

Regulation Impact Statement

NBN Co's Standard Access and Equivalence Obligations

1. Issues which give rise to the need for action

The key issue to be addressed here is why specific Standard Access Obligations (SAOs) are being created for NBN Co, and why it is not sufficient to rely on competitive markets or the existing telecommunications access regime. This Regulatory Impact Statement also addresses the equivalence obligation to be placed on NBN Co.

Background

The Government's 7 April National Broadband Network (NBN) announcement set out the key parameters to apply to NBN Co. The Government announced that NBN Co would be subject to ACCC oversight, would operate on a wholesale-only basis and would offer open and equivalent access to all telecommunications providers.

In Australia, access to bottleneck infrastructure or services is regulated under a number of mechanisms, including:

- the national access regime, established under Part IIIA of the *Trade Practices Act 1974* (the TPA), which does not apply to telecommunications access;
- the telecommunications access regime under Part XIC of the TPA; and
- the facilities access regime under the *Telecommunications Act 1997*, which established rights of access to key telecommunications facilities.

Access regimes reflect Government policy that owners of bottleneck infrastructure can prohibit efficient competition by creating uncompetitive market structures.

A number of submissions on the legislative framework for the NBN claimed that NBN Co will own a network which will have significant bottleneck characteristics, giving NBN Co incentives to restrict supply and extract monopoly rents and also favour its investors and larger customers. They also noted that telecommunications providers who wish to provide high speed fixed-line broadband on a national scale will inevitably require access to the NBN. The majority of submissions therefore argued that access to the NBN should be regulated.

2. Objective

The Government's broad objective in telecommunications policy is to promote the long-term interests of end-users of carriage services or of services provided by means of carriage services.

The Government's objectives for access to the NBN is that carriers and service providers are granted open and equivalent access, with the terms and conditions of services subject to ACCC oversight.

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

Four alternative options (regulatory and non-regulatory) have been identified to address the Government's objectives. These are:

1. No regulation – allow the marketplace to determine the prices and non-price terms and conditions of NBN Co's services.
2. Regulate access to NBN Co's services through the existing telecommunications access regime under Part XIC of the TPA.
3. Regulate access to NBN Co's services through specific amendments to the existing access regime.
4. Regulate access to NBN Co's services through a specific NBN access regime in the TPA.

Option A - No regulation – allow the marketplace to determine the prices and non-price terms and conditions of services

Option A would involve some legislation, as the Commonwealth would need to amend Part XIC of the TPA to make it clear that it does not apply to NBN Co.

Under this option, the prices and non-price terms and conditions of services would be set through negotiations between NBN Co and its customers. As NBN Co is wholesale-only, it would not be expected to have incentives to unfairly discriminate against any of its customers, and the prices those customers pay, and the terms and conditions they receive, would be market-based.

One submission on the legislative framework for the NBN Co, from RBB Economics, argued that it was not clear that the NBN would be a natural monopoly, as it would be subject to competition from alternative fixed line networks. RBB Economics argued that the company should be subject to general competition policy rather than existing or new sector-specific rules.

Option B – Regulate access to NBN Co's services through the existing telecommunications access regime under Part XIC of the TPA

This option represents the base case as it would reflect what action could occur if no new legislation is established.

Under this option, NBN Co would offer services to customers in accordance with the existing access regime, as it is intended to be amended. If the Australian Competition and Consumer Commission (ACCC) considered that it was in the long-term interests of end-users to declare particular NBN Co services, it could do so and, in accordance with the reforms to Part XIC introduced in the Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill, make an access determination setting the prices and terms and conditions of services up front. NBN Co could also submit a special access undertaking, and negotiate access agreements for declared services with access seekers.

Option C – Regulate access to NBN Co’s services through specific amendments to the existing access regime

Under this option, specific provisions would be established in Part XIC of the TPA covering NBN Co. The specific measures that would be included would be designed to ensure that NBN Co offers non-discriminatory access to its services.

If NBN Co is to be covered by Part XIC, specific SAOs would be imposed on NBN Co to underpin this non-discrimination objective including a specific obligation to offer services on an equivalent basis.

A number of submissions on the NBN legislative framework considered that NBN Co could be subject to an access regime similar to Part XIC, or based on Part XIC, but with specific obligations in relation to equivalence and transparency. For example, Optus suggested this overall approach, with regulation only applying to ‘key’ services, but with equivalence and transparency obligations applying to all services.

Equivalence and transparency

As the Discussion paper *National Broadband Network: Regulatory Reform for 21st Century Broadband* stated, there are two general approaches to equivalence in telecommunications regulation. In Australia, the current operational separation arrangements that apply to Telstra are based on ‘equivalence of outcomes’. Under this model access seekers do not receive the same network inputs as Telstra’s retail units. In theory, equivalence of outcomes should allow efficient competitors to produce equally competitive outcomes.

The alternative approach has been introduced, in different forms, in the United Kingdom, New Zealand and Singapore and also underpins approaches to access regulation in the Netherlands. This requires an access provider to provide wholesale customers with the same price and non-price inputs as it provides its own retail units.

Submissions on the NBN legislative framework strongly supported an ‘equivalence of inputs’ obligation for NBN Co. Under this obligation, NBN Co would be required to offer the same services, on the same terms and conditions, processes and timeframes, and the same information about services, to all access seekers.

The broad consensus is that the alternative equivalence of outcomes has ‘not promoted genuine equivalence of access or effective competition in the telecommunications sector’ (Explanatory Memorandum to the Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009, p 15). In its submission on the *Regulatory Reform for 21st Century Broadband*, the Australian Competition and Consumer Commission stated that in Australia the equivalence of outcomes arrangements applying to Telstra do not address Telstra’s incentive and ability to discriminate against its competitors. In relation to NBN Co, an equivalence of outcomes approach would allow NBN Co to provide different access seekers with different inputs. Not only would this not provide a level playing field for all access seekers, but NBN Co could develop incentives to favour specific access seekers.

An equivalence of inputs regime should establish a ‘safety net’, whereby all customers are able to access the same services on standard terms. However, NBN Co should be able to

negotiate with access seekers to vary its standard terms and conditions. Some forms of price and service discrimination can be economically efficient, promote innovation and improve overall consumer welfare. In telecommunications, price discrimination is commonly applied through volume or term discounts. Submissions on the NBN legislative framework generally supported such discounts being permitted.

To preserve equivalence, all access seekers in like circumstances should have equal rights to benefit from any variations to standard terms and conditions.

One of the NBN-specific SAOs should be a requirement to publish all service offers, including a generic description of any discounts or other changes to standard terms made through an access agreement with an individual customer. Without this transparency access seekers will not know what variations have been made to the standard terms, and will not be able to judge whether they could also benefit from any variations.

NBN Co would also be required to lodge all agreements with variations to standard terms and conditions with the ACCC, who would have discretion to take action if an agreement is considered to have anti-competitive effects.

Option D - Regulate access to NBN Co's services through a specific NBN access regime in the TPA

This option is similar to option C, except that instead of making minor changes to Part XIC the Government would insert a new access regime specifically for NBN Co in the TPA (e.g., a new Part XIE of the TPA). This new access regime would include the NBN-specific SAOs but would also have to set out how services could be declared, undertakings submitted and the overall enforcement regime. The basic obligations and approach to equivalence would be the same as set out in option C, but more complex legislation would be required as much of Part XIC would need to be mirrored in Part XIE.

In its submission on the NBN legislative framework, the Australian Telecommunications Users' Group suggested that a specific access regime could be created for NBN Co.

4. Impact assessment

This section discusses the advantages and disadvantages of the four options identified above in terms of the criteria discussed in section 2 and their impact on stakeholders, namely:

- NBN Co as the access provider;
- customers of NBN Co; and
- consumers as ultimate users and beneficiaries of telecommunications services.

As opening observations, a number of factors should be taken to be givens.

Costs

The Government considers that there is likely to be a high degree of consensus amongst access seekers and NBN Co on proposed systems and processes, and therefore there will be little compulsory cost imposition, if any, on customers of NBN Co. The Government notes that NBN Co has been working with the industry body, Communications Alliance, to develop an interconnection model.

Under Option D, there may be limited, one-off, compliance costs for customers as they may need to seek legal opinion on the differences between the NBN access regime and the generic telecommunications access regime.

Option A would impose the lowest compliance costs on access seekers as they would receive services from NBN Co through commercial negotiation.

Under all options NBN Co would itself face compliance costs in developing its services, systems and processes. These costs would be passed on to customers under all options.

Given the limited nature of these costs, they are not expected to contribute significantly to final prices to end-users.

The Department expects its administration costs would be no more than \$2.7 million over four years, including staffing. The ACCC expects its administration costs would be \$24 million over five years, including staffing.

When compared against the proposed investment of up to \$43 billion in the NBN and the expected economic benefits to the country from the level playing field the NBN will provide for carriers and service providers, the benefits clearly exceed the limited costs for the NBN company and access seekers.

Competitive neutrality

In relation to competitive neutrality it is recognised that Option D proposes a specific access regime for NBN Co. However, NBN Co will still be subject to other generic telecommunications and corporate regulation, and the specific access regime would take account of NBN Co's unique open access and equivalence obligations. Consequently, Option D does not breach the Competition Principles Agreement.

Option A - No regulation – allow the marketplace to determine the prices and non-price terms and conditions of services

Advantages:

- Prices, and non-price terms and conditions, of services will reflect negotiations between NBN Co and its customers. However, while a wholesale-only network provider would not be expected to have incentives to unfairly discriminate against any specific customers, in the absence of regulation providers might not have regulatory certainty for access seekers that they will receive open and equivalent access.
- NBN Co is free to develop customised services for particular customers, ensuring that innovation can take place in response to market needs.
- Compliance costs will be lowest.
- Administrative costs would be lower than under options B-D.

Disadvantages:

- Given limited competition, NBN Co may have incentives to limit supply and extract monopoly rents.
- While a wholesale-only network provider would not be expected to have incentives to unfairly discriminate against any specific customers, in the absence of regulation

providers might not have regulatory certainty for access seekers that they will receive open and equivalent access.

- Option A does not promote competitive neutrality as NBN Co would be the only provider not subject to telecommunications access regulation.

Option B – Regulate access to NBN Co’s services through the existing telecommunications access regime under Part XIC of the TPA

Advantages:

- The Part XIC access regime is well known and understood in the sector.
- Regulation would be focused on key bottleneck services, allowing NBN Co to develop innovative services in response to customers’ needs.
- The recent reforms to Part XIC will promote greater certainty and fairness.

Disadvantages:

- This option does not cater for NBN Co’s unique wholesale-only structure.
- This option would not ensure that NBN Co offers services to all customers on an equivalent basis.
- Part XIC does not require access providers to publish all service offers, meaning it does not provide transparency for access seekers.
- Part XIC does not impose an open access obligation on access providers.

Option C – Regulate access to NBN Co’s services through specific amendments to the existing access regime

Advantages:

- The Part XIC access regime is well known and understood in the sector.
- The NBN-specific SAOs will establish equivalence, transparency and open access obligations, promoting a level playing field for customers, while preserving flexibility for customers to negotiate away from standard terms.
- The equivalence requirement will help smaller access seekers customise services for niche markets and will also help ensure that services delivered in regional Australia are based on the same inputs as services delivered in metropolitan Australia.
- This option provides regulatory certainty for NBN Co and its customers on the services that will be provided, the terms and conditions of services, and approaches to varying standard terms.
- Regulation would be focused on key bottleneck services, allowing NBN Co to develop innovative services in response to customers’ needs.

Disadvantages:

- This option could be criticised as not going far enough – it treats NBN Co the same as other access providers, which could make it less clear that NBN Co has an open access obligation. This can be mitigated through the drafting of NBN Co’s SAOs.

Option D - Regulate access to NBN Co’s services through a specific NBN access regime in the TPA

Advantages:

- All of NBN Co's obligations and access regime will be clearly separated from the generic access regime, making NBN Co's open access obligation transparent.
- The NBN-specific SAOs will establish equivalence, transparency and open access obligations, ensuring that NBN Co must offer a level playing field for customers, while preserving flexibility for customers to negotiate away from standard terms.
- This option provides regulatory certainty for NBN Co and its customers on the services that will be provided, the terms and conditions of services, and approaches to varying standard terms.

Disadvantages:

- A separate regime for NBN Co could generate lobbying for change to one or both regimes.
- The differences between the NBN regime and the generic access regimes could create uncertainty. However, this can be mitigated as option D will be consistent with much of the Part XIC access regime.
- This option may be criticised as not being competitively neutral, although in practice this would not be the case as the specific NBN access regime reflects the unique position of NBN Co in the sector.

5. Consultation

On 3 July the Government called for submissions on the legislative framework for the NBN company, including its access regime. In total, 37 submissions were received and the Government also held meetings with 17 organisations.

Overall, there was clear support in the submissions for an access regime which:

- ensured that the prices and non-price terms and conditions of offers could be determined by the regulator up-front, without lengthy delays or gaming;
- left flexibility for NBN Co to negotiate services under market conditions;
- required service offers to be available to all customers on an equivalent basis; and
- allowed the NBN company and customers to negotiate to vary terms and conditions, subject to notification to the ACCC.

Submissions offered varying perspectives on whether or not to use the existing regulatory framework. Telstra, BT, the Competitive Carriers' Coalition and Macquarie Telecom proposed that the current Part XIC access regime could cover the NBN company. Optus also suggested that the NBN company should offer 'key' services which were regulated, but could offer other services, subject to its being obliged under legislation to meet transparency requirements and offer all services on an equivalence of inputs basis. No party specifically raised the facilities access regime.

One submission, from RBB Economics, called for the NBN company not to be subject to specific access regulation, but to competitive market forces.

A few submissions called for the Government to release an Exposure Draft of the legislation for public comment.

The Government also considered advice from the Implementation Study on the NBN access regime. The regime proposed here is largely consistent with that advice, which itself was informed by submissions on the NBN legislative framework.

Within the Commonwealth, the Department 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 proposed access regime.

The main issue raised in these consultations was whether it would be preferable to use the existing regulatory arrangements or establish a specific NBN access regime.

6. Conclusion

As noted above, any costs to NBN Co and access seekers are expected to be insignificant, one-off costs.

Option C, which provides for specific NBN SAOs to be incorporated into the existing access regime under Part XIC of the TPA, is the best option overall for meeting the Government's objectives. The option:

- avoids the confusion arising from different access regimes for carriage services and access to facilities;
- delivers equivalence and transparency across all NBN services, while preserving the ability for customers to negotiate away from standard terms; and
- best reflects the unique structure of the NBN company as a wholesale-only provider with a significant national access network.

Option A is not considered feasible because while a wholesale-only network provider would not be expected to have incentives to unfairly discriminate against any specific customers, in the absence of regulation providers might not have regulatory certainty for access seekers that they will receive open and equivalent access. This could preclude the Government from realising its key objective for the NBN access regime, which is to deliver a level playing field for carriers and service providers. Option A would also not meet competitive neutrality principles.

Option B would not deliver the equivalence and transparency outcomes the Government is seeking, and requires only marginally lower administrative costs to implement than option C. It is therefore not preferred.

Option D would deliver largely similar outcomes to option C, but would involve significant administrative costs arising from the duplication of much of Part XIC in a NBN-specific access regime. This option would also impose higher compliance costs on customers as they would need to prepare more detailed legal advice on the new regime. These costs could be mitigated by the fact that the new regime would be largely similar to Part XIC, but given the greater costs and the largely similar outcomes to option C, option D is not preferred.

7. Implementation and review of the preferred option

Option C will be implemented by amending Part XIC of the TPA to introduce the NBN-specific SAOs. The new arrangements will operate in conjunction with an obligation on NBN

Co to remain a wholesale-only provider, to be established in a separate National Broadband Network Companies Bill.

Operation of the proposed access regime will be subject to ongoing review.