Telecommunications Legislation Amendment (Access Regime and NBN Companies) Bill 2015

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Law and Bills Digest Section

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Date introduced: 2 December 2015
House: House of Representatives
Portfolio: Communications
Commencement: The day after Royal Assent.

Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bill’s home page, or through the Australian Parliament website.

When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the ComLaw website.
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<th>Definition</th>
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<tr>
<td>ACCAN</td>
<td>Australian Communications Consumer Action Network</td>
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<td>ACCC</td>
<td>Australian Competition and Consumer Commission</td>
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<td>BROC</td>
<td>Binding rules of conduct</td>
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<tr>
<td>CCA</td>
<td><em>Competition and Consumer Act 2010</em></td>
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<tr>
<td>CCC</td>
<td>Competitive Carriers’ Coalition</td>
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<tr>
<td>RSP</td>
<td>Retail service provider</td>
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<tr>
<td>SAO</td>
<td>Standard access obligation</td>
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<td>SAU</td>
<td>Special access undertakings</td>
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<td>SFAA</td>
<td>Standard Form Access Agreement</td>
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**Purpose of the Bill**

The purpose of the Telecommunications Legislation Amendment (Access Regime and NBN Companies) Bill 2015 (the Bill) is to amend the *Telecommunications Act 1997*, the *Competition and Consumer Act 2010* (CCA), the *National Broadband Network Companies Act 2011* (NBN Companies Act) and the *National Transmission Network Sale Act 1998* to:

- clarify the interaction between the facilities access regimes in Part XIC of the CCA and Schedule 1 of the *Telecommunications Act*
- facilitate increased competition and innovation in the telecommunications industry and greater choice for consumers by:
  - introducing a new obligation on access providers to give access to in-building cabling that they own or control and use to supply an active declared service, so that other service providers can supply carriage and/or content services through that cabling
  - exempting pilots or trials of new eligible services or enhanced declared services conducted by NBN corporations (such as the NBN Corporation) and other relevant carriers from the CCA’s existing non-discrimination obligations and
  - making various amendments to how the Australian Competition and Consumer Commission (ACCC) makes access determinations, binding rules of conduct (BROCs) and approves special access undertakings (SAUs)
- amend the existing line of business restrictions under the *NBN Companies Act* to provide the NBN Corporation (and any other NBN corporation) with greater flexibility in its business operations by permitting:
  - NBN companies to dispose of surplus assets and
  - allowing regulations to be made that can relax restrictions on supplying non-communications goods, services or investments and
- support the object of ensuring that superfast carriage services are reasonably accessible to all people in Australia, wherever they reside or carry on business by amending existing provisions that authorise the NBN Corporation to engage in certain types of anti-competitive conduct including:
  - limiting interconnection to listed points on its network and
  - requiring customers to purchase bundled services but providing that those authorisations cease once the NBN is built and fully operational.  

**Structure of the Bill**

The Bill is divided into a number of parts:

- Part 1 proposes changes to the interaction between the *Telecommunications Act* and CCA access regimes
- Part 2 deals with access to in-building cabling
- Part 3 proposes to exempt pilots or trials of certain services from existing non-discrimination obligations
- Part 4 proposes changes to how the ACCC makes access determinations, interim access determinations and BROCs
- Part 5 proposes changes to how and when a SAU can be varied
- Part 6 proposes changes to how the ACCC considers ‘fixed principles’ when determining a SAU
- Part 7 proposes amendments that will provide NBN corporations with greater business flexibility and
- Part 8 proposes changes to the definition of a ‘declared service’ to exclude certain commercial agreements between NBN Co, Optus and Telstra as well making consequential amendments and other minor changes.

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Background

**Vertigan Panel**

In December 2013 the Government established a Panel of Experts headed by Dr Michael Vertigan AC (the Panel) to conduct an independent cost-benefit analysis of broadband policy and review the regulatory arrangements. The Panel produced two reports to Government in 2014:

- a statutory review under section 152EOA of the *CCA* (the Statutory Report) and

Together, the reports contained 53 recommendations on regulatory and market structure matters.

**Key recommendations**

The recommendations made by the Panel in these reports that are pertinent to the matters covered by the Bill include:

- clarifying the ACCC’s powers in relation to directly regulating access to facilities under Part XIC of the *CCA* (recommendation 1 of the Statutory Report)
- amending Part XIC of the *CCA* so that provision of access to in-building cabling controlled by a carrier or service provider for use in conjunction with a declared service is included in the standard access obligations (SAOs) (recommendation 5 of the Statutory Report)
- amending the *CCA* to allow the NBN to discriminate where this would aid efficiency or is otherwise authorised by the ACCC (recommendations 13 and 15 of the Statutory Report)
- amending the *CCA* to provide that when the ACCC sets access charges via an access determination for infrastructure providers other than NBN Co, it should be required, along with other factors, to take account of the manner in which it sets charges for NBN Co (recommendation 17 of the Statutory Report)
- amending Part XIC of the *CCA* so that the ACCC, when making access determinations and BROCs, must make ‘reasonable efforts’ to consult with affected parties (but the mere fact it fails to do so should not invalidate the decision by the ACCC) (recommendation 20 of the Statutory Report)
- simplifying the SAU assessment process (recommendation 24) and providing greater flexibility in responding to a notice to vary a SAU (recommendation 23 of the Statutory Report) and
- streamlining the operation of the ‘fixed principles’ (recommendation 25 of the Statutory Report)
- introducing a price capping policy for NBN-type services under which prices continue to be affordable but not necessarily uniform nationally (recommendation 8 of the Market Report)
- to deal with situations such as pilots and trials, amending Part XIC of the *CCA* to allow the ACCC to determine that specified NBN Corporation services are not to be treated as declared services in circumstances where it is satisfied this is in the long-term interests of end-users (recommendation 15 of the Market Report).

**The Government’s response to the Vertigan Panel recommendations**

The Government’s framework for regulatory reform in the telecommunications sector, and its response to the recommendations made by the Panel were set out in a policy paper released on 11 December 2014 entitled ‘Telecommunications Regulatory and Structural Reform’ (the Government Response)."
Consultation

The Explanatory Memorandum states that the Government ‘consulted industry stakeholders on an exposure draft of the legislation and on the early assessment [Regulation Impact Statement] RIS’. The consultation process consisted of sending these materials to ‘major telecommunications carriers (about 20 industry members)’ and key interest groups such as the Australian Communications Consumer Action Network (ACCAN), Communications Alliance and the Competitive Carriers’ Coalition (CCC). The Government also provided the draft RIS and legislation to the ACCC for comment.

While six submissions were received during the consultation process, those submissions do not appear to have been made publically available. The Explanatory Memorandum indicates that in the submissions:

> Opinion was divided on the non-discrimination proposals. One submission proposed broadening the changes to permit any discrimination that aids efficiency. Another supported the proposed changes but sought a specific exemption for itself. Four submissions indicated concern that the changes could advantage larger providers over smaller ones, especially in the context of NBN Co migrating services from Telstra’s networks to the NBN. While the Government accepts that there are risks of such advantages being conferred, it also notes that general competition law provides adequate powers to the ACCC to monitor the sector and take action against anti-competitive conduct.

No submitters commented on the regulatory burden measurement costings in the early assessment RIS.

In their submissions to the current Senate Environment and Communications Legislation Committee’s inquiry into the Bill (discussed below), Macquarie Telecom and the CCC both express concern about the exposure draft consultation process. Macquarie Telecom states that it had:

> … provided its views on an exposure draft of the Bill to the Department [of] Communications in September 2015. We are disappointed that those concerns, which we understand to be reflective of the views of the vast majority of the industry, appear to have gone largely unheeded.

The CCC expresses similar concerns:

> … competitors have expressed serious and fundamental concerns with several elements of the proposed amendments in response to an exposure draft of the Bill that was released last year. A joint submission from the CCC and Optus to the exposure draft is attached to this submission. The concerns raised at that time do not appear to have been addressed… There seems no evidence these representations have been take into account in the present Bill.

These comments suggest that some of the changes proposed by the Bill may not have wide-spread support within the telecommunications industry.

Committee consideration

Senate Environment and Communications Legislation Committee

The Bill has been referred to the Senate Environment and Communications Legislation Committee for inquiry and report by 22 February 2016 (the Committee Inquiry). Details of the Inquiry are available here.

The Committee recommended that the Bill be passed. However, the Labor and Australian Greens’ Senators on the Committee issued a dissenting report disagreeing with the Committee’s recommendation and opposing the Bill. Labor and the Greens consider the Bill to be:

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8. Ibid.
9. Ibid., p. 20.
10. Ibid.
...a misguided and ideological attempt by Government to roll back a number of competition- and consumer-friendly reforms underpinning the National Broadband Network (NBN).16

The dissenting report advises that Labor and the Greens would not oppose the passage of Part 1, 2 and 6 of the Bill, which they consider to be ‘non-contentious’.17

**Senate Standing Committee for the Scrutiny of Bills**
The Senate Standing Committee for the Scrutiny of Bills had no comment on the Bill.18

**Policy position of non-government parties/independents**
The Opposition and Greens have indicated opposition Parts 3 to 7 and 8 of the Bill.19 In addition, the Opposition has previously indicated opposition to wholesale price capping if it leads to ‘people in the bush’ paying ‘more than people in the cities to access the NBN’.20

At the time of writing, the position of other non-government parties and independents on the Bill as a whole was not clear.

**Position of major interest groups**
The table below summarises the position of interest and industry groups that made submissions to the Committee Inquiry on Parts 1 to 8 of the Bill.

**Table 1: Position of major interest groups**

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<thead>
<tr>
<th>Interest group</th>
<th>Part 1</th>
<th>Part 2</th>
<th>Part 3</th>
<th>Part 4</th>
<th>Part 5</th>
<th>Part 6</th>
<th>Part 7</th>
<th>Part 8</th>
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<tr>
<td>Optus21</td>
<td>Supports</td>
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<td>Opposes</td>
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<td>Telstra22</td>
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<td>Macquarie Telecom23</td>
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<tr>
<td>ACCAN24</td>
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<td></td>
<td></td>
<td>No comment</td>
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16. Ibid., p. 31.
17. Ibid., p. 25.
### Financial implications

The Explanatory Memorandum states that the Bill will not impose any financial impact on the Commonwealth.\(^{27}\)

### Statement of Compatibility with Human Rights

As required under Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), the Government has assessed the Bill’s compatibility with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of that Act. The Government considers that the Bill is compatible.\(^{28}\)

**Parliamentary Joint Committee on Human Rights**

The Parliamentary Joint Committee on Human Rights considers that the Bill does not raise any human rights concerns.\(^{29}\)

### Key issues and provisions

#### Part 1: interaction between the Telecommunications Act and Competition and Consumer Act

**Part 1** of the Bill deals with the interaction between the access regimes contained in the *Telecommunications Act* and the *CCA* by proposing amendments to the *Telecommunications Act* to clarify the ACCC’s powers.

**Current law**

Currently both the *Telecommunications Act* and the *CCA* contain access regimes that allow carriers to access the infrastructure of other carriers in certain situations.

**The Telecommunication Act access regime**

Parts 3 and 5 of Schedule 1 of the *Telecommunications Act* create a regime that provides carriers with the right to access certain facilities owned by other carriers. The policy underpinning Schedule 1 of the Act is that, wherever practicable, carrier facilities should be co-located to avoid unnecessary duplication and proliferation of carrier infrastructure (such as transmission towers and underground ducts).\(^{30}\)

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\(^{25}\) Australian Smart Communities Association (ASCA), Submission to the Senate Environment and Communications Legislation Committee, Inquiry into the provisions of the Telecommunications Legislation Amendment (Access Regime and NBN Companies) Bill 2015, December 2015, accessed 3 February 2016.

\(^{26}\) CCC, Submission, op. cit.


\(^{28}\) The Statement of Compatibility with Human Rights can be found at page 9 of the Explanatory Memorandum to the Bill.


\(^{30}\) *Telecommunications Act 1997*, Schedule 1, clause 38; Thomson Reuters, Media and Internet Law and Practice, (at 22 December 2015), Telecommunications, Telecommunications Act, ‘30: Obligations’ [30.1300].
The regime applies to any facility, land on which such a facility is located, buildings or structures on such land, customer cabling and equipment connected to a telecommunications network, an eligible underground facility or telecommunications transmission tower owned or operated by the carrier of which the request is made.31

In short, under the *Telecommunications* Act access scheme, a carrier must give another carrier access to its facilities or network information where the following conditions are met:

- access is for the sole purpose of providing competitive facilities and carriage services or for the requesting carrier to establish its own facilities
- the request is reasonable and
- reasonable notice is given of the request.32

A request will only be reasonable where compliance with the request will ‘promote the long-term interests of end-users of carriage services or of services supplied by means of a carriage service’.33 The *Telecommunications* Act specifically provides that the determination of whether access will promote the long-term interests of end-users is to ‘be determined in the same manner as it is determined for the purposes of Part XIC’ of the CCA.34

The terms and conditions of access to such facilities are those agreed by the carriers or, in the absence of agreement, determined by an arbitrator or, where the carriers cannot agree on an arbitrator, by the ACCC.35

Additionally, the Minister may make a determination (by legislative instrument) setting out principles dealing with price-related terms and conditions relating to the obligation to provide access to certain facilities and network information, and for the ACCC to make a binding Code setting out conditions that are to be complied with in relation to the provision of access to transmission towers and so forth.36 As a result, both the Minister and ACCC can (in effect) set price limits and impose certain conditions that apply to all agreements involving one carrier accessing the facilities of another.

**The Competition and Consumer Act 2010 access regime**

Part XIC of the CCA creates a regulated access regime for the telecommunications industry. The regime provides for the ‘declaration’ of carriage services, and services which facilitate the supply of carriage services. The circumstances in which this can occur include as a result of the ACCC holding a public inquiry, a SAU being submitted, or an NBN Corporation publishing a Standard Form Access Agreement (SFAA).

Once a service is declared, ‘standard access obligations’ (SAOs) apply to carriers or carriage service providers who supply those services, unless otherwise exempt. In addition, once a service is declared the ACCC can make an ‘access determination’ that sets out any or all of the default terms and conditions of access to that service. Whilst the ACCC can make interim access determinations on an *ex ante* (up-front) basis, it must hold a public inquiry before making a final access determination.37

However, the CCA also provides that, prior to supplying a declared service, or before an eligible service is declared by the ACCC, a carrier or carriage service provider may give the ACCC a SAU specifying terms and conditions which it undertakes to comply with in relation to the applicable SAOs.38 SFAAs (issued by NBN Corporations) operate in a similar manner. SAUs and SFAAs override access determinations.39 This is intended to provide greater regulatory certainty, and thus promote investment in infrastructure.

In addition, the ACCC has the power to make binding BROCs. BROCs are intended to operate as short-term regulatory measures that enable the ACCC to urgently address concerns relating to the way a carrier or carriage

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31. *Telecommunications Act 1997*, section 7 (definition of facility), Schedule 1, subclause 17(3) and clause 31 (definitions of eligible underground facility and telecommunications transmission tower).
34. Ibid.
35. Ibid., subclauses 18(1) and (3).
36. Ibid., clauses 19, 28 and 37.
37. *Competition and Consumer Act 2010*, subsections 152AL(3), (3B) and (8A), section 152BCG.
38. *Competition and Consumer Act 2010*, section 152CBA.
39. Ibid., subsection 152AY(2), sections 152AXB and 152CJA.
service provider is complying with a SAO. BROCs override access determinations and may be issued without the ACCC holding a public inquiry.\footnote{Ibid., section 152BD.}

The diagram below highlights the steps involved in declaring a service, producing access obligations and the hierarchy of precedence between existing commercial agreements, SAUs, access determinations and BROCs (an issue raised by a number of submissions to the Committee’s inquiry into the Bill, discussed below).

Figure 1: roadmap to the Part XIC CCA access regime

\footnotesize{Source: CCH, Australian Competition and Consumer Law Commentary (at 15 August 2011), Telecommunications, ¶21 Roadmap of Pt XIC \[¶21-465\].}

As a result, the CCA creates a number of mechanisms through which a carrier or carriage service provider can access the infrastructure and services of other carriers or carriage service provides:

- by direct negotiation between the relevant parties
- where an NBN Corporation publishes a SFAA
- when a SAU is accepted
- through the ACCC making an interim or final access determination or
- through the ACCC making BROCs.

Importantly, the CCA provides that an access provider (that is, a carrier or carriage service providing an active declared service) must comply with statutory SAOs on:

- the terms and conditions commercially agreed with the relevant access seeker(s) in an access agreement or
- if a particular matter is not covered by an access agreement, on any terms and conditions relating to that matters as:
  - specified in any SAU
  - determined by the ACCC in any BROCs or
  - determined by the ACCC in an access determination.
As a result, access determinations, along with SAUs, BROCs, and SFAAs can potentially all play a role in determining the terms and conditions on which access to facilities is provided by one carrier to another under the CCA access regime.

Hence the facilities access regime in the CCA is based not only on negotiation and arbitration, but also on the direct intervention and determination by the relevant regulator (the ACCC). Additionally, the CCA provides the Minister with the power (by legislative instrument) to make a determination setting out principles dealing with price-related terms and conditions relating to SAOs. As a result, the Minister can set out principles that may (in effect) set price limits or impose other conditions on SAOs (other than those arising from commercially negotiated access agreements or a SFAA published by a NBN Corporation).

Issues arising from the existence of two statutory access regimes

In its Statutory Report, the Panel noted that a number of the submissions to its inquiry had pointed to a degree of overlap between the Telecommunications Act and CCA access regimes. These submissions suggested that the Telecommunications Act access regime should be replaced by the CCA access regime. Whilst noting the overlap, the Panel rejected either repealing the Telecommunications Act access regime or aligning it with the CCA’s on the basis that:

> It would not be appropriate to align the facilities access regime with Part XIC by providing the ACCC with a new explicit access determination power for the purposes of these provisions of the Telecommunications Act. This is because the types of facilities covered by the Schedule 1 regime tend to have specific characteristics and cost profiles and it is not clear that generic determinations could readily be developed. By contrast, the case-by-case approach provided for under Schedule 1 enables outcomes tailored to the individual circumstances. (emphasis added)

Although the Panel concluded that despite the overlap between the two access regimes, repealing the Telecommunication Act access regime was not required at this point in time. It recommended that the ACCC’s powers in relation to directly regulating access to facilities under Part XIC of the CCA should be more clearly specified.

The Panel also noted that ‘should it become apparent with the course of time that Part XIC can effectively supersede the Schedule 1 regime’, then repealing the Telecommunications Act access regime could be considered at that time as a deregulatory measure.

The proposed changes: clarifying the powers of the ACCC and the interaction between the access regimes

The changes proposed by Part 1 of the Bill are consistent with recommendation 1 of the Panel’s Statutory Report.

Proposed clauses 19A and 39A, at items 1 and 2 of the Bill, seek to give effect to recommendation 1 of the Statutory Report by providing that a carrier must not request access to facilities under the Telecommunications Act access regime if the service giving access to the facility is (or becomes) a declared service under Part XIC of the CCA. The intention is said to be to reduce the ‘uncertainty of having two competing access regimes operating simultaneously’.

Neither proposed provision affects the terms and conditions of existing agreements under the Telecommunications Act access regime. Both provisions also restrict the definition of a ‘declared service’ to ensure that they will not apply to active declared services being supplied under a special access undertaking, or to declared services being supplied by the NBN Corporation under a SFAA. It is said that this will ‘ensure that

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41. Competition and Consumer Act 2010, section 152AY.
42. Telecommunications Act 1997, Schedule 1, clauses 19, 28.
43. Competition and Consumer Act 2010, sections 152CH and 152CI.
45. Ibid., p. 20.
46. Ibid., recommendation 1.
47. Ibid., p. 20.
Carriers retain the right to seek ex ante access to facilities from NBN Co’ under the *Telecommunications Act* access regime ‘until a service is declared by the ACCC’.  

**Position of key interest groups**

In their submissions to the Committee Inquiry into the Bill, Optus and the CCC indicate their support for the measures proposed under Part 1 of the Bill. Other submitters do not comment on the proposed measures.

**Part 2: access to in-building cabling**

Part 2 of the Bill deals with access to in-building cabling under the CCA access regime. It clarifies the obligations of carriers and carriage service providers in relation to such cabling (for active declared services) by proposing amendments to Part XIC of the CCA (and a consequential amendment to the *National Transmission Network Sale Act 1998*).

**Current law**

Access providers who provide active declared services in accordance with Part XIC of the CCA are required to comply with both the statutory SAOs and any relevant terms of conditions contained in a commercially negotiated access agreement, SAU, SFAA, BROc or access determination relating to the supply of those services. The current statutory SAOs contained in the CCA do not directly deal with access providers giving access to in-building cabling to access seekers. As a result, access to in-building cabling presently falls outside the statutory SAOs, and is a matter for an access agreement, SAU, SFAA, BROc or access determination.

**The proposed changes**

In its Statutory Report, the Panel noted that it was not clear if the CCA’s current access regime would apply to in-building cabling because:

...such in-building cabling is not ordinarily owned or controlled by carriers or carriage service providers (being the persons who would be bound by the Part XIC regime). However, to the extent the cabling is within the legal and operational control of a carrier or service provider, there may be an argument that the regime has some application.

The Panel noted that there were three possible solutions, but ultimately recommended that the CCA be amended to include within the SAOs the provision of access to in-building cabling controlled (but not necessarily owned) by an access provider for use in conjunction with a declared service. However the Panel also noted that the first option (amending the CCA to make it clear that where an access provider controls customer cabling (whether its own or another party’s), access to that cabling is able to be declared under Part XIC) ‘may also need to be utilised to provide clarity that access to such cabling is covered’.

**Proposed subsections 152AR(5A) and 152AXB(5A) of the CCA, at items 5 and 6 of the Bill, reflect the Panel’s recommendation and preferred option. Both proposed provisions will ensure that access providers (including a NBN corporation) will be required to give access to customer cabling:**

- it either owns or controls physical access to and
- uses to supply an active declared service (whether to itself or other persons) for the purpose of allowing the access seeker to supply carriage services and/or content services.

The Government notes that the use of the word ‘controls’ in the proposed amendments is intended to:

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51. *Competition and Consumer Act 2010*, sections 152AR and 152AXB.
53. Ibid., p. 28, recommendation 5.
54. Ibid.
55. *Proposed paragraphs 152AR(5A)(d) and 152AXB(5A)(b).*
56. *Proposed paragraphs 152AR(5A)(e) and 152AXB(5A)(c).*
57. *Proposed paragraphs 152AR(5A)(a) and proposed subsection 152AXB(5A).*
...capture circumstances where a person, by virtue of an agreement with the legal owner or some other arrangement or understanding (express or implied by conduct) between the person and the owner of the cabling, is able to determine who can access and use the in-building cabling.  

The Explanatory Memorandum states that the proposed amendments will remove the potential for a single access provider who controls customer in-building cabling from ‘being able to create an access bottleneck as a result of its control over the cables, thereby favouring its own operations over those of its competitors’. It also notes that the amendments will not create an obligation on a person controlling in-building cabling to provide access to that cabling in the absence of a declared service that is dependent on that in-building cabling for its supply.

**Position of key interest groups**

In its submission to the Committee Inquiry into the Bill, Optus indicates its support for the measures proposed in Part 2 of the Bill. Other submitters do not comment on the proposed measures.

**Part 3: exempting pilots and trials from existing non-discrimination obligations**

Part 3 of the Bill will relax some of the non-discrimination obligations that apply to the NBN Corporation so as to permit it to ‘better conduct’ pilots or trials. The Bill proposes various restrictions on such trials or pilots, including that the NBN Corporation must notify the ACCC of the details of the trial or pilot, which cannot last more than 12 months (without approval by the ACCC).

**Current law**

Currently the CCA imposes a number of non-discrimination obligations on the NBN Corporation in relation to the supply of layer-2 bitstream services, developing new eligible services, enhancing declared services, enhancing certain facilities or the supply of declared services. As a result, if the NBN Corporation (or another carriage service provider) wants to test a new service or technology on the NBN, the NBN Corporation is required to make the same service or technology available to all customers.

**Issues arising from the application of existing non-discrimination provisions to pilots and trials**

The Panel recommended in the Market Report:

NBN Co should generally continue to be permitted to supply only declared services within the meaning of Part XIC of the Competition and Consumer Act 2010. However, to provide flexibility to deal with situations such as pilots and trials, the integration of new networks, the provision of services in contestable markets, and greater competition following full disaggregation, Part XIC should be amended to allow the ACCC to determine that specified NBN Co services are not to be treated as declared services in circumstances where the ACCC is satisfied this is in the long-term interests of end-users.

Whilst the proposed changes in Part 3 of the Bill give effect to part of the Panel’s recommendation (providing flexibility to deal with situations such as pilots and trials), arguably they do not provide the ACCC with the ability to ‘determine that specified NBN Co services are not to be treated as declared services’. This is because, as drafted, provided the NBN Corporation meets the relevant requirements in proposed subsections 152F(1) and (3), the pilot or trial will be automatically approved. In other words, the ACCC does not have the power to ‘determine’ or decide if such a trial is ‘in the long-term interests of end-users’ and hence should be exempted from the usual non—discrimination obligations imposed by the CCA.

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59. Ibid., p. 55.
60. Ibid., p. 56.
62. Competition and Consumer Act 2010, sections 152ARA, 151ARB, 152AXD and 152CJA.
The proposed changes

Proposed section 152F of the CCA (at item 16 of the Bill) provides that the non-discrimination obligations imposed by sections 152ARA, 152ARB, 152AXD and 152CJA will not apply to pilots or trials if the following conditions are met:

• the pilot or trial is of a new eligible service, enhanced declared service (or something ancillary to either)\(^64\)
• the pilot or trial will not operate for more than 12 months (unless the ACCC has agreed to a longer period)\(^65\)
• the ACCC is notified of the proposed trial or pilot prior to its commencement\(^66\)
• the person conducting the pilot or trial publishes an appropriate notice on its website,\(^67\) and
• the notice remains published on the person’s website until the end of the pilot or trial.\(^68\)

Pages 58 to 60 of the Explanatory Memorandum adequately describe the requirements that will apply to the notices given to the ACCC under proposed section 152F and other consequential amendments made by Part 3 of the Bill.

As proposed subsection 152F(5) provides that if the ACCC declares an eligible service that is being supplied as part of a pilot or trial, for the duration of the pilot or trial the service is not a declared service. The declaration would therefore not apply to contracts in place to supply those pilot or trial services. The Explanatory Memorandum notes:

As a result, an access provider supplying the pilot or trial service in accordance with the contract in force during the pilot or trial period (as set out in the notice given to the ACCC), could not be found to have breached the non-discrimination obligations in the event that there were different terms and conditions in the pilot or trial contract from the terms and conditions in access agreements for the declared service. However, the protection is only temporary and as soon as the pilot and trial ceases, the access provider will be required to comply with the access declaration.\(^69\)

The Explanatory Memorandum states that this provision is necessary to ‘provide certainty to industry in relation to investments and the commercially negotiated terms for pilots and trials’.\(^70\)

Position of key interest groups

With the exception of Telstra and the ASCA, all the submissions to the Committee Inquiry specifically oppose the changes proposed by Part 3 of the Bill.\(^71\)

Optus opposes the amendments proposed by Part 3 of the Bill for a number of reasons including that:

...there is no evidence we are aware of that suggests the non-discrimination obligations have operated either to restrict NBN Co’s product development or to discourage innovation. Further, Optus notes that the issue of non-discrimination was hotly contested when the NBN legislation was considered and Parliament made specific amendments aimed at reinforcing the principle of non-discrimination and ensuring that it applies on a consistent basis to all of NBN Co’s activities.\(^72\)

Optus also argues that enabling the NBN Corporation ‘to discriminate by limiting participation in pilots or trials could give a single RSP [retail service provider] a significant first mover advantage in the market’, leading to ‘adverse competition impacts’ especially in circumstances where ‘significant systems, processes or commercial

\(^{64}\) Proposed paragraph 152F(1)(a).
\(^{65}\) Proposed paragraph 152F(1)(b).
\(^{66}\) Proposed paragraph 152F(1)(c) and proposed subsection 152F(3).
\(^{67}\) Proposed paragraph 152F(1)(c).
\(^{68}\) Proposed paragraph 152F(1)(d).
\(^{69}\) Explanatory Memorandum, Telecommunications Legislation Amendment (Access Regime and NBN Companies) Bill 2015, op. cit., p. 4.
\(^{70}\) Ibid.
\(^{71}\) Optus, Submission, op. cit., p. 6; CCC and Optus, Joint Submission, op. cit., pp. 1–3; ACCAN, Submission, op. cit., p. 2; CCC, Submission, op. cit., p. 4; Macquarie Telecom, Attachment to Submission, op. cit., pp. 1–3.
\(^{72}\) Optus, Submission, op. cit., p. 6.
arrangements need to be put in place to bring a product or service to market’. Optus considers that ‘the principle of non-discrimination is fundamental to the level playing field credentials of the NBN’ and hence, it recommends either that the amendments be removed from the Bill, or that the Bill be amended so that:

- the application of Part 3 of the Bill is delayed until the roll-out of the NBN is complete or
- the NBN Corporation is limited to participating in pilots/trials only to the extent that it can demonstrate to the ACCC’s satisfaction that it faces practical constraints in offering broader industry participation.

The ACCAN is also concerned that the proposed amendments ‘may result in anti-competitive behaviour in the industry’ and that:

There is no mechanism to object to the conduct or for the ACCC to insist that the non-discrimination obligations apply to trials or pilots which it would otherwise deem to be anti-competitive.

ACCAN recommends that ‘the Bill be amended to provide the ACCC with powers to reject the switching off of non-discrimination obligations for pilots and trials which it determines to be anti-competitive’.

The CCC is also highly critical of the amendments proposed by Part 3 of the Bill, stating:

The proposal to dilute the non-discrimination requirements in order to allow NBN to do exclusive deals for “pilots and trials” is highly risky, unnecessary and supported by no persuasive evidence that there is a problem in existing rules.

The CCC also notes that the ACCC has issued guidelines ‘that would allow for pilots and trials on the condition that NBN allowed participation by any access seekers that wished to take part’ and that the CCC was ‘unaware of any pilot or trial proposal that has been proposed and prevented under the present rules’. As a result, the CCC concludes that the non-discrimination rules are ‘a core element’ in restraining market power in the telecommunications industry and that ‘they should not be changed’.

Macquarie Telecom made similar points, noting that it is unaware of ‘any examples of pilots or trial proposed by non-incumbents that have been unable to proceed because of the non-discrimination rules’. Macquarie Telecom also submits that there is no evidence that ‘there is some “chilling” effect arising from the non-discrimination rules’ that prevents access seekers from ‘coming forward with ideas to NBN’, and that, as a result:

…the case for change to the non discrimination rules has not been made out and, in the absence of a demonstrated, forward looking problem, the risks of making the proposed amendments are too great.

In relation to the operation of the CCA’s existing non-discrimination provisions to trials and pilots, Optus and the CCC note in their joint submission:

The Respondents do not consider that it would be discriminatory for NBN Co to participate in a bilateral trial at the request of an RSP. The ACCC in its XIC Non-Discrimination Guidelines published in April 2012 clearly takes the same view. The ACCC at page 21 and 22 of its Guideline make clear that it considers that non-discrimination requires NBN Co to generally provide equality of opportunity to participate in trials, not that all parties would be entitled to participate in each trial… It should also be noted that the Guideline remains currently unchallenged, and must be considered to represent the status quo. Accordingly, it appears extraordinary that the Bill seeks to amend the legislation to take of account of a ‘problem’ when there is no evidence that such a problem currently exists, on the
basis of an interpretation of the current legislation which is at odds with the unchallenged view of the industry regulator.  

In summary, the amendments proposed by Part 3 of the Bill appear to go further than the recommendation made by the Panel in the Market Report and have attracted substantial criticism from relevant interest groups and industry participants.

**Part 4: how the ACCC makes access determinations**

Part 4 of the Bill contains amendments to the *CCA* that will clarify the factors the ACCC must consider when making access determinations, interim access determinations and BROCs. The proposed amendments arguably go somewhat further than those foreshadowed by recommendations 17 and 20 of the Panel in its Statutory Report.  

**Current law**

Currently sections 152BCA and 152BDAA of the *CCA* set out matters the ACCC must take into account when making access determinations or BROCs respectively. These include:

- whether the determination will promote the long-term interests of end-users of carriage services or of services supplied by means of carriage services;
- the legitimate business interests of a carrier or carriage service provider who supplies, or is capable of supplying, the declared service and
- the interests of all persons who have rights to use the declared service.  

In relation to the process by which the ACCC makes interim access determinations and BROCs, current section 152BCG does not require the ACCC to observe procedural fairness by, for example, consulting with affected parties.

**The proposed changes**

In seeking to clarify the factors the ACCC must consider when making access determinations, the proposed amendments would require the ACCC to:

- **if the access determination applies to an NBN Corporation**: have regard to the method it uses to determine the non-price and price-related terms and conditions it includes in access determinations that do not apply to the NBN Corporation and
- **if the access determination applies to other access providers**: to the method it applies in determining non-price and price-related terms and conditions in NBN Corporation-specific access determinations.  

The Bill does not amend virtually identical provisions in the *CCA* relating to the factors to be taken into account by the ACCC in making BROCs. The Panel made no recommendation for such an amendment.

Consistent with the Panel’s recommendations, in making interim access determinations and BROCs, the ACCC would be required to make reasonable efforts to consult with affected parties.

**Position of key interest groups**

With the exception of those from Telstra and the ASCA, all submissions the Committee Inquiry specifically oppose the changes proposed by Part 4 of the Bill. Optus opposes these amendments for a number of reasons including that:

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85. *Competition and Consumer Act 2010*, paragraphs 152BCA(1)(a) and 152BDAA(1)(a).
86. *Competition and Consumer Act 2010*, paragraphs 152BCA(1)(b) and 152BDAA(1)(b).
87. *Competition and Consumer Act 2010*, paragraphs 152BCA(1)(c) and 152BDAA(1)(c).
88. *Proposed subsection 152BCA(2B).*
89. *Proposed subsection 152BCA(2A).*
90. *Competition and Consumer Act 2010*, section 152BDAA. The Panel did not recommend an amendment to the *CCA* in this regard.
91. Vertigan Panel, *Statutory Report*, op. cit., recommendation 20; *proposed sections 152BCGAA* and *152BDAB.*
...it is possible to envisage circumstances in which these provisions interfere with or constrain the decision making of the ACCC to the detriment of consumers. As a minimum, they appear to open the scope for further debate as to appropriate approach to setting access prices. This is likely to add complexity and delay in the ACCC’s decision making processes. More significant is the possibility that these provisions might be used to limit or frustrate the ACCC’s decision making powers by encouraging legal challenges to those decisions.\(^93\)

Optus also argues that ‘whilst the amendments respond to recommendations of the Vertigan Review’ they ‘appear to go beyond the specific concerns raised’ by the Panel as they:

...clearly go further than ensuring that an access provider is not disadvantaged as compared to NBN Co, since it also requires the ACCC to ensure that NBN Co is not disadvantaged compared to other access providers.\(^94\)

As a result, Optus recommends that the amendments be removed from the Bill, or alternatively, that the Bill be amended so that ‘the ACCC is required to have regard to consistency between NBN Co and other access providers only in relation to pricing decisions for services that are supplied in the same wholesale market(s) as NBN Co services.’\(^95\)

The ACCAN is also critical of the amendments proposed in Part 4 of the Bill, arguing that they ‘appear to restrict’ the ACCC’s ability to ‘make markets work for consumers’ and would instead ensure that ‘markets work for service providers’.\(^96\) ACCAN is also:

...not convinced that the problems triggering these proposed amendments currently, or will in the future, exist. The amendments are likely to add further complexity to the telecommunications regime and increase the amount of time it takes for the regulator to arrive at, and implement, decisions. ACCAN suggests removing the proposed measures...\(^97\)

The CCC is also critical of the amendments proposed by Part 4 of the Bill, stating that the ‘proposed new legislative requirements relating to the way the ACCC performs its duties represent unnecessary red tape at best, an unwelcome injection of uncertainty at worst’.\(^98\) Macquarie Telecom makes a similar point, stating:

Proposed changes to the processes the ACCC must follow in access determinations and binding rules of conduct do not reflect any demonstrated problem, but do add red tape, risk creating further delay and complexity to an already highly bureaucratic process, and, in so doing, create further barriers to smaller stakeholders participating in these important regulatory processes.\(^99\)

Optus and the CCC note in their joint submission:

... the proposed amendments in Part 4 of the Bill add unnecessary further complexity to Part XIC, which is already unduly lengthy and complex. These amendments will also tend to exacerbate the tendency to delay and cost in inquiries referred to above. In addition, the Respondents do not believe that these amendments address any current problem... the ACCC already devotes huge amounts of time and effort to consideration of access determination and is already required to consider a broad ambit of relevant factors. To add additional factors which the ACCC is required to consider is highly unlikely to impact on decisions made by the ACCC, as the ACCC already consults very widely with all industry stakeholders and is required to take account of a broad range of factors. The

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\(^92\) Optus, Submission, op. cit., pp. 3–4; CCC and Optus, Joint Submission, op. cit., pp. 2–3; ACCAN, Submission, op. cit., pp. 1–2; CCC, Submission, op. cit., p. 5; Macquarie Telecom, Attachment to Submission, op. cit., p. 3.

\(^93\) Optus, Submission, op. cit., p. 3.

\(^94\) Ibid.

\(^95\) Ibid., p. 4.

\(^96\) ACCAN, Submission, op. cit., p. 2.

\(^97\) Ibid.

\(^98\) CCC, Submission, op. cit., p. 5.

\(^99\) Macquarie Telecom, Attachment to Submission, op. cit., p. 3.
In summary, the amendments proposed by Part 4 of the Bill appear to go somewhat further than the recommendations made by the Panel, and have attracted criticism from relevant interest groups and industry participants.

**Part 5: how and when a special access undertaking can be varied**

SAUs are intended to provide certainty around the terms of access to certain facilities by allowing the owner of those facilities to propose the price, terms and conditions on which it will make access to them available to other carriers.

Part 5 of the Bill contains proposed amendments to the CCA designed to increase certainty for a person giving a SAU. The proposed amendments would require the ACCC to specify variations to a SAU that it considers essential for it to accept that undertaking. To increase flexibility, variations may be proposed that, though using different wording, have the same effect or substance. The proposed amendments are consistent with recommendations 22 and 23 of the Panel in the Statutory Report.

**Current law**

Currently, section 152CBDA of the CCA provides that where a SAU is in force, the ACCC may issue a written notice stating that, if the person makes the variations to the SAU specified in the notice and returns the SAU to the ACCC with those variations within a specified period, the ACCC will consider the varied SAU as if it were the original SAU.

**The proposed changes**

The aim of the amendments proposed by Part 5 of the Bill is to clarify the process by which the ACCC can request variations to a SAU. The key thrust of the proposed changes is that the ACCC would be restricted to specifying variations to a SAU that it considers essential to its acceptance of a SAU, rather than the current position where it can specify variations that it considers desirable, but not essential.\(^{101}\) However, the ACCC will retain the power to ‘suggest other variations to the original undertaking’ that it ‘considers desirable’.\(^{102}\)

The amendments will also allow a person responding to a notice from the ACCC to vary a SAU to propose variations that have the same effect (outcome) as those proposed by the ACCC.\(^{103}\) The Explanatory Memorandum suggests that ‘this will confer flexibility on the person giving the SAU’.\(^{104}\) Pages 63 to 64 of the Explanatory Memorandum adequately describe other aspects of the proposed changes.

**Position of key interest groups**

With the exception of Telstra and the ASCA, all submissions to the Committee Inquiry specifically oppose the changes proposed by Part 5 of the Bill.\(^{105}\)

Optus opposes these amendments for a number of reasons including that:

> ...it is unclear what specific problem the changes aim to address. They do not respond to any systemic problem with the variation notice powers which were only recently put into the CCA.\(^{106}\)

Optus also argues that whilst the amendments reflect the Panel’s recommendations they ‘are likely to undermine the efficacy of this regulatory tool, and may have some adverse consequences for the industry and consumers’ as they ‘are likely to add to the delay and uncertainty of settling future SAU’s and they will almost

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101. Proposed subsection 152CBDA(2A).
102. Proposed subsection 152CBDA(2B).
103. Proposed paragraph 152CBDA(2A)(b) and proposed subparagraph (3)(b)(ii).
certainly re-open the scope for regulatory gaming’. As a result, Optus recommends that the amendments be removed from the Bill.

The ACCAN also opposes Part 5 of the Bill on the ground that the proposed amendments ‘appear to restrict’ the ACCC’s ability to ‘make markets work for consumers’ and would instead ensure that ‘markets work for service providers’. The CCC is also critical of the proposed amendments, noting:

There is no evidence that there is a problem with the legislation beyond occasional complaints by those network owners with market power that they need to work hard to satisfy the ACCC that their proposed undertakings are reasonable and promote the long term interest of end users.

The CCC also submits that ‘the proposed amendments have the effect of shifting flexibility and discretion to the monopoly owners and away from the ACCC.’ Macquarie Telecom makes a similar point, stating:

The proposed amendments limiting the ability of the Commission to vary SAU to changes that are necessary to satisfy the Commission that the SAU is “reasonable” are unnecessary, and seriously risk undermining the flexibility that the Commission needs to deal with complicated and extensive undertakings.

In summary, the amendments proposed by Part 5 of the Bill, whilst consistent with the recommendation made by the Panel, have attracted substantial criticism from relevant interest groups and industry participants.

Part 6: how the ACCC considers fixed principles when determining a special access undertaking

Part 6 of the Bill makes technical changes to how the ACCC will consider ‘fixed principles’ when determining a SAU. Unlike other parts of the Bill, Part 6 did not attract any commentary from relevant interest groups and industry participants who made submissions to the Committee Inquiry.

Current law

The ACCC may include in an access determination or SAU a provision that is specified to be a ‘fixed principles provision’ (in the case of Access Determinations) or a ‘fixed principles term or condition’ (in the case of SAUs). This digest will refer to these as ‘fixed principles’. Both price and non-price terms and conditions can be designated as fixed principles provisions.

The Explanatory Memorandum notes that fixed principles are designed to provide long term certainty for service providers and access seekers and have assumed particular significance in the telecommunications industry ‘given that there can be substantial up-front costs in rolling out or upgrading telecommunications networks, with those costs often recouped over a lengthy period.’

The effect of specifying that a provision is a fixed principle provision is to ‘lock in’ the matters dealt with in the term or condition for a specified period(s). An additional effect of designating fixed principles in access determinations or SAUs is that:

• any access determination that replaces the original access determination must include a fixed principles provision in the same terms as that contained in the original access determination

• where a later SAU is submitted by that person that includes the same fixed principle, the ACCC cannot reject that SAU because of that fixed principle

• if the SAU is varied, the ACCC does not have the ability to reject that varied SAU because of the fixed principles term or condition.

107. Ibid., p. 6.
108. Ibid.
110. CCC, Submission, op. cit., p. 5.
111. Ibid., p. 6.
113. Competition and Consumer Act 2010, subsections 152BCD(1) and 152CBA(A)(1).
115. Competition and Consumer Act 2010, subsections 152BCD(2) and 152CBA(A)(3).
The proposed changes

Proposed subsection 152CBD(1A), at item 26 of the Bill, requires the ACCC to have regard to any relevant fixed principles included in other access determinations when considering whether to include a fixed principles provision in an access determination. The proposed amendment is consistent with paragraph (c) of recommendation 25 of the Statutory Report.\textsuperscript{117}

Items 27 and 28 amend paragraph 152CBAA(5)(h) and subsection 152CBAA(6) of the CCA to replace the words ‘for a reason that concerns’ with ‘on the basis of the inclusion or effect of’. The effect of the amendments is to narrow the reasons upon which the ACCC could reject a SAU or variation to a SAU containing a fixed principle. It does this by providing that the ACCC must not reject the SAU on the basis of the inclusion or effect of the fixed principle in question.

The Explanatory Memorandum states that this change will ensure that the ACCC must have more certainty about ‘the implications of accepting fixed principles in the first place’.\textsuperscript{118} Pages 64 to 65 of the Explanatory Memorandum adequately describe other aspects of the proposed changes.

Position of key interest groups

As noted above, none of the submissions to the Inquiry directly address the changes proposed by Part 6.

Part 7: providing the NBN Corporation with greater business flexibility

Currently Part 2 of the \textit{NBN Companies Act} imposes business restrictions on the NBN Corporation that are designed to ensure that it is ‘highly focused on its objectives in its operation and limits its ability to exercise market power through integration in horizontal markets, or participation in downstream markets’.\textsuperscript{119}

Part 7 of the Bill proposes a number of changes to the \textit{NBN Companies Act} that will provide the NBN Corporation with increased business flexibility. The Government argues that the proposed changes will ‘not compromise the key purpose of the existing line of business restrictions’.\textsuperscript{120} Almost all submissions to the Committee Inquiry disagree with part or all of the changes proposed by Part 7 in relation to increasing the business flexibility of the NBN Corporation.\textsuperscript{121}

Current law—line of business restrictions

Currently sections 17, 18, 19 and 20 of the \textit{NBN Companies Act} prohibit the NBN Corporation from supplying content services, non-communications services and non-communications goods, and place restrictions on investment activities respectively.

The proposed changes—line of business restrictions

Proposed section 22B of the \textit{NBN Companies Act}, at item 30 of the Bill, would allow Regulations to specify when the restrictions imposed by sections 18, 19 and 20 do not apply. Whilst appearing to allow the Government to effectively by-pass the business line restrictions imposed by the \textit{NBN Companies Act}, any such regulations would be subject to Parliamentary scrutiny and potential disallowance.\textsuperscript{122} The Explanatory Memorandum states that the proposed changes ‘would allow flexible responses to unanticipated circumstances... without degrading the bright line conduct rules that the sections establish’.\textsuperscript{123}

Item 31 would amend section 19 of the \textit{NBN Companies Act} to provide that an NBN Corporation must not supply non-communications goods to another person unless:

\begin{enumerate}
  \item \textsuperscript{116} Ibid., subsections 152BCD(3) and 152CBAA(3).
  \item \textsuperscript{117} Vertigan Panel, \textit{Statutory Report}, \textit{op. cit.}, recommendation 25, p. 72.
  \item \textsuperscript{118} Explanatory Memorandum, \textit{Telecommunications Legislation Amendment (Access Regime and NBN Companies) Bill 2015}, p. 65.
  \item \textsuperscript{119} Ibid., p. 7.
  \item \textsuperscript{120} Ibid.
  \item \textsuperscript{121} Ibid., \textit{op. cit.}, pp. 4–7; Optus, \textit{Submission}, \textit{op. cit.}, pp. 4–6; CCC and Optus, \textit{Joint Submission}, \textit{op. cit.}, pp. 2–3; ACCAN, \textit{Submission}, \textit{op. cit.}, pp. 1–2; CCC, \textit{Submission}, \textit{op. cit.}, pp. 5–6; Macquarie Telecom, \textit{Attachment to Submission}, \textit{op. cit.}, pp. 3–4.
  \item \textsuperscript{122} \textit{National Broadband Network Companies Act 2011}, section 101; \textit{Legislative Instruments Act 2003}, sections 38–42.
  \item \textsuperscript{123} Explanatory Memorandum, \textit{Telecommunications Legislation Amendment (Access Regime and NBN Companies) Bill 2015}, \textit{op. cit.}, p. 7.
\end{enumerate}
• the goods are for use in the connection or supply, or prospective supply, of an eligible service by the NBN Corporation\textsuperscript{124}

• the NBN Corporation:
  – did not obtain the goods for the purpose of supplying the goods\textsuperscript{125}
  – obtained the goods for the purpose of supplying the goods in connection with the supply, or prospective supply, of an eligible service\textsuperscript{126} or
  – considers the goods to be excess to the NBN corporation’s requirements.\textsuperscript{127}

The Explanatory Memorandum suggests that ‘these additional grounds will allow NBN corporations to manage their asset holdings in a more efficient and financially effective manner’.\textsuperscript{128}

The above amendments are largely consistent with Recommendation 29 of the Panel’s Statutory Report—although the Panel appears to have focused in its recommendations on sections 17, 18 and 19 of the NBN Companies Act. In relation to section 20 (investment activities), the Panel made a number of recommendations contingent on the Government accepting other recommendations.\textsuperscript{129} Those recommendations are not reflected by the proposed changes contained in the Bill. However, the changes proposed in relation to section 20 are consistent with the underlying philosophy and intent of the recommendations related to sections 18 and 19 of the NBN Companies Act. It is worth noting that the proposed amendments in relation to sections 18, 19 and 20 have attracted criticism from relevant interest groups and industry participants, as discussed below.

**Position of key interest groups—proposed changes to line of business restrictions**

With the exception of ACCAN and the ASCA, submissions to the Committee Inquiry oppose the changes proposed by Part 7 of the Bill.\textsuperscript{130}

Optus opposes the proposed amendments for a number of reasons including:

• it is unclear why the proposed changes are necessary and

• given the NBN Corporation was established to ‘specifically address a market failure relating to the provisions of last mile access for high speed broadband services; it should remain focused on that purpose’.\textsuperscript{131}

As a result, Optus recommends that the amendments proposing to relax the NBN Corporation’s line of business restrictions be removed from the Bill.\textsuperscript{132}

The CCC, whilst stating ‘it is reasonable to clarify that NBN should be able to dispose of surplus goods’ considers that ‘the lines of business restrictions were put in place for very important reasons and hence the NBN Corporation ‘should remain strictly focused on the purpose for which it was created – addressing areas of market failure in wholesale markets’.\textsuperscript{133} Macquarie Telecom makes a similar point:

...the rationale for the line of business restrictions – to constrain NBN from entering and undermining competitive markets – remains a keystone element of the regime.\textsuperscript{134}

Macquarie Telecom then concludes that ‘further information about the problem NBN presently faces is necessary before a judgement can be made about the proposed amendments.’\textsuperscript{135}

\begin{footnotes}
\item 124. Proposed paragraph 19(a).
\item 125. Proposed paragraph 19(b).
\item 126. Proposed subparagraph 19(c)(i).
\item 127. Proposed subparagraph 19(c)(ii).
\item 128. Explanatory Memorandum, Telecommunications Legislation Amendment (Access Regime and NBN Companies) Bill 2015, p. 66.
\item 129. Vertigan Panel, Statutory Report, op. cit., recommendations 32 and 33.
\item 131. Optus, Submission, op. cit., p. 7.
\item 132. Ibid., p. 7.
\item 133. CCC, Submission, op. cit., p. 6.
\item 134. Macquarie Telecom, Attachment to Submission, op. cit., p. 4.
\item 135. Ibid., p. 4.
\end{footnotes}
In summary, the amendments proposed by Part 7 of the Bill, whilst broadly consistent with the recommendation made by the Panel, have attracted criticism from relevant interest groups and industry participants.

**Current law—authorised anti-competitive conduct**

Currently Division 16 of Part XIB of the CCA regulates when an NBN Corporation can engage in ‘authorised’ anti-competitive conduct that is ‘reasonably necessary to achieve uniform national pricing’. The types of anti-competitive conduct that a NBN Corporation can be authorised to conduct include:

- refusing to permit interconnection of a facility otherwise than at a ‘listed point of interconnection’ with one or more facilities of a service provider or utility;\(^\text{137}\)
- refusing to supply or offer for supply a designated access service to a service provider or utility unless that entity agrees to acquire one or more other designated access services from the NBN Corporation;\(^\text{138}\)
- engaging in other conduct that is ‘reasonably necessary to achieve uniform national pricing of eligible services supplied by the NBN Corporation to service providers and utilities’.\(^\text{139}\)

The purpose of allowing the NBN Corporation to engage in the above anti-competitive conduct is to facilitate ‘uniform national pricing of an eligible service supplied, or offered to be supplied, by an NBN corporation’ to service providers and utilities.\(^\text{140}\) Importantly, the CCA provides that uniform national pricing of eligible services is achieved ‘if, and only if, the price–related terms and conditions on which the NBN corporation supplies, or offers to supply, the eligible service to service providers and utilities are the same throughout Australia’.\(^\text{141}\)

**The proposed changes—authorised anti-competitive conduct**

In its Market Report, the Panel recommended that:

> A policy of price capping for NBN-type services be adopted, under which prices continue to be affordable but not necessarily uniform nationally. This should be accompanied by a gradual move towards cost-based wholesale pricing, with directly targeted subsidies used to address any concerns regarding user affordability that may result from this change.\(^\text{142}\)

The Government Response accepted the above recommendation and indicated an intention to shift away from uniform national pricing to wholesale price capping, as recommended by the Panel.\(^\text{143}\) The amendments proposed by the Bill to the CCA reflect that policy.

For example, item 33 of Part 7 of the Bill amends objects paragraph 151DA(1)(b) of the CCA to change one of the objects of that section from promoting ‘uniform national pricing’ to promoting ‘access to superfast carriage services by all people in Australia, wherever they reside or carry on business’. Likewise item 35 repeals paragraph 151DA(2)(e), which requires all refusals by a NBN Corporation to permit interconnection of particular facilities at particular locations to be reasonably necessary to achieve uniform national pricing. Similarly, items 38 and 45-48 repeal a number of subsections that refer to national uniform pricing, to give effect to the shift to a policy of wholesale price capping.

Subdivision B of Division 2 of Part 3 of the **NBN Companies Act** sets out the circumstances and method by which Commonwealth ownership of the NBN Corporation ceases. Part of that process is a declaration by the Minister that the NBN should be treated as built and fully operational.\(^\text{144}\) Proposed section 151DC provides that Division 16 of Part XIB of the CCA will cease to have effect when the Minister makes a declaration under the **NBN Corporations Act** that the NBN should be treated as built and fully operational. In regards to this provision, the Government notes:

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136. *Competition and Consumer Act 2010*, paragraphs 151DA(1)(b), (2)(e), and (3)(c).
137. Ibid., subsection 151DA(2); section 151DB (the ACCC must prepare a list of points of interconnection).
138. Ibid., subsection 151DA(3).
139. Ibid., subsection 151DA(4).
140. *Competition and Consumer Act 2010*, paragraph 151DA(1)(b) and subsection 151DA(5).
Position of key interest groups—proposed changes to authorised anti-competitive conduct

None of the submissions to the Inquiry directly addressed the proposed amendments contained in Division 3 Part 7 of the Bill that deal with authorised anti-competitive conduct.

Part 8: definition of declared service and interaction with other agreements

The stated aim of Part 8 of the Bill is to clarify that facilities access services supplied under the commercially negotiated agreements between NBN Corporation, Telstra and Optus:

• are not declared services to the extent that they are supplied under those agreements and
• will continue to operate if those services are declared, until those specific agreements expire.\(^{146}\)

Current law

Currently section 152BE of the CCA defines an ‘access agreement’ in a manner that includes commercially negotiated agreements between an access seeker and carriage service provider who supplies, or proposes to supply, a declared service. Section 152BCC then provides that access agreements prevail over access determinations, to the extent of any inconsistencies between them in relation to the parties to the relevant access agreement dealing with the relevant declared service.

The proposed changes

Proposed subsection 152AQA(1), at item 50 of the Bill, provides that certain agreements or arrangements to access facilities that would be a declared service are not affected by the declaration of those facilities if the specified agreement or arrangement is in place prior to ACCC declaration of those facilities. The types of agreements include:

• a contract to which a determination made under subsection 577BA(9) of the Telecommunications Act applies
• the contract entered into between the NBN Corporation and Optus Networks Pty Limited on 23 June 2011 and restated on 14 December 2014 or
• where the relevant service is being supplied by a NBN Corporation as part of an arrangement between a NBN Corporation and another carrier.\(^{143}\)

In relation to a contract to which a determination made under subsection 577BA(9) of the Telecommunications Act applies, the Explanatory Memorandum notes that there has been one such determination: the Telecommunications (Agreements for Compliance with Structural Separation Undertaking) Determination 2014 (the Determination).\(^{148}\) The Determination applies to six contracts, arrangements or undertakings between Telstra and the NBN Corporation.\(^{146}\) The Explanatory Memorandum notes that the intended purpose of proposed section 151AQA is to:

...capture the commercial agreements made between Telstra and NBN Co, and Optus and NBN Co. The proposed paragraphs will ensure that these agreements, which are designed to facilitate the roll-out of the NBN, will continue to operate in accordance with their existing negotiated terms and conditions, even if the ACCC later declares one or more of the facilities access services which are supplied as part of the agreements. This protection applies for the life of the agreements, thereby giving certainty to the parties concerned on the matters covered. Therefore the exemption in section 152AQA grandfathers the commercial terms in the agreements between Telstra and NBN Co, and Optus and NBN Co... Proposed paragraph 152AQA(1)(c) is intended to capture any arrangement between


\(^{146}\) Ibid., p. 8.

\(^{147}\) Proposed subsection 152AQA(1).

an NBN corporation and another carrier (such as a commercial contract made under access granted in Schedule 1 to the *Telecommunications Act*). This will provide certainty to NBN Co and industry in relation to existing agreements (that are not those agreements set out in 152AQA(1)(a) or 152AQA(1)(b)), and avoids any confusion that might arise as a result of the application of a competing access regime. 150

**Position of key interest groups**

In its submission to the Committee Inquiry, the CCC suggests that proposed section 152AQA ‘duplicates existing provisions’ and therefore ‘represents yet another amendment that appears to be entirely unnecessary’ and would therefore ‘be adding complexity to the CCA for no purpose’. 151

**Concluding comments**

The Bill largely reflects an attempt to give effect to a number of the Panel’s recommendations. However, some of the amendments proposed appear to go further than strictly necessary to give effect to the related recommendation. The Bill, in its current form, has been criticised by a variety of industry and interest groups. As such, it appears likely to be the subject of significant scrutiny and debate as it passes through Parliament.