



Submission to the Australian Competition and Consumer Commission (ACCC) in relation to section 577BA of the Telecommunications Act 1997

22 August 2011

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1. Executive Summary

1. The ACCC has requested NBN Co to provide the ACCC with a submission to assist the ACCC in relation to its consideration of Telstra's Structural Separation Undertaking (SSU).
2. Section 577A of the Telecommunications Act 1997 (**Telecommunications Act**) sets out matters to which the ACCC must have regard in deciding whether to accept Telstra's SSU. Section 577A requires the ACCC to have regard to the national interest in structural reform of the telecommunications industry and the impact of that structural reform on consumers and competition in telecommunications markets. The regulatory regime for this structural reform has now been largely enacted.
3. Section 577A also requires the ACCC to have regard to the matters set out in the *Telecommunications (Acceptance of Undertaking about Structural Separation – Matters) Instrument 2011* (**Ministerial Instrument**). Those matters include the Government's policy, the Statement of Expectations, NBN Co's Corporate Plan and the conduct that would be authorised under section 577BA upon the acceptance of the SSU.
4. Section 577A provides a unique statutory framework within which the ACCC is to consider Telstra's SSU. The Definitive Agreements are authorised by the operation of section 577BA and conduct to give effect to those agreements will be authorised upon acceptance of the SSU. The statutory framework of section 577A is to be contrasted with the test the ACCC is required to apply in assessing an application for authorisation under section 88 of the Competition and Consumer Act 2010 (CCA) and does not import concepts from that test.
5. NBN Co is in a position to make submissions to the ACCC as to how the Definitive Agreements:
 - (a) contribute to the achievement of Government policy;
 - (b) give effect to the Statement of Expectations;
 - (c) support the achievement of the Corporate Plan; and
 - (d) deliver the structural reform of the telecommunications industry that the Government wishes to achieve.
6. NBN Co anticipates that others, such as other industry participants, will be well placed to provide the ACCC with submissions as to how the structural separation of Telstra delivers the

industry reform (and consequential competition and consumer benefits) referred to in section 577A.

7. The key benefits arising from the Definitive Agreements are the delivery of structural reform and the facilitation of a commercially viable open access, wholesale only NBN consistent with the Government's objectives, and the benefits of that reform to consumers and competition. Those benefits are delivered by the Definitive Agreements as a package.
8. The Definitive Agreements also deliver the following specific benefits:
 - (a) Faster migration of customers to the NBN;
 - (b) Achieving structural separation of Telstra, by limiting Telstra's ability to migrate customers to a competing wholesale broadband platform, which would undermine the achievement of the Government's objectives of an industry structure with a national wholesale only, open access broadband network;
 - (c) Support of NBN Co's ability to deliver uniform national wholesale pricing;
 - (d) Facilitation of competition in wireless broadband;
 - (e) Reduction in construction costs, an increase in confidence in NBN Co's ability to deploy within the Government's time frame, a reduction of cost uncertainty, minimisation of community disruption and ensuring efficient roll out planning and protecting the integrity of the NBN;
 - (f) Avoiding inefficient and socially wasteful duplication of infrastructure; and
 - (g) Ensuring that Telstra is supplied on the same terms as other RSPs in accordance with the non-discrimination obligations and does not receive an unfair competitive advantage over other RSPs.
9. This submission is intended to assist the ACCC as follows:
 - (a) by way of context for NBN Co's submission, section 2 discusses the operation of sections 577A and 577BA;
 - (b) section 3 sets out how the Definitive Agreements contribute to the achievement of Government policy, give effect to the Statement of Expectations and support the achievement of the Corporate Plan;
 - (c) Schedule 1 summarises the Government's statements about the structural reform of the telecommunications industry it intends to achieve, why that structural reform is

in the national interest and the impact of that structural reform on consumers and competition in telecommunications markets; and

- (d) sections 4 to 9 set out specific benefits arising from the Definitive Agreements and address any perceived detriments arising from the Definitive Agreements. This part of the submission provided on the basis that the ACCC will have regard to these benefits as part of its consideration of the impact of structural separation on consumers and competition.

- 10. In response to the ACCC's request, NBN Co has also prepared an Information Guide as a public statement about the information NBN Co will provide to RSPs, to assist the ACCC's consultation on the SSU and Migration Plan.

2. ACCC consideration of Telstra's SSU

2.1 Telstra's Structural Separation Undertaking

- 11. On 29 July 2011, Telstra submitted a structural separation undertaking (SSU) and draft migration plan to the ACCC under sections 577A and 577BDA of the Telecommunications Act 1997.
- 12. On 23 June 2011, NBN Co entered into the Definitive Agreements¹ with Telstra under which Telstra agreed that, as the NBN Co Fibre Network² is progressively rolled out in areas, Telstra will disconnect its Copper Network³ in those areas and disconnect and deactivate the HFC Network⁴, other than in respect of certain pay TV services, in those areas.
- 13. The SSU states that "*these commercial arrangements will allow Telstra to achieve its commitment in this Undertaking to structural separation by the Designated Day*"⁵.

2.2 Elements of section 577A

- 14. In deciding whether to accept the SSU, the ACCC is to have regard to:

¹ On 23 June 2011, Telstra and NBN Co executed four documents known as the Definitive Agreements (**Definitive Agreements**). Those documents are the Implementation and Interpretation Agreement (**IID**), the Subscriber Agreement (**SA**), the Infrastructure Services Agreement (**ISA**) and the Access Deed (**AD**).

² As defined in the SSU

³ As defined in the SSU

⁴ As defined in the SSU

⁵ SSU, p 1 Background item F

- (a) the matters set out in an instrument in force under sub-section 577BA(7);
- (b) the national interest in structural reform of the telecommunications industry;
- (c) the impact of that structural reform on:
 - (i) consumers; and
 - (ii) competition in telecommunications markets; and
- (d) such other matters (if any) as the ACCC considers relevant.

15. In exercising the power under section 577A, the ACCC is required to have regard to each of the matters set out in section 4 of the Ministerial Instrument. Those matters include:

- (a) the Government's policy objective of improving the accessibility and quality of broadband services for consumers in Australia, including those in regional, rural and remote areas;*
- (b) the Government's support for a form of structural separation whereby Telstra will progressively migrate fixed-line carriage services that it supplies to retail customers to the national broadband network as that network is rolled out;*
- (c) the expected distribution of the long-term economic benefits for different types of consumers in different geographic areas that would occur as a result of the undertaking coming into force;*
- (d) the conduct that would be authorised under section 577BA of the Act as a consequence of the ACCC's acceptance of the undertaking or the undertaking coming into force;*
- (e) the Government's statement of expectations given to NBN Co dated 17 December 2010;*
- (f) NBN Co's Corporate Plan 2011-2013 dated 17 December 2010;*
- (g) the governance and operating framework for NBN Co, established by the National Broadband Network Companies Act 2011 and the Telecommunications Legislation Amendment (National Broadband Network Measures—Access Arrangements) Act 2011.*

16. The ACCC is also provided with guidance as to the form of structural separation considered by the Government to be consistent with its policy objectives (and therefore to be implemented via the SSU the ACCC is considering). The Explanatory Statement to the Ministerial Instrument requires the ACCC, in the context of paragraph 4(b) of the Ministerial Instrument, to consider the Definitive Agreements as the method of structural separation that is supported

by the Government “*as it delivers the government’s structural reform objectives of a wholesale-only network operating across the country which is not controlled by a retail provider*”.

17. Guidance as to the nature and scope of Telstra’s SSU is also provided by the *Telecommunications (Structural Separation – Networks and Services Exemption) Instrument (No. 1) 2011*.

2.3 NBN Co’s understanding as to the operation of section 577BA

18. Section 577BA authorises entering into a contract, arrangement or understanding (CAU) for the purposes of subsection 51(1) of the Competition and Consumer Act 2010 (CCA). The interaction between the ACCC’s role in considering Telstra’s SSU (and migration plan) and the operation of section 577BA involves a unique and unprecedented process.
19. If the CAU is entered into before the SSU is in force and the operative provisions of the CAU are conditional on the SSU coming into force, section 577BA(3) authorises conduct engaged in by Telstra or NBN Co to give effect to the CAU as long as a copy of the CAU is provided to the ACCC before the SSU is accepted by the ACCC.
20. If the CAU is entered into before the SSU is in force and the CAU contains a migration provision, section 577BA(4) authorises the entering into of that CAU by Telstra and NBN Co and section 577BA(5) authorises conduct engaged in by Telstra or NBN Co to give effect to the migration provision. A migration provision includes provisions for Telstra to cease supply of fixed line carriage services using a telecommunications network it is in a position to exercise control and for Telstra to commence to supply fixed line services to customers using the NBN and provisions in connection with those matters.
21. The Definitive Agreements are contracts that are authorised under section 577BA(3) or section 577BA(4). The Definitive Agreements were provided to the ACCC in accordance with section 577BA on 13 July 2011.
22. The ACCC is required to have regard to the conduct engaged in by Telstra or NBN Co to give effect to the Definitive Agreements, being the conduct that would be authorised under section 577BA of the Telecommunications Act as a consequence of the ACCC’s acceptance of the SSU or the SSU coming into force.
23. Section 577BA operates so that entry into the Definitive Agreements is authorised and conduct to give effect to those agreements will be authorised if the SSU comes into force. This statutory context does not require the ACCC to conduct a substantive evaluation of the

Definitive Agreements to determine whether the Definitive Agreements should receive the benefit of authorisation under section 577BA, for example by undertaking an assessment of the public benefits or anti-competitive detriment that may arise from the conduct or an assessment of the future state of competition with or without the Definitive Agreements.

24. NBN Co recognises that the Ministerial Instrument requires the ACCC to *'have regard to... the conduct that would be authorised under section 577BA of the Act as a consequence of the ACCC's acceptance of the undertaking or the undertaking coming into force'* and that the Explanatory Memorandum to the Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2010 stated that a purpose of section 577BA was to *'...enable the ACCC to scrutinise, at the time it is considering whether to accept a structural separation undertaking, the types of arrangements and conduct that will be authorised'*⁶. It is therefore necessary to consider what the language of *'have regard to'* and *'scrutinise'* involves in this context.
25. The ACCC's *"scrutiny"* of the Definitive Agreements, and *"having regard to"* arrangements in the Definitive Agreements that will be authorised by acceptance of the SSU, appears to involve the ACCC looking at the Definitive Agreements by reference to the Government policy objectives that are effectively summarised in section 577AA(6). This would include the ACCC considering whether the Definitive Agreements (as a package of arrangements) are consistent with those objectives.
26. If Telstra's SSU is not accepted, then Telstra will presumably be required to functionally separate.
27. Relevantly, the ACCC's submission to the Department's consultation process *"National Broadband Network: Regulatory Reform for 21st Century Broadband"* (June 2009), stated:

"The ACCC is of the view that functional separation, when successfully implemented, may go some way to addressing concerns regarding equivalence, and is superior to, the current operational separation regime. However, vertical integration of any form into downstream markets, even when subject to regulatory measures, will not ensure equivalence."

⁶Explanatory Memorandum to the *Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2010* - p102

The structural arrangements of Telstra during the transition to the NBN will be an important determinant of the nature and scope of competition which will exist in Australia's telecommunication markets for at least the next 8–10 years while the NBN is rolled out".

The ACCC is of the view that structural separation of Telstra is the only framework that will ensure equivalence in access during the transition to the NBN and is the only form of separation consistent with the type of wholesale–retail market structure the Government envisages for the NBN environment of the future".⁷

3. Structural reform of telecommunications industry

3.1 Structural reform of telecommunications industry and Government policy

28. The purpose of Part 33 of the Telecommunications Act (including sections 577A and 577BA) is to provide a framework for Telstra to voluntarily structurally separate, consistent with the market structure that will be delivered by the NBN, that is, a wholesale-only, open access telecommunications market structure, transforming the competitive dynamics in the Australian telecommunications industry.⁸

29. This is the structural reform to which the ACCC is required to have regard under section 577A.

30. The Government's statements about why that structural reform is in the national interest, and the impact of that structural reform on consumers and competition, are summarised in Schedule 1.

3.2 Role of the Definitive Agreements in achieving structural reform

31. The Government welcomed the announcement by Telstra and NBN Co that they had entered into a Financial Heads of Agreement on 20 June 2010. This agreement was supported by the Government on the basis that it would deliver structural separation by providing for the progressive migration of customer services from Telstra's copper and cable networks to the new wholesale-only network to be built and operated by NBN Co.⁹ This will result in a national outcome where there is a wholesale-only network not controlled by any retail

⁷ At pages 8-9

⁸ Explanatory Memorandum to the *Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2010* - p10

⁹ Explanatory Memorandum to the *Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2010* - p10

company - thereby creating better and fairer infrastructure access for service providers, greater retail competition and better services for consumers and businesses.¹⁰

32. On 23 June 2011, NBN Co and Telstra announced that they had entered into the Definitive Agreements on the rollout of the NBN. The Definitive Agreements translate the Financial Heads of Agreement into detailed legally binding agreements.¹¹ The Government's media release relating to the Definitive Agreements states that "*[t]he Definitive Agreements will allow for a cheaper, more-efficient rollout of the NBN, which will mean Australians will begin gaining access to the NBN sooner and hasten the Government's delivery of super fast broadband to all Australians... The Definitive Agreements are also an important step in the reform of the telecommunications industry, paving the way for structural separation of Telstra and the construction of the NBN. Telstra's structural separation is a critical reform that will enable the telecommunications sector to provide competitive and innovative services to Australian consumers*".¹² The Joint Media Release dated 23 June 2011 states that the Definitive Agreements are "*fundamental to structural reform of the telecommunications industry*".¹³

33. As noted by Telstra in the supporting material lodged with the SSU and Migration Plan,

*"The Definitive Agreements signed by Telstra and NBN Co, the SSU and Migration Plan will deliver fundamental change in the Australian telecommunications industry. The supply of regulated services on the legacy copper network progressively will be of less significance as the NBN fibre rollout quickly gathers pace and customers (both wholesale and retail) begin to migrate."*¹⁴

...

"The SSU commitments to structural separation (Part C) reflect, and will be driven by, the incremental process of deployment of the NBN and the disconnection of the Telstra copper networks and HFC networks in accordance with the Definitive

¹⁰ Explanatory Statement to the *Telecommunications (Functional Separation Requirements Determination—Further Extension of Period) Instrument 2011* - p2

¹¹ Joint Media Release - *Government - Telstra - NBN Co deal Delivers Historic Telecommunications Reform* - dated 23 June 2011

¹² Joint Media Release - *Government - Telstra - NBN Co deal Delivers Historic Telecommunications Reform* - dated 23 June 2011

¹³ J Gillard, S Conroy, P Wong, Joint media release - *Government - Telstra - NBN Co deal Delivers Historic Telecommunications Reform*, 23 June 2011

¹⁴ Telstra Supporting Material lodged with SSU and Migration Plan, 31 July 2011, p. 4

Agreements. The Explanatory Memorandum to the SSU Guidance makes clear that the approach taken by the Definitive Agreements is consistent with the Government's policy"¹⁵

34. The Explanatory Statement to the Ministerial Instrument states:

"For the purposes of paragraph 577A(6)(a) of the Act, section 4 sets out matters the ACCC is to have regard to in deciding whether to accept an SSU.

The government's telecommunications policy

The government's telecommunications policies are intended to dramatically improve the availability of broadband across Australia by creating a national network that is not controlled by a retail company or companies. Paragraph 4(a) of the Instrument requires the ACCC to have regard to the government's policy objective of improving the accessibility and quality of broadband services for consumers in Australia, including those in regional, rural and remote Australia.

Structural reform of the sector

Paragraph 4(b) requires the ACCC to have regard to the government's support for a form of structural separation whereby Telstra will progressively migrate fixed-line carriage services that it supplies to retail customers to the NBN Co fibre network as that network is rolled out. This recognises that there are a number of ways Telstra could choose to structurally separate under Part 33 of the Act."

In accordance with the definitive agreements with NBN Co, Telstra will elect to structurally separate by migrating its customer services to the NBN Co fibre network as that network is progressively rolled out. Most of the copper network would be disconnected and use of Telstra's HFC network would be limited to pay TV services (the scope of Telstra's SSU is discussed in the Explanatory Statement accompanying the Telecommunications (Structural Separation Undertaking— Networks and Services Exemption) Instrument 2011). This method of structural separation is supported by the government as it delivers the government's structural reform objectives of a wholesale-only network operating across the country which is not controlled by any retail provider.

Economic benefits of structural separation

¹⁵ Telstra Supporting Material lodged with SSU and Migration Plan, 31 July 2011, p. 17

Paragraph 4(c) requires the ACCC to have regard to the expected distribution of the long-term economic benefits for different types of consumers in different geographic areas that would occur as a result of Telstra's structural separation.

The statement of expectations given to NBN Co and NBN Co's Corporate Plan

Paragraph 4(i) and paragraph 4(j) require the ACCC to have regard to the government's statement of expectations given to NBN Co and NBN Co's Corporate Plan for 2011-2013. With Telstra electing, through the submission of an SSU based on migration to the NBN Co fibre network and by entering into the definitive agreements, to structurally separate by migrating customer services to the NBN Co fibre network, it is appropriate that the ACCC should have regard to the government's policy objectives for the NBN and how NBN Co proposes to meet those objectives, which are set out in these two documents."

35. As the Explanatory Statement to the Ministerial Instrument states, the Government's policy and the regulatory regime recognise and take account of the agreement between Telstra and NBN Co as outlined in the FHOA and implemented by the Definitive Agreements. The Government's ability to deliver the NBN commitments made in the Government's Commitment to Regional Australia agreement, the semi-distributed POI structure and the implementation of uniform national wholesale prices assume the entry into and giving effect to of the Definitive Agreements. NBN Co's Corporate Plan and the Statement of Expectations also assume the entry into and giving effect to of the package of arrangements constituting the Definitive Agreements.
36. As the Ministerial Statement and the Explanatory Statement make clear, the Definitive Agreements record the arrangements by which the Government's policy position, including structural separation of Telstra, is to be delivered.
37. The Government has decided to establish NBN Co to build and operate the NBN delivering superfast broadband to 93% of premises with fibre-to-the-premises (**FTTP**) technology. As noted in the Statement of Expectations, the Government's central NBN objectives are to deliver significant improvement in broadband service quality to all Australians, address the lack of high speed broadband in Australia, particularly outside of the metropolitan areas, and reshape the telecommunications sector. The Government recognises that access to affordable, high speed broadband is essential to the way Australians communicate and do business. It will drive productivity, improve education and health service delivery and better connect our cities, regional, rural and remote communities.

38. A key element of the Government's NBN initiative is to fundamentally change the structure of the Australian telecommunications industry by:
- (a) establishing NBN Co as a wholesale-only company and provide access to the NBN to all telecommunications retail service providers (**RSPs**) on an open and non-discriminatory basis; and
 - (b) legislating to allow Telstra to structurally separate on a voluntary basis, which may be achieved by means of progressively disconnecting customer premises from its copper network and HFC network (to be used only to provide certain pay TV services) as the NBN is rolled out, ie via the Definitive Agreements¹⁶.
39. The arrangements between NBN Co and Telstra, and the consequential structural separation undertaking by Telstra, are therefore vehicles for that transformation of the industry. The commercial arrangements are consistent with what is involved in, and required to achieve, structural reform as envisaged by the Government's policy objectives.
40. The Government's policy position has guided NBN Co's when negotiating the Definitive Agreements with Telstra. NBN Co has been particularly conscious of providing a level playing field and ensuring NBN Co is able to comply with its non-discrimination obligations.
41. The Definitive Agreements enable, realise and/or facilitate this industry reform because:
- (a) they provide for and maximise the migration of customers to the NBN Co fibre network, through Telstra's voluntary structural separation by means of disconnection obligations supported by restrictions on Telstra's use and disposal of its copper or HFC network, network preference commitments and restrictions on marketing wireless substitution.
 - (b) they support NBN Co's viability and ability to deliver the NBN and achieve the Government's objectives by removing the threat of opportunistic cherry picking of high-spend, low cost to serve customers by Telstra using its HFC network;
 - (c) they provide disincentives and consequences for a party under the Definitive Agreements that may wish to engage in conduct during the term of the Definitive Agreements which is inconsistent with the commercial commitments and therefore which could undermine the Government's objectives for the NBN and industry

¹⁶ Explanatory Memorandum to the *Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2010* – p3

reform, including, for example, by providing certain services in competition with NBN Co (and inconsistent with the concept of structural separation as provided for in section 577A(1));

- (d) they give Telstra certainty as to the terms on which NBN Co will provide access to the Basic Service Offering (BSO) (but NBN Co will ensure that those terms do not discriminate between Telstra and other RSPs);
- (e) they enable NBN Co, where efficient and economic to do so (as required by the Statement of Expectations), to use Telstra's infrastructure;
- (f) they provide measures which ensure Telstra does not gain any material advantages over other RSPs in connecting to the NBN, including ring-fencing arrangements in relation to the use of Telstra and NBN Co confidential information; and
- (g) they do not go beyond what is required to achieve the Government's policy objective of achieving structural separation and facilitating a viable open access wholesale only NBN.

3.3 Ability of NBN Co to achieve Government's objectives is fundamental to structural reform envisaged by Government

42. The structural reform of the telecommunications industry envisaged by the Government has two elements:

- (a) establishing an NBN to fulfil or deliver the Government's policy objectives including as set out in the Statement of Expectations; and
- (b) the structural separation of Telstra.

43. Structural separation of Telstra is central to the Government's objectives for fundamental reform in the Australian telecommunications sector. The Definitive Agreements with NBN Co are the primary means by which Telstra will achieve structural separation. As noted in the Explanatory Statement to the Ministerial Instrument, in accordance with the Definitive Agreements, *"Telstra will elect to structurally separate by migrating its customer services to the NBN Co fibre network as that network is progressively rolled out. Most of the copper network would be disconnected and use of Telstra's HFC network would be limited to pay TV services"*.

44. As further noted in the Explanatory Statement to the Ministerial Instrument, *"this method of structural separation is supported by the government as it delivers the government's structural*

reform objectives of a wholesale-only network operating across the country which is not controlled by any retail provider”.

45. In turn, NBN Co is intended to “*dramatically improve the availability of broadband across Australia by creating a national network that is not controlled by a retail company or companies.*”
46. The Government's NBN objectives are set out in the Statement of Expectations and include:
- (a) **wholesale only:** the NBN has a wholesale-only, open access mandate;
 - (b) **coverage:** the NBN is to provide access to high speed broadband to all Australian premises, reaching 93% of premises with fibre-to-the-premises technology by the end of the roll out period, with a minimum fibre coverage obligation of 90%;
 - (c) **regional areas:** prioritise the roll out in regional areas and bring forward the introduction of fixed wireless and satellite services so that regional Australia can get better broadband access sooner (pursuant to commitments made by the Government in the "Commitment to Regional Australia" agreement with the Independent Members Mr Tony Windsor and Mr Rob Oakeshott);
 - (d) **technology and broadband speeds:** fibre-to-the-premises technology providing broadband speeds of up to 100 megabits per second for 93% of Australian homes, schools and businesses. Peak speeds of at least 12 megabits per second for remaining premises, served by a combination of next generation fixed wireless and satellite technologies;
 - (e) **roll out period:** 9.5 years as set out in NBN Co's Corporate Plan; and
 - (f) **pricing:** uniform national wholesale prices.
47. The Definitive Agreements support and facilitate NBN Co's ability to achieve these objectives. They support NBN Co's ability to achieve its targeted take up of services and projected financial returns. For example, the access granted to Telstra’s facilities and infrastructure ensures the fibre optic component of the NBN serving 93% of premises can be rolled out efficiently and avoids duplicating infrastructure.
48. The Definitive Agreements are the culmination of almost 2 years of continuous negotiations between NBN Co and Telstra, reflecting the extremely complex and far-reaching nature of those negotiations. Accordingly, they are a negotiated outcome, representing a fine balance between the long term needs and interests of each party, in order to ensure that the agreements

will stand the test of time. It should also be noted that the Definitive Agreements were negotiated having regard to the legislative reforms that were formulated, debated and enacted by Parliament in parallel with the negotiations. Whilst the Definitive Agreements have a clear role in achieving the Government's public policy objectives and industry reform agenda through their role in giving effect to Telstra's SSU, it is also important to understand that both parties have negotiated the Definitive Agreements with their respective commercial interests firmly in mind, as befits Telstra as a publicly listed company and NBN Co as a Government Business Enterprise. The Definitive Agreements therefore contain certain provisions that each party believes are essential in order to protect its long term interests during the 35+ years over which the Definitive Agreements will operate.

3.4 Definitive Agreements and NBN Co's Corporate Plan

49. The ACCC is required to have regard to the Government's policy objectives, the Statement of Expectations given to NBN Co dated 17 December 2010 and NBN Co's Corporate Plan 2011-2013 dated 17 December 2010.
50. NBN Co's Corporate Plan recognises the Government's objectives and provides detailed financial and operational information regarding the building of the NBN to meet these objectives.
51. In developing the Corporate Plan, NBN Co made the following key assumptions:
 - (a) "that the Telstra Definitive Agreements will be completed in accordance with the terms of the Financial Heads of Agreement and result in clarity of the decommissioning of existing networks and migration of existing Telstra End Users onto the NBN Co platform" (Corporate Plan, p.48);
 - (b) "the construction of the NBN is estimated to take 9.5 years to complete in a Telstra deal scenario" (Corporate Plan, p.22);
 - (c) "that any Internet protocol-based services, broadband services or services requiring a return path transmission from the user will be progressively migrated from the Telstra HFC network onto the NBN Co network as the NBN is rolled out (as per the Financial Heads of Agreement) (Corporate Plan, p.48);
 - (d) "that the Telstra Definitive Agreements will be completed in accordance with the terms of the Financial Heads of Agreement for use of existing passive infrastructure (conduits acquired, ducts, exchanges and backhaul leased where fit-for-purpose)" (Corporate Plan, p. 50);

- (e) "In formulating the Revenue Plan a number of key assumptions have been made...Existing Copper Network progressively decommissioned during NBN roll out ". Telstra HFC Network progressively deactivated during NBN roll out for IP-based services, voice services, broadband services or services requiring a return path transmission from the End User (Corporate Plan, pp. 109-110);
- (f) "effective protections are in place to guard against cherry picking in both Greenfields development and low cost high revenue regions" (Corporate Plan, p. 48); and
- (g) "the deal with Telstra ...substantially mitigates a number of key risks, notably in relation to demand forecasts and the cost and speed of deploying the FTTP network" (Corporate Plan, p. 51).

52. The provisions of the Definitive Agreements support the achievement of the Corporate Plan and the Government's objectives, by providing for the structural separation of Telstra through the progressive disconnection of Telstra's copper network and HFC network (other than certain pay TV services) within the NBN fibre footprint.

53. These commitments also promote the Government's broader objectives for the NBN through maximising the uptake of the NBN by Telstra's existing customers and ensuring that Telstra is incentivised to support the NBN's fixed line connections in the future, and to support NBN Co's achievement of the revenue assumptions that NBN Co sets out in its Corporate Plan.

54. The commercial terms contained in the Definitive Agreements, including the disconnection payment, reflect the value to NBN Co of having Telstra commit to prefer the NBN as the Fixed Line Connection to Premises and agree to the restrictions on use of and dealings with its copper and HFC networks.

4. Benefits arising from Definitive Agreements

4.1 Delivery of structural reform in accordance with Government's objectives

55. The key benefits arising from the Definitive Agreements are the delivery of structural reform and the facilitation of a commercially viable open access, wholesale only NBN consistent with the Government's objectives, and the benefits of that reform to consumers and competition. Those benefits are delivered by the Definitive Agreements as a package, as set out in section 3.

56. As set out in paragraph 48, the Definitive Agreements are a negotiated outcome which as a whole deliver acceptable outcomes to the parties, finely balanced and negotiated having regard to the legislative reforms that were formulated, debated and enacted by Parliament in parallel

with the negotiations. Changes to components could lead to a need to changes other components to rebalance the total outcome. For this reason, individual components of the Definitive Agreements need to be considered as a total package that delivers structural reform in accordance with the Government's objectives.

4.2 Promotion of economic efficiency and investment in telecommunications markets

57. The Definitive Agreements promote economic efficiency and investment in telecommunications markets. The Regulation Assessment - Addressing Telstra's Vertical and Horizontal Integration within the Explanatory Memorandum to the Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2010 sets out a detailed assessment of the regulatory impact of the Government's decision to implement measures to address Telstra's horizontal and vertical integration. Many of the views expressed in the Regulation Assessment were taken from submissions to the *National Broadband Network: Regulatory Reform for 21st Century Broadband Discussion Paper*¹⁷. The Regulation Assessment summarises the problems of Telstra's integration, the views of industry and the ACCC and the benefits arising from Government action, including "a healthy competitive market, thereby improving quality, prices and choices for end users, and creating a sector where different business models and innovation can prosper"¹⁸. As noted by the ACCC,

*As well as ensuring true equivalence structural separation may also encourage dynamic efficiencies through the promotion of competition in downstream services and may also permit lighter-handed regulation elsewhere (such as price cap regulation), and may increase the effectiveness of the targeted regulatory intervention that is currently applied to Telstra*¹⁹.

4.3 Benefits from NBN as ubiquitous national broadband network

58. Consistent with the Government's policy objectives, the NBN will be a ubiquitous national broadband network in Australia. This policy is expected to deliver significant benefits to

¹⁷ Submissions to this discussion paper can be found at: http://www.dbcde.gov.au/broadband/national_broadband_network/regulatory_reform_for_21st_century_broadband/national_broadband_network_regulatory_reform_for_21st_century_broadbandsubmissions

¹⁸ Regulation Assessment - Addressing Telstra's Vertical and Horizontal Integration within the Explanatory Memorandum to the Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2010, p 22

¹⁹ ACCC submission to DBCDE consultation process "National Broadband Network: Regulatory Reform for 21st Century Broadband (June 2009), p34

consumers in the form of improved access to next generation broadband services as well as increased competition in retail broadband markets.

59. The natural monopoly characteristics which are inherent in fixed broadband networks mean that the establishment of the NBN as a national open access wholesale only fibre network to 93% of premises will maximise productive and allocative efficiency. Moreover it will also avoid the wasteful duplication of a high fixed cost network and will facilitate NBN Co's ability to achieve uniform national wholesale pricing.
60. For end users, increased productive efficiency means lower prices. Additionally, increased allocative efficiency will result from an efficient use of and investment in, the NBN as opposed to investment in technologically inferior alternative networks which would simply result in excess capacity. Increased allocative efficiency reflects a better use of society's scarce resources.

4.4 Benefits of fibre technology

61. The rollout of a high speed fibre broadband network to 93 per cent of Australian premises will achieve the Government's policy objective of providing improved broadband to all Australians. As an enabling technology, the delivery of improved access to broadband will generate a plethora of direct and indirect benefits to Australian consumers, businesses and the government sector. Such benefits will be realised through a greater use of productivity enhancing applications such as telecommuting, telehealth and video conferencing²⁰.
62. The Definitive Agreements support the roll out of that network as set out in sections 3 and 5-8.
63. The delivery of a high-speed broadband network using fibre-optic cable (often shortened to "fibre") is capable of providing distinct advantages over other technologies, such as the existing copper telephone wires or wireless-based systems. These advantages include:
 - (a) Fibre is capable of carrying broadband signals at full speed for more than 40 kilometres from an exchange and is immune from nearby interference. In contrast, ADSL over the existing copper telephone network, signal speed decreases as distance increases from the exchange and generally becomes unserviceable beyond 4.5kms.
 - (b) Fibre provides symmetric speeds. By contrast most broadband networks today are like one-way roads. ADSL, which the majority of internet users have today, provide

²⁰ The information in this section is provided by way of context as it is not the purpose, nor should it be, of this submission to provide evidence of such benefits

download speeds of around 12 Mbps and upload speeds of no more than 1 Mbps. Similarly HFC cable TV connections which have download speeds of up to 100 Mbps have limited upload speeds of just 2 Mbps. This asymmetry tempers the end-user experience and limits the type of applications commonly used by end users. By contrast fibre networks provide symmetric connection speeds thus enabling a whole range of business and creative activities that cannot be done today. This is especially important for enabling high-quality videoconferencing.

- (c) Fibre networks are capable of delivering greater data capacity to individual premises compared to existing ADSL and HFC networks. Accordingly, the NBN's capacity will allow households and businesses to use a wide range of high bandwidth online applications, simultaneously.
- (d) Fibre networks provide improved stability and reliability of service relative to ADSL and HFC networks. Fibre is the most reliable broadband technology that supports applications that need guaranteed levels of performance.
- (e) Fibre networks are scalable. The NBN will initially be capable of supplying services that are faster than anything that can be achieved now and in the future the same fibre network will support increasingly faster speeds simply by replacing the equipment at each end. Hence, the use of national open access fibre network is an efficient and cost effective way of meeting Australia's current and future broadband needs.

4.5 Other benefits arising from Definitive Agreements

64. The Definitive Agreements deliver the following specific benefits:

- (a) Faster migration of customers to the NBN, due to the network preference and supporting obligations (see section 5.2);
- (b) Limitation of Telstra's ability to migrate customers to a competing wholesale fixed line broadband platform, which would undermine the achievement of the Government's objectives of an industry structure with a national wholesale only open access broadband network (see sections 5.2, 5.6 and 5.8);
- (c) Provision of further support for NBN Co's ability to deliver uniform national wholesale pricing, given anti-cherry picking provisions in legislation (see sections 5.3 and 5.7);
- (d) Facilitation of competition in wireless broadband (see section 5.4);

- (e) Reduction in construction costs from use of Telstra ducts and exchanges (see section 6.2);
- (f) Supporting NBN Co's ability to deploy within Government's time frame (see section 6.3);
- (g) Reduces cost uncertainty (see section 6.4);
- (h) Minimises community disruption (see section 6.5);
- (i) Avoiding inefficient duplication of infrastructure (see section 6.6);
- (j) Efficient roll out planning and protecting integrity of NBN (see section 6.7).
- (k) Ensuring that Telstra is supplied on same terms as other RSPs in accordance with the non-discrimination obligations (see section 7.2); and
- (l) Protections and restrictions on use of information to ensure Telstra does not receive an unfair competitive advantage over other RSPs (see section 8).

65. Each of those benefits is discussed in further detail below.

5. Subscriber Agreement benefits

5.1 Overview

66. The Subscriber Agreement deals with the disconnection by Telstra of copper-based Customer Access Network services and broadband services on its HFC cable network (but not certain pay TV services on the HFC) that are provided to premises in the NBN fibre footprint as the NBN is rolled out.

5.2 National interest in structural reform of telecommunications industry and impact on consumers and competition in telecommunications markets

67. The progressive disconnection of Telstra's copper network and HFC broadband network within the NBN fibre footprint and the migration of Telstra's customers to the NBN supports both elements of structural reform of the telecommunications industry, that is, the structural separation of Telstra and the roll out of the NBN in a manner consistent with the Government's NBN objectives.

Structural separation of Telstra

68. The Telstra copper network and the HFC network have been the focus of competition concerns about vertical and horizontal integration respectively as noted in Schedule 1.
69. The Subscriber Agreement delivers the progressive disconnection of Telstra's copper network and HFC broadband network within the NBN fibre footprint to achieve that structural separation. This is supported by the requirement that Telstra exclusively use the NBN Co fibre network as the fixed line connection to Premises in the NBN fibre footprint to provide fixed line carriage services to those Premises for 20 years and the restrictions on Telstra reconnecting the copper network or reconnecting and reactivating the HFC network. This requirement is entirely consistent with section 577A(1).
70. Telstra is not prevented from continuing to compete in the market for high speed fixed broadband services. It also avoids the potential for Telstra to duplicate infrastructure with natural monopoly characteristics. Such conduct may be privately profitable for Telstra, but socially wasteful. In this regard the Subscriber Agreement is both pro-competitive and economically efficient.
71. As noted by Optus in its submission to *Regulatory Reform for the 21st Century*, the duplication of Optus' HFC network by Telstra in the early 1990s may have been a successful strategy for Telstra, but came at a high cost to competition and consumers²¹. As further noted by Optus²²:

7.8 The economics of fixed line networks in Australia are challenging. Optus' experience through its own investment in a major HFC network is that the market cannot efficiently support multiple fixed line networks of scale. Tellingly, both Telstra and Optus were forced to write down the value of their respective HFC investments by a combined \$2.4 billion, despite these networks addressing some of the most densely populated and affluent areas of Australia. Such an outcome damages consumer interests because prices are necessarily higher to support these sub-scale investments.

7.9 It should be clear that divestiture would not solve this problem because it leaves both subscale fixed line networks in place. Once the network was built the damage was done and neither network (regardless of ownership) is likely to be capable of achieving a viable scale. Optus submits that Government should be wary of

²¹ Optus submission, *Regulatory Reform for the 21st Century*, June 2009, p60

²² Optus submission, *Regulatory Reform for the 21st Century*, June 2009, pp60-61

attempting to encourage alternate facilities based investment through the forced divestiture of Telstra's HFC network.

7.10 More significantly, to ensure that the NBN is successful and delivers on its promised benefits Government should be seeking to create a market structure that will maximise take-up of services on the NBN. It would appear to be wholly inconsistent with this objective for Government to require Telstra to divest its HFC network and encourage a third party to take on such a sub-scale investment and seek to lock-in customers to that network.

72. The Subscriber Agreement also includes a provision which limits Telstra's ability to build new fibre networks. NBN Co considers that this provision is fundamental to NBN Co's ability to meet the Government's policy objectives. In the absence of this provision, Telstra would be able to build a fibre network in substitution for the copper and HFC networks which NBN Co had paid Telstra to disconnect, potentially using the disconnection payments from NBN Co to fund that network. Telstra's construction of a substantial fibre network could adversely affect NBN Co business case and the ability of NBN Co to meet its obligations to offer uniform national wholesale pricing.
73. It could also undermine the structural separation of Telstra, through substituting a fibre network for the copper and HFC networks, which would risk giving rise to the same competition concerns as those arising from Telstra's ownership and operation of the copper and HFC networks. The benefits arising from the HFC provisions are set out in sections 5.5 to 5.10 .
74. The structural separation of Telstra is in the national interest, as set out in Schedule 1.
75. The benefits to consumers and competition arising from the structural separation of Telstra are set out in Schedule 1.

Establishment of NBN

76. The Subscriber Agreement maximises the uptake of services supplied using the NBN by Telstra's existing customers and ensures that Telstra is incentivised to support the NBN's fixed line connections in the future, including through the requirement that Telstra exclusively use the NBN Co fibre network as the fixed line connection to premises in the NBN fibre footprint to provide fixed line carriage services to those premises for 20 years, the restrictions on Telstra reconnecting the copper network or reconnecting and reactivating the HFC network, protection against Telstra promoting wireless services as substitutable for fibre and the Substantial

Adverse Event provisions, which protect against behaviour such as circumvention of the network preference provisions.

77. These commitments enable NBN Co to deliver an NBN that meets the Government's policy objectives, the requirements of the Statement of Expectations and the assumptions made in the Corporate Plan.
78. The benefits to consumers and competition delivered by the NBN (in accordance with the Government's policy objectives and Statement of Expectations) are set out in Schedule 1.
79. Other benefits arising from the Subscriber Agreement are set out in sections 5.3 to 5.11 below.

5.3 Uniform national wholesale pricing

80. Another key element of the Government's structural reform of the telecommunications industry is the requirement that NBN Co charge access seekers uniformly for services across its network for all technologies and for the basic service offering, in support of the Government's objective of enabling uniform national wholesale prices²³.
81. Uniform national wholesale pricing, which is distance and technology independent, provides a wide range of substantial economic and social benefits:
 - (a) Uniform national wholesale pricing will lower the barriers to entry for RSPs, facilitating a higher number of players with significant scale and therefore greater levels of retail competition and innovation. This can be contrasted with pricing for the Unconditioned Local Loop Service (ULLS) which has experienced competition in only a limited number of exchanges (540 out of ~5000 exchanges) due primarily to the costs associated with long-distance, non-metro backhaul.
 - (b) Lower barriers to entry will facilitate more extensive retail competition and in turn facilitate greater take-up by end-users.
 - (c) Greater competition in rural and regional Australia lowers the costs of doing business in those geographies, and addresses concerns about the emerging "digital divide". The number and frequency of transactions increases with access to affordable broadband and this contributes to the capacity of regional areas to increase their relative attractiveness for investment and employment.

²³ Statement of Expectations, p. 7

- (d) More ubiquitous take up of high speed services by end-users will in turn stimulate the development of new applications and services that require these speeds, increasing the utility of the NBN.
- (e) Higher numbers of services in operation and a shift in population and commuting patterns are likely to result in meaningful carbon abatement from reduced transport requirements and increase the feasibility of smart metering and demand-side energy management.
- (f) Increase the viability of long-term in-home health care and reduce the geographic restrictions of education and training.²⁴

82. In its January 2009 report to the Expert Panel on the NBN, the ACCC recognised:

"Wholesale cross-subsidies — that is, averaged access prices — are unsustainable if there is infrastructure-based competition in regions which provide the subsidy (e.g. metropolitan markets)".²⁵

...

"However, if access seekers in metropolitan areas have no other option but to purchase access services from the NBN operator — that is, if there is no possibility that the NBN will be bypassed — averaged access charges may be sustainable".²⁶

...

"The sustainability of cross-subsidies at the wholesale level will depend on whether there is competition in the provision of wholesale services, say because service-based competitors are able to build their own networks to compete, and/or because there are alternative platforms from which service-based competitors can purchase wholesale services. If there is competition at this level, averaged access prices will not be sustainable".²⁷

²⁴ NBN Co Public Position Paper: Proposed NBN Co Points of Interconnect, p. 2

²⁵ ACCC Assessment of Proposals, National Broadband Network Process: Report to Expert Panel, Appendices Public Version (January 2009), p111

²⁶ ACCC Assessment of Proposals, National Broadband Network Process: Report to Expert Panel, Appendices Public Version (January 2009), p111

²⁷ ACCC Assessment of Proposals, National Broadband Network Process: Report to Expert Panel, Appendices Public Version (January 2009), p131

83. NBN Co notes that a number of RSPs have recently announced their proposed uniform national retail pricing for services which will be delivered using the NBN²⁸.
84. The following provisions of the Subscriber Agreement provide protection against Telstra engaging in cherry picking activities on a scale that might materially affect the economics of NBN Co and its ability to deliver uniform national wholesale pricing as required by the Statement of Expectations:
- (a) the requirement that Telstra disconnect its copper network and exclusively use the NBN Co fibre network as the fixed line connection to Premises in the NBN fibre footprint to provide fixed line carriage services to those Premises for 20 years;
 - (b) the restrictions on Telstra reconnecting the copper network or reconnecting and reactivating the HFC network, or permitting or enabling a third party to do so;
 - (c) the protection against Telstra promoting wireless services as substitutable for fibre, although Telstra remain free to compete in the market for the supply of wireless services;
 - (d) the Substantial Adverse Event provisions.
85. These provisions will increase the take-up rate of the NBN by those customers, thereby improving NBN Co's ability to cross-subsidise lower margin areas and offer lower uniform national wholesale pricing and deliver the public benefits that arise from such pricing.
86. NBN Co's ability to cross-subsidise lower margin areas would be limited should Telstra be in a position to cherry pick high value customers.
87. NBN Co considered that these separate contractual provisions were fundamental to NBN Co's ability to meet the Government's policy objectives. In the absence of the provisions, Telstra would be able to attract customers to a platform in substitution for the copper and HFC networks which NBN Co had paid Telstra to disconnect, potentially funded by the disconnection payments from NBN Co. This could undermine the NBN business case and the ability of NBN Co to meet its obligations to offer uniform national wholesale pricing.
88. These contractual provisions operate together with the level playing field regime and the network and services exemptions provided in the Telecommunications (Structural Separation -

²⁸ See for example: Internode, *Internode unveils initial retail pricing for NBN services*, Press Release 21 July 2011, Dodo Australia Pty Ltd, *NBN paves the way for Dodo unlimited data download*, Media Release 9 August 2011 and Suzanne Tindal, *Exetel releases commercial NBN prices*, ZDnet.com.au, 25 July 2011

Networks and Services Exemption) Instrument (No. 1) 2011 (**Exemption Instrument**) to achieve the Government's policy objectives and in particular the ability of NBN Co to offer uniform national wholesale pricing. The provisions negotiated with Telstra are an appropriate complement to the level playing field regime and the scope of Telstra's SSU (as determined by the Exemption Instrument the Minister has made, in the knowledge of the contractual arrangements being negotiated between NBN Co and Telstra). All three elements work together, and are required, to achieve the Government's policy objectives.

89. The Government's position as set out in the explanatory statement for the Exemption Instrument is as follows:

“The definitive agreements between Telstra and NBN Co will provide for the progressive disconnection of Telstra's copper network and the broadband capability of its hybrid fibre-coaxial (HFC) network as the wholesale only NBN Co fibre network is rolled out. This will deliver the envisaged structural reform of the telecommunications sector.

Undertaking structural separation in this manner will lead to a national outcome where there is a wholesale only network operating across the country which is not controlled by any retail company. Separation between the network provider and retail providers will mean better and fairer infrastructure access for service providers, greater retail competition and better services for consumers and businesses.

This method of structural separation is supported by the government and was one of the ways foreseen under Part 33 of the Telecommunications Act that Telstra could propose.”

5.4 Competition for wireless broadband services

90. The NBN will utilise FTTP technology and hence be complementary to (rather than competitive with) wireless technologies. The complementarity of fixed and wireless technologies is reflected in the business models of many telecommunications providers. Indeed both Telstra and Optus emphasise that as a full service telecommunications provider their ability to bundle both fixed and wireless services is a key competitive advantage. Similarly, Telecom New Zealand, Singtel, Eircom, France Telecom, Bell Canada, Verizon, Belgacom, Deutsche Telekom, Telia Sonera, AT&T and SwissCom, as well as many other telecommunications providers, all compete in both the fixed and wireless markets.

91. The provisions against Telstra promoting wireless services as substitutable for fibre services will have no effect on competition for wireless broadband services. It is important to note that Telstra does not currently promote its wireless services with reference to its fixed network. To the contrary, Telstra promotes its wireless network as superior to other wireless networks in terms of speed, coverage, reliability and value for money. This is consistent with Telstra's business model of being a full service telecommunications provider and being able to meet customers fixed and wireless telecommunications needs.
92. Rather, those provisions support the migration of customers to the NBN and are integral to the viability of NBN Co's business case.
93. While the parties each consider that wireless services are complementary to fibre services, it is possible for wireless broadband services to deliver speeds of 12Mbps (the initial entry level service to be offered by NBN Co on its fibre network). As noted in NBN Co's Corporate Plan (p. 41), wireless network speeds are limited by both distance and contention within a cell's coverage. Because wireless network performance is dependent on the number of users per cell, the ability of wireless to compete at higher bandwidths is largely determined by the number of base stations deployed. It is conceivable that wireless service speeds in particular areas may be comparable to the speed of NBN Co's entry level services as the NBN rolls out.
94. The payment to Telstra for the disconnection of copper and HFC premises, without the restrictions on promotion of wireless services as substitutable for fibre services and the provisions for a deduction in the disconnection payment for wireless substitution, could create significant commercial incentives for Telstra to migrate its customers to the Telstra Next-G wireless networks, because Telstra would then avoid the need to pay NBN any ongoing access fees and retain a higher proportion of its revenues, but still collect the payment for disconnections. Telstra could then use some of the disconnection payments from NBN Co to finance marketing and sales activities including additional subsidies on wireless handsets or customer premises equipment. Telstra's ability to support a large number of customers on its wireless network is further enhanced through its ability to leverage recently remediated infrastructure (for the NBN Co roll-out) to deploy additional base stations and new wireless technologies such as LTE. On the 8 August 2011, Telstra announced the launch of Australia's first commercial 4G/LTE device²⁹.
95. Telstra's dominant position in retail markets means it is in a position to influence the migration choice of many customers. The disconnection payments are made to Telstra upon

²⁹ *Telstra to launch Australia's first commercial 4G/LTE device*: Telstra Media Release, 8 August 2011

disconnection of premises in accordance with the Definitive Agreements, rather than upon migration of Telstra's customers to the NBN. Accordingly, appropriate limitations on Telstra's ability to migrate customers to another Telstra platform are integral to the viability of the NBN Co business case. The ability of NBN Co to roll out the NBN in accordance with the Government's objectives depend upon the viability of the NBN Co business case. In essence, Telstra required certain value to its shareholders in exiting its access network business. NBN Co required sufficient confidence that Telstra would provide business to NBN Co (rather than Telstra migrating customers to another Telstra platform). The terms agreed in the Definitive Agreements reflect the balance struck between these objectives.

96. The wireless promotion and substitution protections in the Subscriber Agreement have no impact on Telstra's ability to develop its wireless network as it sees fit. It can promote wireless services as complementary to fibre services and it is not required to use the NBN fibre network to connect Telstra mobile base stations. It would not prevent Telstra from offering to the end-user a wireless only service.
97. As noted in the Explanatory Memorandum to the CCS Bill³⁰, given Telstra's clear commitment to structural separation, the Government amended the Bill so that the "excluded spectrum regime" cannot be determined if the SSU is accepted. If the SSU is accepted and the Minister declares under section 577J(3) and (5) that Telstra is exempt from the requirement to divest its HFC network and its interests in Foxtel, Telstra will be able to seek spectrum for any long term wireless plans it may have.
98. The wireless marketing protections in the Subscriber Agreement have no impact on any other suppliers of wireless services.
99. Telstra's attitude towards the wireless marketing provisions is reflected in Telstra's CEO David Thodey comments following the announcement of the definitive agreements on the 23 June 2011. *"The only constraint we have is to directly promote wireless instead of the NBN fixed broadband, so that's very very specific".... "I mean, our intent is to get a customer to migrate and use the fixed NBN broadband and to take wireless. It is only a very limited constraint of a direct substitution for NBN fixed broadband, so I don't think it's an issue at all"* ³¹.

³⁰ Explanatory Memorandum to the *Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2010* - p41

³¹ *NBN will not stop wireless promotion: Thodey*, Technology Spectator, 27 June 2011

100. NBN Co considers that the NBN will facilitate increased competition and lower prices for wireless broadband services. The NBN will also facilitate the use of femto cells, which are very small wireless cells that are installed in the home or office and potentially offer users lower cost mobile data when at home or in the office. It is expected that the NBN will drive a proliferation of femto cells. On 28 July 2011, Optus launched Australia's first national Femtocell service, "Optus 3G Home Zone".³² On 21 October 2010, VHA announced that it planned to rollout Femtocells to consumers at some time in 2011.³³
101. Greater use of wireless technologies in the home and office will intensify competition between fixed and mobile devices. Furthermore, the growth in the use of devices that are seamless between fixed and wireless platforms will mean that end-users do not have to pay for multiple devices which will lower their overall telecommunications spend.³⁴

5.5 HFC provisions are consistent with Government policy

102. The HFC provisions in the Definitive Agreements are consistent with the Government's wider policy objectives of structural reform of the telecommunications industry, the achievement of uniform national wholesale pricing and the provision to all Australians of improved broadband services on an open access platform. Contrary to claims that the decommissioning of Telstra's HFC broadband capability is anti-competitive, the arrangements in the Definitive Agreements are both pro-competitive and economically efficient.
103. The HFC provisions should be supported on the basis that they are part of the Definitive Agreements package which was negotiated as a whole to achieve acceptable outcomes to the parties as set out in paragraphs 48 and 55 above. They are an important element of achieving the necessary value to Telstra and NBN Co's ability to justify that value in Telstra providing sufficient confidence in providing business to NBN Co, in achieving the proposed level of structural separation and in supporting NBN Co's capacity to deliver uniform national wholesale pricing.

5.6 The HFC provisions will help deliver structural separation

104. The migration of Telstra's HFC broadband customers to the NBN removes significant instances of vertical integration in the supply of fixed-line services. It is consistent with Government policy that competition outcomes would be improved by the provision of fixed-

³² *Time to unshackle the home phone with launch of Optus Home Zone*: Optus Media Release, 28 July 2011

³³ *VHA eyes mobile data with network expansion*: itnews, 21 October 2011

line services on a wholesale-only open access basis and reinforces Telstra's structural separation. In the absence of such an arrangement, Telstra would be able to continue to operate as a vertically integrated operator potentially advantaging itself over independent retail service providers (RSPs) operating on the NBN.

5.7 The HFC provisions will facilitate the achievement of uniform national wholesale pricing

105. As set out in the Statement of Expectations, consistent with the Government's policy objective of enabling uniform national wholesale prices, NBN Co is required to charge access seekers uniformly for services across its network for all technologies and for the basic service offering. This requires NBN Co to cross subsidise from its national revenue flows to offer a common entry level broadband price structure.
106. The ability of NBN Co to deliver uniform national wholesale pricing while operating on a financially viable basis would be undermined if Telstra, or any other operator of Telstra's HFC network, was able to continue to operate the network and 'cherrypick' customers in high-income, low-cost, high-density areas. Accordingly, the HFC provisions of the Definitive Agreements address the most significant threat of cherry picking to NBN Co.
107. It is important to note that the Parliament has passed a number of measures that are intended to protect NBN Co from cherry picking behaviour by other companies which would detract from NBN Co's ability to deliver the policy objectives discussed above. These include:
- (a) legislative authorisations under the Competition and Consumer Act for conduct by NBN Co that is reasonably necessary to achieve uniform national pricing of eligible services; and
 - (b) in order to ensure that end-users have access to the same high-quality superfast broadband services, regardless of the network provider, and assist the NBN in meeting its objectives nationally by ensuring it operates on a more level regulatory playing field, the Parliament supported mandatory requirements that:
 - (i) new mass market fixed-line access networks which supply superfast carriage services with a download transmission speed normally of more than 25 Mbps must operate on a wholesale-only basis and offer a Layer 2 bitstream service;

- (ii) services provided on these superfast networks are subject to the key access, non-discrimination and transparency obligations that apply to NBN Co; and
- (iii) carriers comply with any appropriate codes and standards that are put in place, so that FTTP networks are consistent with NBN specifications.

108. The interaction between the contractual provisions, the level playing field regime and the Network and Services Exemption is set out in section 5.3.

5.8 The HFC provisions will enable the provision of improved broadband on an open access basis

109. The HFC provisions in the Definitive Agreements are a commercially negotiated outcome which is consistent with the Government's policy of ensuring all Australians benefit from significantly improved broadband access on an open access platform for effective retail competition. As a result of the HFC provisions in the Definitive Agreements, broadband customers in the Telstra HFC footprint will now have access to an open access network with improved technical capacity compared to that available on the HFC network, noting the inherent capacity constraints of HFC as a shared access technology, and the NBN fibre network will be able to provide services of up to 1 Gigabit per second. It also recognises that the fibre-based NBN provides a more robust platform for future network and service upgrades.

5.9 The HFC provisions are not anticompetitive

110. It may be argued that the HFC provisions in the Definitive Agreements are anticompetitive because they require Telstra to disconnect and cease supply of broadband services using the HFC network. Indeed, in relation to information contained in NBN Co's Corporate Plan, one commentator argued that:

“What is most striking about the plan is that its anti-competitive features are far worse than previously understood - since the plan is to decommission hybrid fibre coaxial (HFC) cable modems, street by street, as fibre is installed.”³⁵

111. These criticisms rely on three assumptions all of which are incorrect and fundamentally fail to appreciate the broader policy context.

³⁵ Michael Porter, 25 November 2010, Competition Bites the Dust see <http://www.ceda.com.au/research/infrastructure/national-broadband-network/2011/4/1/competition-bites-the-dust>

112. The first assumption is that the existing HFC network provides the opportunity for infrastructure based competition with the NBN. This is incorrect for several reasons. First, given that the NBN will operate on an open access, wholesale only basis it is questionable whether the continued operation of the Telstra HFC network would result in greater competition in downstream retail markets. In this regard, it is worthy to note that HFC networks are shared platforms and have a number of technological limitations which makes the provision of wholesale services using HFC networks highly problematic. In fact NBN Co knows of no HFC network anywhere in the world which is being used to deliver layer 2 wholesale services which are comparable to the fibre based services which will be provided over the NBN.
113. The second assumption is that competition between two or more networks is more productively efficient than having one national open-access wholesale only network. In other words, it is assumed that having the HFC network compete with the NBN will result in lower prices to consumers. Such an assumption ignores the well recognised natural monopoly characteristics of fixed broadband networks.
114. Given the high fixed cost nature of both HFC and fibre networks, lower prices will only result from the combination of minimising total costs and by maximising network take-up. Even having regard to the fact that Telstra's existing network is a sunk cost (i.e. that the fixed costs have already been incurred), the ongoing operation of Telstra's HFC network for the purposes of supplying broadband carriage services will not be costless, but will instead increase total costs. By way of example, on 10 March 2009, Telstra announced that it would upgrade its HFC network in Melbourne with the installation of DOCIS 3.0 software. This investment was expected to cost approximately \$300 million and cover about 1 million homes³⁶.
115. In addition to increased costs, competition between Telstra's HFC network and the NBN would likely have an adverse impact on the take-up of the NBN and its ability to deliver uniform national prices. The combination of higher production costs and lower take-up will mean higher access prices for NBN Co's layer 2 bitstream services. Higher access prices will dampen competition between RSPs in downstream broadband markets resulting in higher retail prices and decreased investment and innovation by RSPs.
116. The third assumption underlying statements that the HFC provisions of the Definitive Agreements are anticompetitive is that there are parties willing to purchase or utilise Telstra's HFC network in order to compete with the NBN. This implies that Telstra would be willing to

³⁶ *Telstra unveils super-fast cable broadband – Melbourne first to be upgraded:* Telstra Media Release, 10 March 2009

supply wholesale broadband services over the network once it has structurally separated or that a third party would be willing to purchase the network for the purpose of competing with the NBN. Both of these outcomes are unlikely. First, the provision of wholesale services, by either Telstra or a third party, will require additional investment in the network, however such investment will be high risk given that currently no HFC operators provide wholesale services and the technology solution once developed will be unproven. Second, the anti-cherry picking provisions contained in the Access Arrangements Act discourages further investment in Telstra's HFC network by either Telstra or any other third party.

5.10 The HFC provisions are efficient and pro-competitive

117. The arrangements in the Definitive Agreements relating to Telstra's HFC network will maximise productive and allocative efficiency for the following reasons.
- (a) They prevent the use of Telstra's HFC network for cherry picking thus increasing the number of users of the NBN. This in turn will maximise the economies of scale and scope that are inherent in the NBN, lead to lower access prices for RSPs and facilitate the achievement of uniform national wholesale prices;
 - (b) They lower the risk profile of the NBN. As a consequence NBN Co's future cost of debt will be lower. This will mean lower access prices for NBN Co's services;
 - (c) They avoid the unnecessary cost that would be required to upgrade the existing HFC network in order for it to provide NBN comparable wholesale services; and
 - (d) They allow Telstra to continue to earn a return from their cable investment by providing pay TV-transmission services to Foxtel and certain other pay TV content providers while at the same time satisfying Telstra's requirement to structurally separate.
118. In addition to promoting productive and allocative efficiency the provisions in the Definitive Agreements relating to Telstra's HFC network are pro-competitive. Because the arrangements in the Definitive Agreements are economically efficient, access prices for the NBN will be lower. Lower access prices will in turn encourage competitive entry into downstream markets and facilitate ongoing innovation and product development by RSPs. Lower access prices may also encourage competitive investment by RSPs in other markets such as in the backhaul market.
119. Also there are substantial coverage gaps in both the Telstra and Optus HFC networks which the NBN rollout will be able to address. The Telstra network is unable to serve about 2 per

cent of houses within its coverage areas. The Optus network has 36 percent of houses within its coverage area as unserviceable. Optus claims that its coverage gap is compromised of MDUs, distances and heritage overlays. Any solution that relies on the HFC networks would require these gaps to be filled³⁷. Without the agreements with Telstra and Optus, it is unlikely that it would be economical to service these gaps.

5.11 Substantial Adverse Events

120. The Subscriber Agreement provides disincentives and consequences for a party under the Definitive Agreements that may wish to engage in conduct during the term of the Definitive Agreements which is inconsistent with the commercial commitments and therefore which could undermine the Government's objectives for the NBN and industry reform, including, for example, by providing certain services in competition with NBN Co. This Substantial Adverse Events mechanism is no wider than required to effectuate the policy and legislative settings set by the government for structural reform of the telecommunications industry.

Limited circumstances in which the SAE can be triggered

121. The circumstances in which the SAE mechanism can be triggered are limited and NBN Co considers the SAE test is a very high threshold.
122. In addition, the SAE clause only applies for the same period of time as the network preference clause applies ie for 20 years from the Commencement Date.
123. The SAE mechanism can only be triggered if:
- (a) Telstra engages in competition with NBN Co in the market for the provision of carriage services to premises which has the effect (or is highly likely to have the effect of) substantially adversely affecting NBN Co's fibre network business; or
 - (b) NBN Co engages in competition with Telstra in the market for the supply of retail carriage services or the market for supply of mobile carriage services in Australia which has the effect (or is highly likely to have the effect of) substantially adversely affecting Telstra's business in those markets.
124. Given the long term nature of the Definitive Agreements and the difficulty of identifying now every single example of conduct, the parties have set out a non-exhaustive list of examples of conduct that could trigger the SAE clause – however, the test would always require

³⁷ McKinsey & Company and KPMG, *National Broadband Network Implementation Study*, released 6 May 2010, p.108

competitive conduct in the specified market which has a substantial adverse effect on the core business of other party.

125. This test sets a high threshold that limits the regime to applying only where a party acts in a manner that is fundamentally inconsistent with the commercial assumptions on which the Definitive Agreements were based and only where that conduct has a substantial adverse effect on the core business of the other party.
126. Further limiting the scope of the SAE mechanism, the parties have agreed certain competitive conduct which will not trigger the SAE.
127. For example, the following conduct engaged in by Telstra will not trigger a SAE:
- (a) the installation of new P2P fibre and provision of P2P services where that conduct is bona fide proportionate competitive activity in the market for fixed line carriage services in Australia to meet the competition in that market or to main proportionate competitive advantage in relation to Telstra's fixed line networks (other than any competitive advantage in relation to the NBN Co fibre network) or in the market for services or solutions which Telstra provides using P2P fibre; and
 - (b) bona fide proportionate competitive activity in the market for the supply of mobile carriage services in Australia to meet the competition in that market, or to maintain proportionate competitive advantage in relation to Telstra's mobile networks or its mobile carriage services.

Limited variations to the Subscriber Agreement as a result of the SAE

128. If the SAE clause does apply, both the nature and extent of the variations that can be made to the Subscriber Agreement as a result of the operation of the SAE clause are limited. The Subscriber Agreement provides clear boundaries as to the scope of the changes that can be made.
129. Specifically, the variation must only be a modification or deletion of existing provisions in the Subscriber Agreement which puts the affected party in a position to more effectively compete with the other party and/or the imposition of restrictions which have the effect of putting each party in the same position in which it would have been had the SAE not occurred.
130. Further, in all circumstances, the overall effect of the variation must be proportionate to the competitive activities of the party which gave rise to the SAE.

131. The parties consider that conduct to give effect to the SAE clause is conduct that will be authorised upon the SSU coming into force. The terms of the SAE clause limit the circumstances in which it applies and the variations that are permitted to be made. The terms of the clause limit the extent to which the parties are permitted to vary the Definitive Agreements and set the boundaries of the conduct that may be engaged in by the parties to give effect to the SAE clause. The ACCC, in scrutinising the Definitive Agreements, should consider the boundaries within the SAE clause and the limited variations that are permitted as a result of the SAE.
132. In addition, if the parties were to enter into a new agreement, the entry into that agreement and conduct engaged in to give effect to provisions of that agreement would be authorised under section 577BA(8), if Telstra enters into that new agreement in order to comply with an undertaking in force under section 577A. NBN Co also notes that although the terms of section 577BA operate so as to authorise all conduct that gives effect to the Definitive Agreements, such conduct (including variations to give effect to the SAE clause) will not necessarily require authorisation for the purposes of section 51(1) of the CCA.

6. ISA benefits

6.1 Overview

133. The ISA contains the detailed terms for the long-term provision of access to three types of infrastructure and related services by Telstra to NBN Co: dark fibre links, rack spaces in exchanges, ducts and associated duct infrastructure (pits and manholes). In addition, Telstra provides access to its Lead in Conduits (**LICs**) for NBN Co's use in connecting premises. Telstra retains property in all the infrastructure except for those LICs used by NBN Co, which become NBN Co's property once NBN fibre is installed in the LIC.
134. The ISA is an agreement under which Telstra grants NBN Co certain rights to enable NBN Co to access and use Telstra's existing infrastructure in order to roll out the NBN. As the NBN is rolled out, Telstra will disconnect premises from its copper and HFC network, to achieve structural separation and migration of customers to the NBN in accordance with the Government's objectives. It is not an agreement between competitors to share infrastructure.

135. The ISA contains a number of provisions that are typically included in long term access and supply agreements that underpin substantial infrastructure investment³⁸.

6.2 National interest in structural reform of telecommunications industry and impact of that structural reform on consumers and competition in telecommunications markets

136. The ability of NBN Co to deliver the NBN that meets the Government's objectives and within the time frame set out in the Corporate Plan depends on NBN Co's ability to access and use Telstra's existing infrastructure.

137. Without the ISA, NBN Co would have to build most of this infrastructure itself, or secure regulated access. Either of these alternatives is likely to significantly extend the rollout period and to result in substantially higher costs to NBN Co.

138. The ISA supports delivery of the NBN in accordance with the Government's objectives, the Statement of Expectations and NBN Co's Corporate Plan and hence supports the delivery of structural reform of the telecommunications industry.

139. That structural reform is in the national interest, as set out in Schedule 1.

140. The benefits to consumers and competition in telecommunications markets arising from the roll out of the NBN in accordance with the Government's NBN objectives are set out in section 1. The provisions of the ISA support the delivery of these benefits to consumers and competition in telecommunications markets.

141. Other benefits arising from the ISA are set out in sections 6.3 to 6.7 below.

6.3 Increased confidence in NBN Co's capacity to deploy

142. Under the ISA, NBN Co gains access to a substantial proportion of the infrastructure that is needed to rollout the NBN.

143. The alternative to entering into the Telstra Transaction is that NBN Co would have to build most of this infrastructure itself, or secure regulated access. Either of these alternatives is likely to significantly extend the rollout period and to result in substantially higher costs to

³⁸ See, for example: Re: AGL Cooper Basin Natural Gas Supply Arrangements (1997) ATPR ¶¶41-593 at 44,216; Applications for Authorisation Mereneie Producers - Gasgo Sales Agreement ACCC Final Determination 7 April 1999

NBN Co. The build alternative would also be substantially more disruptive to communities and would be likely to result in a higher proportion of the network being built aerially, which could be expected to result in increased community dissatisfaction.

144. Under the Infrastructure Services Agreement, it is projected that Telstra will supply around 60% of the exchange rack spaces and all of the dark fibre links (which are required by NBN Co for its transit network) progressively over the first 3.5 years from execution of the Definitive Agreements. This infrastructure will be delivered in a number of releases which will enable NBN Co to establish a series of interconnected fibre transmission rings.

145. In the absence of entering into the ISA, NBN Co would not be able to complete such an ambitious program itself within the timeframe.

6.4 Lower cost uncertainty

146. The cost of NBN Co building itself the infrastructure that is accessed or acquired under the Definitive Agreements is estimated to be significantly higher than the cost to NBN Co under the Definitive Agreements, and is subject to a significant level of risk on a number of levels, including:

- (a) The proportion of the network that could be deployed aerially (particularly in the absence of additional carrier powers and immunities);
- (b) Negotiating extensive infrastructure access arrangements;
- (c) The costs of remediating Telstra infrastructure under regulated access;
- (d) Construction costs for the underground network build; and
- (e) Resource constraints in the construction industry that could impact costs and/or timing.

147. The Definitive Agreements provide a substantially higher level of certainty in NBN Co's capital expenditure and operating expenditure. The level of risk when installing fibre in existing infrastructure (i.e. ducts, pits and exchanges) is significantly lower than having to install the underlying infrastructure itself.

6.5 Minimising community disruption

148. The ability to utilise existing infrastructure will not only enable NBN Co to roll out the NBN more efficiently, but will also minimise the cost and disruption to communities.

149. As noted in the joint media release, the Definitive Agreements provide for the reuse of suitable Telstra infrastructure and for Telstra to progressively structurally separate by decommissioning its copper network and broadband HFC network capability during the NBN fibre rollout. This means less disruption to communities and less use of overhead cables.³⁹
150. In the absence of the Definitive Agreements, NBN Co would need to undertake extensive trenching in streets, with the resultant disruption and inconvenience to communities. NBN Co would also need to increase the proportion of its aerial build.
151. The use of Lead in Conduits will also minimise the disruption to end-users.

6.6 Avoiding inefficient duplication of infrastructure

152. The Definitive Agreements provide for the efficient re-use of existing telecommunications infrastructure on a national scale.
153. The alternative would be for NBN Co to substantially replicate Telstra's existing infrastructure, resulting in wasteful duplication which is socially inefficient.

6.7 Efficient roll out planning and protection of NBN integrity

154. It is essential that NBN Co has as much certainty as possible that infrastructure will be available when and where it is needed in order for NBN Co to be able to plan an efficient Rollout of the network.
155. The ISA provisions provide that certainty. If Telstra was permitted to decommission, relocate or dispose of the underlying infrastructure at its discretion, there would be uncertainty as to the ability of NBN Co to access and use that infrastructure to roll out and operate the NBN to meet the Government's NBN objectives.
156. Restrictions on laying and removing cables and on sub-ducting are intended to protect the integrity of the NBN.

7. Access Deed benefits

7.1 Overview

157. The Access Deed documents the high-level commitments made by NBN Co to Telstra in respect of the terms of supply for NBN Co's BSO and the charging for certain wholesale supply services. As NBN Co's product and service offering remains under development, and

³⁹ J Gillard, S Conroy, P Wong, Joint media release - *Government - Telstra - NBN Co deal Delivers Historic Telecommunications Reform*, 23 June 2011

ongoing industry consultation, the complete terms of supply could not be agreed and documented at the time the Definitive Agreements were entered into..

158. Nothing in the Access Deed prevents NBN Co from complying with its legislative obligations not to discriminate between access seekers.

7.2 Telstra does not receive advantages over other RSPs

159. NBN Co is to operate on an open access basis and comply with its Category B Standard Access Obligations on a non-discriminatory basis. NBN Co has been particularly conscious of providing a level playing field and its non-discrimination obligations in negotiating the Definitive Agreements, including the Access Deed.

160. NBN Co intends that the terms of access to the BSO will be made available to third party access seekers via NBN Co's WBA and/or SAU. Development of the WBA and SAU is ongoing and involves industry consultation.

161. The terms of the Access Deed and the WBA/SAU give Telstra certainty, while at the same time ensuring that Telstra is not supplied on terms that are more favourable than the terms on which other access seekers are supplied, in accordance with the non-discrimination obligations.

8. Information provision and confidentiality

8.1 Information exchanged under Definitive Agreements for roll out purposes

162. The Definitive Agreements contain provisions which require information to be disclosed and used to give effect to the Definitive Agreements, to roll out the NBN and to operate networks.

163. The parties have negotiated confidentiality arrangements which seek to balance the need to enable information to be used and disclosed to give effect to the Definitive Agreements and to operate networks, but ensure that neither party uses or discloses that information to gain an unfair competitive advantage.

164. The confidentiality arrangements include ring fencing provisions. The purpose of the ring-fencing provisions is to ensure appropriate restrictions on the use by a party of confidential information of the other party that it obtains through the implementation of the transactions set out in the Definitive Agreements.

165. Under the confidentiality provisions, the parties have also agreed to consult with, and to take account of any concerns raised by, the ACCC concerning the use and disclosure by Telstra of NBN confidential information and by NBN Co of Telstra confidential information.

166. The parties note that the Migration Plan Principles require that the Final Migration Plan include measures dealing with Telstra's use of relevant information it receives from NBN Co. As a general matter, NBN Co believes the ACCC should also play an appropriate role in relation to ensuring that Telstra does not gain an unfair competitive advantage in relation to the use or disclosure of information while it separates.

8.2 Information Guide

167. NBN Co, at the request of the ACCC, has prepared and will publish an Information Guide titled *Migrating to the National Broadband Network*. The purpose of this Information Guide is to provide Access Seekers and other interested parties with a high level overview of the end-to-end processes and framework for migrating end-users to the NBN in the context of the Definitive Agreements and Telstra's Structural Separation Undertaking.

9. Public detriment

9.1 No public detriment arises from Definitive Agreements

168. NBN Co does not consider that any public detriment arises from the Definitive Agreements.

169. However, NBN Co is aware of public criticism of aspects of Definitive Agreements and addresses that criticism in this section. NBN Co considers that the public benefits outlined above outweigh any anti-competitive detriment that could be said to arise from the Definitive Agreements.

9.2 NBN Co as a new monopoly

170. A number of commentators have observed that NBN Co will be a monopoly provider of high-speed broadband fibre services.

171. It has been argued that the migration of customers from the existing Telstra HFC infrastructure to the NBN and the decommissioning of existing infrastructure will remove infrastructure-based competition, creating a new wholesale-level monopoly which will result in higher prices for consumers⁴⁰.

⁴⁰ Australian (Lauren Wilson), Labor hails 'historic milestone', 24 June 2011; Malcolm Turnbull, Conroy Holds Gun to Telstra's Head - Shoots Own Foot, 23 June 2011 (see <http://www.malcolmturnbull.com.au/media/releases/conroy-holds-gun-to-telstra%e2%80%99s-head-%e2%80%93-shoots-own-foot/>) and most recently in his speech to the National Press Club on 3 August 2011; Courier Mail (Steven Scott), NBN deal to keep network complete, 24 June 2011; West Australian (Nick Butterfly), Telstra finally signs up for move to NBN, 24 June 2011; Victorian Government Submission to the House of Representatives Standing Committee on Infrastructure and Communications Inquiry into the Role and Potential of the National Broadband Network, p12; Australian (Henry Ergas), Dial M for Monopoly and Send the Bill to Consumers, 24 June 2011; Australian (Features), One way or another this will be Labor's monument, 24 June 2011.

172. Such observations raise concerns that NBN Co will seek to earn economic profits and may exercise its market power to the detriment of competition. Other concerns include that in the absence of competition NBN Co will face little incentive to minimise costs or to innovate. While these concerns are valid each of these has been addressed by the regulatory regime applying to NBN Co.
173. The ability for NBN Co to earn economic profits is limited given that NBN Co is prohibited from providing a service which is not a declared service. This means that all revenue and profits earned by NBN Co will be subject to regulatory oversight by the ACCC. Moreover, as detailed in NBN Co's discussion paper *Introducing the NBN Co SAU*, NBN Co is committed to lodging with the ACCC a Special Access Undertaking (SAU). The SAU will set out a number of commitments which will provide NBN Co the opportunity, but not a guarantee, to recover its costs and earn an appropriate return on capital over a 30 year period. The SAU will also establish prudency measures to ensure that NBN Co's is only allowed to recover costs which are efficiently incurred.
174. Concerns that NBN Co may exercise its market power to the detriment of competition are addressed by the legislative amendments contained in the Access Arrangements Act and the NBN Companies Act:
- (a) The NBN Companies Act contains a wholesale-only supply obligation along with 'lines of business restrictions' which together prohibit NBN Co from competing in downstream retail markets. Accordingly, NBN Co will have no incentive to restrict or limit the supply of wholesale services to the detriment of competition in retail markets.
 - (b) The Access Arrangements Act requires NBN Co to supply on a non-discriminatory basis. This requirement means that NBN Co is prevented from favouring any one or group of access seekers to the detriment of competition⁴¹.
175. In addition, NBN Co does not have a retail arm. As noted by the ACCC, "without a retail arm, a wholesale-only operator would gain little from favouring one access seeker over another."⁴² This is a very different structure to the vertical and horizontal integration of Telstra. The structure of NBN Co means that the competition concerns that arose from Telstra's structure

⁴¹ Explanatory Memorandum (and Supplementary Explanatory Memorandum) to *Telecommunications Legislation Amendment (National Broadband Network Measures - Access Arrangements) Bill 2010*.

⁴² ACCC, Submission to the Department of Broadband, Communications and the Digital Economy, National Broadband Network: Regulatory Reform for 21st Century, June 2009, pp33-34.

are unlikely to arise. In any event, the NBN Companies Act contains powers to enable the Government to take steps to address any structural concerns that might arise in the future.⁴³

176. As a result of the Definitive Agreements, broadband customers in the Telstra HFC footprint will now have access to an open access network with improved technical capacity compared to that available on the HFC network, noting the inherent capacity constraints of HFC. The NBN fibre network will be able to provide services of up to 1 Gigabit per second. The fibre-based NBN provides more robust platform for future network and service upgrades.
177. As a consequence of competition in downstream markets and constant technological change in the industry there will be considerable pressure on NBN Co to innovate and undertake product development. For this reason NBN Co has committed to establish a Product Development Forum (PDF). As detailed in the *Product Development Forum (PDF) Processes* (released on 28 July 2011) the intention of the PDF is to establish a forum by which NBN Co can work with RSPs on an equal basis to undertake product development activities in an effective and cost efficient manner.

9.3 Wireless marketing restriction undermines competition between fixed and wireless networks/services

178. It has been argued that the provisions of the Definitive Agreements restricting the ability of Telstra to promote wireless services as a substitute to the NBN will undermine competition that may otherwise exist between services offered on the NBN and those wireless services the subject of the restriction⁴⁴. To the contrary this clause is little more than a formal recognition that Telstra wishes to perpetuate its existing business model of being a full service telecommunications provider.
179. The operation and likely effect of the wireless marketing and substitution clauses is set out in section 5.4 above. Those provisions will not undermine the ability of Telstra or any other provider of wireless services to invest in wireless networks or supply wireless services. Those provisions support the migration of customers from Telstra's fixed line networks to the NBN.

⁴³ *National Broadband Network Companies Act 2011*, Divisions 3 and 4

⁴⁴ Australian (MITCHELL BINGEMANN, ANNABEL HEPWORTH), NBN deal with Telstra 'absurd and wasteful', 4 July 2011; Australian (Paul Fletcher), BROADBAND MONOPOLY IS BAD POLICY, BAD BUSINESS, AND BAD FOR YOU, 30 June 2011 [Paul Fletcher is a Liberal MP, a former telecommunications executive and author of *Wired Brown Land: Telstra's Battle for Broadband* (New South Books, 2009)]; Australian (Terry McCrann), Non-compete clause exposes flaws of NBN, 25 June 2011; Australian (Annabel Hepworth, Tracy Lee, additional reporting: Lauren Wilson, Mitchell Bingemann), Business Fears Curbs on Competition: NBN power grows with \$11bn deal, 24 June 2011

180. While Telstra is restricted from marketing its wireless services as substitutable for the fibre-to-the-premises services to be offered on the NBN, Telstra is not restricted from otherwise marketing those wireless services on the basis of the features offered by its wireless services.
181. Telstra is also not restricted from otherwise competing freely in the market for the supply of wireless services. The parties consider that wireless services are complementary to fibre services.
182. As noted in NBN Co's Corporate Plan, there are currently five main technologies being used to deliver broadband to residential consumers in Australia:
- (a) Telstra's copper network (ADSL; ADSL 2+);
 - (b) Telstra and Optus HFC networks;
 - (c) Fibre (e.g. Greenfields);
 - (d) Wireless; and
 - (e) Satellite⁴⁵.
183. Whilst each of these technologies is able to compete effectively for a share of the broadband market at relatively low speeds, technologies, other than fibre, have technical limitations that make delivery at higher speeds increasingly difficult⁴⁶.
184. It is possible for wireless broadband services to deliver speeds of 12Mbps (the initial entry level service to be offered by NBN Co on its fibre network). However, the quality of wireless broadband services is highly sensitive to the number of users on a cell, meaning that advertised rates of 10-25Mbps often translate into actual rates of less than 2-3Mbps. Exhibit 2.15 of NBN Co's Corporate Plan (p41) illustrates this sensitivity for the next generation of wireless, highlighting that despite the promise of LTE providing 100Mbps, average actual user throughput will be considerably less:
185. The Government's policy objectives to provide superfast broadband to all Australians in the national interest over the long term would in part be thwarted by wireless substitution as the productivity gains and future proofing of the fibre based fixed line network cannot be achieved to the same degree by wireless network services owing to technical limitations.

⁴⁵ Corporate Plan, p. 38

⁴⁶ Corporate Plan, p. 38

186. As set out in section 5.4 above, these provisions have no effect on other providers of wireless services. The wireless marketing protections in the Subscriber Agreement have no impact on Telstra's ability to develop its wireless network as it sees fit. It can promote wireless services as complementary to fibre services and it is not required to use the NBN fibre network to connect Telstra mobile base stations.
187. NBN Co considers that the NBN will facilitate further competition in the provision of wireless broadband services, as set out in section 5.4 above.

9.4 Wireless marketing restriction could undermine technological innovation

188. It has been argued that the restriction on promoting wireless services as a substitute for the NBN will stifle technological innovation and the provision of new technologies to Australian consumers⁴⁷.
189. As discussed above, Telstra is restricted only from marketing its wireless services as substitutable for the fibre-to-the-premises services to be offered on the NBN, but is otherwise free to compete in the market for the supply of wireless services (including promoting wireless services as complementary to fibre services).
190. To the extent that there are further developments in wireless technology enabling the provision of faster wireless services to consumers, Telstra will be free to offer those services to its customers. The wireless marketing restrictions will not act as a disincentive for Telstra to invest in developing improved wireless technologies should it wish to do so.
191. The restrictions placed on Telstra's ability to market wireless services as substitutable for fixed line services provided over the NBN will in no way affect the ability of other wireless service providers to do so (provided such claims can, in the future, in fact be substantiated).
192. Even if Telstra lacked any incentive to develop new wireless technologies, the wireless marketing restrictions placed on Telstra could not have that same effect on the other wireless service providers (now and in the future) who are not subject to those restrictions.

⁴⁷ Courier Mail (Tim Hughes), 'Dinosaur' forced on telco, 27 June 2011 [Tim Hughes is a director of Value Capital Management]; Australian (JENNIFER HEWETT), Gillard gambles on delivering a digital future, 25 June 2011; Australian (Henry Ergas), Dial M for Monopoly and Send the Bill to Consumers, 24 June 2011; Australian (Annabel Hepworth, Tracy Lee, additional reporting: Lauren Wilson, Mitchell Bingemann), Business Fears Curbs on Competition: NBN power grows with \$11bn deal, 24 June 2011.

193. As noted above, the NBN will facilitate the use of Femto Cells, which are very small wireless cells that are installed in the home or office and potentially offer users lower cost mobile data when at home or in the office. It is expected that the NBN will drive a proliferation of Femto Cells and assist in facilitating the concept of 'fixed/mobile convergence'.
194. Greater use of wireless technologies in the home and office will intensify competition between fixed and mobile devices. Furthermore, the growth in the use of devices that are seamless between fixed and wireless platforms will mean that end-users do not have to pay for multiple devices which will lower their overall telecommunications spend.

Schedule 1

Summary of Government statements about benefits of structural reform for consumers and competition

1.1 Structural reform is in the national interest

1. It is clear that Parliament considers the method of structural separation in accordance with the Definitive Agreements to be in the national interest. Section 577BA was included in the *Competition and Consumer Act 2010 (CCA)* "in recognition that Telstra's progressive migration of customers from its copper and subscription television cable networks to the new wholesale-only fibre network, in accordance with an undertaking accepted by the ACCC, is in the national interest and will promote structural reform of the telecommunications industry"⁴⁸.
2. The terms of s577BA state that "the object of this section is to promote the national interest in structural reform of the telecommunications industry...".
3. In the Second Reading Speech to the Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2010 Mr Albanese stated that "structural reform is clearly in the national interest" and that the Financial Heads of Agreement between Telstra and NBN "is a key milestone to achieve Telstra's structural separation through the progressive migration of customer services from Telstra's copper and subscription television cable networks to the new wholesale-only network".⁴⁹
4. NBN Co's wholesale-only, open access mandate is designed to solve the current structural issues in the telecommunications sector.⁵⁰ The Government's long term objectives for NBN Co set out in the Statement of Expectations⁵¹ include:

"To achieve a truly competitive telecommunications industry and in support of the NBN, the Government is implementing reform of the industry. The establishment of

⁴⁸ Explanatory Memorandum to the *Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2010* - p3. See also p2 of the Explanatory Memorandum where the Financial Heads of Agreement were expressly acknowledged: 'The implementation of that Agreement will provide for the progressive migration of customer services from Telstra's copper and subscription television cable networks to the new wholesale-only fibre network to be built and operated by NBN Co and would deliver the envisaged structural reform of the telecommunications sector'.

⁴⁹ A Albanese, Second Reading Speech *Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2010*, 20 October 2010

⁵⁰ Explanatory Memorandum to the *Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2010* - p9

⁵¹ Letter dated 17 December 2010 from the Minister for Finance and Deregulation and the Minister for Broadband, Communications and the Digital Economy to the Chairman of NBN Co, with the subject "Statement of Expectations"

*NBN Co with a wholesale-only, open-access mandate is a key element of this reform.*⁵²

5. Consistent with the market structure that will be delivered through the NBN, Part 33 of the Telecommunications Act provides a framework for Telstra to voluntarily structurally separate. If Telstra does not voluntarily structurally separate, the functional separation of Telstra will be required under Part 9 of Schedule 1 to the Telecommunications Act. The Government has made it clear that it would prefer Telstra to vertically structurally separate, on a voluntary basis, and to transition to the NBN.⁵³
6. The Government considers that these structural reforms provide a once-in-a-generation opportunity to create a level playing field and enable competition and investment to flourish for the benefit of consumers.⁵⁴
7. The Government considers that this structural reform is in Australia's national interest for the following reasons:
 - (a) Telstra's high level of integration has hindered the development of effective competition in the telecommunications sector. Telstra's ownership of the two largest fixed line networks in Australia has limited competitive tension in the telecommunications sector, and therefore choice for consumers.⁵⁵ There have been long-standing and widespread concerns that the existing telecommunications structure is failing consumers, businesses and the economy in general;⁵⁶
 - (b) The Definitive Agreements between Telstra and NBN Co Limited will provide for the progressive disconnection of Telstra's copper network and the broadband capability of its hybrid fibre-coaxial (HFC) network as the wholesale-only NBN Co fibre network is rolled out, and will deliver the envisaged structural reform of the telecommunications sector. The progressive migration of Telstra's fixed-line

⁵² Statement of Expectations - p10

⁵³ Explanatory Memorandum to the *Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2010* - p10

⁵⁴ S Conroy, Media Release - *Structural reform of telecommunications a step closer*, 24 June 2011

⁵⁵ Explanatory Memorandum to the *Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2010* - p37

⁵⁶ Explanatory Memorandum to the *Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2010* - p10

customer services to the NBN will result in substantial long-term benefits for Australia;⁵⁷

- (c) The NBN will deliver a wholesale-only network not controlled by any retail company, thereby transforming the competitive dynamics in the Australian telecommunications industry.⁵⁸ NBN Co will have less incentive to unfairly discriminate between access seekers. It will also be required to operate on an open access basis and provide equivalent terms and conditions of access to all access seekers.⁵⁹ Separation between the network provider and retail providers will mean better and fairer infrastructure access for service providers, greater retail competition and better services for consumers and businesses⁶⁰; and
- (d) An open telecommunications market will maximise competition, providing Australian consumers with access to innovative and affordable services. The intended outcome is a healthy competitive market, thereby improving quality, prices and choices for end-users, and creating a sector where different business models and innovation can prosper.⁶¹

8. Senator Conroy stated in his media release of 24 June 2011 that "the delivery of this structural reform, in parallel with the rollout of the National Broadband Network, will finally enable all Australians to have better and fairer access to world class broadband services at affordable prices".⁶²

⁵⁷ Explanatory Statement to the *Telecommunications Act 1997 - Telecommunications (Migration Plan Principles) Determination 2011* - p2

⁵⁸ Explanatory Memorandum to the *Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2010* - p1

⁵⁹ Explanatory Memorandum to the *Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2010* - p9

⁶⁰ Explanatory Statement to the *Telecommunications Act 1997 - Telecommunications (Migration Plan Principles) Determination 2011* - p2

⁶¹ Explanatory Memorandum to the *Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2010* - p3 and 22

⁶² S Conroy, Media Release - *Structural reform of telecommunications a step closer*, 24 June 2011

1.2 Impact of structural reform on consumers and competition in markets

9. The Government's telecommunications policies are intended to dramatically improve the availability of broadband across Australia by creating a national network that is not controlled by a retail company or companies.⁶³

10. The Government considers that the method of structural separation set out in the Definitive Agreements between Telstra and NBN Co will introduce competition to the telecommunications market, and this will open up genuine choice of services and drive highly competitive prices for consumers, whether they live in a capital city or in rural and regional areas.⁶⁴ Structural reform will result in better and fairer infrastructure access for service providers, greater retail competition and better services for consumers and businesses.⁶⁵

11. The Government has stated that the NBN will deliver the following benefits to consumers⁶⁶:

- (a) Better health care—people living in regional, rural and remote areas will have improved access to specialists and doctors, without having to travel long distances. All Australians will benefit from better informed diagnosis, targeted treatment and patient management enabled by online collaboration between health professionals and the instant transmission of diagnostic images, such as x-rays.

Two separate studies prepared by Access Economics for the DBCDE modelled the benefits of introducing a telehealth intervention into existing aged and veterans care programs⁶⁷. The modelling is based on a potential two-year telehealth trial in the National Broadband Network (NBN) first-release sites of Armidale, Kiama and Minnamurra, and Townsville.

In both reports, Access Economics concludes that there are net financial benefits for the health system, veterans and individuals from the introduction of telehealth.

⁶³ Explanatory Statement to the *Telecommunications Act 1997 - Telecommunications (Acceptance of Undertaking about Structural Separation - Matters) Instrument 2011* - p3

⁶⁴ A Albanese, Second Reading Speech - *Telecommunications Legislation Amendment (Competition and Consumer Safeguards Bill 2010*, 15 November 2010

⁶⁵ Explanatory Statement to the *Telecommunications Act 1997 - Telecommunications (Migration Plan Principles) Determination 2011* - p2

⁶⁶ See National Broadband Network Overview, Department of Broadband, Communications and the Digital Economy, Mary 2010

⁶⁷ See: www.dbcde.gov.au/digital_economy/benefits_of_digital_economy_from_nbn

Among their findings, the reports calculate a financial benefit-cost ratio of 1.61 to 1 (a 61 per cent return on investment) over two years. If quality of life benefits from reduced pain and suffering are factored in, the benefit-cost ratio would increase to 2.49 to 1 (a 149 per cent return on investment) over two years. These benefits would flow from delayed entry to residential aged care, health system savings (for example, through fewer hospitalisations), a lessened burden on carers, and reduced transport costs.

- (b) Better learning opportunities—students, no matter where they live, will have opportunities to expand their learning through access to education and research with material transmitted in real time. Opportunities for entirely new teaching methods will evolve, including the ability to choose courses from any learning institution.
- (c) Supporting digital and online business models — businesses that have a strong online presence are already becoming more competitive in a globally-connected world. In the future, travel to work and across the country for business will be increasingly replaced by digital applications such as next generation, high definition videoconferencing and telepresence. A report by Access Economics for the DBCDE analyses the impacts of teleworking under a National Broadband Network. It incorporates qualitative discussion of benefits to teleworkers, their employers and society and also undertakes high-level quantitative measurement of some of these benefits.

The report estimated that a 10 per cent increase in Australian employees that telework 50 per cent of the time would result in net economic benefits of between \$1.4 billion and \$1.9 billion per annum. Other benefits include decreased fuel consumption, less congestion and savings on infrastructure. Furthermore given the low levels of teleworking in Australia, Access Economics concluded that the NBN would support and promote increased levels of teleworking in Australia as well as new digital platforms and business models.

- (d) Boosting the economy and creating new jobs The NBN will have many direct and indirect economic benefits. Direct benefits include the additional employment of 25,000 per year on average over the eight year construction of the NBN, peaking at 37 000 at the height of activity. Indirect benefits include increased jobs and investment from the growth and expansion of Australian digital and internet economy.

- (e) Connecting communities—by providing more people with information, tools and capabilities for social networking, the NBN can help overcome isolation and allow people to become more informed and better able to interact with communities.
 - (f) Consumer and household benefits – the NBN will remove barriers to online retailing which will deliver benefits to Australian households and consumers. A report by Access Economics for the DBCDE found that growth in e-commerce will produce economic benefits including:
 - (i) an increase in consumer welfare as a result of greater choice and reduced information costs
 - (ii) increased productivity via a reduction in the number of sales and customer service staff required (although this may lead to job losses in particular industries)
 - (iii) an increase in competition that may, over time, lead to a welfare transfer to the consumer sector via an increase in consumer surplus.
12. The Government considers that the NBN has already stimulated new activity in the Australian ICT sector.⁶⁸
13. In its Commitment to Regional Australia Agreement⁶⁹, the Government specifically outlined the following key benefits arising from the NBN for every community in regional Australia:
- (a) For the first time, broadband prices will be the same for households and businesses regardless of where they are located - in the city, in regional Australia or in more remote parts of the country.
 - (b) For the first time, the Government will put in place a cross subsidy to achieve this objective.
 - (c) For example, a uniform national price for broadband will mean that unlike a phone call between Tamworth and Sydney or Mt Isa to Brisbane that costs more than a phone call within a capital city, prices for communicating through the NBN will be the same regardless of where you live.

⁶⁸ See National Broadband Network Overview, Department of Broadband, Communications and the Digital Economy, May 2010

⁶⁹ Commitment to Regional Australia Agreement (p10 of Annexure B to Agreement)

- (d) High-speed broadband services in Tasmania are available for around \$60 a month currently based on wholesale prices, which will now be applied on a national basis.
- (e) As the NBN is built, regional areas will be given priority to ensure they can more quickly overcome the 'digital divide' they have experienced for too long.
- (f) NBN Co will bring forward the introduction of fixed wireless services and satellite services so that regional Australia can get access to better broadband straight away.⁷⁰

14. NBN Co notes that the ACCC's Advice to Government on National Broadband Network Points of Interconnect, has already played a direct part in the arrangements to facilitate competition in retail markets. As noted by the ACCC in that context, a semi-distributed approach to the initial location of NBN Co's POIs will support the development of a vibrant wholesale market where other service providers are able to offer 'value-added' wholesale services to RSPs using the NBN.

⁷⁰ Commitment to Regional Australia Agreement (p6 of Annexure B to Agreement)