Regulation Impact Statement

Measures to provide a level playing field for the provision of super fast broadband across Australia

Telecommunications Act 1997 and Trade Practices Act 1974

1. Issues which give rise to the need for action

Australia has limited investment in next generation superfast broadband which is considered a fundamental enabling infrastructure for Australia's future economic prosperity. Broadband services, pricing and take-up in Australia also rate poorly relative to other OECD countries. A key driver of these poor outcomes has been the lack of incentive to invest and difficulties in competing given the structure of the telecommunications industry, particularly as Telstra was privatised without an effective competition framework being put in place. In 2008-09 the Government conducted a tender process to find a private sector entity prepared to roll-out high-speed broadband. None of the tenders received were found to offer value for money.

To address this situation, on 7 April 2009, the Government announced that it would establish a company, NBN Co, to build and operate a new national wholesale-only superfast broadband network.

The key issue to be addressed in this regulation impact statement (RIS) is whether regulatory requirements are needed to ensure that the Government's policy objectives for the provision of superfast broadband in Australia are effectively delivered by NBN Co and competing providers. The particular issue of concern is whether, in the absence of such regulation, market operations may mean that NBN Co is unable to deliver on objectives related to addressing the original situation, which gave rise to its creation.

In broad terms these policy objectives can be summarised as ensuring:

- consumers have access to high-quality superfast broadband services, preferably delivered by fibre-to-the-premises (FTTP) (the 'speed and quality objective');
- superfast broadband services[1] are available nationally (the 'coverage objective');
- there is national uniform wholesale pricing for such services (the 'pricing objective')[2]; and
- there is efficient and effective competition in the provision of superfast broadband infrastructure and services, that supports, by open and equivalent access to wholesale services on that infrastructure, a vibrant and competitive retail market (the 'competition objective').

[1] Superfast broadband networks are defined as fixed networks offering download speeds of 25 Mbps or above. They include fibre-to-the-premises (FTTP), fibre-to-the-node and hybrid-fibre-coaxial networks (HFC).

[2] DBCDE understand that the Prime Minister has determined that the agreement entered into with the independents should be treated as an election commitment.

By ensuring these four objectives are delivered nationally, the Government is also aiming to provide, as far as possible, equitable access to superfast broadband services to all Australians, whether in metropolitan, regional, rural or remote Australia (the 'equity' objective').

As the key vehicle for delivering these objectives is NBN Co, the Commonwealth also has an objective of ensuring that NBN Co can operate on a commercially sustainable basis (the 'sustainability' objective).

While other options for delivering the Government's objectives, particularly in relation to pricing, may be considered further, the measures proposed in this RIS seek to ensure that these objectives are supported by the provision of a level playing field, particularly one which prevents opportunistic cherry-picking.

Clearly, these objectives are inter-related. For example, if the pricing objective is to be delivered through NBN Co being required to implement an internal cross-subsidy, other fibre providers could select to roll-out fibre in low-cost, high-revenue markets and offer potentially cheaper wholesale prices – effectively cherry-picking NBN Co's revenue streams. While such an outcome would be consistent with the Government's competition objective, it would impact on NBN Co's ability to deliver the coverage, equity and sustainability objectives.

Further, if equivalent regulatory obligations and technical specifications do not apply across all competing superfast broadband networks, these networks may fail to provide consumers with services that meet the Government's speed and quality objective. In order to support a competitive retail market, it is important that there are appropriate services and interfaces across these competing networks.

The issue is essentially whether NBN Co and other providers of superfast broadband networks in Australia should operate on the same level regulatory playing field and, if so, what the rules of that playing field should be. The Government's intention for NBN Co is that it will provide national coverage of superfast broadband at uniform wholesale prices; however, the market will still be open to entry by other investors.

With the potential roll-out of multiple networks, there is a question of how to achieve outcomes for end-users which are consistent with the objectives of the NBN. To achieve this, the Government wants to ensure infrastructure that is installed provides high levels of services in terms of speed and quality and can support strong retail level competition.

Background

On 7 April 2009 the Government announced it would establish a new company, NBN Co, to build and operate a new superfast National Broadband Network (NBN). The new network will connect 93 per cent of Australian premises with FTTP and connect other premises in Australia with next generation wireless and satellite. The network is to operate on a wholesale-only, open and equivalent access basis, to promote fair and effective retail level competition. The Government has also decided that wholesale prices on the NBN should be uniform across Australia.

On 7 September 2010 the Prime Minister announced that broadband prices on the NBN will be the same for households and businesses regardless of where they are located – in the city, in regional Australia or in more remote parts of the country. This will be achieved by a new cross subsidy to ensure a uniform national wholesale price so that regional areas can pay the same price as people in the city.[3] This decision is further reflected in the agreement between the Australian Labor Party and Messrs Windsor and Oakeshott of the same date.[4]

The NBN will provide the vehicle for fundamental structural reform in the Australian telecommunications industry, requiring an appropriate policy footing so it can effectively play its role as part of the critical infrastructure for Australia's future.

To assist with the implementation of its announced policy, the Government commissioned McKinsey and KPMG to conduct a comprehensive study on the implementation of the NBN. The Government released the Implementation Study on the NBN on 6 May 2010.

Amongst other things, in section 10.2.3 the Implementation Study (pp.463-467) discusses the difficulties that could arise for the delivery of the Government's policy objectives as a result of NBN Co having to operate subject to strict regulatory requirements while competing against other providers of superfast broadband. In particular, the Study noted the scope for competing providers to:

- target high-income and low-cost, high-density areas, thereby undercutting NBN Co's ability to average its pricing (p.463);
- operate as vertically-integrated providers and advantage themselves over independent retail service providers (RSPs) on the NBN (p.464); and
- ignore technical standards applying to the NBN – this would mean consumers may not enjoy the benefits of the speed, quality and competition at which those standards are directed (p.464). For example, technical specifications can define the download and upload speeds, the grades of service offered, reliability, the number of retail service providers that can be supported by an optical network terminal (ONT), the functionality of the wholesale services available and the future scope for physical unbundling.

In this context, and bearing in mind the Government's overall policy objectives, the Implementation Study recommended that the Government look at measures to provide a level playing field for all superfast broadband networks.

The Implementation Study identified five broad options for levelling the playing field:

- requiring new FTTP networks to meet the technical standards applying to the NBN;
- requiring new superfast broadband networks to provide open and equivalent access to wholesale services, particularly to ensure any integrated retail operations could not be unfairly advantaged;
- regulating the pricing of services on superfast broadband networks so that they match the rate of return on the NBN;
- imposing a levy on new superfast broadband networks which would be directed at subsidising the provision of telecommunications in high-cost areas; and
- prohibiting the construction of competing superfast broadband networks.

[3] Joint Press Conference with the Deputy Prime Minister, Wayne Swan, 7 September 2010, p.8.
[4] "The Australian Labor Party & the Independents (Mr Tony Windsor and Mr Rob Oakeshott) (the Parties) – Agreement, 7 September 2010, Annex B, p.6

The Implementation Study rejected the third and fifth options as creating very high or absolute barriers to investment. Such investment could be desirable, for example, to support innovation or maintain competitive pressure on NBN Co. The Study recommended, however, that consideration be given to the first, second and fourth options, noting that the fourth option, a levy, could discourage investment and should only be considered if cherry-picking were to become a clear problem for the achievement of the Government's objectives. The other options do not provide these high barriers. They provide for entry into the market and allow competitive pressure to be directed at NBN Co, but on terms comparable to those applying to NBN Co itself. This RIS considers these options, together with some variations, against the content of the objectives discussed above.

2. Objective

The Government's objective is to ensure appropriate policy, regulatory or other measures are in place to ensure the objectives of its NBN policy (as indicated in section 1 - speed and quality, coverage, pricing, competition, equity and sustainability) are delivered by NBN Co and other superfast broadband networks. This requires an assessment of whether action is needed to provide a level playing field and if so, what the rules of this playing field should be.

3. Options (regulatory and/or non-regulatory) that may constitute viable means for achieving the desired objective(s)

Noting the options that have already been ruled out above for the reasons given, five options (regulatory and non-regulatory) have been identified that might address the Government's objectives. These are:

A. No further regulation – Require NBN Co to operate according to strict regulatory requirements while allowing other carriers to invest and compete with lighter regulation.

B. Require NBN Co and other carriers installing FTTP infrastructure supply services to the public to meet the same or similar technical specifications.

C. Require NBN Co and other carriers operating superfast networks to offer wholesale services on an open and equivalent access basis.

D. Establish a mechanism by which a levy could be applied to the operators of superfast broadband networks, if warranted by circumstances, to support the provision of superfast broadband nationally, consistent with the Government's policy objectives.

E. Require all providers of superfast broadband to operate on a wholesale-only basis; that is, they would not only have to offer wholesale services, but would be limited to this line of business.

Option A is effectively a stand-alone option. Options B, C and D could operate singularly or in combination for fuller effect. Option E is effectively an extension of Option C. For convenience, the options are discussed individually and their interaction is discussed in the conclusion.

The option of removing the policy and regulatory constraints under which NBN Co must operate is considered unrealistic. This would mean there would be no effective vehicle to deliver the policy objectives it was established to address in the absence of the types of requirements that are otherwise being discussed in Options B, C, D and E.

Option A – No further regulation – Require NBN Co to operate according to strict regulatory requirements while allowing other carriers to invest and compete with lighter regulation

Under Option A, there would be no legislative or regulatory change. NBN Co would be required to meet the policy and regulatory requirements imposed on it, whether through the Commonwealth's ownership of the company or regulation which is to be introduced. Other persons would be free to enter and invest in superfast broadband, targeting markets as they wished. This could include large national operators like Telstra or Optus, overseas operators looking to expand into new markets, or smaller regional or niche operators.

At present there are around ten small fibre providers in addition to Telstra. They would need to compete with NBN Co products and pricing in the markets they choose to service. Their willingness to do so would depend on a range of factors, including, in the case of Telstra, the Definitive Agreements it intends to conclude with NBN Co, the value of target markets and potential first mover advantages. They would not, however, be subject to additional regulation. They would not be subject to any coverage or pricing obligations. They would have full and equivalent access to NBN Co.

NBN Co would have access to the infrastructure of these carriers as would be available as a result of the operation of Part XIC of the *Trade Practices Act 1974* (TPA). They would only need to provide access, and at regulated prices, if the services they provided were declared. All providers would be subject to other protections against anti-competitive conduct applying under the TPA.

Option B – Require NBN Co and other carriers installing FTTP infrastructure to supply services to the public to meet the same or similar technical specifications

Under Option B, operators of superfast FTTP broadband networks that provide services to the public would need to meet the same or similar technical specifications to be met by the NBN. (Private networks would not be subject to such standards). The specifications would apply to new networks, that is the requirements would be prospective rather than retrospective. These standards would be based on NBN Co's technical specifications and would either be codified by the Communications Alliance and/or standardised by the Australian Communications and Media Authority (ACMA). It would be expected that the standard would be finalised over the next 6 - 12 months. As well as relating to network design, installation and products, the specifications would deal with architectural issues including the use of passive optical network (PON) or point-to-point or home-run architectures. Such specifications would ensure infrastructure and services of sufficient capability and quality were available to consumers to support Australia's needs well into the future.

They would also ensure infrastructure and services are configured to support service level competition (in combination with Option C or if access is declared) and potentially competition on the basis of fibre unbundling. Because they are inherently different technologies, the same specifications could not, however, be applied to decisions to upgrade hybrid fibre-coaxial (HFC) networks, or to upgrade the existing copper local loop to a fibre-to-the-node (FTTN).

While it is general industry practice to meet relevant technical standards, if there is no requirement for providers to meet these standards, there is always the risk that this will not occur.

Option C – Require NBN Co and other carriers operating superfast broadband networks to offer wholesale services on an open and equivalent access basis.

Under Option C, NBN Co would continue to provide wholesale services on an open and equivalent access basis as has always been proposed. It is intended to lock in these requirements in NBN Co-specific legislation as well as amendments to the TPA. In addition, other operators of superfast broadband networks would also be required to provide open and equivalent access to their wholesale services. This would generally require them to provide, at a minimum, a Layer 2 Ethernet service.

The obligation to provide access would be similar to that applying to the provision of access if those services were declared by the ACCC under Part XIC of the TPA, but would be decided in advance in statute. Moreover, the operators would need to provide access on an equivalent basis. That is, they would need to provide access to services to access seekers on the same basis on which they provide access to any retail operation of their own or a related person. Generally other providers would be free to set their own wholesale prices, but they would be subject to oversight by the ACCC.

While there is a strong trend amongst fibre broadband operators to provide open access, and all services can be declared, if there is no requirement for providers to provide open access, access may be delayed.

Option D – Establish a mechanism by which a levy could be applied to the operators of superfast broadband networks, if warranted by circumstances, to support the provision of superfast broadband nationally, consistent with the Government's policy objectives.

Under Option D, a mechanism would be established in statute under which financial contributions could be levied from operators of superfast broadband networks in high-value markets to off-set the cost of providing superfast broadband in high-cost, low-revenue markets. This option would provide a means of requiring operators who cherry-pick high-value markets, while ignoring low-return markets typically found in rural and remote areas, to contribute to the servicing of those markets.

The Implementation Study proposed that a levy could be imposed based upon the ratio of premises served in different zones (as defined under the current Unconditioned Local Loop Service declaration) and proportional to the total number of premises served. The Study was silent on what the actual levy should be; for example, whether it should be calculated as a percentage of revenues earned from the competitive investment, or simply imposed at a flat rate. The current universal service levy, which imposes a levy on carriers in proportion to their revenue, is one possible model. The Implementation Study proposed that any levy should be strictly limited through a sunset clause of no more than ten years and this option takes up that variation. The size of any levy would depend on the impact cherry-picking might have on NBN Co's ability to service low-return markets. The potential size of the levy cannot be estimated but it could be considerable.

Option E – Require all providers of superfast broadband to operate on a wholesale-only basis; that is, they would not only have to offer wholesale services, but would be limited to this line of business.

Under Option E, providers of superfast broadband networks would not only be required to offer open and equivalent access (as under Option C) but they would also be restricted to the provision of wholesale services in the same way NBN Co is being restricted. That is, they would effectively be structurally separated and prevented from operating retail businesses. This would provide a structural means of removing any incentive or ability to favour a downstream retail operation to the disadvantage of another wholesale customer.

Basically the statute would prevent any person operating a superfast wholesale network from operating a wholesale network and offering retail services. Potential models for such arrangements can be found in the operational arrangements for NBN Co and the voluntary structural separation being progressed by Telstra. Some small fibre providers like Opticomm and OPENetwork are already operating on this basis.

4. Impact assessment

Stakeholders

This section discusses the advantages and disadvantages of the five options identified above and their impact on key stakeholders, namely:

- consumers and the wider community, whether they be individuals, not-for-profit organisations or businesses, including small businesses;
- NBN Co as the access provider;
- customers of NBN Co; and
- other carriers interested in investing in superfast broadband (these may also be customers of NBN Co).

Considerations

In assessing the impact of the five options on stakeholders, the key factors considered are:

- effectiveness in supporting the Government's substantive policy objectives, that is:
  - broadband of appropriate speed and quality,
  - national coverage,
  - uniform wholesale pricing,
  - competition;
- the extent to which the option supports the operation of NBN Co on a commercially sustainable basis;
- costs, including possible costs to tax payers;
- consistency with broader policies and international obligations; and
- administrative practicality and efficiency.

In relation to broader policies, of particular relevance are the changes being made through the Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2010 to ensure access to Telstra's declared services is provided on an open and equivalent basis. This includes the implementation of appropriate arrangements for the separation of relevant businesses, including functional separation or voluntary structural separation.

On 20 June 2010, the Government indicated that in new real estate developments NBN Co will be the infrastructure provider of last resort. Other providers may also provide fibre infrastructure in such developments, providing they comply with NBN technical specifications and operate on an open and equivalent access basis.

Assessment of options

Option A – No further regulation (base case) – Require NBN Co to operate according to strict regulatory requirements while allowing other carriers to invest and compete with lighter regulation

Advantages:

- The Government's policy objectives may be achieved through the combination of NBN Co's activities and those of other providers of superfast broadband.
- Some end-users in high-value markets may receive superfast broadband earlier than under NBN Co's roll-out schedule under this option, and, in the short-term at least, at a lower or comparable price. This approach is competitively neutral to the extent it minimises additional regulation and compliance costs on private sector competitors.
- The arrangements would generally be practical to administer.
- Allows choice, innovation and all the benefits associated with infrastructure-based competition, but may inhibit the development of service-level competition.

Disadvantages:

- While NBN Co would set a competitive benchmark for other providers, there would be little or no certainty the Government's policy objectives would be achieved as intended.
  - There would be no mechanism to ensure relevant broadband investments meet appropriate levels of speed or quality or are readily able to support access. Although some investments in superfast fixed-line infrastructure have been made on an open access basis, these are of limited scale, and many investments do not support open access or only very limited access (for example, to a resale service which offers access seekers limited scope for service differentiation and innovation). Consequently, consumers could be 'locked in' to a provider which does not meet the Government's objectives.
  - For open access to be offered on these non-NBN Co networks, the ACCC would need to declare a service under Part XIC. However, currently Part XIC provides only a very limited assurance of equivalence of access, meaning that the Government's objective to promote retail competition may be curtailed in regions where alternative providers roll-out superfast broadband.
  - To the extent competing networks reduced NBN Co's revenues in high-value markets, they could either:
    - erode NBN Co's ability to provide national coverage and uniform national pricing, and may harm NBN Co's sustainability; or

    - charge consumers in those markets prices that simply shadow NBN Co's average pricing, while themselves facing lower costs. This may produce a windfall benefit for these providers, rather than these consumers, while harming NBN Co's ability to deliver the Government's objectives.
- The financial cost of delivering the Government's policy may be higher than under other options, as NBN Co may not be able to offset its roll-out costs through revenue streams from high-return low-cost markets.
- To the extent infrastructure is duplicated by investors not subject to equivalent obligations, this may be inefficient if it is driven by regulatory failure rather than market forces and may inhibit the delivery of national outcomes.
- Overall, while this option may support infrastructure-based competition, it would do so on an uneven basis and at the risk that all of the Government's objectives would not be delivered. Consequently, this option is not favoured as it is not cost effective.

Option B – Require NBN Co and other carriers installing FTTP infrastructure to supply services to the public to meet the same or similar technical specifications

Advantages:
- Clear technical specifications will provide greater certainty that infrastructure and services of the requisite speed and quality are available for consumers and deliver the necessary services and interfaces to support retail competition.
- These specifications would be particularly important in areas where a provider supplies services in advance of NBN Co (for example, in new developments) to ensure consumers receive levels of service comparable to those available on the NBN.
- The compliance costs are limited as there are already well developed specifications for FTTP infrastructure and services and well-established processes for standardisation. Relevant specifications include those developed by NBN Co, the Communications Alliance and international bodies like the Broadband Forum, International Telecommunication Union (ITU), Metro Ethernet Forum, Institute of Electrical and Electronic Engineers (IEEE), Internet Engineering Taskforce (IETF), and European Telecommunications Standards Institute (ETSI). The Communications Alliance already has practices for codifying specifications and the ACMA can make standards.
- Clear technical specifications could also enhance NBN Co's sustainability to the extent it would mean it would be operating on a more level regulatory playing field.
- Consumers would be able to receive services that are consistent with the Government's objectives and would also be able to choose alternative providers, as service providers could not lock end-users into their network.
- This option could reduce the cost to taxpayers when compared to Option A, by facilitating the roll-out of the NBN nationally in a way that minimises duplication and technical differences.

Disadvantages:
- Technical specifications would limit carriers' flexibility in the choice of technology, with potential implications for innovation and their ability to meet market demands at least cost. This could limit the service choices available to consumers.

- Technical specifications would only apply to competing FTTP investments, and not to upgrades to existing HFC networks or copper networks.
- While administratively practicable, the processes for developing specifications may be complex and time-consuming.
- Service providers may need to adjust their ongoing specifications and processes. Statements by relevant providers indicate industry practice is to generally follow established standards and any costs should therefore be negligible and transitional in nature.
- Non-NBN Co carriers may argue that this option is anti-competitive if the standards are based on NBN Co's technical specifications. They may consider that they are being denied the commercial flexibility to determine specifications that suit their own, and their customers', needs.

Option C – Require NBN Co and other carriers operating superfast broadband networks to offer wholesale services on an open and equivalent access basis.

Advantages:
- Upfront open and equivalent access obligations will ensure access seekers (who provide retail services) have ready access to new superfast broadband infrastructure with a view to providing retail services on a competitive basis. This will be particularly important where such infrastructure is deployed in advance of, but not in competition with, the NBN.
- Upfront obligations will provide certainty to investors as to their long term obligations and the implications for their business activities.
- Equivalent obligations will prevent vertically integrated carriers from favouring their retail businesses over other access seekers. This should bolster retail competition and thereby deliver better outcomes for end-users.
- Open and equivalent access obligations could also enhance NBN Co's sustainability to the extent it would mean it would be operating on a more level regulatory playing field.
- Where first-mover networks are compliant with the Government's policy objectives, the need for a roll-out by NBN Co may be negated. Where such networks compete with NBN Co, they still constitute a bottleneck facility for the premises to which they are connected and it is important that they be open access so consumers can enjoy the benefit of retail level competition.
- Statements by smaller fibre providers indicate they generally offer open and equivalent access and follow established standards so additional costs, if any, should therefore be negligible and transitional in nature. Telstra has also indicated it was developing a wholesale service for its fibre operation, Velocity, and Telstra has well developed compliance systems.
- This option could reduce the cost to taxpayers, when compared to Option A, by facilitating the roll-out of the NBN nationally in a way that minimises the impact on retail competition from market power in the wholesale market.

Disadvantages:
- Requiring carriers to provide open and equivalent access may impact on the business decisions and investments of vertically-integrated operators such as Telstra and Optus, because they would not be able to supply to their own retail operations on a preferential basis. ACCC regulation of access prices could limit

their ability to earn the desired rate of return. This is unlikely to be a disadvantage for carriers that already operate on an open access basis.

- Open and equivalent access obligations could increase compliance costs for the carriers concerned and for the ACCC as regulator. Providers would need to meet the transparency measures being applied to NBN Co to ensure that customers have visibility of any differentiated deals. They would also need to comply with the ACCC's principles for allowable discrimination. The ACCC would need to invest resources in approving any volume discounts offered by these service providers, and in monitoring compliance with the requirements. It is impossible to quantify these compliance costs, but they are unlikely to be significant and largely one-off. As noted above, small fibre providers have indicated they are operating on an open access basis and Telstra has indicated it has been developing a wholesale product for fibre. Any costs would be passed on to end-users in the short term.

Option D – Establish a mechanism by which a levy could be applied to the operators of superfast broadband networks, if warranted by circumstances, to support the provision of superfast broadband nationally, consistent with the Government's policy objectives.

Advantages:

- A levy would provide a mechanism by which higher returns from high-value markets could, if necessary, be used to facilitate national coverage and support uniform national wholesale pricing.
- A levy could enhance NBN Co's sustainability to the extent it would mean it would be operating on a more level regulatory playing field.

Disadvantages:

- A levy could deter investment that could otherwise be beneficial by reducing the return from those investments. This could limit infrastructure and service choices for consumers and affect the efficient allocation of resources across the community. These impacts could potentially be mitigated by a sunset clause.
- Such a levy could affect incentives for NBN Co to expedite its network roll-out and operate efficiently as it may expect the levy to be directed at addressing shortfalls in its performance.
- Affected service providers may consider that a levy breaches the Government's competitive neutrality commitments, although this would be subject to a consideration at the time any such levy was introduced of whether the benefits outweigh the costs.
- Depending on how a levy was designed, it could be anti-competitive and would need to be tested against the Commonwealth's commitment to the Competition Principles Agreement, as even if it did deliver a net benefit, restricting competition may not be the only way to achieve the Government's policy aims.
- While administratively practicable, experience with the universal service levy suggests it would be complex to design, implement and administer. If the universal service model was adopted, the Minister would ultimately have the discretion to set the size of the levy following advice from the Australian Communications and Media Authority. Detailed arrangements to model and cost the levy would be required. The Authority's costs would be recovered from industry through carrier licence fees and ultimately passed on to end-users.

- There would be uncertainty about the quantum of a levy. The quantum cannot be estimated in the abstract and this may add to the uncertainty with impacts for investment decisions.
- A levy would obviously impose an additional cost on those to whom it was applied. The cost would be significant as it would be directed at offsetting the cost of superfast broadband in rural, regional and remote Australia.
- Compliance and administrative costs would be involved and could be relatively significant given the likely complexity of such a scheme.

Option E - Require all providers of superfast broadband to operate on a wholesale-only basis; that is, they would not only have to offer wholesale services, but would be limited to this line of business.

Advantages:
- Would provide a structural means of ensuring that network providers treated all their wholesale customers on an equivalent basis.
- Should reduce compliance and regulatory monitoring costs as compliance would be built into the very nature of the entity.
- Would further level the playing field between NBN Co and other superfast fibre networks.
- Should enhance NBN Co's sustainability and its ability to deliver on its policy objectives, particularly in low revenue areas, thereby reducing the need for further taxpayer support.

Disadvantages:
- Would restrict the freedom of investors to determine how they should structure their businesses to maximise their profit.
- May unnecessarily deter beneficial investment in broadband infrastructure and services.

5. Consultation

Development of the Government's NBN policy has been a matter of extensive consultation since the Government was elected in November 2007. The issue of regulatory obligations on the providers of superfast broadband has been a factor in those consultations. Relevant processes include consultation on draft NBN Co legislation in February 2010. The Senate also established the Select Committee on the NBN. The policy has also been the subject of extensive media and public commentary, including during the 2010 election campaign.

Given the volume of feedback and the wide range of views and topics covered, it is difficult to generalise on stakeholder views. As a general observation, there seems to be broad acceptance as to the merits of the Government objectives for the NBN. There is clearly a range of views as to how these objectives are best achieved.

In general, industry feedback is opposed to the imposition of new regulatory requirements that may limit its operational flexibility. The telecommunications industry has had long standing concerns about the universal service levy and similar concerns would be expected to apply to Option D. A general exception to this is there is a general preference, from those who are predominantly access seekers, to have ready access to infrastructure, subject to ACCC oversight. That said, little specific comment has been provided on the issue of consistent regulatory requirements on NBN Co and other providers.

The NBN Implementation Study was based on extensive consultations with stakeholders by McKinsey and KPMG. Following the release of the Implementation Study on 6 May 2010, the Government also called for public submissions on the Study. Responses on measures to ensure a level playing field for all superfast broadband networks were limited and mixed. Only five carriers commented specifically on recommendations 73 and 74. AAPT, Austar and TransACT did not support the recommendations. The Business Council of Australia and Telstra expressed concern that a proposed cherry-picking levy could breach competitive neutrality requirements and international obligations, as well as deter efficient investment and competition. Optus supported the measures, but noted that recommendations 73 and 74 should not extend to existing high-speed fixed-line networks; recommendation 73 should be extended to deployments in greenfield sites; and that technical specifications should be widened to include as many of the support systems, processes and other operating requirements as possible. Submissions did not comment on the possible compliance costs associated with the recommendations.

Within the Commonwealth, the Department of the Broadband, Communications and the Digital Economy has consulted with the Department of the Prime Minister and Cabinet, the Treasury, the Attorney-General's Department, the Department of Finance and Deregulation and the ACCC on the issues and options. The main issues raised in these discussions have been the need to balance achievement of the Government's objectives, including efficient investment, and freedom and flexibility for industry with the role of regulation. Of particular concern here was the need for, and potential impact of, a levy mechanism.

6. Conclusion

Overall, while Option A (no further regulation) may support infrastructure-based competition, it would do so on an uneven basis and at the risk that all of the Government's objectives would not be delivered. Consequently this option is not favoured as it is not cost effective.

Option B (mandating technical specifications for FTTP) would ensure consistent speed and quality outcomes across multiple FTTP networks and support retail competition and unbundling outcomes. Clear technical specifications could also enhance NBN Co's sustainability to the extent it would mean it would be operating on a more level regulatory playing field. However, this option could not be applied to non-FTTP superfast broadband networks. This option could reduce costs by facilitating the roll-out of the NBN nationally. By itself, however, option B would not ensure the provision of open and equivalent access or uniform pricing objectives.

Similarly Option C (mandating open and equivalent access for superfast broadband) would ensure open and equivalent access, thereby providing retail services on a competitive basis. By providing open and equivalent access generally, such obligations should also promote more efficient investment as there would be ready access to infrastructure, reducing the need for duplication. Open and equivalent access obligations could also enhance NBN Co's sustainability to the extent it would mean it would be operating on a more level regulatory playing field. This option may also reduce the cost of roll-out of the NBN, as it negates the need for NBN Co to roll-out where first-mover networks are NBN consistent. This option is also considered to represent negligible cost to existing and future fibre providers.

On balance, the preferred approach is a combination of Options B and C. This would result in requiring any new FTTP infrastructure to meet the technical specifications for the NBN and all superfast broadband networks providing open and equivalent access. Options B and C could also enhance NBN Co's sustainability to the extent they would mean it would be operating on a more level regulatory playing field.

There would be costs to industry under Options B and C, and while difficult to quantify it is expected these would be low because the arrangements concerned are commonly in operation in the industry. Moreover, the Government expects the benefits from fully delivering on the Government's policy objectives, including the establishment of an effective wholesale platform, would outweigh these costs. A combination of Options B and C would be complex but practicable to implement. The combination is unlikely to breach competitive neutrality requirements as they create a level playing field that does not favour NBN Co. Similarly, in relation to international obligations, the proposed approach would result in uniform, rather than asymmetric, regulation.

Option D (levy) could further underpin the delivery of the Government's NBN policy objectives, particularly in relation to coverage and pricing and thus equity. It would also enhance NBN Co's sustainability while potentially reducing the cost of the NBN roll-out. However the levy would be a major intrusion into the operation of industry, involve significant cost and be complex and potentially costly to design, implement and administer. Depending on how a levy was designed, it could be anti-competitive and would need to be tested against the Commonwealth's commitment to the Competition Principles Agreement, as even if it did deliver a net benefit, restricting competition may not be the only way to achieve the Government's policy aims. A levy could also deter beneficial investment, limiting infrastructure and service choices for consumers while potentially slowing the roll-out of the NBN. Given this, such a levy is not proposed at this time, however, it could be kept in reserve as a possible policy tool that can be brought into play should circumstances demonstrate it is warranted.

Option E (wholesale–only obligation) could further underpin the delivery of the Government's NBN policy objectives, particularly in relation to coverage, pricing, equity and competition. It also enhances NBN Co's sustainability. However this mechanism would be a major intrusion into the operation of industry and of individual private-sector firms (as opposed to the Government-owned NBN Co). It is possible that this option will deter beneficial investment in broadband infrastructure and services. Options B and C should provide sufficient surety that the Government's objectives will be achieved. Given this, a wholesale-only obligation is not proposed at this time.

7. Implementation and review of the preferred option

To implement Option B the Communications Alliance will be asked to examine FTTP technical specifications developed by NBN Co with a view to endorsing them and codifying them for the industry. If necessary, the ACMA can be asked to adopt specifications as a binding standard. An amendment to Part 6 of the *Telecommunications Act 1997* is included in the Telecommunications Legislation Amendment (Competition and Consumer Safeguard) Bill to enable the Minister to direct the ACMA to make a standard under Part 6 should this required.

Option C, mandating open and equivalent access obligations on superfast broadband networks (fixed networks offering download speeds of 25 Mbps or greater) will be implemented through appropriate amendments to the *Telecommunications Act 1997* and Part XIC of the TPA.

As noted above, on 20 June 2010 the Government indicated that in new real estate developments NBN Co will be the infrastructure provider of last resort. It also indicated that other providers can install fibre infrastructure in such developments, providing they comply with NBN technical specifications and operate on an open and equivalent access basis. Given the need to provide early guidance to stakeholders in the sector (and dependent on timing considerations) the requirements concerned may be applied to superfast FTTP broadband networks in new real estate developments through the *Telecommunications (Fibre Deployment) Bill 2010*.

Operation of the proposed arrangements will be subject to ongoing review. The Government is also considering Recommendation 78 of the Implementation Study, that an independent review of the telecommunications market and the regulatory framework for the NBN be undertaken following completion of the network and prior to its proposed privatisation. Such a review could be undertaken by the Productivity Commission and would be expected to look at the matters covered in this RIS.