



Australian
Competition &
Consumer
Commission

**ACCC submission to the Independent Cost Benefit Analysis
Review of Regulation Telecommunications Regulatory
Arrangements Paper (s.152EOA Review)**

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Executive Summary

The telecommunications sector in Australia is currently undergoing a long period of transition brought about by technological developments, changes in consumer usage and most significantly, policy-induced structural change. In addition, competition issues in relation to services offered on the legacy network remain. Therefore, the regulatory framework must be capable of ensuring competitive access to existing networks, a smooth transition process as the NBN is progressively deployed and an effective regulatory framework for the NBN as a monopoly wholesale provider.

In this light, the ACCC supports the preservation of the core of the Part XIC framework in its present form on the basis that Part XIC is fit-for-purpose and generally working well to provide effective access regulation for telecommunications services. The significant reforms introduced in 2011, following extensive consultation by government, have generally achieved the policy aims of providing a flexible and robust framework, promoting the long-term interests of end-users.

Part XIC appropriately focusses attention on the 'long term interests of end users'. This recognises that the purpose of competition law, and access regulation, is to enhance the welfare of all Australians. In general, the interests of Australian consumers are promoted by regulation that promotes competition and aids economic efficiency. Communications services are significant services for a large proportion of Australians and providing an effective access regime for telecommunications services is in the interests of Australian consumers.

The major change introduced in 2011 was the shift from a negotiate/arbitrate framework to an 'upfront terms and conditions' model based on access determinations. Based on experience to date, it is apparent that this change has been successful in providing greater certainty to both network providers and access seekers while promoting competition in downstream markets. In particular, the access determination process has facilitated a consolidated, industry-wide consideration of access issues for regulated services, resulting in consistent and timely regulatory outcomes for all parties and improved regulatory certainty.

Although the framework has only been in place for just over three years, and there have been some complexities around its application, the framework is generally flexible. For this reason, the ACCC does not consider that a fundamentally different approach to regulated access to telecommunications is necessary or warranted. For example, while the access hierarchy may have led to some concerns around 'take it or leave it' negotiation strategies the ACCC considers that further amendment of Part XIC carries some risk and that concerns can be addressed within the flexible Part XIC framework.

Further, given the dynamic nature of the telecommunications industry, providing greater prescription in the legislation could detract from the end-goal of the long term interests of end users. In this context, an appropriately bounded regulatory discretion is best able to achieve outcomes that promote competition, transparency and efficiency.

A recurring theme throughout the panel's paper is the impact of the Part XIC framework on infrastructure investment. The ACCC considers that encouraging efficient investment is an important part of an effective regulatory regime and recognises that poorly designed regulation can create uncertainty that is harmful to efficient investment. In this respect, Part XIC contains two mechanisms

that are explicitly designed to provide the desired regulatory certainty — fixed principles and special access undertakings. Based on the ACCC's experience, both fixed principles and special access undertakings have proven to be effective and flexible tools in providing certainty before investment decisions are made, while balancing the interests of access seekers and end-users.

There are two particular issues regarding the operation of Part XIC that could require further policy consideration. First, while the ACCC generally supports infrastructure based competition where it is efficient, use of VDSL vectoring may mean that there is a trade-off between promoting competition and technical quality. Considering the best outcome for end-users may require an assessment of the potential advantages of competition in a particular area against the extent of any quality degradation, as well as the extent to which that degradation can be mitigated or competition otherwise promoted.

Second, the non-discrimination provisions could limit NBN Co's ability to take advantage of efficiencies. The ACCC considers that it is important that the provisions do not prevent normal commercial negotiation between access providers and access seekers from occurring and do not discourage efficient outcomes that do not undermine competition. That said, over the short term, non-discrimination provisions could have a role to play during the transition to ensure that one or two access seekers do not entrench a market position. However, the ACCC recommends that non-discrimination provisions should be reviewed once the NBN Co build has progressed to ensure that they continue to promote competitive and efficient outcomes.

The panel has also sought submissions on the rules about the operations of NBN Co in the *NBN Companies Act 2011*. In general, the ACCC supports retaining the provisions that put in place vertical separation arrangements for NBN Co through wholesale-only requirements and ownership restrictions, and the provisions that restrict the services that NBN Co can supply. Together, these provisions will be important determinants of the nature and scope of competition existing in Australia's telecommunications industry.

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1 Introduction

The ACCC welcomes the opportunity to make a submission in response to the panel's Telecommunications Regulatory Arrangements Paper (the panel's paper). The ACCC understands that the panel's paper comprises the panel's consideration of issues relevant to the statutory review of the Part XIC telecommunications industry access arrangements required under s.152EOA of the *Competition and Consumer Act 2010* (the CCA).

2 Overall approach

Section 152EOA was introduced into the CCA by the *Telecommunications Legislative Amendment (Competition and Consumer Safeguards) Act 2010* (CACS Act), which introduced a number of changes (a 'new system') to Part XIC. The Explanatory Memorandum to the CACS Bill states that the Part XIC review will be conducted 'to assess how the new system is working.'¹ The ACCC understands this to mean the purpose of the statutory review is to assess the mechanical operation of Part XIC and whether it is achieving the desired regulatory outcomes.

The ACCC's overall view is that Part XIC is generally working well and, while they have only been in place for three years, the experience to date indicates that the reforms introduced in 2011 have significantly improved the operating of the Part. There does not generally appear to be a compelling case for significant changes given the risks and regulatory uncertainty associated with legislative change.

This submission outlines the ACCC's views as follows:

- **Part 3** outlines the overall purpose of Part XIC, including service-based regulation in the long-term interests of end-users and how Part XIC promotes investment.
- **Part 4** details the legislative review and 2011 legislative reform broadly outlining the concerns those reforms were intended to address.
- **Part 5** details the ACCC's views on 'how the new system is working', setting out the ACCC's experience in administering the new provisions. In particular, the ACCC sets out its views on the declaration of services, access determinations, binding rules of conduct, access undertakings, standard forms of agreement, non-discrimination, and merits review.
- **Part 6** responds to the specific potential future reforms of Part XIC raised by the panel in its consultation panel.
- **Part 7** responds to the panel's review of Division 2 of Part 2 of the NBN Companies Act and related provisions.

The ACCC has already provided its view on industry structure matters in response to the panel's first issues framing paper. The ACCC would welcome the opportunity to assist the panel further as the review progresses.

¹ Explanatory memorandum, *Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2010*, p. 55

3 Legislative reform of Part XIC

As the panel is aware, the economic regulation of the telecommunications industry is primarily provided for through Part XIC of the CCA, which contains a telecommunications industry-specific access regime. Part XIC was introduced in 1997 specifically to regulate the telecommunications industry, following the introduction of open competition to telecommunications markets.²

When it was established, Part XIC included a 'declare/negotiate/arbitrate' regime. The overall framework was based on the general access regime set out in Part IIIA, with refinements to reflect the Government's policy interests in:

- promoting any-to-any connectivity
- promoting diversity and competition in the supply of carriage services, content services and other services supplied by means of carriage services
- ensuring access to carriage services was established on reasonable terms and conditions and necessary ancillary services such as physical interconnection, billing information and access to conditional access customer equipment.³

In 2009, following the announcement of the NBN policy, the government undertook a major review of Part XIC. The then Department of Broadband, Communications, and the Digital Economy (DBCDE) published a discussion paper 'Regulatory reform for a 21st century broadband network' (hereafter, the **2009 DBCDE paper**).⁴

The ACCC provided a lengthy public submission to this process. ACCC views in that submission included:

- where an access provider has market power and an incentive to deny access, the negotiate-arbitrate regime was less effective than an ex-ante regime in delivering timely access on reasonable terms and conditions and providing greater regulatory certainty for access providers and access seekers
- locking-in certain parameters, or rules for determining the parameter, via fixed principles would promote regulatory certainty
- access seekers may delay the implementation of reasonable prices through the use of judicial and merits review processes (e.g. throughout the course of an arbitration)
- if an access provider has market power and is vertically integrated, the incentive under the regime is to delay an arbitration by submitting undertakings that are unacceptable
- for special access undertakings, a number of limitations in the undertaking process hindered the timely acceptance of undertakings that contain reasonable terms and conditions.

Industry also provided submissions in response to the discussion paper. The ACCC and most of the industry supported reform of Part XIC; principally reforms to the 'negotiate-arbitrate' framework that existed at that time.

² More limited competition was first introduced in 1991/2 with the issue of fixed line carrier licences (for Telstra and Optus in 1991) and mobile operator licenses (in 1991)

³ Explanatory Memorandum to the *Trade Practices Amendment (Telecommunications) Bill 1996*, p. 38.

⁴ DBCDE, Regulatory Reform for a 21st Century Broadband Network, April 2009

http://www.archive.dbcde.gov.au/2013/august/regulatory_reform_for_21st_century_broadband

Part XIC was amended through the CACS Act, a package of reforms streamlining Part XIC. The majority of its provisions came into force on 1 January 2011.

The Explanatory Memorandum to the CACS Bill states that the legislative package was, among other things 'aimed at enhancing competitive outcomes in the Australian telecommunications industry.'⁵ The explanatory memorandum for the Bill quotes from the ACCC's submission to the 2009 DBCDE paper, and notes several of the reforms received widespread industry support. Reforms replacing the negotiate-arbitrate framework were adopted by Parliament with bipartisan support.

Some other measures were also introduced at that time, such as the removal of review rights to the Australian Competition Tribunal and removal of certain procedural requirements, for example in making Binding Rules of Conduct. Some of these were not matters specifically addressed in the ACCC's submission at that time.

In addition to the CACS Act, Part XIC was also amended by the *Telecommunications Legislation Amendment (National Broadband Network Measures – Access Arrangements) Act 2011*. This Act introduced a number of NBN-specific access arrangements, including Category B standard access obligations, non-discrimination provisions and standard form of access agreements.

⁵ Explanatory Memorandum, *Telecommunications Legislation Amendments (Competition and Consumer Safeguards) Bill 2010*, p 1.

4 The purpose of Part XIC

In this section of the submission the ACCC has considered those issues raised by the panel's paper which are fundamental to the underlying philosophy and purpose of Part XIC. The amendments to Part XIC introduced in 2011 streamlined the negotiate/arbitrate framework as discussed in part 3. Key elements of the regime – such as its overall purpose and objective – have remained unchanged since it was first introduced in 1997. The ACCC considers that these fundamental aspects of Part XIC are generally appropriate and are consistent with other regulatory regimes, as expanded upon below.

4.1 The long-term interests of end-users (LTIE) test

The panel noted that the LTIE test has been largely unchanged since 1997 and that its criteria reflect circumstances at that time, including the telecommunications market structure. The panel has asked whether these are still the matters of greatest importance in deciding whether actions are in the LTIE (as broadly understood) and whether the LTIE test could be more clearly prescribed in legislation.

In summary, the ACCC strongly supports the LTIE as the appropriate test and considers the criteria contained within it are appropriate.

The object of Part XIC is to promote the long-term interests of end-users of carriage services or services provided by means of a carriage service.⁶ The Explanatory Memorandum to the bill that introduced Part XIC noted that:

The main object is to provide a regulatory framework that promotes the long-term interests of end-users of carriage services or services supplied by means of carriage services and the efficiency and international competitiveness of the Australian telecommunications industry. The reference to promoting 'the long-term interests of end-users' is intended to have a wide meaning, and is not intended to be read down by reference to the narrower definition of promoting the long-term interests of end-users in proposed section 152AB in the proposed Part XIC of the TPA. That section sets out an object for proposed Part XIC alone.⁷

The panel has noted the criteria enable the ACCC regulatory discretion to respond flexibly to a changing market and technological environment. The ACCC agrees and considers this an important feature of the LTIE test. Although the state of competition in telecommunications markets has changed radically since 1997 the enduring natural monopoly characteristics remain unchanged. These arguments are expanded upon in section 7 of the ACCC's 14 March 2014 submission to the panel. Further, communications services are significant services for a large proportion of Australians. In fact, the emergence of the 'digital economy' means that access to these facilities may be considered to be of increasing significance. Therefore, the welfare of all Australians can be promoted by legislation that 'makes markets work' by providing an effective access regime for telecommunications services.

⁶ CCA, s.152AB

⁷ Explanatory Memorandum to the *Trade Practices Amendment (Telecommunications) Bill 1996*, p. 38.

In this regard, the ACCC considers that a broad test that places primacy on the interests of Australian consumers (end-users) is appropriate. This test aligns with the overall purpose of the CCA to 'enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection'.⁸ This object reflects the well accepted proposition that competition is generally the best way to enhance community welfare by promoting economic efficiency. A strength of the current regulatory framework is that it focuses access regulation on end-user interests and is flexible to deal with a range of circumstances.

The ACCC notes that the National Access Regime in Part IIIA of the CCA treats economic efficiency as a separate consideration rather than as a limb of a 'long term interests' of end-users test as in telecommunications (and energy). The panel have asked whether the LTIE criteria should be brought closer in content and operation to those set out under the National Access Regime. The ACCC repeats its submission to the Productivity Commission's review of the National Access Regime that:

...the ACCC's view is that as long as the primary regulatory focus is on economic efficiency, requiring the regulator to pursue the long-term interests of consumers is unlikely to result in different regulatory decisions—that is, there is significant overlap between the pursuit of economic efficiency and the promotion of the long-term interests of consumers. This is because, in general, the effect of implementing the regulatory efficiency objective is to promote the long-term interests of consumers... increasing economic efficiency leads to higher productivity, economic prosperity and community welfare. Consequently, economic efficiency improvements directly promote the long-term interests of consumers.⁹

The LTIE test is also broadly similar to the objectives used in other access regimes, such as the national electricity law's objective of promoting the long-term interests of consumers.

The ACCC notes that while the LTIE is the applicable test for declaration, the ACCC has a range of other mandatory considerations in making other Part XIC regulatory decisions including setting terms and conditions of access in an access determination. For example, the 'reasonableness' criteria include a specific, stand-alone, consideration of the legitimate business interests of the carrier and its investments in facilities used to supply the declared service.¹⁰ The ACCC's view is that this provision provides an appropriate degree of prescriptive guidance to the ACCC in making regulatory decisions that may affect investment decisions.

4.2 Part XIC and incentives for investment

The panel has noted that the breadth of criteria in the LTIE test and the application of this test may create regulatory uncertainty that is harmful to investment.

The ACCC considers that an important element of Part XIC and access regulation in general is providing appropriate incentives for efficient investment in infrastructure in upstream and downstream markets. The ACCC has consistently advocated for the regulatory framework to be designed to encourage efficient investment (see part 5 of this submission). However, the ACCC is

⁸ CCA, s.2

⁹ ACCC, *Productivity Commission Review of the National Access Regime — ACCC Submission to Issues Paper*, February 2013, p.13

¹⁰ CCA, s.152AH

acutely aware that a poorly designed access regime can distort the returns to, or risks associated with, infrastructure investments, potentially resulting in inefficient investment.

The ACCC discussed extensively the role and impact of access regulation of investment incentives in its submission to the Productivity Commission's review of the National Access Regime. The ACCC reiterates these views for the panel, and in particular:¹¹

- In regulating infrastructure access, some balancing will be needed of the impacts of regulatory measures on the efficiency of investment, both by the infrastructure operator and by access seekers, and on the efficiency benefits from facilitating competition in downstream markets by regulating access to the essential input.
- The concerns raised by the PC (and others) in the past about the potential for access regulation to reduce investment incentives and distort investment decisions as a result of asymmetric truncation of investment returns are now well-known and well-understood. The ACCC reviews the effectiveness of its regulatory decision-making processes, and assess the efficiency and competition impacts of specific decisions, on an on-going basis.
- Improving regulatory frameworks and the design and implementation of access regulations will reduce the adverse impacts of regulation on investment incentives. For example, increasing the predictability and accountability of regulatory decision-making will reduce the risks associated with infrastructure investments. Similarly, the choice of regulatory pricing approaches and taking care to ensure that investors will be appropriately compensated for bearing legitimate risks (for example, the use of building block model can provide regulated businesses with an expectation of being able to recover prudent costs and to earn a reasonable rate of return on capital).

In regulated industries generally, including telecommunications, there is no unanimous view on the impact of the regulatory regime or particular regulatory decisions on investment incentives. Access regulation may have different effects on investments in different parts of the supply chain. For example, since local loop unbundling, access seekers and access providers have both made substantial investments in their own infrastructure to allow them to provide services to retail customers using DSLAMs. In addition, it is often difficult to separate the impacts of regulation on investment from other influences, such as changes in technology (e.g. the increasing importance of mobile infrastructure), economic conditions, and government policies (e.g. the establishment of NBN Co).

The ACCC notes that Part XIC contains a number of important mechanisms that are intended to explicitly address the potential for regulation to discourage investment by access providers. In particular, fixed principles and access undertakings are intended to provide greater regulatory certainty to access providers. As discussed in section 5.5 and 5.8 of this submission, the ACCC considers that these have been successful in providing greater regulatory certainty.

¹¹ ACCC, *Productivity Commission Review of the National Access Regime — ACCC Submission to Issues Paper*, February 2013, p. 47-48

4.3 Services based regulation

Consistent with other regulatory access regimes, Part XIC regulates services, rather than underlying facilities. A facility may provide more than one service and a 'service' may comprise use of an underlying facility. Given the convergence towards service based regulation across multiple access regimes a departure from a service-based approach would be a radical change that could result in regulatory uncertainty.

The ACCC understands that the panel has raised issues regarding services-based regulation in the context of considering the appropriate functional level at which services should be declared. It is important to note that even services described at a lower functional level – e.g. dark fibre – would generally be considered as *services* rather than access to underlying *facilities*. For example, in *Rail Access Corporation*, the Federal Court explained in the context of Part IIIA that:

The definition of 'service' in s 44B of the Act makes clear that a service is something separate and distinct from a facility. It may, however, consist merely of the use of a facility. The definition of 'service' distinguishes between the *use* of an infrastructure facility, such as a road or railway line, and the *handling* or transporting of things such as goods or people, by the use of a road or railway line.¹²

The issue of the functional layer upon which access should be provided is quite distinct from the facilities access regime in the Telecommunications Act. The facilities access regime supplies an *ex ante* right of access to certain types of actual facilities, including, for example, the right to access land. By contrast, all Part XIC declared services involve services provided over *facilities*, consistent with the approach taken in the National Access Regime and National Electricity Law.

As to the appropriate functional level for service declaration, the ACCC's general approach is that for those elements of a network where an enduring bottleneck does not persist competition is likely to be promoted where those elements are contestable (i.e. unbundled). This approach is based on the principle that rivals are able to differentiate their services and compete more vigorously across greater elements of the network supply chain. This general principle has been applied by the ACCC in analysing the competitive effects of network design, such as where points of interconnect should be located having regard to whether backhaul routes to those points of interconnect are enduring bottlenecks.

The ACCC agrees with the panel that the ULLS is one example of how providing regulated access to one part of a network may stimulate competition and innovation, both by access seekers and by the access provider. In addition to multiple access seekers deploying DSLAM networks, Telstra (the network provider) also invested in DSLAM infrastructure as a result of competition.

More generally, unlike utility services, the ACCC notes the overall quality of a retail DSL service can depend heavily on the manner in which the service is installed and configured, and the features and capabilities of the customer premise equipment used. Further, while declared services may be 'resold' to end-users as part of a retail product, all declared services are combined with other network elements. For example, the ULLS, LSS and Wholesale ADSL services¹³ must all be combined

¹² *Rail Access Corp v New South Wales Minerals Council Ltd* (1998) 87 FCR 517 at 524

¹³ These services are examples of how more than one service may be provided over an underlying facility. The ULLS, LSS, and Wholesale ADSL services are all services that include access to a last-mile copper line. The ULLS

with other network components such as a core network, domestic backhaul, servers, and international transit. The Wholesale ADSL service can also be differentiated in terms of the selected line profile and the amount of AGVC provisioned. The ACCC also regulates other resale services, such as the WLR, as well as network access services.

The ACCC considers it appropriate that the *services* to be declared under Part XIC should continue to be subject to the LTIE test and that in applying this test the ACCC should consider the functional level at which access is most likely to promote competition in downstream retail markets.

5 How the changes to Part XIC have operated in practice

As noted earlier, the Explanatory Memorandum to the CACS Bill states that the Part XIC review will be conducted 'to assess how the new system is working.' The ACCC understands this to mean the purpose of the statutory review is to assess the mechanical operation of Part XIC and whether it is achieving the desired regulatory outcomes.

The ACCC approaches this question by considering:

- the reasons why the changes to Part XIC were introduced
- the ACCC's experience since 2011 in how the provisions have worked in practice
- whether the ACCC considers any further changes are required.

The ACCC has considered these issues for each of the key mechanisms provided for in Part XIC, with reference to any specific issues raised in the panel's paper. The ACCC notes that the provisions have only been in place a relatively short time, and has generally taken the approach that where provisions have generally worked well and any specific concerns can be accommodated within the framework that further legislative amendment is undesirable and may create regulatory uncertainty.

5.1 Declaration of services

If a service is a 'declared service' it can be subject to regulation, including requirements for service providers to comply with the Standard Access Obligations (discussed in section 5.2) and the ability for the ACCC to set terms and conditions in access determinations (section 5.3) and binding rules of conduct (section 5.4). As noted in the panel's paper, there are a number of ways a service can become declared and some special provisions apply in relation to NBN Co. The ACCC's experience is that the declaration provisions continue to work effectively within the new framework and, as discussed in section 4.1, the LTIE test is appropriate.

The panel's paper has raised for comment the duration of declaration and the effectiveness of review mechanisms. Prior to the CACS Act, declaration decisions had to have an expiry date of five years or less. The 2011 amendments granted the ACCC discretion to set a longer expiry date if the ACCC considered that circumstances warranted it.¹⁴ The purpose of the change was to enable the

and LSS service provide access from a point of interconnection at a telephone exchange building whereas the wholesale ADSL service includes an aggregation component that provides accesses from more centralised points of interconnection.

¹⁴ CCA, s. 152ALA(2)

ACCC to provide longer-term regulatory certainty, where appropriate, to promote competition and investment.¹⁵

The ACCC has not made any declaration with an expiry date of more than 5 years, although it has considered doing so in some circumstances.¹⁶ The panel raises the possibility that the ACCC could make ‘open-ended’ declarations where services are of such fundamental importance that they should remain declared for the foreseeable future. The ACCC is of the view that such changes are not necessary; the ACCC already has sufficient discretion due to the 2011 amendments to make declarations over long time frames where this is appropriate. The ACCC also concurs with the panel that the dynamic nature of the industry may limit the circumstances where open-ended (or very long time frame) declarations are warranted.

5.2 Standard Access Obligations (SAOs)

Once a service is declared, an access provider must comply with ‘standard access obligations’ which set out key obligations of access. As noted by the panel, Category A SAOs apply to non-NBN Co providers and Category B SAOs apply to NBN Co.¹⁷

The ACCC considers that the general standard access obligations are appropriate. Further, as noted by the panel, the ACCC can specify additional terms and conditions of supply in making an access determination. There does not appear to be a case for increasing the regulatory impost on network operators by extending the standard access obligations generally, when the current SAOs are operating well and the ACCC can make further regulatory terms as appropriate based on a case-by-case consideration.

The panel asks whether the Category B SAOs should be extended to other wholesale-only providers. The ACCC would note that the difference between the categories of SAOs is minor. The Category A SAO imposes additional equivalence obligations in relation to equivalence between that ‘supplied to the service provider’ and ‘*that which the access provider provides to itself*’. The rationale for omitting this SAO from the Category B (NBN Co) SAOs was that:

These obligations are designed for vertically integrated access providers who provide services to their own retail units and to access seekers. As NBN Co is a wholesale-only company, it would not be appropriate for it to be subject to the existing SAOs.¹⁸

There may be some drafting reasons to better align the Category B SAOs with the status of wholesale-only providers. However, the ACCC considers that if a provider is already wholesale-only – and not providing services to itself - the practical consequence of that network provider being subject to Category A rather than Category B SAOs is minor.

¹⁵ Explanatory Memorandum, Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2010 (Cth), p.167.

¹⁶ E.g. ACCC, Declaration of the Wholesale ADSL Service under Part XIC of the CCA: Final Decision, February 2012, p.62

¹⁷ NBN Co is subject to a ‘Category B Standard Access Obligation’ (CCA, s. 152AXB). A separate ‘Category A SAO’ applies to other service providers (CCA, s. 152AR).

¹⁸ Explanatory Memorandum, National Broadband Network Companies Bill 2010 [and] Telecommunications Legislation Amendment (National Broadband Network Measures – Access Arrangements) Bill 2010, p.10-11

5.3 Access determinations

One of the fundamental reforms of the 2010 CACS Act was to replace the negotiate/arbitrate framework with access determinations. Since these reforms, the ACCC has made access determinations for all non-NBN Co regulated (declared) services. It is clear that the Part XIC framework is now working more effectively than it previously did. While the terms of access to network services remain a contentious issue, the access determination processes have facilitated a consolidated, industry-wide consideration of access issues for regulated services, resulting in consistent regulatory outcomes for all parties and improved regulatory certainty (e.g. through setting fixed principles that last for multiple regulatory periods). The ACCC considers that the access determination access regime provides an effective, streamlined approach to regulation while allowing parties to negotiate commercial terms.

The panel has raised for consideration an alternative 'reference model' approach allowing the access provider to formulate terms and conditions for approval by the regulator. The approach proposed appears to differ from an extension of the 'SFAA model' that currently applies to NBN Co, in that the 'reference model' terms would be accepted or rejected by the ACCC and be at the top of the legislative hierarchy. By contrast, NBN Co's obligation is merely to offer an access agreement based upon the SFAA upon request and, absent an access agreement, the SFAA has no formal role in the legislative hierarchy.

The ACCC does not consider that a 'reference model' that would replace the access determination model is necessary. Although the access determination framework has only been in place for a few years, experience to date is that it has generally worked well. Introducing further legislative changes, departing from this model, could introduce unnecessary regulatory uncertainty with unclear benefits.

The ACCC acknowledges that a 'reference model' could facilitate the setting of more comprehensive terms, which could provide for more effective recourse (as further discussed in section 6.2). However, the current Part XIC model allows access providers to propose comprehensive terms and conditions to the ACCC. Further, the ACCC could use the access determination process to set 'SFAA' style terms and conditions, potentially based on existing agreements.

The panel has also raised for consideration whether it is appropriate that access determinations can set different terms and conditions for different carriers / carriage service providers. The current framework allows the ACCC to make carrier-specific terms and conditions,¹⁹ although the ACCC has made access determinations of general application with exemptions as appropriate.²⁰ The current framework recognises that, while a service may be declared on a broad LTIE test, specific considerations may arise as to whether particular terms and conditions are appropriate. The ACCC should retain the ability to set different terms and conditions for different carriers and CSPs.

¹⁹ s. 152BC(h) and (i) and s. 152BC(5).

²⁰ e.g. the ACCC 'exempted' non-dominant networks from the wholesale ADSL FAD.

5.4 Binding Rules of Conduct

Binding Rules of Conduct allow the ACCC to make binding rules²¹ where there is ‘an urgent need to do so’. BROCs operate as a temporary measure pending an inquiry to vary (or make) an access determination.

The BROC power was initially considered by the Government in the context of deficiencies with Part XIB – specifically, that the process was subject to delay and was procedurally cumbersome.²² However, in introducing the BROC power into Part XIC the government elected to introduce a power more clearly tied to existing declared services, rather than the broader ambit of Part XIB applying to all services. The government considered that including BROCs in Part XIB ‘may be considered to be over-reaching and could harm investor confidence.’²³ In particular, the government considered:

BROC are best introduced into Part XIC, because this would ensure BROCs are only issued in relation to declared services. This outcome is preferable, because it ensures that any BROCs that may be issued by the ACCC are clearly linked to benefiting the long-term interests of end users.²⁴

The ACCC has not made any binding rules of conduct since the power was introduced. However, the ACCC’s experience strongly suggests that having recourse to the power provides a useful means to consider swift action to address potentially detrimental conduct in already regulated markets. This is particularly important given the dynamic nature of such markets and the risk of anti-competitive conduct during the transition to the NBN. Although the circumstances in which BROCs would be made by the ACCC are necessarily few given the requirement that there must be an ‘urgent’ need to intervene, nonetheless they provide an important regulatory ‘check’.

The panel specifically asks whether BROCs should be subject to merits review and/or procedural fairness. The ACCC does not consider this is appropriate as it would interfere with the effectiveness of BROCs as an ‘urgent’ form of intervention. However, the requirement for the BROC to expire after 12 months and that the ACCC should substantively consider the issue through a variation inquiry into an access determination should be retained. This provides an appropriate opportunity for review.

5.5 Special access undertakings

Part XIC allows an access provider to submit an access undertaking for a service that has not been declared by the ACCC — called a ‘special access undertaking’. A special access undertaking allows the access provider to propose the declaration of a new service and the associated terms and conditions of access to this service (both price and non-price). The undertaking is assessed by the ACCC against statutory criteria and is either accepted or rejected (with the ability of the ACCC to propose variations).

²¹ BROCs can specify any or all of the terms and conditions on which a carrier or carriage service provider (CSP) is to comply with the SAOs or require a carrier or CSP to comply in a manner specified by the rules.

²² Department of Broadband, Communications and the Digital Economy, *National Broadband Network: Regulatory Reform for 21st Century Broadband Discussion Paper*, April 2009, p. 16

²³ Explanatory memorandum, Telecommunications Legislation Amendment (Competition and Safeguards) Bill 2010, p.62

²⁴ Explanatory memorandum, Telecommunications Legislation Amendment (Competition and Safeguards) Bill 2010 p.64-65

There is no requirement for an access provider to submit a special access undertaking. Rather, the undertaking process allows the access provider and the ACCC to agree to the regulatory framework prior to the access provider making substantial investment in infrastructure. This is intended to provide regulatory certainty to the access provider in recovering its efficient costs and access seekers' interest in obtaining sufficient certainty about access terms and conditions to reduce the risks associated with complementary investments.

The special access undertaking process was amended in 2011 by the CACS Act to:

- allow the access provider to vary the undertaking in response to an ACCC request
- allow the access provider to propose that the ACCC perform or carry out functions as specified in the undertaking.

Since these amendments, the ACCC has accepted NBN Co's special access undertaking for the NBN Access Service (December 2013). In establishing this framework for the first time, the process that took place in accepting the undertaking was contentious and inevitably lengthy. However, ultimately, the SAU represents broad industry consensus on an appropriate framework for regulating NBN Co's products and prices, and provides long-term regulatory certainty to NBN Co, while being flexible to respond to changes in network design. The ACCC considers that this process has demonstrated that special access undertakings can be an effective and flexible tool that can provide certainty before investment decisions are made, while balancing the interests of access seekers and end-users of the service.²⁵

It is important to note that the SAU was accepted in the context of the ACCC's ability to make access determinations and binding rules of conduct under Part XIC to address ongoing issues as they may arise, including on prices for new products and non-price terms and conditions. If the supporting Part XIC framework is substantially varied or removed, the long-term regulatory framework as contained in the SAU may no longer be considered to be in the long-term interests of end-users.

Further, the amendments to the undertaking process allowing a more streamlined 'variation' process have been successful in facilitating the acceptance of special access undertakings that contain reasonable terms and conditions. For example, the ability of the ACCC to propose variations to the 2012 NBN Co special access undertaking was instrumental in its acceptance of the undertaking. Similarly, the undertaking conferred a number of functions on the ACCC that meant that the undertaking was flexible enough to ensure the long-term interests of end-users would be promoted. These are important aspects of the regime that it is critical to retain.

In summary, based on its experience, the ACCC considers that special access undertakings have a valuable role to play in encouraging regulatory certainty and reasonable terms and conditions of access. Further, given the ACCC has recently accepted NBN Co's SAU and that SAU is flexible to adapt to changes in network design, changes to Part XIC could introduce unnecessary regulatory uncertainty.

²⁵ In the ACCC's submission to the Productivity Commission review of the National Access Regime, it similarly noted that access undertakings have proven to be effective in promoting economic efficiency and competition and aligning incentives for efficient operation and investment across supply chains. See ACCC, *Productivity Commission Review of the National Access Regime — ACCC Submission to Issues Paper*, February 2013, p. 31.

5.6 Ordinary access undertakings

Prior to the 2011 reforms introduced by the CACS Act, Part XIC contained ordinary access undertakings. Unlike special access undertakings, ordinary access undertakings only applied to services that were already declared. This means that while access undertakings are available for providers of new services, such as NBN Co, they are not available for providers of existing declared services. This can give rise to a potential inconsistency, particularly given the ACCC's recent experience with the 2012 NBN special access undertaking suggesting that undertakings can be effective mechanisms for developing reasonable terms.

The basis for the repeal of ordinary access undertakings was that, in practice, almost all ordinary access undertakings submitted under Part XIC were rejected by the ACCC on the basis that they did not promote the long-term interests of end-users. The majority of these undertakings were submitted by Telstra and covered the existing declared services that were subject to the negotiate-arbitrate framework. As previously noted by the ACCC in 2009:

The assessment of an undertaking is a highly resource-intensive and time-consuming process (particularly when the decision is appealed to the Tribunal). It involves multiple complex issues, volumes of submissions and other materials, and costly legal and economic expert advice. The undertaking process creates uncertainty in the market and diverts the resources of the ACCC and access seekers away from other tasks (in particular, arbitral determinations). However, at the end of this process, no parameters are locked in, and access seekers still have not obtained access on reasonable terms and conditions.²⁶

As noted in section 5.3, the ACCC considers that the ex-ante access determination model in Part XIC has facilitated consistent regulatory outcomes for all parties and improved regulatory certainty for access providers (e.g. through the use of fixed principles). In this context, and given past difficulties, it may be that ordinary access undertakings will not better promote the LTIE and that unnecessary regulatory changes should be avoided. However, the ACCC does note that access undertakings that are only available to providers of certain services gives rise to a potential inconsistency.

5.7 Exemptions

The 2011 amendments:

- Removed from the CCA the ability for access seekers to apply for, and the ACCC to make, ordinary 'exemption orders' to exempt existing declared services from regulation (on a class or individual basis) based on an application from an access provider.
- Retained the ability to make anticipatory exemptions, for services that may be declared in the future.
- Introduced the ACCC's ability to include in access determinations terms and conditions with the *effect* (not the form) of exempting access providers from regulation.

²⁶ ACCC, *Assessment of Proposals National Broadband Network Process — Report to Expert Panel (Public Version)*, January 2009, Appendix A, p. 20

Under the current regime, an access determination 'may' include terms and conditions providing that the SAOs are not applicable to a carrier or CSP either unconditionally or subject to conditions and limitations as are specified in the determination.²⁷ The Explanatory Memorandum explains that:

...the need for ordinary class exemptions is removed because the ACCC will be able to include provisions in an access determination which remove or limit the obligation of carriers or CSPs to comply with some or all of the standard access obligations.²⁸

The ACCC does not consider that these changes to exemptions in 2011 need to be reconsidered.

The removal of 'ordinary exemption orders' in preference for including appropriate terms and conditions in fixed services review has worked well. That is, access determination inquiries have worked well as a streamlined way to consider the scope of regulation. The ACCC does not consider that 'ordinary exemption orders' are necessary or that such a process would lead to materially different outcomes.

A potential inconsistency is that while ordinary exemption orders are no longer available, anticipatory exemption orders for services that are not declared remain in the Part XIC framework. However, this is necessary because anticipatory exemptions, which relate to services that are currently not declared, cannot be accommodated within the access determination framework as access determinations are only made for declared services. Therefore, a separate mechanism is warranted.

Anticipatory exemptions alongside special access undertakings are the primary regulatory mechanisms for providing certainty for new services. They are preferable mechanisms than a more radical overhaul of Part XIC, such as amending the objectives of the Part. As the panel notes, regulatory certainty may be particularly important for new investments such as greenfield scenarios.

5.8 Fixed principles

Fixed principles were introduced into Part XIC in 2011 as part of the CACS Act. Fixed principles allow the ACCC to lock-in specific access terms and conditions beyond the term of an access determination or undertaking.

In 2009, the ACCC strongly advocated for the introduction of fixed principles into Part XIC as a mechanism to facilitate greater regulatory certainty. Specifically it stated:

A further issue is the extent to which a term of access, such as a parameter which is an input to determining access prices should be locked-in, so that the parameter applies to all future relevant decisions under the regime. This currently is not possible under Part XIC. The ACCC is of the view that locking-in certain parameters, or rules for determining that parameter, would promote regulatory certainty. To implement this, the ACCC recommends that an undertaking should be able to contain

²⁷ Sections 152BC(3)(h) and (i) of the CCA

²⁸ Explanatory memorandum, Telecommunications Legislation Amendment (Competition and Safeguards) Bill 2010, p.170

‘fixed principles’ which would be rolled over to any subsequent access undertakings applying to that service, or that an access determination is made regarding that parameter.²⁹

This submission was made in a context of considerations around locking in a regulatory asset base (RAB), and associated pricing methodologies. The benefits of locking in these terms and conditions is that it provides the regulated business with certainty about the framework used to set access prices and how it may recover its expenditure over time, thereby encouraging investment. In addition, by specifying particular values or methodologies that the ACCC must adopt, it reduces the burden on the ACCC and stakeholders from having to periodically reassess these matters.

The ACCC has adopted fixed principles in the access determinations that apply to Telstra (the fixed line services and wholesale ADSL access determinations)³⁰ and accepted fixed principles in NBN Co’s special access undertaking.³¹ The ACCC considers that fixed principles will play an important role in providing regulatory certainty for access providers and other stakeholders. While the ACCC has not yet had to apply fixed principles across regulatory decisions, both access providers and access seekers have been generally supportive of using fixed principle provisions and the specific provisions adopted by the ACCC.

Fixed principles are an important mechanism to provide regulatory certainty to network operators where it is appropriate to do so. The ACCC considers they are a preferable regulatory mechanism to provide certainty, and that providing more prescription in the CCA itself would be inappropriate. These issues are further explored in section 6.4.

5.9 SFAA

Part XIC also provides for NBN Co to formulate a type of ‘open offer’ to supply services, known as a standard form of access agreement (SFAA).³² The terms and conditions contained in an SFAA are determined by NBN Co. If an access seeker requests NBN Co to enter into an Access Agreement that contains the same terms and conditions as those contained in an SFAA, NBN Co must comply with the request.³³ As noted by the panel, the SFAA itself does not form part of the access hierarchy but may form the basis of an access agreement which would prevail, to the extent of any inconsistency, over regulated terms.

The ACCC considers that it is appropriate that some terms and conditions may be contained in a contract separate to the regulated terms. As noted by the panel, allowing different levels of regulatory involvement may provide flexibility for certain terms to evolve over time as appropriate. The SFAA obligation can also be seen as providing transparency and equivalence, and should be considered within a general framework which currently includes non-discrimination (see section

²⁹ ACCC, Submission to DBCDE, ‘National Broadband Network: Regulatory Reform for 21st Century Broadband’, June 2009, p. 11

³⁰ These fixed principles are the opening values of the RAB and the RAB roll-forward mechanism, the components of the revenue requirements (e.g. return on capital, depreciation, operating expenditure and tax) and methodologies for calculating these components.³⁰ These fixed principles operate until 2021.

³¹ These fixed principles are the opening values of the RAB and initial cost recovery account, the RAB roll-forward mechanism and the components of revenue requirements. These fixed principles operate until 2040 to reflect the length of time NBN Co expects to recover its network rollout costs.

³² CCA, ss. 152CJA(2) and 152CJF.

³³ CCA, s. 152CJA(2).

6.3). Further, NBN Co's SAU commits NBN Co to offer SFAA's with a two year expiry.³⁴ This ensures that terms are regularly subject to review and re-negotiation, with the prospect of regulatory recourse if required.

The panel has identified particular concerns about SFAAs being offered on a 'take it or leave it' basis. The ACCC considers that similar concerns arise relating to the access hierarchy generally, and not just NBN Co and/or the SFAA. The ACCC has considered this issue in section 6.2, as a more fundamental reform of Part XIC.

5.10 Merits review

When Part XIC was inserted into the Act in 1997, most decisions were subject to full merits review. Specifically, decisions on access undertakings, arbitration of access disputes, and exemptions were subject to merits review. Declaration decisions were not, and never have been. In 2002, Part XIC was amended, following a review by the PC, to reduce the availability of merits review and reduce the cost and delay associated with such review. In 2011, the CACS Act amendments to Part XIC in the CCA removed merits review from the telecommunications-specific access regime.³⁵

In its submissions to the 2009 DBCDE paper, the ACCC noted that repeated challenges to arbitrations and undertakings were highly resource-intensive and time-consuming.³⁶ For example, six ACCC undertaking decisions were appealed to the Australian Competition Tribunal, all of them unsuccessfully. The ACCC considers that since the reforms to the negotiate-arbitrate framework combined with the removal of merits review the process has had less disputation and worked to deliver timely, certain, results.

It is important to note that the form of merits review previously in Part XIC allowed the Australian Competition Tribunal jurisdiction to consider afresh certain Part XIC regulatory decisions having regard to any information given to the ACCC or referred to in the ACCC's reasons (although the Tribunal interpreted this to mean it could also have regard to its own knowledge and expertise³⁷). The scope of such a review was potentially a very broad re-hearing of the efficiency and competition assessment. Review mechanisms should not merely duplicate the effort and expertise of the regulator and recognise that the regulator, not a review body, is generally best placed to conduct consultation processes and achieve the aims of open and transparent decision-making.

5.11 Access to ancillary facilities

One issue that has arisen in the context of access to telecommunications services is access to ancillary 'facility' services (that is, facilities used to supply declared services) and access to facilities. For example, to interconnect with the ULLS or LSS generally requires access to the telephone exchange facility in order to install a DSLAM and the relevant cables. Telstra currently provides access as the 'Telstra Exchange Building Access' (TEBA) service. The ACCC considers that other ancillary facility services include access to underground ducts, internal interconnection cables, and external interconnection cables.

³⁴ NBN Co SAU. Schedule 1B, clause 1B.2

³⁵ Merits review remains for record keeping rule disclosure decisions under Part XIB, s.151CI of the CCA

³⁶ Merits review for arbitration decisions in Part XIC was removed in 2002.

³⁷ Application by Chime Communications Pty Ltd (No 2) [2009] ACompT 2 (27 May 2009) at [11]

As discussed in section 4.3, Part XIC provides access to services although a service may comprise solely the use or supply of a facility. The ACCC notes:

- The ACCC can declare a service that ‘facilitates the supply of a listed carriage service’,³⁸ which would appear to include some ancillary obligations that may require a service provider to also grant access to relevant facilities. The ACCC could only declare an ancillary facilities service if it was in the long-term interests of end-users. None of the services described above are declared, although TEBA is treated as a ‘regulated service’ for the purpose of the Structural Separation Undertaking (due to a Ministerial Instrument)
- One of the standard access obligations for declared services is that access providers must provide interconnection of facilities to enable the supply of declared services (the interconnection SAO).³⁹ This means that the ACCC can set terms in FADs and other regulatory mechanisms for access to facilities that are ancillary to the use of declared services. For example, the internal interconnection cable may be considered ancillary to the supply of the declared ULLS.

Access to the underlying facilities used to supply ancillary services (such as space in exchanges, or in underground conduits to enable to co-location of competitors’ network equipment) is governed by provisions set out in the Telecommunications Act provides. The regime in the telecommunications Act applies to carrier and non-carrier infrastructure. Relevantly, the Telecommunications Act provides that a carrier must, if reasonably requested to do so by another carrier, give the second carrier access to facilities owned or operated by the first carrier, except in specified circumstances.⁴⁰ The Telecommunication Act further specifies that access to facilities is to be provided on terms and conditions reached by agreement and failing that as determined by an arbitrator. The default arbitrator is the ACCC.⁴¹ In addition to the general facilities access obligation, the ACCC can make and has made a Code of access which covers certain facilities.⁴² The Code does not set price terms, but the ACCC may determine a price in its arbitral role in relation to access disputes under the Code.

The ACCC notes that demands on the facilities access regime are likely to increase under the National Broadband Network if infrastructure based competition increases. Some access seekers have suggested that the Telecommunications Act does not facilitate effective access to facilities and that the ACCC should declare facilities that supply services under Part XIC. Other stakeholders consider that the Telecommunications Act regulates facilities and it is beyond the scope of Part XIC to also regulate facilities through the declarations of an ancillary facility service. Concerns of access seekers have centred on both price terms of access as well as physical access issues, such as delays

³⁸ Section 152AL(1)(a) of the CCA refers to ‘listed carriage service’ as defined by the *Telecommunications Act 1997*. Section 16(1) of the *Telecommunications Act 1997* provides that a ‘listed carriage service’ is a carriage service – between two points within Australia; between a point in Australia and one or more other points (one of which is outside Australia); and between one point outside Australia and one or more other points (one of which is in Australia). Section 7 of the *Telecommunications Act 1997* provides that a ‘carriage service means a service for carrying communications by means of guided and/or unguided electromagnetic energy’.

³⁹ Section 152AR(5) of the CCA.

⁴⁰ Clause 17 Part 3 and clause 35 Part 5, Schedule 1 of the *Telecommunications Act 1997*.

⁴¹ Clause 18 Part 3 and clause 35 Part 5, Schedule 1 of the *Telecommunications Act 1997*.

⁴² Clause 37 Part 5, Schedule 1 of the *Telecommunications Act 1997*.

in obtaining access to required facilities. These concerns are likely to be critical issues for access seekers during the transition to the National Broadband Network.

The ACCC considers that regulating access to facilities is dealt with under either Part XIC or the Telecommunications Act. However, the regimes differ, the Telecommunications Act provides a 'negotiate arbitrate' model for access to facilities whereas Part XIC provides for access to declared services on negotiated terms or, where there is no agreement, on terms set or approved by the ACCC. The ACCC considers that it would provide more certainty if the ACCC's powers in relation to directly regulating access to facilities were specified more clearly in Part XIC.

6 Other specific issues raised by the panel

6.1 VDSL Vectoring and regulation of FTTB networks in small markets

The panel has raised for consideration the linkages between the use of VDSL2 with vectoring and access to service. The Communications Alliance has submitted to the panel that:⁴³

To reap the maximum performance benefits of vectoring and prevent service instability (e.g. dropouts) no more than one provider can offer vectored services within each cable sheath. This effectively means that there can only be one provider of VDSL2 network services in a node serving area or within a multiple dwelling unit or business centre development. This could be a wholesale-level provider, giving the opportunity for open access to enable other providers to offer services through the node.

Communications Alliance working group 58 has been considering issues relating to the deployment of VDSL2 in FTTB networks. The ACCC has been an observer to that process.

In its 14 March 2014 submission to the panel the ACCC submitted that:

1. infrastructure-based competition should generally be promoted unless there were special circumstances suggesting that the long-term interests of end-users were not promoted
2. while Part XIC is an appropriate mechanism to facilitate 'open access' in the form of supply obligations, it cannot require 'wholesale-only'
3. where there is a sole (monopoly) supplier in a particular area that sole (monopoly) supplier should be subject to open access and wholesale-only requirements

These points can be expanded upon in the current context.

On the first point, the key issue here is that while multiple operators can supply VDSL without interference the effective use of *vectoring*, and the accompanying higher data rates, requires a sole (monopoly) supplier. There may therefore be a need to reconcile technical difficulties with the objective of promoting competitive outcomes. For example, by developing models that facilitate competitive deployment where vectoring is a consideration such as through infrastructure-based competition between a VDSL operator and an FTTP operator

⁴³ Communications Alliance submission, March 2014, p. 3.

Possibly, there may be a trade-off between optimal competition outcomes and optimal quality outcomes, in determining which approach best promotes the interests of end-users. However, this assessment of the LTIE would depend upon the potential advantages of competition in a particular area against the extent of any quality degradation, as well as the extent to which that degradation can be mitigated or competition otherwise promoted.

On the second point, the panel has raised questions as to whether small scale networks meet the requirements for declaration. A large number of small scale networks are already declared as a consequence of the LBAS declaration, which was mandated by government. For those services not covered by the LBAS declaration (e.g. within an exception or pre-2011 networks), the ACCC could declare those services should this promote the LTIE. The ACCC would consider efficiency considerations as well as whether competition would be promoted in downstream markets, which could be a broader geographic market. The ACCC concurs with the panel that whether a particular small scale network could reach this test may depend on the market definition adopted, and a consideration of the costs, benefits, and proportionality of declaring very small local markets. The ACCC also notes that declaration only imposes supply obligations where a service is supplied by an access provider to itself or others, and would not impose obligations where a service is currently not supplied.

On the third point, while declaration of a service under Part XIC can require an access provider to provide access to a service upon request where it provides the service to itself or others ('open access') it *cannot* mandate a network be 'wholesale-only'. This is the case regardless of whether the service is declared by the LBAS declaration or some separate process. This is why the current arrangements, which apply to the LBAS service, are separately legislated for in the Telecommunications Act.

Therefore, the ACCC has submitted in its March 2014 submission that should the government's policy intent be to expand open access and wholesale-only requirements it could do so by expanding the LBAS declaration and the 'level playing field' provisions. The ACCC notes its general position that regulation should only be expanded where there is a compelling economic rationale.

In addition to these points, it is also important to note that the current 'level playing field' provisions do not prevent overbuild. An alternative network provider could still choose to overbuild an open-access wholesale-only network, which could promote competition but could cause interference with VDSL services. This is a separate issue that needs to be considered – declaring small-scale networks and applying wholesale-only obligations would not appear to address the fundamental issue raised by Communications Alliance of safeguarding against interference caused by competing networks.

In this regard, the Communications Alliance has submitted to the panel that:

While there are different paths forward dependent upon the preferred policy and regulatory direction, it is clear that the existing ULLS environment and the proper technical performance of vectored VDSL2 are not compatible.

The ACCC concurs with the Communications Alliance on the need for policy and regulatory direction. In particular, the ACCC notes that Communications Alliance itself could not normally impose anti-competitive industry standards in order to promote a preferred technical outcome. It is therefore appropriate that these issues be considered by the panel, particularly given issues raised around the

future industry structure. Critically, on the current regulatory and statutory arrangements, overbuild that would permit VDSL vectoring interference is permitted.

6.2 Hierarchy of regulated terms

The current regulatory regime provides for terms and conditions to be established by agreement between service providers and access seekers, with the opportunity for a regulated outcome through access determinations and binding rules of conduct. The Part XIC hierarchy is intended to provide for an effective, streamlined approach to regulation while allowing parties to commercially negotiate different terms. In this regard, ACCC access determinations and/or accepted special access undertakings provide a set of terms and conditions that can be relied upon where negotiation is unsuccessful, in addition to informing commercial negotiations.

The panel has asked whether access agreements should continue to have primacy in the regulatory framework. The ACCC considers that commercially agreed terms and conditions of access are desirable where these can occur. For this reason, the 'hierarchy' of Part XIC should allow parties to agree their own terms and conditions even where those terms differ from regulated terms.

However, the ACCC also considers that access seekers should also have the opportunity to seek an effective regulatory solution. This is because part of the rationale for declaring services under Part XIC and for the regulation of services offered by NBN Co is that those service providers have substantial market power and that, absent regulation, access seekers lack sufficient countervailing power to ensure that terms and conditions of access are reasonable. It is for this reason that the ACCC has the power to set up-front terms and conditions, and these terms and conditions – where they are in place – can be enforced by the ACCC or an access seeker.

In practice, the ability for access seekers to have recourse to regulated terms may be constrained by contracting and bargaining practices of the network provider. However, the ACCC considers that the current regime can work as intended to allow parties to negotiate different terms while preserving the effectiveness of regulated intervention.

Two important aspects of the current regime improve its operation:

- In relation to NBN services, NBN Co has committed in its Special Access Undertaking to offer access agreements based on the SFAA for two year periods. This provides a regular opportunity for the access agreement to be reviewed, and/or access seekers to have recourse to regulated terms.⁴⁴
- In relation to legacy services supplied by Telstra, Telstra has committed in its Structural Separation Undertaking to pass through ACCC pricing decisions made under Part XIC by agreeing to supply regulated services on terms that included reference prices as per a rate card that would include rates based on Part XIC decisions.⁴⁵

Further, access seekers have some countervailing power in negotiations due to the standard access obligations, which means that the access providers cannot refuse to supply declared services upon

⁴⁴ SAU. Schedule 1B, clause 1B.2

⁴⁵ SSU, Clause 18.2, Clause 18.3(c)

request.⁴⁶ To refuse to supply a declared service – for example on the basis that the access provider’s preferred form of access agreement had not been executed – would risk breaching the standard access obligations which are a carrier licence condition.

As noted by the panel, the concern is that terms may be offered on a ‘take it or leave it’ basis and access seekers – wanting a comprehensive agreement – may agree to an access agreement (such as one based on an SFAA) on this basis. These terms would then prevail over any inconsistent ACCC regulatory determination, until the access agreement expired or was terminated. However, the ACCC can set further terms and conditions should this be necessary and, should the need be urgent, could make a binding rule of conduct.

In summary, the ACCC’s view is that there are mechanisms within the existing framework to ensure effective regulatory recourse and that wholesale change to the legislative hierarchy is not warranted given the disruption that this could cause.

6.3 Non-discrimination

The ACCC’s view on the non-discrimination provisions is that while these may have a role to play during the transitional period, they may limit NBN Co’s ability to take advantage of efficiencies and should be subject to review once the transition to the NBN has occurred.

6.3.1 Background to non-discrimination provisions

Non-discrimination provisions were introduced into Part XIC as part of the *Telecommunications Legislation Amendment (National Broadband Network Measures – Access Arrangements) Act 2011*. The provisions prohibit NBN Co (and other designated superfast telecommunications network operators) from discriminating between their access seekers in supplying declared services and carrying on related activities.

The Government’s original objective in introducing the non-discrimination provisions was to ensure that the obligations placed on NBN Co can effectively prohibit discrimination, while also promoting economically efficient outcomes that do not lessen competition.⁴⁷ The Explanatory Memorandum also stated that, even though NBN Co is a wholesale-only provider, it may have incentives to favour certain access seekers such as its largest and most profitable customers at the expense of smaller players.⁴⁸

As noted by the panel, in 2011, the Parliament rejected an alternative approach to allow NBN Co to discriminate where this would have aided efficiency, provided that all access seekers with like circumstances had an equal opportunity to benefit from the discrimination. This alternative approach reflected the idea that discrimination can sometimes be efficient, such as when differences in terms and conditions of access reflect differences in the costs of supply and/or encourage the efficient use of network infrastructure. The legislated approach contained in Part XIC now contains a strict prohibition on discrimination.

⁴⁶ Subject to some requirements regarding e.g. creditworthiness

⁴⁷ Revised Explanatory Memorandum to the NBN Access Arrangements Bill, p. 42.

⁴⁸ Revised Explanatory Memorandum to the NBN Access Arrangements Bill, p. 42.

On 19 April 2012, the ACCC published explanatory material on the non-discrimination provisions as required under the CCA. As the non-discrimination provisions do not define what type of conduct will amount to 'discrimination between access seekers', the explanatory material provides the industry with guidance on where the ACCC will consider that discrimination has occurred. To date, the ACCC has not received any complaints from access seekers under the non-discrimination provisions.

6.3.2 ACCC views on non-discrimination provisions

As noted by the panel, non-discrimination provisions may limit NBN Co's ability to take advantage of efficiencies, such as offering different price terms to access seekers who are prepared to make investments that reduce the costs to NBN Co of providing access. The ACCC considers that this may ultimately depend on the interpretation of 'discrimination' or 'non-discrimination', which is undefined in the legislation and has not been interpreted by the courts.⁴⁹ It is important that regulatory settings do not prevent normal commercial negotiation between access providers and access seekers from occurring and do not discourage efficient outcomes that do not undermine competition. In this context, the potential effect of the provisions may be to reduce NBN Co's willingness to explore different pricing options.

Further, the ACCC has previously argued, as noted by the panel, that discrimination is inherently related to vertical integration. NBN Co (and other designated superfast network operators) will be vertically separated, wholesale-only operators. In this structural context, the ACCC considers that natural incentives for these operators to discriminate between access seekers to the detriment of competition in downstream markets is greatly diminished relative to vertically integrated operators.

However, during the transition to the NBN there are some concerns that any access conditions that favour one or two access seekers may be detrimental to downstream competition over the long-term. In particular, the ACCC acknowledges that a particular concern in introducing the provisions was that NBN Co may have incentives to offer 'bigger' access seekers more favourable terms than those offered to 'smaller' access seekers, in particular around price.⁵⁰ Further, during the transition period where NBN Co is designing product constructs there could be some incentives to bias product development towards the interests of particular access seekers. The ACCC notes that the general operation of Part IV and Part XIB could prevent certain types of discriminatory anti-competitive conduct.⁵¹ However, this would depend upon the facts and not provide as much assurance as a strict legislated non-discrimination obligation. In this context, non-discrimination may have some role to

⁴⁹ The ACCC's explanatory materials – which are not binding on any court - note that the non-discrimination provisions may require that access seekers belonging to the same class have been given an equal opportunity to obtain the same term or condition, or receive the same treatment. This reflects the ordinary meaning of 'discrimination', that access seekers in like circumstances are given like treatment. This approach might not necessarily prevent NBN Co from providing access on different terms and conditions to those access seekers that make investments that reduce NBN Co's costs, so long as all access seekers that make those investments are offered those particular term and conditions.

⁵⁰ Senate Hansard, No. 3 2001, 21 March 2011, pp. 1227-1229.

⁵¹ However there may be limitations with the ability of Part IV to address infrastructure access issues. See for example Productivity Commission, Inquiry Report: National Access Regime, 25 October 2013, p.95-99

play in preventing the entrenchment of a dominant market position during the transition to the NBN.

Should the non-discrimination provisions be retained, the ACCC would recommend that they are a transitional measure that is subject to review at an appropriate point.

6.4 Possible fundamental reform of Part XIC

The panel has suggested some possible alternative approaches to Part XIC including repealing Part XIC and relying on Part IIIA, or commercial negotiations, or Part XIB anti-competitive conduct provisions, or an equivalence test. The panel has also suggested some more radical reforms to Part XIC including introducing a substantial market power test and/or introducing a more prescriptive approach to pricing, for example by ministerial pricing determinations 'locking in' certain parameters.

The ACCC does not consider a fundamentally different approach to regulated access to telecommunications services would be in the long-term interests of end-users. This is because, where regulatory intervention is warranted, well-developed access regulation is able to promote competition in downstream markets by ensuring access to upstream inputs on reasonable terms and conditions of access.

Economic access regulation is an appropriate regulatory arrangement for industries with natural monopoly characteristics where an infrastructure facility forms a bottleneck for firms operating in upstream or downstream markets. The economic regulation of natural monopolies aims to achieve the productive efficiency benefits of a single infrastructure operator while preventing the allocative and dynamic efficiency losses that would result from the monopolist's use of its market position. Access regulation is also intended to promote competition in markets that need access to bottleneck infrastructure. The ACCC considers that the current Part XIC framework achieves these objectives.

By contrast, and as recently noted by the Productivity Commission, reliance on general competition law alone is limited in its ability to deal with access to essential infrastructure.⁵² Further, additional prescription in the legislation may not promote interests of end-users better than an appropriately bounded regulatory discretion guided by the long-term interests of end-users.

The long-term interests of end-users test is an appropriate vehicle through which to ensure that the welfare of all Australians is maximised. Should greater certainty be required around the application of regulation this can be done through the current framework through fixed principles and, for new services, special access undertakings and anticipatory exemptions. Fundamental reform is not justified and could risk anti-competitive outcomes that are not in consumer interests.

7 NBN Companies Act

The *NBN Companies Act 2011* (NBN Companies Act) contains provisions that constrain the ownership and activities of NBN Co. A number of these arrangements will be an important determinant of the nature and scope of competition existing in Australia's telecommunications industry, as they:

⁵² Productivity Commission, Inquiry Report: National Access Regime, 25 October 2013, p.95-99

- put in place vertical separation arrangements for NBN Co, thereby addressing the vertical integration concerns that have existed in relation to legacy networks
- restrict NBN Co from supplying content and non-telecommunications services, thereby preventing NBN Co from leveraging its market power into other markets
- provide the Minister with powers to mandate or prohibit NBN Co from supplying certain activities such as restricting NBN Co to supplying Layer 2 services.

In summary, the ACCC supports the retaining these provisions in the NBN Companies Act as fundamental elements of the structural reform of the telecommunications industry.

The ACCC's comments on the specific provisions in the NBN Companies Act are set out in the remainder of this section.

7.1 Wholesale-only and vertical separation arrangements

The NBN Companies Act contains provisions that put in place structural separation arrangements for NBN Co. These include:

- imposing wholesale-only requirements on NBN Co (with some exceptions)
- placing restrictions on ownership arrangements between NBN Co and downstream carriers, to prevent vertical re-integration through ownership.

The ACCC supports legislative measures that address issues of vertical integration in the telecommunications industry. By placing these restrictions in legislation, it ensures that structural separation is not subverted in the future by allowing NBN Co to directly supply services to retail customers in the future or entering into ownership arrangements with retailers and other carriers.

The ACCC views on the specific provisions are as follows.

7.1.1 Wholesale-only provisions

The wholesale-only restrictions in the NBN Companies Act operate through provisions which restrict NBN Co to supplying services to carriers and service providers.⁵³ This has the effect of preventing NBN Co from supplying services directly to end-users (as end-users will generally not be carriers or service providers). The ACCC generally supports these arrangements, and considers that they are an effective means of giving effect to a wholesale-only policy for the NBN.

NBN Co is permitted to supply directly to certain utilities companies for the purposes of managing their own networks (e.g. energy supply bodies, transport and road authorities and water supply bodies).⁵⁴ These permissions do not apply to the supply of telecommunications services to utility companies for purposes other than network management. As noted by the panel, these provisions have not yet been used.

The ACCC recognises that there is a tension between the competition benefits from restricting NBN Co from supplying services in potentially contestable markets (e.g. the market for supplying

⁵³ *National Broadband Network Companies Act 2011*, s. 9

⁵⁴ *National Broadband Network Companies Act 2011*, ss. 10-16

telecommunications services to utilities) and the potential efficiency benefits of allowing NBN Co to directly supply particular services to utility companies (including in competition with other telecommunications providers). Because the provisions have not yet been used, it is difficult to assess whether they achieve the right balance. The ACCC considers that this issue may best be addressed through placing appropriate restrictions on the types of services that NBN Co may supply to utility companies (e.g. restricting services to Layer 2 bitstream).

Finally, the panel has also sought comment on whether there are circumstances where NBN Co might be perceived as needing to deal directly with end-users and, if so, the rules that should apply where it was permitted to do so. The existing provisions generally restrict NBN Co to supplying telecommunications services on a wholesale-only basis, rather than restricting NBN Co from consulting and sharing information with end-users. NBN Co currently deals with end-users in a number of ways, including on matters of network rollout (e.g. issuing notices to end-users for the purposes of entering premises and installing equipment), providing information on their website and through processes such as the Product Development Forum. The ACCC does not consider that any additional rules are required in legislation to support NBN Co dealing with end-users directly.

7.1.2 Ownership restrictions

The ACCC supports restrictions on ownership arrangements between NBN Co and downstream carriers, as a means to restrict vertical re-integration through equity ownership.

The NBN Companies Act does not restrict NBN Co from acquiring another carrier (e.g. retailer). Rather, any company that NBN Co owns or is in a position to control must be wholesale only through the definition of an 'NBN Corporation'.⁵⁵ This has the effect of restricting NBN Co from owning or controlling a retailer. These provisions have not been tested in practice as NBN Co has not yet sought to purchase a downstream company; therefore it is difficult to assess how the provisions will operate in practice. However, at the current time, the ACCC is satisfied that these arrangements, alongside the prohibitions on anti-competitive acquisitions in the CCA (s 50), are sufficient to address competition concerns that may arise through NBN Co purchasing downstream carriers.

The NBN Companies Act similarly does not restrict downstream carriers from purchasing a controlling stake in NBN Co (e.g. when NBN Co is privatised). Rather, the Act allows the Minister to make regulations to restrict NBN Co from entering into an 'unacceptable private ownership or control situation'.⁵⁶ The ACCC considers that the optimal approach to ownership restrictions would be to establish up-front ownership caps in legislation, as this would eliminate any possible future tension in having to set ownership restrictions through regulation while at the same time seeking to maximise the value of NBN Co through privatisation. For example, ownership caps of 5 per cent (per company) may be an appropriate level to minimise the incentives for NBN Co to discriminate in favour of particular downstream providers.⁵⁷ However, the ACCC recognises that the current arrangements have the flexibility to impose ownership restrictions in the future, close to the time when private ownership of NBN Co may occur and the structure of the industry at that time.

⁵⁵ An 'NBN Corporation' is defined to include 'a company over which NBN Co is in a position to control'. See *National Broadband Network Companies Act 2011*, Schedule 1, s. 1.

⁵⁶ *National Broadband Network Companies Act 2011*, ss. 69-74

⁵⁷ This is similar to the restrictions on ownership of airports by airlines in the *Airports Act 1996*.

7.2 Limitations on the supply of services

The NBN Companies Act contains provisions that restrict the services NBN Co supplies and the investments it can make. These restrictions compliment the vertical separation arrangements in the Act by specifying the types of wholesale-only services that NBN Co must or must not supply. These arrangements are:

- The Minister can direct NBN Co to supply (or not supply) particular services as a carrier licence condition (e.g. the type or 'layer' of services supplied by NBN Co)
- NBN Co must not supply content services or non-telecommunications services
- NBN Co is generally restricted from making investments in companies or securities that are unrelated to the supply of telecommunications services.

The ACCC's general approach is that, for those elements of a network that are effectively contestable and where an enduring bottleneck does not persist, competition is likely to promote the interests of end-users. This supports limiting the scope of the services supplied by NBN Co to the lowest 'layer' of the network that is economically and technically feasible. There has been general agreement that restricting NBN services to Layer 2 bitstream is currently the most economically feasible access service for NBN Co to provide.

The Act does not mandate that NBN Co must supply a Layer 2 bitstream service. Rather, NBN Co was directed to provide Layer 2 services in NBN Co's 2010 statement of expectations.⁵⁸ NBN Co has subsequently designed and built its network and operating systems to support Layer 2 services, with some Layer 3 functionality to support certain services. The services currently declared by the NBN Co SFAA (Wholesale Broadband Agreement) and the special access undertaking are Layer 2 bitstream services, with some Layer 3 functionality.

The ACCC considers that it is reasonable to restrict the layer in which NBN Co will supply services through regulation or Ministerial directions. Given the dynamic nature of the telecommunications industry, specifying the scope of telecommunications services in legislation reduce the flexibility to respond to competitive conditions and investment in retail markets (e.g. declaring services above or below Layer 2 if this will promote the long term interests of end-users). However, given that the NBN Companies Act reflects the governance arrangements for NBN Co, it would not be inappropriate to specify the services that NBN Co will supply in this Act.

Finally, the ACCC also supports the current restrictions on NBN Co from supplying content and non-telecommunications services, and the restrictions on investments. These will limit the scope of NBN Co to leverage its market power as the national network owner into other markets, including those serviced by retail service providers and other carriers (e.g. content).

⁵⁸ Statement of Expectations, December 2010, p. 2 '... the Company will operate in accordance with the provisions of those Bills as introduced and specifically will offer open and equivalent access to wholesale services, at the lowest levels in the network stack necessary to promote efficient and effective retail level competition, via Layer 2 bitstream services.'

Concluding remarks

The ACCC welcomes the opportunity to contribute to the panel's review and would be happy to provide further information at the request of the panel.