education Department, Systems Integrators, Content Service Providers.

The current definition of "carriage service provider" does not seem to ATUG to envisage this new group of wholesale service customers and the existing obligations on service providers would not be appropriate to these new service providers.

The existing definition of content service provider suggests the services are provided to the public at large rather than a defined group of clients or service end users including businesses in the case of Systems Integrators.<sup>34</sup>

5.22 Mr Paul Budde, explained his view of the merit of clauses 9 and 10 as follows:

We certainly need to ask the question: what gets priority here – competition policy subtleties or the national interest? I would like to stress that the issue is the creation of an infrastructure such that competition may be maximised at the services level.

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33 Ms Rosemary Sinclair, Chair, Australian Telecommunications Users Group, *Committee Hansard*, Canberra, 15 April 2010, p. 14.

34 ATUG, answer to question on notice, 16 April 2010 (received 28 April 2010), p. 1.

This concern seems to be addressed to a certain extent in the proposed NBN Co legislation, which will give the government the possibility of allowing sectors to buy infrastructure capacity directly from NBN Co.<sup>35</sup>

### *Explanation from the Department*

5.23 Following the committee's final hearings, the committee sought an explanation from the Department as to the decision to insert a Ministerial discretion in proposed subclause 9(2) of the NBN Co Bill enabling the Minister to exempt NBN Co from wholesale-only service restrictions. The Department provided the following response:

The objectives of the NBN Co Bill make it clear that NBN Co will operate on a wholesale-only basis (proposed section 3(2)(a)). NBN Co has clearly stated that it will offer Layer 2 bitstream services. These are, by their nature, wholesale services, not retail services.

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This provision was included because some sophisticated end-users, such as some government agencies and corporate users, may want to buy wholesale services directly for their own internal use. It was considered appropriate that the option should exist for such end-users to be able to seek services directly from NBN Co for their use, rather than having to force them to use intermediary providers that could simply add unnecessarily to their cost structures. The Australian Telecommunications Users Group (ATUG) has supported this provision. Clearly if NBN Co were to supply such end-users it would need to be on the basis that they were not favoured over other customers of wholesale services.

For any end-user to be able to benefit from such an exemption, it would need to be able to invest in equipment to transform the bitstream service into useable services such as telephony or broadband. This is not a simple undertaking and would require the end-user to invest in necessary equipment and staff as opposed to simply purchasing higher level service from other providers. NBN Co would not be competing directly with retail providers to provide services to customers simply seeking a broadband or telephony service in the everyday retail marketplace.

While this is the reason the provision has been included in the Bill, the Bill is an exposure draft designed to elicit feedback. The legislation will be finalised in light of that feedback.<sup>36</sup>

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35 Paul Budde Communication Pty Ltd, *Submission 105*, p. 2.

36 Department of Broadband, Communications and the Digital Economy, answer to question on notice, 20 April 2010 (received 23 April 2010), p. 11.



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*Committee view*

5.24 The committee believes that NBN Co should be a supplier of wholesale services only. By 'wholesale', the committee means that NBN Co should not be permitted to supply services higher than Layer 2.

5.25 The committee believes that NBN Co should only provide services at Layer 2 and below.<sup>37</sup> In the event that a competitive market for the supply of unbundled Layer 3 services does not develop, then the committee recommends that a Universal Service Obligation should be considered for addressing this failure, particularly in regional and remote areas.

**Recommendation 12**

**5.26 That the NBN Co Bill be amended so that NBN Co can only provide services at Layer 2 and below.**

**5.27 That, in the event that a competitive market for the supply of unbundled Layer 3 services does not develop, the Government consider arrangements for a Universal Service Obligation to address this failure, particularly in regional and remote areas.**

*Cessation of majority Commonwealth ownership*

5.28 In Part 3, clauses 21–25, the Bill provides for the Communications Minister to declare, before 30 June 2018, that the NBN should be treated as 'built and fully operational'.<sup>38</sup> The Finance Minister must, within five days, then declare that either (a) conditions are suitable for the entering into and carrying out of an NBN Co sale scheme<sup>39</sup> (with the consequence that the Commonwealth must then sell all of its remaining equity in NBN Co within five years or an extended period if the Finance Minister so declares<sup>40</sup>), or (b) declare a 'sale deferral period' during which the Commonwealth is not required to sell its equity in NBN Co.<sup>41</sup> The deferral period must not be longer than 12 months,<sup>42</sup> but the Bill contains no limit on the number of deferrals that the Finance Minister may make. The declaration by the Communications Minister, and the subsequent declarations by the Finance Minister, are not legislative instruments.<sup>43</sup>

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37 See the discussion in the previous chapter of this report on product offerings, specifically NBN Co's decision to supply only a Layer 2 service.

38 NBN Co Bill, cll 21–22.

39 NBN Co Bill, cl 25.

40 NBN Co Bill, cl 24.

41 NBN Co Bill, cl 25.

42 NBN Co Bill, cl 25(4).

43 NBN Co Bill, cll 22(8), 24(7), 25(8).

5.29 Some submitters raised concerns about the implications that a cessation of majority Commonwealth ownership will have, particularly for service delivery in regional and remote areas. For example, the Indigenous Remote Communications Association (IRCA) submitted that because of its concerns that 'remote Australia will not provide viable returns for future purchasers of NBN Co, thus leading to reduced services', IRCA would 'like to see the Government retain a stake in NBN Co beyond its sale, in relation to wholesale service provision of broadband to remote Australia'.<sup>44</sup> IRCA submitted this was necessary to ensure 'the ongoing provision of quality, subsidized or affordable broadband to sparsely populated regions'.<sup>45</sup>

5.30 The Australian Communications Consumer Action Network submitted that the 'object of the [NBN Co] Bill be expanded to enshrine the role of the NBN Co in ensuring access to affordable fast broadband, accompanied by a requirement to produce five-year implementation plans'.<sup>46</sup> ACCAN submitted such an amendment would provide a legislative protection to 'deliver the type of broadband future that Australians want and need'.<sup>47</sup>

5.31 The Communications Law Centre of the University of Technology Sydney, submitted that the current ownership limitations 'do not shed light on the way in which NBN Co will have incentive to maintain and upgrade its network once the Government sells down its shares'.

In a worst-case scenario, this would result in Australia's telecommunications infrastructure being controlled by a monopoly immune from market pressure.<sup>48</sup>

5.32 Finally, Mr Allan Horsley, an individual with some 45 years of experience in design, operational, representative and regulatory telecommunications roles, drew attention to the lack of reporting obligations on NBN Co when it ceases to be a Commonwealth majority owned corporation. Part 4 of the NBN Co Bill requires, amongst other things, NBN Co to keep the Communications Minister and the Finance Minister informed of the operations of NBN Co and NBN Co subsidiaries,<sup>49</sup> an obligation which would presumably include providing information about the service performance of the NBN. However, all reporting obligations contained in Part 4 of the Bill cease to apply once the Commonwealth ceases to hold a majority of the voting shares in NBN Co.<sup>50</sup> Mr Horsley submitted that the lacuna in information disclosure should be remedied by amending the NBN Co Bill:

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44 Indigenous Remote Communications Association, *Submission 110*, p. 1.

45 Indigenous Remote Communications Association, *Submission 110*, p. 1.

46 Australian Communications Consumer Action Network, *Submission 121*, p. 4.

47 Australian Communications Consumer Action Network, *Submission 121*, p. 4.

48 Communications Law Centre, University of Technology Sydney, *Submission 111*, p. 7.

49 NBN Co Bill, cl 54.

50 NBN Co Bill, cl 59.

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The legislation [should] require the development of appropriate regulations by the Australian Communications and Media Authority...to establish an appropriate monitoring and reporting arrangement to ensure Government and the community are fully informed on the service performance of the NBN, reporting each six months for the first five years of full network operation and then each twelve months thereafter if service quality is considered to have been generally satisfactory in the initial five years.<sup>51</sup>

### *Committee view*

5.33 The committee does not believe that it is necessary for the Commonwealth to retain majority ownership of NBN Co in the long term, as long as legislation governing NBN Co's operations also sets out mandatory minimum service requirements for the company. Those requirements should, at a minimum, statutorily require NBN Co to fulfil the Government's stated policy objectives for the NBN. They are that:

- 100 per cent of Australian premises receive super-fast broadband services (with 90 per cent receiving Fibre to the Home services with speeds of up to 100 Mbps, and the remaining 10 per cent receiving speeds of at least 12 Mbps); and
- NBN Co provide wholesale services on an open-access and equivalent basis.

5.34 The governing legislation should also impose on NBN Co a continuing obligation to upgrade services to Australians into the future so as to positively ensure that Australia's broadband network is not 'frozen' at present technological standards and capabilities.

5.35 The committee understands that the draft legislation would not enable the Commonwealth's majority ownership to be sold down until the Communications Minister has declared that the NBN should be treated 'as built and fully operational'.<sup>52</sup> The committee is concerned that there is a lack of definition in the NBN Co Bill as to what constitutes 'built and fully operational'. The committee believes that subclause 22(5) of the NBN Co Bill (which provides the matters to which the Communications Minister must have regard in deciding whether to make the declaration) should be amended so that a declaration cannot be made unless the NBN in fact 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.

5.36 Additionally, the committee has the following three concerns about the implications which will flow from cessation of majority Commonwealth ownership.

- First, that there is currently no obligation explicitly set out in the draft legislation requiring NBN Co to maintain its capability to provide broadband

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51 Mr Allan Horsley, *Submission 108*, p. 4.

52 NBN Co Bill, cl 21.

services to 100 per cent of Australian premises with services of at least 12 Mbps. The committee understands that one potential method of ensuring continued coverage might be to mandate it as a condition of NBN Co's carrier licence.<sup>53</sup> However, the committee believes that it is more appropriate that such an obligation be explicitly set out in the governing legislation, as a minimum service obligation, providing upfront certainty for all Australians and stakeholders as well as future investors.

- Second, that loss of Commonwealth majority ownership will remove any future incentive for NBN Co to upgrade its services to unprofitable areas – likely to be regional and remote areas – following the initial rollout of the NBN. The result is that broadband services to these areas may be 'frozen' at levels which prove inadequate for future communications needs. The committee notes on this point the commentary in the Implementation Study that 'NBN Co, as a monopoly and after completion of the roll-out and if the copper and HFC networks are deactivated, will lack competitive pressure to optimise its operations.'<sup>54</sup> After noting that one consequence may be higher prices charged to operators, the Implementation Study commented that '[i]n the absence of competitive pressure, NBN Co will have limited incentive to engage in rigorous cost management'.<sup>55</sup> The committee believes the Government should amend the legislation so as to require NBN Co – regardless of the Commonwealth's equity stake in it – to ensure that broadband services are available to all Australians on an equitable basis<sup>56</sup> and to a minimum level service standard.
- Third, that loss of Commonwealth majority ownership may result in the cessation of public disclosure obligations of NBN Co as to its service performance. The committee believes that NBN Co should be subject to continual public disclosure requirements as to its service performance, and that these requirements should continue even after the cessation of majority Commonwealth ownership. The committee did not receive sufficient guidance from submitters as to whether requirements under the *Corporations Act 2001* (Cth) would sufficiently fulfil any lacuna.

### **Recommendation 13**

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53 The Department indicated in answer to a question on notice that it considered requirements being placed on NBN Co by license conditions would be one option that would be available, and might be applied, 'as necessary': Department of Broadband, Communications and the Arts, answer to question on notice, 20 April 2010 (received 23 April 2010), p. 13.

54 McKinsey-KPMG, *Implementation Study for the National Broadband Network*, 5 March 2010, p. 444.

55 McKinsey-KPMG, *Implementation Study for the National Broadband Network*, 5 March 2010, p. 444.

56 Noting the 90 per cent at 100 Mbps and 10 per cent at 12 Mbps divide.

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**5.37** That provisions of the NBN Co Bill relating to the future privatisation of NBN Co be amended to clarify what is meant by 'built and fully operational'.

#### **Recommendation 14**

**5.38** That the NBN Co Bill be amended so that a declaration by the Communications Minister that the NBN should be treated as built and fully operational is a disallowable instrument. That is, that clause 22(8) of the NBN Co Bill stating that such a declaration is 'not a legislative instrument' be deleted.

#### **Recommendation 15**

**5.39** That the NBN Co Bill be amended so as to expressly require NBN Co to meet minimum service obligations after the cessation of Commonwealth majority ownership. Those obligations must include that:

- NBN Co retain its capacity to provide broadband services to 100 per cent of Australian premises;
- NBN Co retain its capacity to service 90 per cent of Australian premises with Fibre to the Home services with speeds of up to 100 Mbps;
- NBN Co retain its capacity to service the remaining 10 per cent of Australian premises with broadband connections of speeds of at least 12 Mbps;
- NBN Co develop and maintain its capacity to supply Layer 2 services to 100 per cent of Australian premises; and
- NBN Co maintain its open-access network, providing wholesale services on an equitable basis.

## **Recommendation 16**

**5.40 That the Government consider ways to 'future-proof' NBN Co's services. This must include a specific requirement that NBN Co report to the ACCC every five years on developments in broadband services in other comparable advanced economies, and that if the report demonstrates that NBN Co's services are falling behind those available to a majority of end users in other comparable advanced economies, lay out a plan to close the gap.**

## **Recommendation 17**

**5.41 That the NBN Co Bill be amended so as to explicitly require NBN Co to publicly disclose its service performance even after the cessation of majority Commonwealth ownership.**

### *Private ownership and control*

5.42 Division 3, clauses 41–46 make provision for restrictions on what is termed 'an unacceptable private ownership or control situation'<sup>57</sup> occurring or continuing. The NBN Co Bill leaves it to regulations, developed after consultation with the ACCC, to determine what in fact will constitute an unacceptable private ownership or control situation.<sup>58</sup>

5.43 Optus was the most vocal on this issue, suggesting that these arrangements are 'wholly inadequate' because the prospect remains that 'a retail telecommunications provider could gain an effective controlling stake in NBN Co which significantly compromises the reform credentials of the NBN'.<sup>59</sup> Optus submitted the NBN Co Bill should be amended so as to limit a retail telecommunications provider from taking more than a 20 per cent stake in NBN Co, and clearer rules should be established to prevent a minority shareholder from exercising effective control of the NBN Co.<sup>60</sup>

5.44 The Department explained that it was intended that regulations which would be made subject to consultation with the ACCC and which would be disallowable instruments, would sufficiently address concerns such as those voiced by Optus.<sup>61</sup> However, the Department also stated that 'the Government is now considering its approach in light of the submissions on the exposure drafts and the Implementation Study'.<sup>62</sup>

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57 NBN Co Bill, cl 41(1).

58 NBN Co Bill, cl 41.

59 Optus, *Submission 114*, p. 3.

60 Optus, *Submission 114*, p. 4.

61 Department of Broadband, Communications and the Arts, answer to question on notice, 20 April 2010 (received 23 April 2010), p. 12.

62 Department of Broadband, Communications and the Arts, answer to question on notice, 20 April 2010 (received 23 April 2010), p. 12.

5.45 Other submitters raised concerns about whether, during the term in which NBN Co is majority Commonwealth owned, private investors will have sufficient access to information provided by NBN Co to the Government. The Business Council of Australia submitted that:

The Bill does not, however, explicitly set out the rights to information for any future minority non-government owners of NBN Co... For the avoidance of any doubt, the Bill should set out the basis on which minority equity owners can request access to any information provided by NBN Co. to the government. In principle, all information provided to the Ministers for Communications and Finance should also be provided to minority equity holders.<sup>63</sup>

5.46 The Department stated in response that NBN Co 'should receive the same legal treatment as other Commonwealth companies' and referred to the continuous disclosure obligations under the *Corporations Act 2001* and the reporting obligations in the *Commonwealth Authorities and Companies Act 1997*.<sup>64</sup>

#### *Committee view*

5.47 The committee believes that, given regulations made under clause 41 will be legislative instruments, and hence subject to parliamentary scrutiny and disallowance, it is appropriate that restrictions on private ownership be provided for in regulations.

5.48 The committee believes that it is appropriate to explicitly set out the basis on which minority equity owners can request access to any information provided by NBN Co to the Government.

### **Recommendation 18**

**5.49 That the NBN Co Bill be amended to explicitly set out the basis on which minority equity owners can request access to any information provided by NBN Co to the Government.**

#### *Matters not currently addressed in the Bill*

5.50 A number of submitters raised additional matters that they argued should be addressed in the NBN Co Bill. Two key matters raised were:

- a need for additional provisions safeguarding consumer interests;<sup>65</sup> and
- that provision be made for national training standards and the development of national training and upskilling modules that will apply to members of the future workforce that will construct and install the NBN.<sup>66</sup>

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63 Business Council of Australia, *Submission 107*, p. 8.

64 Department of Broadband, Communications and the Arts, answer to question on notice, 20 April 2010 (received 23 April 2010), p. 13.

65 Australian Communications Consumer Action Network, *Submission 121*, p. 3.

### *Consumer interests*

5.51 Concerns about consumer interests – and suggestions for amendment to the NBN Co Bill to address these – were made by the Australian Communications Consumer Action Network (ACCAN). ACCAN made two primary suggestions:

- a proposal that the NBN Co Bill establish a designated consumer representative on the NBN Board and establish a consumer advisory group;<sup>67</sup> and
- that a regulatory instrument be adopted to ensure that wholesale and retail service providers have clear responsibilities in resolving end-user complaints;<sup>68</sup>

5.52 In oral evidence, ACCAN's representative, Ms Teresa Corbin, elaborated on how current consumer groups and the Telecommunications Industry Ombudsman are inadequately resourced to meet the needs of consumers in an NBN-world and that more formal arrangements between consumer interest positions and NBN Co need to be established.<sup>69</sup>

5.53 The committee does not believe it appropriate to establish a designated consumer representative on the NBN Co Board because it considers that such a position could be difficult to reconcile with directors' duties to act in the best interests of the company. However, the committee recommends the establishment of a consumer advisory group along the lines of the Consumer Consultation Forum. That forum is one to which the Australian Communications and Media Authority is required to have regard when performing its functions.

5.54 Further, the committee believes the question of complaints handling is one requiring urgent attention from the Government. It is deeply concerned by the evidence it received that the Telecommunications Industry Ombudsman is overwhelmed and ill-equipped to take on the additional workload that will emerge as the NBN is rolled out and becomes operational.

### **Recommendation 19**

**5.55 That the Government establish a consumer advisory group dedicated to the NBN. That the NBN Co Bill be amended to require NBN Co to have regard to the advice of that consumer advisory group when performing its functions.**

### **Recommendation 20**

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66 Communications and Information Technology Training Ltd, *Submission 127a and 127b*.

67 Australian Communications Consumer Action Network, *Submission 121*, p. 3.

68 Australian Communications Consumer Action Network, *Submission 121*, p. 3.

69 Ms Teresa Corbin, Deputy CEO, ACCAN, *Committee Hansard*, Canberra, 15 April 2010, p. 36.



**5.56 That the Government and NBN Co prepare a strategy to address how end-user complaints are to be handled, and review the sufficiency of current resourcing and processes of the Telecommunications Industry Ombudsman to handle the expected future workload.**

5.57 The committee addresses training of the future workforce deploying and installing the NBN in chapter seven below.

