REGULATION IMPACT STATEMENT

Amendments to Division 16 of Part XIB and Part XIC of the *Competition and Consumer Act 2010*

Introduction and overview

This Regulation Impact Statement (RIS) looks at the arguments for and against amending existing statutory authorisations in the *Competition and Consumer Act 2010* that allow NBN Co to limit its points of interconnection (POIs) and support NBN Co's supply of service elements.

These practices are essential to the efficient and timely construction of the National Broadband Network (NBN) and the Government's ability to provide all people in Australia with access to next-generation broadband. There is a risk however that the practices could be considered contrary to general competition law. This creates risk and uncertainty for NBN Co that could delay the roll-out.

The proposed amendments respond to the change in Government policy, in December 2014, whereby a price capping requirement would replace the previous Government's policy of uniform national wholesale pricing (UNWP) on the NBN. The existing statutory authorisations mentioned above are based on UNWP. Notwithstanding this change, there are strong arguments for the retention of the authorisation in a modified form to facilitate the prompt and efficient rollout of the NBN, thereby providing early access to the benefits it will deliver.

This RIS:

- provides background to this problem,
- explains the Government objectives,
- considers the options available, and the strengths and weaknesses of those options,
- assesses the impact of those options on stakeholders, and
- recommends a preferred course of action.

The options are:

1. retaining the status quo,
2. repealing the existing statutory authorisations,
3. amending the existing statutory authorisations to reflect changes in NBN Co's operational mandate so that the authorisations work effectively (with those authorisations ceasing once the network is deemed to be completed), and
4. as above at option 3, but with the statutory authorisations continuing after the network has been completed.

The RIS recommends option 3 as being the only legally sound and effective means of providing NBN Co with the certainty it requires to roll out and complete the NBN in a timely manner, and within budget, consistent with Government objectives, and with minimal practical impact on competition.

Background

Since the NBN was first announced in April 2009, a key issue has been the way in which it would ensure faster broadband services are made available to all people in Australia, whether in metropolitan, regional, rural or remote areas.

Funding of broadband services in rural and regional Australia was a particular concern as the costs incurred in supplying telecommunications services to regional areas are generally higher than the costs incurred in supplying city areas. This is because additional infrastructure is required to connect services and higher operating expenditure is likely to be required per premises in regional areas in order to support the geographically dispersed population.

The then Government stated in its 2008 request for proposal process to select a provider(s) to build, operate and maintain the NBN that there would be uniform wholesale pricing in all regions of Australia. This policy was expanded upon in the then Government's 2010 Statement of Expectations issued to NBN Co:

> NBN Co will be required to charge access seekers uniformly for services across its network for all technologies and for the basic service offering.[1]

This policy of UNWP was designed to ensure that a retail service provider (RSP) would pay the same wholesale price for an NBN carriage service to serve an end-user customer regardless of the end-user's location within Australia.

The then Government's NBN UNWP policy was dependent on NBN Co operating an internal cross-subsidy, under which the higher cost of providing services to users in regional areas would be subsidised by the revenue earned in the higher-margin metropolitan areas. These policy requirements were factors in the design of NBN Co's product model and pricing.

In this context, NBN Co, consistent with Government decisions, chose to limit the locations at which RSPs could interconnect with the NBN to the listed POIs agreed between the ACCC and NBN Co (this concept is discussed in detail, below). NBN Co's wholesale services involve the acquisition of a number of elements (this concept is also discussed in detail, below). This was consistent with the efficient and effective rollout of the network and supported the delivery of UNWP. However, in certain circumstances, there was a risk that such conduct could breach the competition provisions in Parts IV and XIB of the *Competition and Consumer Act 2010* (the CCA).

There was also a risk that NBN Co's limiting interconnection at POIs and requiring RSPs to acquire the bundled service elements would be inconsistent with Part XIC of the CCA. Amongst other things, Part XIC sets out a number of standard access obligations (SAOs) that NBN Co must comply with. For example, NBN Co is required, on request, to interconnect its facilities with the facilities of its customers. This SAO also requires NBN Co to allow interconnection at any POI.

Accordingly, the then Government introduced Division 16 of Part XIB of the *Competition and Consumer Act 2010* (CCA), which authorises conduct by NBN Co if it is reasonably necessary for it to achieve UNWP. This authorisation enables NBN Co to engage in conduct that may otherwise be considered anti-competitive in order to meet its UNWP requirements without breaching the CCA. The authorisations in Division 16 were reflected in complementary provisions in Part XIC which limit NBN Co's standard access obligation to interconnect facilities to listed POIs and also provide for regulatory processes to be consistent

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[1] Senator the Hon Penny Wong and Senator the Hon Stephen Conroy, 'Statement of Expectations', 17 December 2010, p.7.

with the authorisations. In this way, Division 16 supported the operational practices that were reasonably necessary to deliver UNWP and the efficient and effective rollout of the network.

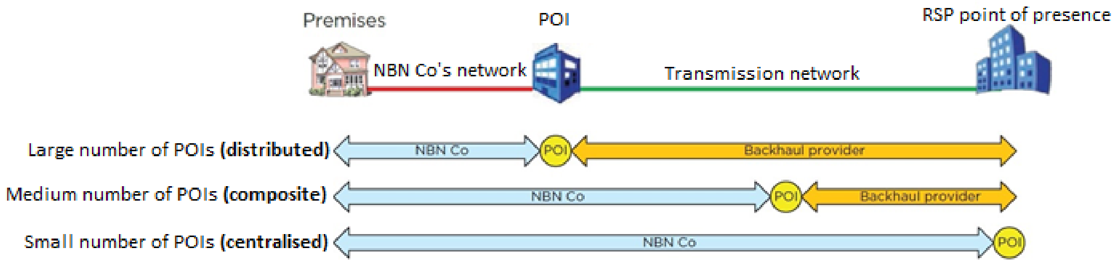
Points of interconnection

An NBN POI is the location where the end-user traffic on NBN Co's network is handed over to a transmission network used by a RSP. The transmission network carries the combined traffic of many separate services between the POI and the RSP's point of presence, where their technical equipment such as servers and routers is located (generally this location is in a capital city). Under Divison 16, the ACCC is required to keep a list of POIs. There are currently 121 'listed POIs'. These are shown at Attachment A to this RIS.

NBN POIs operate as 'star' networks. That is, lines run out from the POI to premises in nearby suburbs and towns. RSPs then pay NBN Co to use these lines to access customers. However, RSPs are responsible for transmission to and from every POI that they interconnect at and the wider telecommunications network. Access seekers must interconnect at the POI closest to their customer in order to supply them. This means that an access seeker with customers in both Perth and Canberra cannot connect all customers through a POI in Canberra. Instead, the RSP must interconnect at each relevant POI in Perth and Canberra, and then, if necessary carry communications between them, using non-NBN infrastructure.

Under the current Division 16, NBN Co may operate the listed 121 POIs without offering further POIs. It may also, if it chooses, offer additional POIs (that are not included in the ACCC's list).[2] In all instances, it can limit RSP access to these POIs without breaching the competition provisions in the CCA (if doing so is reasonably necessary to achieve UNWP).

The ACCC and NBN Co's decision on the placement and number of listed POIs was critical because of the effect that POIs have on network design and cost. As the 'inner' geographic boundary of NBN Co's network is at its POIs, a small number of POIs allows NBN Co to control its costs of rolling out the network. Conversely, a large number of POIs may increase NBN Co's costs on the basis that provisioning its network to enable interconnection at a larger number of POIs will result in higher costs. The figure below shows the size of NBN Co's network under the three options described above.



Identification of the Listed POIs

In 2010-11, following public consultation, the ACCC and NBN Co agreed on 121 listed POIs that would preserve existing competition in transmission markets and promote the efficient use of, and investment in, transmission infrastructure on competitive routes.[3] The ACCC and NBN Co considered three broad approaches to the number and location of listed POIs:

[2] If NBN Co does decide to provide services from an additional POI, it is required to provide access seekers with at least 12 months prior notice of the new POI, per clause 1H.4.2 of its Special Access Undertaking (of 18 December 2012, varied on 18 November 2013).

[3] ACCC Advice to Government – National Broadband Network Points of Interconnect, p 2

1. *Distributed* – approximately 718-750 POIs would be located deep in NBN Co's network at local telephone exchanges. Under this approach, POIs would be closer to end-users' premises. It would not provide any transmission services, avoiding any stranding of existing transmission infrastructure.
   At many of these POIs, especially in rural and regional Australia, Telstra would be the only transmission provider and this could limit the development of wholesale and retail competition in these areas.
2. *Semi-distributed* – POIs would be located at local exchanges where there were at least two competing transmission providers. Under this approach, NBN Co's costs of construction would be lower than under the first approach (because fewer POIs would need to be provisioned to enable interconnection), but higher than under the third approach. NBN Co would provide transmission services to its POIs.
   This would limit stranding of existing transmission infrastructure and promote competition in the transmission market.
3. *Centralised* – 14 POIs would be located in the five mainland state capital cities (4 x Sydney, 4 x Melbourne, 2 x Brisbane, 2 x Adelaide, 2 x Perth). Under this approach, NBN Co's wholesale product would include 'transmission'. This would extend NBN Co's network beyond the access network, stranding some existing transmission infrastructure being used to supply services to fixed-line customers. The option would risk foreclosing future competition in transmission networks.

POIs under the Government's multi-technology mix model

In April 2014, NBN Co's Shareholder Ministers (the Minister for Finance and the Minister for Communications) required NBN Co to use a range of technologies to achieve the Government's objective of ensuring that all Australians have access to very fast broadband as soon as possible and at least cost to taxpayers. Under this multi-technology mix (MTM), NBN Co will remain a national, wholesale only, open access provider of broadband, and will still be required to roll out its network to metropolitan, rural and regional areas within the funding envelope provided to it by Government.

Under the MTM, the technology used over the 'last mile' of the network, which is used to connect the final network element (usually a 'node') to the end-user, could be one of three types – fibre, HFC or copper. In a large number of cases, rather than new fibre optic cabling being deployed and connected to the end-user premises at significant cost to the Government, the existing copper network will be utilised to provide similar, high-speed services. The MTM model added extra access technologies to the NBN, but it did not change NBN Co's overall design of the network. That is, NBN Co's network design is based on its ability to provide its product bundle, aggregate traffic back to 121 POIs, and for those POIs to still be linked by competitive backhaul providers.

<u>Bundling of designated access services</u>

Division 16 of Part XIB also allows NBN Co to refuse to supply a 'designated access service' to a service provider or utility unless that person acquires other 'designated access services'. This ensures that NBN Co can require access seekers to purchase a 'bundle' of service elements, rather than only one or two of those service elements. Each of the service elements is characterised in Division 16 of Part XIB as a 'designated access service', of which there are five:

- a user network interface (UNI) service – the physical port at the end-user premises,

- an access virtual circuit service (AVC) – the bandwidth allocated to each end-user,
- a connectivity virtual service (CVC) – additional bandwidth, on top of AVC, between the POI and the end-user (this is designed to enable RSPs to add value to the basic NBN Co service through the provision of their own services, such as IPTV),
- a network-network interface (NNI) – the physical port at NBN Co's POI, and
- a voice telephony facilitation service.

This service bundle enables NBN Co to effectively plan and provision the building of its network and provides it with commercial certainty in relation to the supply of services to its RSP customers. The service bundle is illustrated by the following diagram:

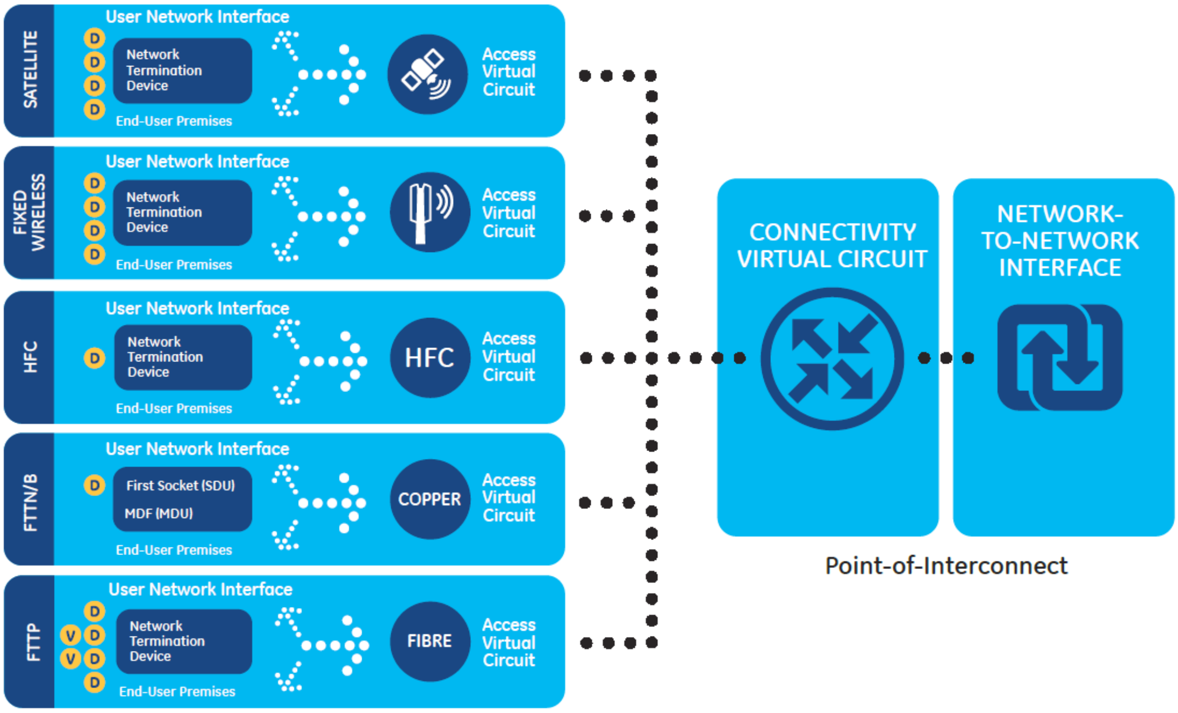


Figure 1: NBN Co's product construct as shown in its 2016 Corporate Plan

This service bundle, involving as it does an integrated product from the UNI to the NNI, again has been constructed to reflect the network structure and operational model set for NBN Co at the outset, including the number and location of POIs.

NBN Co submitted a special access undertaking (SAU) to the ACCC setting out its policy to require RSPs to purchase the bundle of services. A SAU is a tool used by an access provider to gain regulatory certainty over future products and pricing into the future. The SAU sets out commitments to supply specific services and locks in specific pricing methodologies for those services. NBN Co's SAU was accepted by the ACCC in 2013. The formulation of NBN Co's SAU reflects the service elements constituting the 'designated access services' to be purchased by RSPs and also sets out provisions relating to points of interconnection that are consistent with the authorisations in Division 16 of Part XIB.

CCA provisions and Division 16 authorisations

Part IV of the CCA includes a number of provisions that prohibit anti-competitive conduct. These provisions apply to all industry sectors. Part XIB of the CCA contains telecommunications-specific provisions which prohibit anti-competitive conduct in that sector.

Division 16 was inserted into the CCA in 2011 as part of the Telecommunications Legislation Amendment (National Broadband Network Measures—Access Arrangements) Bill 2010 (the Bill) to protect NBN Co from liability under the CCA. The objects clause states that the purpose of the Division is to:

- promote the national interest in structural reform of the telecommunications industry (s151DA(1)(a)); and
- promote uniform national pricing of eligible services supplied by NBN corporations (s151DA(1)(b)).

There are three authorisations for conduct that is "reasonably necessary to achieve uniform national pricing of eligible services supplied by the NBN corporation" which provide NBN Co with the ability to:

- refuse interconnection of its facilities at a particular location with the facilities of another service provider or utility if the location is not a listed POI (s151DA(2));
- refuse to supply a designated access service to a service provider or utility unless that person acquires other NBN access services (s151DA(3)); and
- engage in conduct that is reasonably necessary to achieve uniform national pricing (s151DA(4)).

These authorisations mean that NBN Co has statutory protection from any potential legal action under the Part IV of the CCA for that conduct. They also exempt NBN Co from the telecommunications-specific provisions in Part XIB of the CCA (s151AJ(7)(a)).

By refusing interconnection at any POI and requiring RSPs to acquire each of the service elements, NBN Co could theoretically (depending on the particular circumstances) breach the competition provisions in Parts IV and XIB of the CCA if this conduct substantially lessened competition in any market. This means that if Division 16 is repealed, NBN Co is exposed to a risk of breaching Parts IV and XIB of the CCA (and could potentially face litigation by the ACCC and/or competitors) if it sought to rely on the authorisations.

Interaction with Part XIC

Part XIC of the CCA sets out a telecommunications industry-specific access regime which is administered by the ACCC. Under Part XIC, the ACCC can require NBN Co to give access to telecommunications services and facilities where this promotes the long term interests of end-users. Part XIC also sets out a number of standard access obligations (SAO) that NBN Co must comply with. For example, NBN Co is required, on request, to interconnect its facilities with the facilities of its customers. This SAO requires NBN Co to allow interconnection at any POI.

The authorisations in Division 16 are reflected by provisions in Part XIC of the CCA that 'switch off' certain regulatory processes in Part XIC. For example, the SAO that requires NBN Co to allow interconnection at any POI does not apply to an interconnection at a location that is not a listed POI (subsection 152AXB(4A)). The ACCC also cannot make access determinations or binding rules of conduct that would have the effect of making NBN Co engage in conduct that is inconsistent with the authorisations (subsections 152BCB(3B) and 152BDA(3B)) or reject a special access undertaking if it contains a refusal to engage in conduct that is authorised under Division 16 (subsection 152CBD(5C)).

Vertigan Review and Government Policy Statement of 11 December 2014

The Independent Cost-Benefit Analysis of Broadband and Review of Regulation, undertaken in 2014 by the Vertigan panel of experts, recommended that the Government end its UNWP policy and instead adopt a policy of capping the prices of NBN Co's services (recommendation 8).

The recommendation reflected the panel's view that infrastructure-based competition should be facilitated to the greatest extent possible, and also its concern that NBN Co would not be able to compete with other infrastructure providers if it was required to maintain UNWP. If UNWP applied, NBN Co would have to charge its customers more in metropolitan areas than its competitors in order to subsidise the cost of providing services in low-value areas. The panel's view was that NBN Co should be able to reduce its prices in metropolitan areas in response to competitive pressure, enabling customers in metropolitan areas to experience the benefits of competition (i.e. lower prices and higher quality of service). As a result, the panel recommended that wholesale price caps should be implemented in order to ensure that consumers in low value areas still had access to affordable services.

The panel also recommend that, assuming UNWP is no longer required, the Government should repeal Division 16 (recommendation 10). This recommendation was made on the basis that if the authorisation provisions in the Division were there to enable UNWP, then in the absence of a UNWP policy, NBN Co would have no reason to be able to engage in the authorised conduct.

The Government broadly accepted the panel's findings in relation to these recommendations. In its *Telecommunications Regulatory and Structural Reform* policy paper, released in December 2014, the Government stated that it would confirm that NBN Co has flexibility to adjust prices on a non-uniform basis, subject to price caps, and that it would repeal Division 16, subject to considering implementation arrangements for price capping.

The Government's price cap policy still imposes obligations on NBN Co to ensure that the wholesale prices do not increase above the current prices approved by the ACCC in NBN Co's SAU. To the extent that price capping will require NBN Co to provide services on a non-commercial basis, the *Telecommunications Regulatory and Structural Reform* paper provides for the implementation of a transparent funding scheme. Accordingly, the Bureau of Communications Research is developing a possible funding mechanism for consideration by Government.

The case for action

The fundamental issue that this RIS explores is the need to minimise risk, uncertainty and cost for NBN Co, other carriers and CSPs and end-users in rolling out the NBN as quickly and cost-effectively as possible, and the role Division 16 may need to continue to play to achieve this. As noted above, the Government's in-principle decision in its December 2014 policy statement was to repeal Division 16 on the basis that UNWP did not allow NBN Co to price efficiently in competitive markets, such as metropolitan areas. That decision to repeal Division 16 was however, subject to considering implementation arrangements for price capping.

Given that the price cap will be funded through a transparent industry cross-subsidy, there appears to be little basis for maintaining Division 16 for pricing reasons. However, in analysing this matter further, it has become apparent that justification remains for the retention of some authorisations, but in amended form.

It was evident in carriers' submissions to the Vertigan Review that the telecommunications sector in Australia strongly supports the completion of the NBN rollout. The NBN will not only provide faster internet access for end-users, but also a new platform for fairer and more retail competition. To complete the rollout, however, NBN Co must be able to plan and provision its network in the most cost effective and resource efficient manner possible. Since 2011, NBN Co has operated on the basis that it would be able to limit its number of POIs and sell a 'bundle' of access service elements to carriers and carriage service providers. This model has effectively been endorsed by the Parliament in its original enactment of Division 16 and by the ACCC's approval of NBN Co's SAU, which reflects NBN Co's product design and the supply of services at listed POIs.

This has been the operating model that the company has built and designed its network around. As noted above, while the move to an MTM rollout changes the technologies NBN Co will use in the access network, it does not change its fundamental operating model of POIs and products.

The repeal of authorisations under Division 16 could give rise to additional risk, uncertainty and cost through the application of Part XIC to NBN Co's network during the period in which it is being rolled out. There is a risk that without the conduct authorised under Division 16 being available to it, NBN Co could be subject to pressure from access seekers to change the fundamental design of NBN Co's products and services, and to provide additional points of interconnection during the rollout of the network. This is problematic because it would require NBN Co to look at alternative operating models to the one on which it is building and operating its network. Put simply, repealing Division 16 has the potential to create significant delays and additional costs which would be directly contrary to the Government's objective to roll out the NBN as soon as possible and at lower cost to taxpayers.

The current POI and bundling arrangements have these implications for NBN Co:

1. *POIs* –NBN Co is only required to provide service providers access to its 121 POIs. By requiring access to these POIs, NBN Co can optimise use of the POIs it maintains and ensure that its transmission services are being utilised to the maximum extent, ensuring economic efficiency and that the NBN can be rolled out within the Government's funding profile. Further, it is not distracted from its roll out task by having to provide additional unplanned POIs. Any access seeker is likely to request access to a large number of additional POIs and NBN Co could not accommodate this within its current plan.

2. '*Bundling*' *of services* – NBN Co is permitted to sell specified service elements as a 'bundle'. This provides it with certainty in the planning and provisioning of its services because it is maximising the efficient supply of those services, and providing them on terms that provide NBN Co with the opportunity to seek to recover the cost of building the network. If NBN Co were required to change its product design this could significantly impact delivery of the NBN overall given the interaction between NBN Co's product design and the 121 listed POIs (e.g. the NNIs are located in the POIs).

Access to additional POIs and service elements could be sought by carriers where those carriers have existing networks or facilities that would enable them to provide services. For example, a carrier may have transmission capacity at or near potential (unlisted) POIs. If the ability to refuse interconnection at non-listed POIs was removed, the carrier could seek to connect to the NBN at the unlisted POI. A carrier that seeks access to additional POIs may request access to hundreds, if not thousands, of POIs. This would inevitably distract NBN Co from its planned build. It could also affect the ability of NBN Co to provide reasonably priced services to all RSPs, including those who do not have much network infrastructure available to use.

Provision of access at this level is not part of the existing build plan.

Given these factors, any request to NBN Co to offer interconnection at a significant number of new POIs, and to ‘unbundle’ its service elements, would have serious implications for NBN Co. Effectively, it would require a fundamental re-design of its current network design and operating model.

It could, for example, be required to build larger nodes or use different equipment to support access at many more points, and it may need to look for new and/or different locations for POIs with all of the complexity in terms of time and costs that that would entail. Given that, it is more likely that NBN Co would reject a request for interconnection at a large number of additional points. It may then seek an authorisation under Part IV, or an access seeker could approach the ACCC for a regulatory decision under Part XIC of the CCA. In either case, NBN Co may choose to slow its rollout until a regulatory decision is made. Such decisions can take time; approximately six months in the case of an authorisation, and up to a year or longer in the case of Part XIC processes. As a result, the network would be delayed during that period, thereby delaying the benefits to end-users and other access seekers of having access to the network.

If NBN Co were required to supply interconnection at a larger number of POIs, this could also result in a resource shortfall, both for NBN Co and the broader industry in terms of the availability of skilled personnel and equipment with consequential time and cost implications for NBN Co and therefore also access seekers. More seriously, the requirement would impose significant new costs on NBN Co. NBN Co would face extra costs from having to identify new locations for POIs, seek approvals, buy new or additional equipment and hire additional staff. Its ability to recover some or all of these costs would be subject to the ACCC’s regulatory determinations, but in any case it could not recover the costs from access seekers until it could actually supply them with the service – that is, after it had hired the additional staff and built the additional POIs – or until there were actually access seekers seeking those products.

Delays to the rollout would also have impacts on NBN Co’s ability to meet its forecast revenue.

Certainty in relation to the rollout of the NBN is important to other carriers and CSPs as well. It provides confidence in relation to future investments and in the provisioning of their own networks or facilities. Most carriers and CSPs have developed their business models, and configured their networks or supply arrangements to access the NBN in the form that it is currently planned, that is to connect at listed POIs and purchase the ‘bundle’ of service elements as required.

Impacts on end-users are considered in greater detail in the ‘analysis of options’ section, below.

Unbundling of access services may lead to competitive efficiencies, such as enhanced or differentiated service offerings and possibly lower retail prices. These potential benefits are considered in further detail in the discussion of options below.

Once the NBN has been built, the case for retaining Division 16 is reduced and default rules and processes can prevail. The reason that the authorisations can be repealed once the network is complete is because certainty is only needed to facilitate the efficient and effective rollout of the network. If an access seeker requests interconnection at a large number of new POIs once the NBN has been built, NBN Co will already have a functioning network that is earning revenue. It will also have the network on the ground and would not need to fundamentally redesign it. Furthermore, it would be able to seek a funding contribution from another carrier for any new facilities *before* it builds those facilities, meaning that it would not face unmanageable calls on its funding.

The authorisations are an important mechanism for providing certainty and ensuring that the network is built quickly as now planned, without distraction, as would be the case if access to non-listed POIs could be granted or different service elements ‘unbundled’, requiring significant redesign and potentially significant further, currently unplanned, investment by NBN Co and access seekers. Once the network is built however, the ability to unbundle it to support greater competition, if the demand exists, using standard processes like those under Part XIC, should be available.

To summarise, the broad policy issue the Government needs to address is:

- whether NBN Co needs to be able continue to operate a limited number of POIs and bundle services so that it can roll out the network as planned, on a timely basis, at lower cost, for the benefit of consumers, and as expected by its customers; or
- whether NBN Co should not have the benefit of the exemptions, so that other carriers could potentially seek access to its infrastructure to help them provide competing services, especially in the long term, despite the potential short term impact on the NBN rollout, stakeholders, and the benefits the rollout will deliver.

The issue basically arises because the move from UNWP to price capping calls into question the existing statutory authorisations.

NBN Co needs to continue to engage in the conduct concerned, because it has planned its network on this basis, and industry has also planned to access the NBN on this basis, and a change in policy would delay the rollout of the NBN, increase costs for NBN Co and also delay access for industry and end-users to high-speed broadband services. This therefore means that the statutory authorisations should be amended to allow the behaviour to continue, but in doing this the Government needs to ensure that the impacts on competition and efficiency are limited and appropriate.

In drawing a suitable balance between these issues, the Government will also need to consider the timing of various actions. Delays and costs for NBN Co are likely to be particularly acute during the rollout stage, i.e. pre-2020, as any requirements to repurpose or redesign the network would be likely to create additional costs, and result in delays. Once the network is built however, i.e. post-2020, industry can negotiate with NBN Co for additional POIs at locations that reflect market signals, and the costs of building new POIs can be shared. Building new POIs at this point does not cause any delays or additional rollout costs, but could promote competition and benefits for end-users. As a result, there is merit in ensuring that the authorisations are only set in place for a period of time in which they are useful and do not unduly restrict competition, and are lifted when the benefits for competition can be realised.

Overview of options

Option 1 – Do nothing

Under this option the Government would leave Division 16 in its current form. It is assumed that NBN Co would operate on the basis that the authorisations provided by Division 16 would remain in place, however, in the absence of the Government's policy supporting UNWP, the interpretation of the authorisations is somewhat uncertain.

Option 2 – Repeal Division 16 in its entirety, rely on existing ACCC powers to authorise certain conduct that may be anti-competitive

Under this option the Parliament would repeal Division 16 in its entirety. NBN Co could seek authorisation from the ACCC in relation to restrictive trade practices under Part IV and Part XIB of the CCA (noting, however, that there would be no protection in relation to Part XIC[4]), but this authorisation is far from guaranteed.

In addition, the provisions in Part XIC of the CCA which allow NBN Co to refuse interconnection at any facility that is not a listed POI would be repealed. An access seeker could therefore request interconnection to an unlisted POI and NBN Co could be required to allow this interconnection. If NBN Co refused interconnection the ACCC or the affected RSP could apply to the Federal Court seeking an order to require NBN Co to allow interconnection.

Option 3 – Amend Division 16 so that it provides authorisation for necessary conduct that facilitates the rollout of the NBN

Under this option, the Government would amend Division 16 to continue to authorise NBN Co to limit the number of POIs and to bundle services as it currently does. This would aim to ensure that NBN Co was authorised to engage in conduct to enable the effective and efficient roll out of its network by minimising the risks to which NBN Co is exposed to.

To this end, the Division would be amended so that the object of the Division is to facilitate access to superfast carriage services by all people in Australia, wherever they reside or carry on business. The amendments would also ensure conduct necessary to achieve this object—namely limiting interconnection to listed POIs and bundling access services—was authorised. That is, in effect, the authorisations would be amended to cover conduct reasonably necessary to build the NBN according to the established operating model, rather than to achieve UNWP. Matching amendments would be made to Part XIC to ensure that the SAOs continue to be limited by the authorised conduct.

A new clause would also be included in the amended Division 16 to ensure that the Division ceases to have effect once the NBN has been completed and is fully operational, as declared by the Minister under section 48 of the *National Broadband Network Companies Act 2011*. The anticipated date of completion of the network is 2020, meaning that any authorisations would be in place for a limited period. This would be consistent with the rationale for the amendments, that is, to provide certainty for NBN Co during the rollout of the network.

Option 4 – Amend Division 16 so that it provides that NBN Co can engage in authorised conduct during the rollout of the network, and once it has been completed

[4] As noted on pages 8-9 above, the authorisations in Division 16 are linked to the SAOs set out in Part XIC of the CCA. Part XIC currently contains provisions preventing the ACCC from making an access determination that is inconsistent with the authorisations set out in Division 16 (s 152BCB(3B)). While authorisation under Part IV of the CCA would enable NBN Co to engage in the conduct specified, the ACCC could still make an access determination providing access to NBN Co's services which would otherwise be protected under Division 16.

This option is similar to option 3 in that the Government would amend Division 16 to continue to authorise NBN Co to limit the number of POIs that it provides access to and to bundle services as it currently does. The key difference however is that NBN Co will continue to be able to engage in authorised conduct once building of the network has been completed.

Impacts of options

The following criteria have been considered in assessing the costs and benefits of the different options:

1. Will the option support the successful rollout of the NBN?
2. Will the option affect competition, both infrastructure and retail, in the telecommunications market?
3. Does the option comply with the Competition Principles Agreement, made between the Council of Australian Government (COAG) on 11 April 1995 and which requires that any legislation that potentially restricts competition:
   - must be able to show that the benefits to the community of the restrictions on competition outweigh the costs, and
   - the objectives of the legislation can only be achieved by restricting competition.
4. How will the option affect end-users?

In terms of the overall conceptual framework for analysis being applied, the focus is on the benefits to be derived from NBN Co having certainty and reduced risk and costs in relation to the rollout, versus, the theoretical potential benefits of more efficient supply from NBN users being able to source infrastructure from providers other than NBN Co and using it in conjunction with the NBN.

Option 1 – Do nothing

Advantages:

The main benefit of the status quo option is that the Parliament would save time and resources by not having to consider the matter.

As this option is likely to give rise to significant uncertainty, the effect of the option on competition, the NBN rollout, and end-users are all considered in the disadvantages section.

Disadvantages:

The status quo option would result in Division 16 remaining in the CCA in its current form, despite the Government’s adoption of a price capping policy and the cessation of the UNWP policy. This would create considerable uncertainty around the application of Division 16 and NBN Co’s ability to use the authorisations contained within it.

NBN Co would face the risk that, if it continues to operate under the current framework, a carrier might challenge the legality of that framework, due to the shift in Government policy. Legal action, or consideration of the matter by the ACCC, could create further uncertainty and delay to the roll-out. If a court settled on an outcome which required NBN Co to re-design its network to support broader interconnection and unbundling, then the Government may need to consider legislation to address this. In other words, an outcome of option 1 would be that the Government needs to proceed to options 3 or 4 anyway.

The effect of this option on competition is difficult to assess. If NBN Co was to continue operating as if the authorisations remained in place, and its approach was not challenged by other industry players, then the NBN would continue to be rolled out and retail service providers could benefit from increased access to an open access network offering services on non-discriminatory terms and conditions.

Conversely, if competitors sought to interconnect outside NBN Co's 121 POIs, or unbundle NBN Co's designated access services, and these changes became available following a court or regulatory process, the implications for competition are less clear. Some access seekers may be able to make greater use of existing transmission assets, which could reduce their costs and allow them to compete more effectively. However, it is not clear that such a request would be made, given the strong industry support for the NBN model and for the authorisations in Division 16 to continue. As noted above, non-NBN carriers and CSPs have planned their network investments and supply arrangements to take account of the NBN, and delays to the rollout or a network redesign could impose costs on them from having to adjust their own operating models and plans.

If an access seeker did request greater interconnection or unbundling, and NBN Co refused, then any subsequent court or regulatory process would also delay the rollout as NBN Co would need to pause its current plans in case it was made to redesign its network and products. These delays would flow through to other carriers and CSPs, imposing delay costs on their activities.

Delays and additional costs would have consequential implications for end-users. People living in areas where the NBN is being rolled out could face a delay in being able to access high-speed broadband. Many would not be able to access such services from competing providers, as those providers target a limited number of high-density areas or new developments and do not, for example, target suburban or regional areas. Such delays are likely to outweigh any benefits for individual access seekers from being able to make greater use of their transmission assets.

The existing arrangements are consistent with the competition principles agreement on the basis that a uniform pricing approach was considered to provide benefits that outweighed the restrictions on competition. If an access seeker sought additional locations for interconnection and difference service elements from NBN Co, then any benefits for competition would be consistent with the agreement, but the possibility of wider costs for industry and delays to end-users' ability to receive services would mean that the costs of this option would outweigh the benefits, which are uncertain in all instances (i.e. because it is uncertain anyone will seek such interconnection).

The long term implications of this option are unlikely to be significant in that competing carriers are unlikely to come forward to seek to access to NBN assets at a deeper level in the network. However, if they did come forward and did secure access, through ACCC decisions, it could potentially enhance infrastructure-based competition in areas attractive to competitors into the future. This means that infrastructure competition may be more developed in some areas post-2020, compared to the counterfactual presented in option 3. However, this would come at the expense of rolling out the NBN more quickly and at lower cost and providing the benefits of better broadband sooner on a national basis, while leaving open the option in the future for access seekers to seek to leverage NBN assets. This would also be expected to impact on NBN Co's long term commercial performance.

Option 2 – Repeal Division 16 in its entirety, rely on existing ACCC powers to authorise certain conduct that may be anti-competitive

Advantages:

Under option 2, the legislation would be repealed on the basis it is no longer needed to support UNWP, which would be consistent with the Government's regulatory reform policy.

This would create a greater degree of certainty for industry and NBN Co than Option 1. NBN Co could seek authorisation under Part VII of the CCA to limit interconnection and require RSPs to purchase bundled services if it considered that it required protection from potential action for anti-competitive conduct. This option would comply with the Competition Principles Agreement on the basis that it does not restrict competition (and, if NBN Co sought an authorisation, that authorisation would by definition be granted on the basis that the benefits outweigh the costs).

Disadvantages:

This option does not address the fundamental issue of NBN Co potentially having to provide levels of wholesale access during its rollout that are inconsistent with its operating model. This, in turn, gives rise to significant uncertainty, risk and potential delay to the rollout of the network.

If Division 16 (and the consequential limits on the SAOs) are repealed, an access seeker would be able to request interconnection outside listed POIs, and may seek to unbundle the designated access services. If NBN Co refused this request, an access seeker could raise the issue with the ACCC which could consider whether it needed to take regulatory action. As services supplied by NBN Co under its SAU are 'active declared services', the ACCC would be able to consider making an access determination setting out requirements for interconnection and unbundling. However, as noted above, NBN Co's SAU sets out a requirement for RSPs to purchase bundled access services and establishes arrangements in relation to interconnection at NBN Co's POIs. There is no provision in legislation for the ACCC to re-open a SAU once it has approved the SAU. However, this need not mean that the SAU would shield NBN Co from change.

If a challenge were to occur and the ACCC made an access determination under Part XIC requiring NBN Co to offer additional POIs, then NBN Co would be required to provide more interfaces at which access seekers/RSPs could interconnect, and could also be required to unbundle its services. As noted above, these obligations could require it to re-design its network and product suite, which could significantly increase its costs and delay the rollout of the NBN.

Another consideration is the constraints on resources, in terms of skilled personnel or equipment. If more POIs are required, in addition to planning and redesigning the network, NBN Co would, by extension, require more equipment and labour which would result in further costs and delays to the network.

It is not certain that the ACCC would consider that it needed to undertake a regulatory process, or that access seekers would seek interconnection outside listed POIs and unbundling. It should be noted that industry, in submissions on the draft legislation, supported retaining authorisations relating to interconnection and bundling. On that basis, it is uncertain that there would be any challenge to NBN Co's current arrangements. However, the risk of a challenge and subsequent regulatory uncertainty could divert resources within NBN Co from the rollout and access seekers and other industry participants from implementing their existing business plans; with consequential impacts for end-users. At its worst, it could lead to the significant redesign of the network, affecting the budget and delaying the rollout of the NBN. Generally, where a risk exists that could, even theoretically, lead to significant delays to the NBN rollout, it is preferable to address that risk than to ignore it.

An opportunistic carrier or carriers could request interconnection at a significant number of POIs, placing significant resource and cost burdens on NBN Co.

If NBN Co considered the risk of having to provide access to additional POIs or to unbundle its services was significant, it could seek authorisation under Part VII of the CCA to limit interconnection and require RSPs to purchase a bundle of designated access services.

Part VII enables NBN Co to apply to the ACCC to obtain authorisation to engage in conduct that may have anti-competitive implications under Part IV of the CCA, if the public benefit of such conduct outweighs the public detriment. This would be time consuming and uncertain. Moreover, it would only provide relief for NBN Co from potential action for anti-competitive conduct under Parts IV and XIB of the CCA. It could not ‘switch off’ the SAOs in Part XIC of the CCA. This could result in an unusual regulatory situation where NBN Co is protected from the consequences of limiting interconnection and requiring bundling, but an access seeker could nonetheless still ask the ACCC to consider regulating these issues. The uncertainty creates scope for opportunistic behaviour and, to the extent that industry needs to adjust its behaviour to cater to the uncertainty, creates additional costs for industry.

In its 2016 Corporate Plan, NBN Co noted for every seven months that the launch of its FTTN product is delayed, the company would require an extra $1 billion in funding.[5] If NBN Co seeks authorisation under Part IV, the subsequent ACCC processes are likely to result in lengthy delays which will result in significant costs to the network. If there are multiple authorisation requests, those delays could conceivably extend to 18 months or more. If additional funding is then required by the Government, then consideration should be had for the opportunity cost of that funding.

In relation to competition, if alternative providers did not seek access to NBN Co’s POIs deeper in the network, then there would presumably be no impact on the current level of competition in the market. If alternative providers did, however, seek access to unlisted POIs and NBN Co was required to go through the process described above in relation to Part IV and ACCC declaration under Part XIC, there could be delays to the construction of the network which would result in delays to the retail competition in areas where the network has not been built.

To the extent that access seekers are able to make greater use of their transmission assets and reduce their costs, they may be able to compete more effectively and efficiently in some areas of Australia. However, the only access seeker with extensive transmission network infrastructure in rural and regional Australia is Telstra. In its 2010 advice to the Government in relation to POIs the ACCC expressed concern that this could foreclose competition in those areas because Telstra would have an advantage over other providers because it owned the transmission networks. As a result, it would inevitably be better placed to compete on price than its competitors[6]. Consequently, this option may in fact reduce competition in many areas of the country. Moreover, any potential for additional infrastructure competition in such instances must be assessed against the broader disruption and uncertainty caused to the rest of the rollout.

There is no guarantee that this option would result in better commercial outcomes for carriers and CSPs generally. As noted in option 1, non-NBN carriers and CSPs have planned their own network investments and supply arrangements with the expectation that the NBN will be rolled out as currently planned and completed within the proposed timeframe. Any redesign of the NBN could be expected to similarly adversely affect the speed at which access seekers are able to leverage the NBN to provide their own services. To the extent an alternative

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[5] NBN Co Corporate Plan 2016, p 69

[6] *ACCC Advice to Government – National Broadband Network Points of Interconnect*, November 2010, p2.

provider wanted to compete with NBN Co without accessing NBN Co assets, it would be largely unaffected by the proposed approach.

This option is also unlikely to lead to better outcomes for end-users, whether residential or business. In the event that NBN Co is subject to uncertainty and risk that could delay its rollout, those delays will flow through to end-users. As the majority of end-users live or work in areas where competitive rollouts are not planned or are unlikely to occur, those end-users will not be able to access viable fixed-line alternatives for high-speed broadband services.

To the extent that the option might foster competition, it would be consistent with the Competition Principles Agreement, but the extent to which it will is far from certain.

The long term effects of this option are likely to be similar to those discussed under option 1. If unbundling of service elements and access to additional POIs was sought by carriers and permitted by the ACCC, then infrastructure competition may develop in high-value areas where it would be advantageous for carriers to interconnect their own networks to additional NBN POIs, and the ACCC allows interconnection to take place. This may enable the benefits of infrastructure competition to be realised. It would appear to be more likely however, that competition would be limited to those high-value areas. Consequently, it is likely that people in most areas of Australia would receive delayed access to high-speed broadband services, and therefore the benefits from promoting competition in some areas are likely to be less significant than the costs to end-users. This would also be expected to impact on NBN Co’s long term commercial performance.

Option 3 – Amend Division 16 so that it provides authorisation for conduct that facilitates the rollout of the NBN

Advantages:

NBN Co would be able to refuse interconnection at non-listed POIs and require providers to purchase its 'bundle' of service elements where those actions are required to achieve the objectives of structural reform of the telecommunications sector and rolling out the NBN. This will enable NBN Co to operate its network during the construction phase in the most effective and efficient manner possible. It will avoid a potential redesign of the operating model. This would significantly increase certainty for the project, and for the wider industry. By extension, this should result in the delivery of the network as a whole, faster, and therefore enable all Australians to experience the benefits of faster broadband, sooner. The sooner and more efficiently the network is built, the sooner and at lower cost it is available to support retail competition.

One of the key findings of the Vertigan Review, which conducted a cost-benefit analysis of the NBN, was that the overall benefits of the NBN would be greater if the network was completed sooner. This is because users are able to realise the value of faster broadband earlier. The Vertigan Review estimated the MTM scenario provided a net benefit relative to the FTTP scenario of $16 billion. $6 billion of this difference is attributed the benefit of the MTM scenario delivering higher speeds to consumers sooner than the FTTP model.[7],[8]

The Vertigan Review also commissioned 'willingness to pay' analysis which estimated the benefits to households and business of getting access to high-speed broadband sooner. The analysis found that the weighted total benefit per household moving to the NBN is $26.30 per month.[9] Assuming that the approach proposed under this option means faster broadband is provided 12 months sooner than might be the case under option 1 or 2, due to the uncertainty and potential delay under those other options, there would be a significant nominal benefit of $26 multiplied by the number of end-users that would otherwise be connected to the NBN during the delay period.

This option would also remove the right of NBN Co to engage in authorised conduct once the network has been built. This would ensure that there are no ongoing authorisations in place and that the sector can default to the general regulatory approach following the completion of the network build. The impacts of the option are limited to the duration of the network build, meaning (as set out below) that the impacts on competition are limited.

It should be noted that while the authorisations are in place, other carriers are not prevented from rolling out their own networks. To the extent an alternative provider wanted to compete with NBN Co without accessing NBN Co assets, it would be largely unaffected by the proposed approach. Carriers can still invest and compete against NBN Co, but they cannot leverage certain NBN Co infrastructure in order to compete against it. Non-NBN Co carriers and CSPs would also be able to take advantage of the benefits inherent in the network being rolled out as planned, by not having to revise their existing plans to provide services through the NBN. This will ensure that end-users are able to access services with the changes proposed by this option sooner, than under options 1 and 2.

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[7] *Independent cost-benefit analysis of broadband and review of regulation: Volume 2 – The costs and benefits of high-speed broadband*, p84.

[8] While the NBN Co 2016 Corporate Plan estimated that the cost of the MTM or FTTP rollout would be greater than the previous figures used by the cost predicted as part of the Vertigan review, the principle that there is a greater net-benefit associated with a network being rolled out sooner would still apply.

[9] *Independent cost-benefit analysis of broadband and review of regulation: Volume 2 – The costs and benefits of high-speed broadband,* p 74

The option is also consistent with the COAG Competition Principles Agreement. Section 5 of the Agreement requires that legislation should not restrict competition unless it can be demonstrated that:

1. the benefits of the restriction to the community as a whole outweigh the costs, and
2. the objectives of the legislation can only be achieved by restricting competition

The public benefits of the option are likely to outweigh the cost of any potential reduction in competition while the network is being built. The benefits of the proposed approach are that it would enable the network to be built as quickly as possible, allowing benefits of the kind estimated by the Vertigan Review to be captured. The costs would primarily relate to possible future costs, from NBN Co having to provide deeper interconnection and to unbundle services, if access to such products was sought sometime in the future. That, in itself, however, is uncertain. Importantly, the option provides a far more reliable pathway to retail competition over the NBN compared with options 1 and 2 as NBN Co would have greater certainty in relation to it rollout under this option. Industry is already operating on the basis that it interconnects at 121 POIs and purchases a 'bundle' of designated access services. Consequently, it will not need for them to incur adjustment costs. Allowing interconnection at more points in the network could potentially allow some industry players to use more of their transmission facilities to supply services and reduce their costs. However, this is uncertain given industry support for the NBN, and the ability for alternative providers to roll-out their own networks, independent of the NBN. For example, TPG has announced that it will roll out an FTTB network to 500,000 apartments in competition with NBN Co. It is currently reported to service 850 buildings. There has also been speculation that M2 and Vocus, if their merger proceeds, may adopt a similar strategy. All indications are they would pursue these strategies using their own infrastructure, rather than accessing NBN Co's.

Once the NBN is complete NBN Co would be subject to the normal operation of Part XIC and industry will be able to seek interconnection outside listed POIs.[10]

As noted above, in submissions on the draft legislation no industry members indicated concerns in relation to this option. This proposal also reflects industry submissions to the Vertigan Review which argued in favour of the NBN being completed as soon as possible.

Any potential disadvantages for the wider industry from a delay in being able to use their own transmission assets more fully should be considered against the benefits to business and residential end-users from gaining earlier access to high-speed broadband. As noted above, the cost-benefit analysis of broadband undertaken by the Vertigan Review estimated that the benefits of the MTM NBN were in the order of $18 billion (in net present value terms). These benefits reflected the fact that the MTM is lower cost than an all-fibre rollout, and, significantly, will be able to be rolled out faster, meaning that the economic benefits of the technology could be captured sooner.

Although a number of competitors have rolled out infrastructure in competition with NBN Co, fixed-line rollouts are limited to certain areas of major capital cities (new developments, business parks, CBDs) where the investment can produce a clear commercial return. In these areas end-users will, as a result, always be able to receive high-speed broadband services from alternative fixed-line providers. However, NBN Co is servicing the entire country and history has shown that competitive fixed-line rollouts are unlikely to occur in regional or rural areas, or indeed in the suburbs of larger cities. Delays to the NBN rollout will therefore result in the majority of areas of Australia not receiving high-speed broadband services

[10] As noted above, because NBN Co's SAU sets out a requirement for RSPs to purchase bundled access services, industry would not be able to seek unbundling before the SAU expires in 2040.

quickly. This option therefore provides a clear advantage for end-users as it promotes certainty and the early rollout of the NBN.

As under options 1 and 2, the long term implications of this option are unlikely to be significant in that competing carriers are unlikely to come forward to seek to use NBN Co's assets and will not be affected by restrictions on doing so. However, if an access seeker does wish to secure access through ACCC decisions, they would not be able to under Option 3 and any long term benefit derived from that infrastructure-based competition would not eventuate. Competitors, however, would still be able to compete using their own infrastructure and, once the NBN was built and fully operational, they would be able to seek to use NBN Co's assets, should they wish to, under usual ACCC processes. At the same time, NBN Co would be able to roll out its network more efficiently with greater certainty and lower risk, delivering the benefits of better broadband sooner. NBN Co may, as a result, be better positioned long term to compete with other infrastructure providers, however, those other providers are still able to build their own networks while NBN Co is building its network and will be able to seek access to the NBN in future.

In the long term, carriers would be able to seek access to NBN infrastructure and because the NBN market place will be more mature, they would be better placed to request interconnection in response to market signals. They would be able to seek access to NBN Co's assets to leverage their existing backhaul and transmission infrastructure. However, NBN Co would not be disadvantaged by the cost of building in interconnection capability that may not be required, but access seekers could seek access in future at their cost, with that cost recoverable from them as the cost-causers. Overall, the benefits of this approach are seen to outweigh the costs.

Disadvantages:

This option could, for a short period of time, limit providers' ability to use their existing backhaul networks to interconnect at deeper points in the NBN. However, as the authorisations will only be in place for a limited period of time, any such impacts would be short-term and are likely to be outweighed by the benefits of reducing delays in the rollout and ensuring that people in a broader span of Australia will be able to access high-speed broadband services sooner. To the extent an alternative provider wanted to compete with NBN Co without accessing NBN Co assets, it would be largely unaffected by the proposed approach.

While this option may theoretically have an adverse effect on competition in some markets for a limited period of time, this will not always be the case. Other infrastructure providers are likely to continue to invest in transmission networks that connect directly to their own local access networks, where such investment is viable, for example, in high-density metropolitan areas. Consequently, where competitive infrastructure investment is commercially viable, there is unlikely to be a significant cost to industry from option 3. This means that while the NBN is being built, the option will preclude industry from being able to access specific facilities or services where it may be efficient for them to do so, but as noted above, the advantages of completing the NBN sooner would outweigh the limited short term costs.

Option 4 – Amend Division 16 so that it provides that NBN Co can engage in authorised conduct during the rollout of the network, and once it has been completed

Advantages:

The advantages of option 4 are similar to those listed under option 3, particularly in the short term. That is, the continued operation of authorisations will enable NBN Co to roll out its network during the construction phase in the most effective and efficient manner possible. It will avoid a potential redesign of the operating model. This would significantly increase certainty for the project, and for the wider industry. By extension, this should result in the delivery of the network as a whole, faster, and therefore enable all Australians to experience the benefits of faster broadband, sooner. Such certainty would be on an enduring basis.

Disadvantages:

Allowing NBN Co to continue to limit access to POIs after it has completed the NBN would risk putting in place longer-term limits on competitive investment in transmission infrastructure. Over the long term, such restrictions could inhibit efficiencies in the market and limit the ability of competition to provide end-users with better services and lower prices. Accordingly, once the network has been built, NBN Co should be subject to the normal operation of the SAOs. If the authorisations were continued on an ongoing basis, access seekers could not even seek access under Part XIC, and the ACCC would not have the opportunity to consideration declaration.

This option is arguably not compliant with the Competition Principles Agreement as the long term effect of retaining the authorisations is potentially not outweighed by the benefits. The benefits occur by limiting disruption to the rollout, and ensuring that end-users can gain earlier access to high-speed broadband services. Once the rollout is complete then the benefits of early adoption are by definition no longer available. Conversely, if there are enduring benefits from limiting access to POIs, then this can be considered by the ACCC in the context of its Part XIC processes.

Selecting the best option

The preferred option is option 3 because it is expected to confer the highest net benefit. As noted in the Vertigan Review, there is a $6 billion net benefit to rolling out the NBN as planned under an MTM scenario, compared with other, slower rollout scenarios. For the NBN to be rolled out quickly and cost-effectively, it needs to be built with as few disruptions as possible to the model planned. Option 3 provides a mechanism for NBN Co to roll out its planned model. It will provide NBN Co with the certainty required to minimise delays to the rollout of the NBN and to contain its costs. It also provides the broader telecommunications industry with certainty that the NBN will be completed as soon as possible. As discussed above, it is also likely that the benefits to end-users from a faster rollout of the NBN outweigh the costs to industry from short-term restrictions on lower levels of interconnection. None of the major industry participants objected to the preferred option.

There are risks associated with Option 3. As noted above, depending on the plans of competitors, Option 3 may affect the shape and extent of infrastructure-based competition. For example, it may encourage competing carriers to build their own competing infrastructure, instead of leverage NBN assets, through the access regime. Conversely, it may delay their ability to seek to leverage NBN Co assets, under ACCC processes, until the NBN is built and operational. Obtaining greater access at that time, may also be more costly due to the need to add that capability. Both scenarios also have long term commercial implications for NBN Co. However, the risks of Option 3 are assessed as low, and to be outweighed by the benefits. Again, those benefits are that the network is built faster and at lower cost, delivering benefit to the community sooner.

Options 1 and 2 do not provide an acceptable level of certainty for NBN Co and the wider industry. This lesser degree of certainty and consequential higher degree of risk is not counter-balanced by the possibility of greater private sector investment and competition. Options 1 and 2 are likely to result in significant additional costs compared to Option 3. As noted in the analysis above, on top of the legal and administrative processes that will be required, options 1 and 2 may be resource intensive, both for NBN Co and industry. As discussed above, it is also likely that the benefits to end-users from a faster rollout of the NBN outweigh the costs to industry from short-term restrictions on lower levels of interconnection.

By contrast, under the proposed approach (Option 3), an access seeker would be able to seek access under Part XIC in future, and the ACCC would consider whether it is in the long term interests of end-users, and if so, declare such access, with the cost being able to be recovered from the access seeker/s. The Department therefore considers Option 3 delivers the highest net-benefit because:

- it delivers access to superfast broadband sooner,
- no significant cost is incurred in advance on a wholly speculative basis (and significant potential waste is therefore avoided), and,
- if there is demand in the future for deeper interconnection, it can be provided, albeit it at a cost, but that cost will be able to be measured against benefits.

In particular, the cost could be assessed in terms of the costs access seekers would avoid in future by accessing the NBN rather than building their own infrastructure. This is in contrast to NBN Co incurring a cost now, which cannot be assessed against given unknown demand, and thus unknown costs and benefits.

Option 4 is not preferred because it would prevent carriers from leveraging NBN Co's infrastructure over the long term, which may be an appropriate outcome once the network is rolled out and one which the ACCC should be able to consider at that time.

Consultation

There was extensive consultation in 2014 on future industry structure as part of the Vertigan Review. For the Regulatory Report, the panel released a Regulatory Framing Paper in February 2014 to take soundings from industry and the public on key factors that should be considered. The panel received 43 submissions. For the Statutory Review, the panel released a consultation paper in March 2014 to seek views from industry and the public on the telecommunications access arrangements. The panel received 15 submissions.

While few submissions focussed specifically on Division 16, the majority of submissions strongly endorsed the NBN model, with many submitters noting that future investment plans had been made on this basis of the NBN rollout.

The Structural Review, which considered Division 16, was released in October 2014, allowing industry considerable time to provide feedback to the Government on its recommendations. The then Department of Communications consulted carriers and industry organisations in relation to the panel's recommendations. The Government released its response to the Vertigan review in December 2014, again leaving industry with time to provide comment. There has been little such comment.

Separately in October 2013, Deloitte Access Economics reported to Government on a review of s 151DD of the CCA that is was commissioned to undertake and which invited stakeholders to comment on Division 16.[11] Seven submissions were received, including from Telstra, Optus and the ACCC. The review found that the authorisations had not given rise to conduct that has attracted any practical concern about the operation of the Division.

[11] *Independent review under s.151DD of the Competition and Consumer Act 2010*, October 2013

In August 2015, an exposure draft containing the proposed amendments to Division 16 was provided to industry stakeholder for three weeks comment. None of the major industry participants objected to the proposal that was put forward. No changes were made to the exposure draft following consultation.

Industry was also asked to comment on this RIS prior to the Bill being introduced into Parliament. Again, no industry participants objected to the proposal that was put forward**.**

Implementation and evaluation

Legislation is expected to be introduced during the Spring 2015 sittings of the Parliament. Should the Parliament pass the legislation as proposed, the new authorisations would come into effect on Royal Assent. They would cease to have effect once the Minister for Communications determines, by legislative instrument, that the NBN is built and fully operational. The Government would evaluate the impacts of the legislation through its normal industry monitoring and consultation processes. Additionally, the Productivity Commission is required to conduct a thorough review of the NBN once the Minister for Communications determines that the NBN is built and fully operational. This review must consider a range of matters, including competition in telecommunications markets, structural features of those markets, access to broadband services and bundling of services supplied by NBN Co.[12]

[12] Section 49 of the *National Broadband Network Companies Act 2011*.

Regulatory Burden Measurement

Options	Preferred	Regulatory Burden Measurement
1: Status quo	No	If, under this option, NBN Co does not seek authorisation through ACCC processes and/or carriers do not seek access to additional POIs or unbundled services, there are unlikely to be any additional costs. If access or unbundling is however sought, the following costs would apply: Administrative Cost – NBN Co may need to seek authorisation for conduct from the ACCC, which would then need to consider whether to authorise the conduct. Delay cost – If the ACCC takes time to authorise conduct, there may be a delay in the rollout of the NBN and a delay to access the benefits of the NBN. (The Vertigan review concluded that one of the benefits of the MTM model was that it would be able to deliver the economic benefits of faster broadband sooner). If the ACCC decided not to provide any authorisations sought, there could be considerable resulting uncertainty and complexity that would be likely to impose further administrative and delay costs to the network and industry, the costs of which may be comparable or greater to the authorisation process.
2: Repeal Division 16 in its entirety	No	Administrative Cost – NBN Co may need to seek authorisation from the ACCC for its conduct, and the ACCC would then need to consider whether to authorise the conduct. Delay cost – If the ACCC takes time to authorise conduct, there may be a delay in the rollout of the NBN and a delay to access the benefits of the

		NBN. (The Vertigan review concluded that one of the benefits of the MTM model was that it would be able to deliver the economic benefits of faster broadband sooner). If the ACCC decided not to provide any authorisations sought there could be considerable resulting uncertainty and complexity that would be likely to impose further administrative and delay costs to the network and industry, the costs of which may be comparable or greater to the authorisation process.
3: Amend Division 16 to authorise NBN Co to limit the number of POIs and to supply a 'bundle' of service elements to support the timely and cost-effective roll-out of the NBN.	Yes	No additional costs.
4: As with options 3, but authorisations continue until after the roll-out of the NBN is completed.	No	No additional costs.

Assumptions (option 1)

- The NBN will be substantially completed by 2020.
- NBN Co will employ 3.0 FTE over a period of 3 months to develop its authorisation applications. It will only need to do this once, however, multiple authorisation applications may be necessary.
- The ACCC will employ 2.0 FTE over a period of six months conduct a review of NBN Co's authorisation applications, although this is speculative and depends on the number of authorisation applications that NBN Co makes.
- 5 carriers are likely to make a submission to the ACCC review of NBN Co's authorisations. These carriers are likely to employ 1.0 FTE over the 2 months to work on the submission and follow-up consultation.
- Costs in relation to any delays that may result following ACCC consideration of an authorisation application have not been considered as there is too much potential variability in these costs.
- This option does not consider the cost impact of any ACCC regulatory decisions which would arise through Part XIC processes, however these costs would be expected to be comparable or greater.

Average Annual Regulatory Costs (from Business as usual)				
Change in costs ($million)	**Business**	**Community Organisations**	**Individuals**	**Total change in cost**
Total by Sector	($0.038)	$0	$0	($0.038)

Assumptions (option 2)

- The NBN will be substantially completed by 2020.
- NBN Co will employ 3.0 FTE over a period of 3 months to develop its authorisation applications, however, multiple authorisation applications may be necessary.
- The ACCC will employ 2.0 FTE over a period of six months conduct a review of NBN Co's authorisation applications, although this is speculative and depends on the number of authorisation applications that NBN Co makes.
- 5 carriers are likely to make a submission to the ACCC review of NBN Co's authorisations. These carriers are likely to employ 1.0 FTE over the 2 months to work on the submission and follow-up consultation.
- Costs in relation to any delays that may result following ACCC consideration of an authorisation application have not been considered as there is too much potential variability in these costs.
- This option does not consider the cost impact of any ACCC regulatory decisions which would arise through Part XIC processes, however these costs would be expected to be comparable or greater.

Average Annual Regulatory Costs (from Business as usual)				
Change in costs ($million)	**Business**	**Community Organisations**	**Individuals**	**Total change in cost**
Total by Sector	($0.038)	$0	$0	($0.038)

Assumptions (option 3 (preferred) and option 4)

- Option 3 assumes that NBN Co retains the ability to rely on statutory authorisations. This would mean that there is no additional cost on industry to implement the changes as there is no change to existing outcomes or arrangements.

- Option 4 similarly assumes that NBN Co would retain the ability to limit POI access and to bundle services. The key difference is that these authorisations would not cease when the network is completed. However, as option 4 does not require any changes to existing arrangements within industry it does not impose a regulatory burden.

Regulatory Burden and Cost Offset Estimate Table

Average Annual Regulatory Costs (from Business as usual)				
Change in costs (<u>$million</u>)	**Business**	**Community Organisations**	**Individuals**	**Total change in cost**
Total by Sector	($0.0)	$0	$0	($0.0)
Cost offset (<u>$million</u>)	**Business**	**Community Organisations**	**Individuals**	**Total by Source**
Agency	($0.0)	$0	$0	($0.0)
Are all new costs offset? ☐yes, costs are offset ☐no, costs are not offset ☑deregulatory, no offsets				
Total (Change in costs - Cost offset) (<u>$million</u>) ($0.0)				

As the preferred option proposes a cost neutral regulatory framework, there are no costs to offset.