

Independent review  
under s.151DD of the  
*Competition and  
Consumer Act 2010*

October 2013

The Hon Malcolm Turnbull MP  
Minister for Communications  
Parliament House  
Canberra ACT 2600

8 October 2013

Dear Minister

**Independent review under s.151DD of the *Competition and Consumer Act 2010***

I am pleased to present to you a report on the review of the operation of Division 16 of Part XIB of the *Competition and Consumer Act 2010* (Cth) (CCA), as required under section 151DD of the CCA.

The review is related to the statutory authorisations provided to NBN Co in Division 16 of Part XIB of the CCA to support its achievement of uniform national wholesale pricing (UNWP). The CCA also required that the review be conducted by a person who has expertise in competition law and economics. I, with the support from a team at Deloitte Access Economics, was asked by the previous Minister to conduct this review.

The review focussed on assessing any conduct by NBN Co that may have been authorised under subsections 151DA(2)-(4) of the CCA as being reasonably necessary to achieve UNWP and, in the absence of the authorisations, which may otherwise have been considered anti-competitive. Matters relating to the NBN policy as a whole, or the design, implementation and rollout of the NBN were considered beyond the scope of the review.

The review was required to include public consultation. Stakeholders were invited to comment on the operation of the statutory authorisations provided to NBN Co in Division 16 of Part XIB of the CCA. Stakeholders were also invited to comment on any other and broader impacts associated with the existence of the section 151DA statutory authorisations.

The report also outlines some of the broader issues that were raised by stakeholders during the public consultation process. Collectively, these issues go beyond an operational review and to the question of whether the statutory authorisations are necessary. Given that the NBN is still in the early stage of its rollout, and that NBN Co is still in the relatively early stages of deploying its Points of Interconnect, these issues may justify further assessment or review as the NBN rollout progresses.

The review has found that the statutory authorisations have not given rise to conduct that has attracted practical concerns about the operation of Division 16 of Part XIB of the CCA. This could be attributed to number of reasons, all of which suggest that it is too early to arrive at any definitive conclusion. Further, the review airs views from stakeholders that the provisions may not be needed, but does not actually find that the provisions are not needed.

It is my conclusion that the need for the section 151DA authorisations could be considered in the future, in light of the continued operation of Division 16 of Part XIB of the CCA and any changes to NBN policy. If evidence arises suggesting that the statutory authorisations are not needed, a future assessment or review may find that the existence of the provisions are not necessary.

During the course of the review, I was provided with confidential information both in written submissions and during follow up interviews. That information contributed to the formation of my findings.

Should you have any questions in relation to the matters raised by the report, please do not to hesitate to contact me.

Yours sincerely,

Dr Ric Simes  
Partner  
Deloitte Access Economics Pty Ltd

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# Glossary

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ACCC	Australian Competition and Consumer Commission
AVC	Access Virtual Circuit
CCA	<i>Competition and Consumer Act 2010 (Cth)</i>
CVC	Connectivity Virtual Circuit
NBN	National Broadband Network
POI	Point of interconnection
RSP	Retail service provider
UNWP	Uniform national wholesale pricing

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# 1 Introduction

Dr Ric Simes, with the support of Deloitte Access Economics, was appointed by the previous Minister for Broadband, Communications and Digital Economy to undertake an independent legislative review, as required under section 151DD of the *Competition and Consumer Act 2010* (Cth) (CCA). The review related to the statutory authorisations provided to NBN Co<sup>1</sup> in Division 16 of Part XIB of the CCA to support its achievement of the policy of uniform national wholesale pricing (UNWP).

## 1.1 Legislative basis for review

The review was required under section 151DD of the CCA. It was required to begin two years after the legislation commenced, and be completed within 6 months.

Section 151DD of the CCA requires that:

- (1) After the end of the 2-year period that began at the commencement of this Division, the Minister must cause to be conducted an independent review of this Division during that period.*
- (2) Without limiting subsection (1), a review under that subsection must consider:*
  - a. the conduct that was authorised under subsection 151DA(2) for the purposes of subsection 51(1);*
  - b. the conduct that was authorised under subsection 151DA(3) for the purposes of subsection 51(1); and*
  - c. the conduct that was authorised under subsection 151DA(4) for the purposes of subsection 51(1).*

Section 151DA is provided in full in Appendix A.

The CCA also required that the review be conducted by a person who has expertise in competition law and economics. This involves an understanding of how business actions and behaviour might affect the overall level of competition in the sector. It also requires knowledge of the policy intentions and economic theory underpinning competition law in Australia.

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<sup>1</sup> The authorisations cover ‘NBN Corporations’, which capture, in addition to NBN Co, its subsidiaries, such as NBN Tasmania. For the purposes of this report, we simply refer to “NBN Co” throughout.

## 1.2 The scope of this review

This review process was limited to the issues set out in the legislation. Specifically, the review was concerned with assessing any conduct by NBN Co that may have been authorised under subsections 151DA(2)-(4) as being reasonably necessary to achieve UNWP, and, in the absence of the authorisations, which may otherwise have considered anti-competitive. Matters relating to the NBN policy as a whole, or the design, implementation and roll-out of the NBN were considered beyond the scope of this review.

### 1.2.1 Relation to post-implementation review

Australian Government agencies are required to undertake a post-implementation review (PIR) of regulation introduced without a Regulation Impact Statement (RIS), unless the impact is of a minor or machinery nature and the regulation did not substantially alter previous arrangements. A PIR must commence within one to two years of the implementation of the regulation, as per the Government's best practice regulation requirements.<sup>2</sup> A PIR is very similar in form and substance to a RIS. Like a RIS, a PIR needs to outline the problem and objectives, provide evidence and analysis, present findings from consultation, and make a conclusion. The main difference is that the impact analysis for a PIR should include information about the actual impacts of the regulation, rather than just estimates.

The section 151DD review is one of three reviews that will be collectively assessed by the Office of Best Practice Regulation as part of PIR requirements relating to the NBN. The other reviews are the ACCC's review of the policies and procedures relating to NBN Co POIs under section 151DC of the CCA and a broader review under section 152EOA that includes consideration of the operation of Part XIC of the CCA.

## 1.3 Public consultation

The review was required to include public consultation. Stakeholders were invited to make submissions on the operation of the statutory authorisations provided to NBN Co in Division 16 of Part XIB of the CCA. The primary objective of the public consultation process was to seek evidence of conduct by NBN Co involving:

- refusal to provide access to a non-listed point of interconnection;
- refusal to provide unbundled services; and
- any other activity directed toward achieving UNWP.

Stakeholders were also invited to comment on any other and broader impacts associated with the existence of the section 151DA statutory authorisations. Submissions made in this context gave rise to a number of issues, some of which were considered beyond the scope of the review. However, such issues were considered relevant to the future operation of Division 16 of Part XIB of the CCA. These issues included:

- whether the statutory authorisations are redundant;

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<sup>2</sup> Commonwealth of Australia, 2013. *Best practice regulation handbook*.

- the potential risk of unintended consequences arising from the operation of the statutory authorisations;
- the meaning of the expression “reasonably necessary” in the statutory authorisations; and
- achieving the objective of uniform national retail pricing.

The findings of the reviewer are based solely on the evidence made available to him.



## 2 Background to the s.151DD review

Chapter 2 explains the concepts and context which underpin this review.

### 2.1 Uniform National Wholesale Pricing

UNWP was a key component of the policy framework for the National Broadband Network (NBN). With a newly elected Coalition Government, UNWP is expected to be replaced with a system of uniform national wholesale price caps.<sup>3</sup>

UNWP meant that NBN Co was to offer within each of its technology platforms – fibre, wireless and satellite – its various services at uniform prices across Australia. NBN Co was also required to offer the entry level service (12/1 Mbps) at a uniform price across all three platforms. Where new services became available, NBN Co was to seek to provide them at a uniform price on all platforms, as was the case with the new 25/5 Mbps service.<sup>4</sup> The objective of UNWP was to enable retail service providers to offer more equitable, uniformly priced retail services across the NBN all over Australia.

### 2.2 Points of interconnection

Points of interconnection (POIs) are inter-network locations where communications traffic is exchanged between one network and another. They allow access seekers (such as RSPs and utilities<sup>5</sup>) to connect and exchange traffic with the NBN.<sup>6</sup> As such, they are an important piece of infrastructure facilitating the ongoing operation of NBN services.

For the purposes of Division 16 of Part XIB of the CCA, the ACCC published a list of POIs for the NBN in November 2012.<sup>7</sup> These POIs were identified on the basis of three criteria<sup>8</sup>, given the semi-distributed network approach adopted by the Government.

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<sup>3</sup> Liberal Party of Australia, *Fast. Affordable. Sooner. The Coalition's Plan for a better NBN*, accessed 4 October 2013.

<sup>4</sup> House of Representatives Hansard, 24 March 2011, p.3350.

<sup>5</sup> While NBN Co is generally limited under the *NBN Companies Act 2011* (Cth) to supplying services to carriers and carriage service providers, under Division 2 of Part 2 of that Act, it is subject to a number of exemptions that allow it to supply services to directly utilities in the interests of supporting the efficient supply of utility services.

<sup>6</sup> ACCC, 2010, *ACCC advice to Government: National Broadband Network Points of interconnect*, accessed 26 July 2013.

<sup>7</sup> Australian Competition and Consumer Commission, 2012, *Listed Points of Interconnection – NBN Corporation*.

<sup>8</sup> The Competition Criteria, as set out in *ACCC Advice to Government: National Broadband Network Points of Interconnect (Public Version, 2010)*, states that an NBN Co POI should be located where: (1) it is technically and operationally feasible to allow interconnection (usually at an Ethernet aggregation switch); (2) there are at least two competitors with optical fibres within a nominated distance from that location which (i) connect that site to an optical fibre network which is connected to a capital city, and (ii) deliver wholesale transmission services which are suitable for use by service providers who wish to connect to the NBN at that location; and (3) there is other evidence that the particular route is, or is likely to become, effectively competitive.

However, the NBN is still in its early stages. At one point in 2013, only 32 of the 121 listed POIs were active, and more customers were provided with service through temporary POIs than listed POIs.

## 2.3 Authorisations

NBN Co was directed to deliver UNWP using an internal cross-subsidy.<sup>9</sup> UNWP applies across the NBN's network – from POIs to individual premises. As a result access seekers in capital cities may pay a higher price relative to the cost of providing the service. This differential allows services in regional, rural and remote areas to be priced on a uniform basis, which may be below the cost of providing them.

This conduct, and other conduct by NBN Co to support the delivery of UNWP, such as limiting its POIs and bundling services, could potentially raise competition issues. This could potentially place NBN Co in breach of provisions of Part IV (Restrictive Trade Practices) of the CCA. For example, subsection 46(1AA) of the CCA provides that:

- (1) A corporation that has a substantial share of a market must not supply, or offer to supply, goods or services for a sustained period at a price that is less than the relevant cost to the corporation of supplying such goods and services, for the purpose of:*
- (a) eliminating or substantially damaging a competitor of the corporation or of a body corporate that is related to the corporation in that or any other market; or*
  - (b) preventing the entry of a person into that or any other market; or*
  - (c) deterring or preventing a person from engaging in competitive conduct in that or any other market.*

Similarly such conduct could potentially place NBN Co in breach of the competition rule in Part XIB of the CCA.

In this context, to ensure that NBN Co could achieve the policy objective of UNWP without contravening Part IV and XIB of the CCA, NBN Co is afforded authorisations under Division 16 of Part XIB of the CCA for conduct that might otherwise be considered anti-competitive.

These provisions are set out in section 151DA of the CCA, and authorise NBN Co to engage in specified conduct where the conduct is “reasonably necessary” to achieve UNWP. While these provisions authorise this conduct where reasonably necessary to delivering UNWP, they do not require or compel NBN Co to engage in the conduct.

By operation of subsection 151DA(2) of the CCA, NBN Co may refuse to provide access to a **non-listed point of interconnection**. If NBN Co has facilities outside of the listed point, they may choose not to grant service providers access to this facility, even if connecting at this point would be preferable from a provider perspective. Specifically, under section 151DA(2) NBN Co may refuse to permit interconnection of its facilities with other facilities if:

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<sup>9</sup> NBN Co Corporate Plan 2011-13, pp. 13.

- d. *the location is not a listed point of interconnection; and*
- e. *the refusal is reasonably necessary to achieve uniform national pricing of eligible services supplied by the NBN corporation to service providers and utilities...*

As noted in section 2.2 of this report, the number and location of POIs was published by the ACCC in November, 2012.<sup>10</sup> A total of 121 POIs were identified. The legislation indicates that NBN Co may refuse a utility or service provider the ability to interconnect at any NBN Co facility outside of those identified, if this is reasonably necessary to achieve UNWP.

Subsection 151DA(3) of the CCA authorises NBN Co to refuse to provide **unbundled services**. NBN Co may refuse to supply one requested service if the buyer does not agree to purchase other services as well, even if the service provider does not want or need the other service. Specifically, NBN Co is authorised to refuse bundling certain carriage services (referred to as “designated access services”) if this bundling is “reasonably necessary” to achieving UNWP. According to the legislation, NBN Co may:

*refuse to supply, or refuse to offer to supply, a designated access service to a service provider or utility unless the service provider or utility acquires, or agrees to acquire, one or more other designated access services (other than voice telephony facilitation services) from the NBN Corporation.*

Subsection 151DA(9) defines “designated access services” to mean any of the following five services:

- an access virtual circuit service;
- a connectivity virtual circuit service;
- a network-network interface;
- a user network interface service; or
- a voice telephony facilitation service.

In turn, each of these fibre services are defined in subsection 151DA(9). Any of the above may be included in a bundle of services.

Finally, subsection 151DA(4) of the CCA authorises NBN Co to engage in other conduct that is reasonably necessary to achieve UNWP of eligible services supplied to service providers and utilities. This subsection provides a broader scope for NBN Co to conduct its business in a manner that achieves UNWP. This conduct may include cross-subsidising prices.

Specifically, the subsection states that:

*If an NBN corporation engages in conduct that is reasonably necessary to achieve uniform national pricing of eligible services supplied by the NBN corporation to service providers and utilities, that conduct is authorised...*

A general explanation of the rationale for the authorisations (as originally proposed) may be found in the Supplementary Explanatory Memorandum to the Telecommunications

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<sup>10</sup> Australian Competition and Consumer Commission, 2012, *Listed Points of Interconnection – NBN Corporation*.

Legislation Amendment (National Broadband Network Measures – Access Arrangements) Bill 2011.<sup>11</sup>

The authorisations were included in the CCA on the best understanding at the time of how the NBN would need to operate to deliver UNWP. Given their significance, however, the Parliament of Australia legislated for them to be reviewed. The review was anticipated to serve as:

*...an additional safeguard to the way these provisions are intended to operate, and... [provide] significant comfort to those smaller telcos that are very important in driving innovation and competition in the market place.<sup>12</sup>*

## 2.4 Other relevant processes

### 2.4.1 ACCC's review of POI policies and processes

Since publishing the list of POIs to the NBN, the ACCC has recently reviewed the policies and procedure for identifying the Listed POIs as required under section 151DC of the CCA. The section 151DC review, required to be conducted by 30 June 2013 and to include public consultation, also considered any requests made by the ACCC to NBN Co to agree to vary the Listed POIs, any response made by NBN Co to such requests and the extent to which facilities are interconnected at Listed POIs.

While the findings of the 151DC review are yet to be released, the ACCC said submissions to the review suggested that industry bodies had been broadly satisfied with the processes by which the POIs had been identified. Submissions also highlighted other issues relating to the:

- appropriateness of the criteria for identifying potential POIs;
- price of backhaul, and availability of aggregation services; and
- specific impacts on satellite providers and smaller RSPs.

The ACCC provided its report to the previous Minister for Broadband, Communications and Digital Economy and the report was made available on a confidential basis to the section 151DD review as part of its considerations.

### 2.4.2 NBN Co's special access undertaking

NBN Co has lodged with the ACCC a special access undertaking (SAU) which, among other things, specifies the terms and conditions upon which the NBN Co will supply its listed

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<sup>11</sup> Parliament of Australia, *Telecommunications Legislation Amendment (National Broadband Network Measures—Access Arrangements) Bill 2011*, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillhome%2Fr4496%22#ems>, accessed 26 July 2013.

<sup>12</sup> Commonwealth, *Parliamentary Debates*, Senate, 24 March 2011, 1986 (Nick Xenophon)

carriage service to access seekers. NBN Co indicated at the time it was lodged that the SAU was relevant to its ability to achieve UNWP.<sup>13</sup>

The ACCC considered the SAU and issued the final notice to vary the SAU on 8 October 2013, the acceptance of which by NBN Co would facilitate the SAU's approval. While the SAU has not yet been finalised, the section 151DD review is mindful of those aspects of the SAU process relevant to this review.

## 2.5 NBN rollout progress

This subsection briefly outlines the current environment in relation to the rollout of the NBN. As explained in the Australian Government's Interim Statement of Expectations to NBN Co, the Government will issue several directions to the NBN Co Board to facilitate the NBN rollout in line with the *Coalition's Plan for Fast Broadband and Affordable NBN*<sup>14</sup>. Among other points of advice, the Government has advised NBN Co to continue:<sup>15</sup>

- (1) *deploying the fixed wireless network, but in doing so take into account the very likely availability of fixed line broadband technology via VDSL in smaller communities not currently in the fibre fixed line footprint;*
- (2) *to offer services over the interim satellite services;*
- (3) *work associated with the build and launch of the long term satellites;*
- (4) *construction of the transit network and points of interconnect;*
- (5) *the development of special services, enterprise services etc.; and*
- (6) *to deploy fibre to new development areas.*

It is noted that the NBN is in the early stage of its rollout. Importantly for the review, only some of the listed POIs are active, and more customers are currently provided with service through temporary POIs than listed POIs. In addition, NBN rollout targets for fibre optic cable, fixed wireless and satellite network have been revised down since the initial targets were published in NBN Co's 2011-2013 Corporate Plan.

It is noted that the issues raised throughout the public consultation process of this review may alter both in terms of relevance and significance as more POIs become active, and the supply and demand of NBN services increase.

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<sup>13</sup> NBN Co Limited, *NBN Co Special Access Undertaking (SAU) overview paper – 5 December 2011*, accessed 26 July 2011.

<sup>14</sup> See Liberal Party of Australia, *Fast. Affordable. Sooner. The Coalition's Plan for a better NBN*, accessed 4 October 2013.

<sup>15</sup> Department of Communications, *Interim Statement of Expectations to NBN Co – 24 September 2013*, Government of Australia, accessed 4 October 2013.

## 3 Public consultations

As noted in Chapter 1, the review included public consultations. In August 2013, Deloitte Access Economics published an Issues Paper on the s.151DD Review website<sup>16</sup>, and issued a media release to inform the media and interested stakeholders of the commencement of the review. During the submission period, reminders were also sent to stakeholders to make submissions prior to the due date for submission.

The purpose of the Issues Paper was to seek information from stakeholders in regard to conduct by NBN Co that may have either been authorised under subsections 151DA(2)-(4) or, in the absence of the authorisations, which may otherwise have been considered anti-competitive. The submissions provided would allow the review to assess the impact of the statutory authorisations.

The Issues Paper also invited all interested stakeholders to comment on whether the existence of the section 151DA authorisations may have other and broader impacts. For example, the Issues Paper asked stakeholders whether the provisions influenced any aspect of their business decisions and strategies.

Stakeholders were provided with a three-week period to make a written submission from the date of the Issue Paper's publication. Submissions were received from Optus, Telstra, NBN Co and the ACCC. All submissions are publicly available on the s.151DD review website.

After reviewing the submissions received, Dr Simes, with the support of Deloitte Access Economics, also conducted follow up interviews with Telstra, Optus and the ACCC. Dr Simes also held a follow up interview with NBN Co, in light of the issues raised by the other submitters.

In addition, Dr Simes held interviews with other NBN service providers including Fastel and BorderNET and a medium-sized RSP that wished not to be identified. Although these providers had not provided a written submission in response to the Issues paper, seeking input from a range of NBN service providers was considered valuable to the comprehensiveness of the s.151DD review.

A table of the stakeholders that participated in consultations during the review and of whether or not they provided a written submission is at Appendix B.

Throughout the public consultation process, confidential information was received both in written and verbal form. That information helped to form the findings of the review.

### 3.1 Stakeholder views

**Each of the NBN providers** noted that it had not been refused interconnection at an established NBN Co facility which is not a listed point of interconnection. In addition, each

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<sup>16</sup> Deloitte Access Economics 2013, *Independent review under s.151DD of the Competition and Consumer Act 2010*.

provider expressed that it had not been refused a designated access service on the basis of not also agreeing to acquire another designated access service.

### 3.1.1 Telstra

**Telstra** submitted that it was unable to comment on whether the statutory authorisations were working effectively toward supporting UNWP and whether there were any competition effects in different regions and markets due to the existence of the statutory authorisations. However, Telstra noted that the existence of the authorisations had not influenced its business decisions, operations or strategy to date.

In its follow up interview, Telstra noted that the availability of the statutory authorisations was intended to provide NBN Co with future flexibility in regard to its mandate to achieve UNWP.

### 3.1.2 Optus

In its submission, **Optus** provided background to the introduction of authorisation provisions to the CCA and expressed an understanding of “NBN Co’s need for some initial regulatory certainty over pricing.” It also noted that the existence of the authorisations had not influenced its business decisions regarding the purchase of services on the NBN. However, Optus expressed reservations regarding the need for the statutory authorisations to achieve UNWP and concerns about unintended consequence that may arise from the future operation of the statutory provisions.

Optus considered “that the specific conduct contemplated by the provisions could be approved on merit through separate regulatory processes.” In order to substantiate its assertion, Optus discussed a few examples including the ACCC’s proceedings with respect to the number and location of POIs and NBN Co’s proposed SAU.

To elaborate on its concern about unintended consequences that may arise from the future operation of the statutory provisions, Optus made reference to two scenarios. The first scenario related to NBN Co’s ability to refuse unbundled services under subsection 151DA(3). Based on comments previously made in the context of NBN Co’s SAU consultations regarding certain NBN Co multicast product conditions, Optus submitted:

*...NBN Co’s multicast product contains conditions that require multicast and broadband services to be provided by the same RSP. That is, there can be no over-the-top multicasting through the NBN. NBN Co has indicated that this is not solely due to technical reasons...[this] product bundling has been dictated by NBN Co notwithstanding concerns raised by access seekers about the potential adverse downstream retail impacts of requiring the bitstream AVC and multi-cast AVC (MAVC) be provided by the same provider.*

Optus noted that it is uncertain as to whether the scope of the protection afforded to NBN Co under subsection 151DA(3) extended to the conduct outlined above, and consequently to other potential bitstream and non-bitstream bundling combinations. Optus considered “the potential competitive detriment that may arise from mandating bundling of multicast AVC with bitstream AVC” to be an unintended consequence that may arise from the future operation of subsection 151DA(3). Optus noted that such conduct “should be subject to

ACCC assessment.” In addition, Optus recommended that subsection 151DA(3) be either repealed or have its scope refined.

The second scenario relates to NBN Co’s proposed SAU. Optus submitted “that NBN Co have utilised the concept of UNWP to justify almost all aspects of the proposed SAU that is currently being assessed by the ACCC.” Optus argues that while some aspects of the proposed SAU are needed to achieve UNWP, other aspects including “restricting ACCC oversight or the setting of service level commitments” have little relevance to the achievement of UNWP.

Optus argued that the statutory authorisations potentially “provide NBN Co with an incentive and opportunity to justify particular policies or behaviour as being necessary to support UNWP when they are not.” Optus recommended that subsection 151DA(4) be “more narrowly cast to make it clear [that] UNWP only related to pricing.”

In its follow up interview, Optus noted that it would not have supported the enactment of the statutory authorisations had it been given an opportunity to express its views through a consultation process.

### 3.1.3 A medium-sized RSP

**A medium-sized RSP** that wished not be identified noted that it had not applied for, nor been refused, interconnection at a non-listed POI. It also noted that it had not applied for, nor been refused, a designated access service on the basis of it not also agreeing to acquire another designated access service.

The RSP explained that the statutory authorisations under section 151DA had not influenced any of its business decisions, operations or strategy. It also described a lack of incentive to offer NBN services in certain “locations where the direct connect POI backhaul are excessively expensive due to the lack of effective competition for the provision of backhaul services.”

The RSP noted that it had an understanding of why the statutory authorisations were broadly drafted, but it indicated a preference for the clarification of their scope and suggested a future review of the operation of the statutory authorisations, given that the NBN is still in the early stage of its rollout.

### 3.1.4 Fastel

**Fastel**, an RSP solely based in the Queensland market, expressed severe concerns about the absence of competition that it has experienced in the wholesale market. Fastel noted that the current state of the NBN wholesale market had prevented it from providing a range of services due to a lack of access to backhaul services to POIs.

### 3.1.5 BorderNET

**BorderNET** noted that it currently delivers satellite internet through NBN’s satellite network. The Internet service provider accesses a single POI, which enables it to deliver its services at a uniform retail price. However, BorderNET was concerned that this may change



in the future if it were to be required to connect to more than one POI in order to deliver its services.

BorderNET also noted that the costs associated with delivering satellite internet are higher than other internet technologies and such costs could be difficult to recover if it was required to connect to multiple POIs. It also suggested that it may be forced to enter the fibre and ADSL markets, as the 121 POI policy does not provide a sustainable environment for many business models adopted by satellite internet providers.

### 3.1.6 ACCC

The **ACCC** noted that it had not been aware, or informed, of any NBN Co conduct relevant to the statutory authorisations provided under section 151DA of the CCA. It also questioned the need of the statutory authorisations going forward, given that “there is now more clarity around how NBN Co will determine prices, the conduct that will be required for UNWP, and the risk that such conduct may breach the CCA.”

Similar to the line of thought presented in the submission made by Optus, the ACCC considered that:

*...[its] publication of listed Points of Interconnect (POIs) and its assessment of NBN Co’s Special Access Undertaking (SAU) have required [it] to evaluate the competition implications associated with the matters covered by the authorisations.*

In addition, the ACCC considered that subsection 151DA(3) was not needed:

*...as part of the SAU process [it] has stated that it accepts that NBN Co should be permitted to require the purchase of a bundle where this is necessary for a technical perspective for supply of the NBN Access Service.”*

Regarding subsection 151DA(2), the ACCC noted that:

*...a refusal to interconnect at non-listed POIs is unlikely to raise competition concerns that would prompt action under Part IV or Part XIB of the CCA. This is particularly the case given that the location of listed POIs has been determined under Part XIC of the CCA with reference to competition criteria. Given the minimal risk, the ACCC considers that it is not necessary to exempt such conduct from the ordinary operation of the CCA.*

The ACCC also noted that the reading of subsection 151DA(4) gives rise to uncertainty as to the range of conduct that NBN Co may be authorised to engage in order to achieve UNWP. The ACCC expressed concern that the statutory authorisation provisions do not “provide scope for review should circumstances change” and submitted that the:

*...authorisations should be defined with reference to specific conduct, for a specific period of time, and substantiated by evidence that such conduct is reasonable necessary to achieve UNWP. The ACCC considers that it is likely that most conduct by NBN Co to achieve UNWP should not require an exemption from the competition provisions contained in Parts IV and XIB of the CCA, particularly if that conduct is supported by other regulatory instruments such as the SAU.*

### 3.1.7 NBN Co

**NBN Co** submitted that the operation of the statutory authorisations provided for under section 151DA “must be considered as part of the broader regulatory framework in which NBN Co operates.” NBN Co provided an outline of its regulatory environment. It noted that it is to remain a wholesale provider, with legislation preventing it from discriminating between access seekers and with ACCC oversight ensuring it operate in a transparent manner.

Given the level of regulatory mechanisms in place, NBN Co considered that

*...it is apparent that there is sufficient regulatory oversight of the conduct that falls within ss151DA(2)-(4) of the CCA, as well as the operation of the Division more generally; and authorising conduct directed towards achieving [UNWP] is consistent with the NBN Co’s broader Government mandate of operating in a non-discriminatory and transparent manner.*

In its follow up interview, NBN Co noted that it would be concerned if the statutory authorisations were to be repealed, given that there is an absence of evidence on their actual operation. NBN Co also noted that the statutory authorisations were drafted subsequent to the development of its product construct and that its product construct is reflected in the statutory authorisations as well as in its proposed SAU.

## 4 Review findings

The public consultation process, which included written submissions and follow up interviews, gave rise to the following findings on the operation of section 151DA:

- The review found no evidence of any RSP having applied for interconnection at an established NBN Co facility which is not a listed POI, and thus there was also no evidence of an application being refused.
- The review found no evidence of any RSP having applied for a designated access service and then been refused supply by NBN Co on the basis of not also agreeing to acquire another designated access service.
- The review found no evidence of any RSP having experienced NBN Co engaging in any other conduct on the basis that it was reasonably necessary to achieving UNWP.
- NBN Co has not justified any decision or action, relating to either the provision of service or price, directed toward the promotion of UNWP on the basis of the statutory authorisations.<sup>17</sup>
- The review found no evidence of any RSP having had its business decisions, operations or strategy influenced by the statutory authorisations. However, the current semi-distributed POI model, recommended by the ACCC, has impacted the service offerings of smaller RSPs.

The findings from the public consultation process emphasise that the statutory authorisations have not given rise to conduct that has attracted practical concerns about the operation of Division 16 of Part XIB of the CCA. This could be attributed to either or both of the following reasons, and both of which suggest that it is too early to arrive at any definitive conclusion:

- There is a possibility that the statutory authorisations are either not necessary or that the matters contemplated by the statutory authorisations are regulated by other areas of competition law (i.e. they are redundant).
- The NBN is still in the early stage of its rollout, and the market may need to mature further before the statutory authorisations are utilised.

It is possible that the mere existence of the statutory authorisations has already influenced RSPs not to apply for access to a non-listed POI or access to unbundled designated access services on the assumption that such applications will be refused by NBN Co on the basis of its statutory authorisations to make such a refusal. It may also be possible that RSPs have been generally accepting of UNWP and NBN Co's approach to it and have not challenged conduct by NBN Co or whether it is "reasonably necessary" to achieve UNWP.

However, the review has found no evidence of any RSP being affected in manners described above and, ultimately, that NBN Co is relying on the statutory authorisations. Again, an absence of evidence in this regard could be a result of level of progress currently made with respect to the rollout of the NBN.

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<sup>17</sup> NBN Co referred to the section 151DA authorisations in its SAU in the context of bundling. However, this reference does not appear to indicate that NBN Co is relying on the statutory authorisations (see pp. 56, 61 and 293 in NBN Co (2012) *NBN Co Special Access Undertaking*, accessed 4 October 2013).

## **Conclusion**

The independent reviewer concludes that the need for the section 151DA authorisations could be considered in the future, in light of the continued operation of Division 16 of Part XIB of the CCA and any changes to NBN policy. If evidence arises suggesting that the statutory authorisations are not needed, a future assessment or review may find that the existence of the provisions are not necessary.

## 5 Other matters

This section discusses some of the broader issues that were raised by stakeholders during the public consultation process on the operation of the statutory authorisations provided to NBN Co in Division 16 of Part XIB of the CCA. The issues considered are whether the statutory authorisations:

- are redundant;
- give rise to a risk of unintended consequences;
- are too broad because of the term “reasonably necessary”; and
- present difficulties for smaller RSPs to compete on the NBN.

Collectively, these four issues go beyond the scope of the operational review of the statutory authorisations. However, they go to questions of whether the availability of the statutory authorisations is necessary.

In addition, consideration of these issues contributes to assessing the effectiveness and efficiency of the statutory authorisations in meeting their policy objectives, and whether the statutory authorisations remain appropriate. An assessment of this kind is relevant to the scope of the section 151DD review, as it is one of three reviews that will be collectively assessed by the Office of Best Practice Regulation as part of the post-implementation review requirements relating to the NBN.

### 5.1 Are statutory authorisations redundant?

Optus and the ACCC expressed reservations regarding the need for the statutory authorisations provided for under section 151DA of the CCA to achieve UNWP, submitting that sufficient regulatory oversight of the conduct contemplated by the statutory authorisations already exists.

Optus argued that separate regulatory processes were both available and capable of dealing with the kinds of conduct contemplated by the authorisation provisions, and referenced a few examples which included the ACCC’s proceedings with respect to the number and location of POIs and NBN Co’s proposed SAU.

The ACCC made similar arguments to that of Optus. However, it added that a refusal under section 151DA(2) is unlikely to raise competition concerns and bring about action under the CCA given the ACCC was involved in the publication of the listed POIs. In addition, the ACCC noted that section 151DA(3) is not necessary because “as part of the SAU process [it] has stated that it accepts that NBN Co should be permitted to require the purchase of a bundle where this is necessary from a technical perspective for supply of NBN Access Service.”

The findings from the public consultation process show that the statutory authorisations have not given rise to practical concerns to date. While there is a possibility that matters contemplated by subsections 151DA(2)-(4) of the CCA are covered elsewhere in other areas of competition law, thereby making the statutory authorisations redundant, this has not been tested, including by the ACCC. The NBN is still in the early stage of its rollout, and the market may need to mature before the statutory authorisations are used.

In addition, it is recognised that the statutory authorisations provide NBN Co with additional certainty to achieve UNWP.

## 5.2 Unintended consequences

The next consideration on whether the statutory authorisations are necessary is whether their availability gives rise to the risk of unintended consequences. During the public consultation process, concerns were raised in relation to the potential for NBN Co to make use of the statutory authorisations in a manner that was not intended by Parliament.

Referring to the bundling behaviour by NBN Co with respect to its multicast AVC and bitstream AVC products, Optus argued that such behaviour may have negative competition effects for access seekers and could potentially fall within the scope of subsection 151DA(3). However, it is understood that such behaviour is subject to ACCC assessment and NBN Co would need to demonstrate that its product bundling was reasonably necessary to achieve UNWP in the event that it was found to be in breach of competition law.

In addition, Optus submitted that NBN Co could use the broader subsection 151DA(4) authorisation to justify conduct that is not strictly related to achieving UNWP, and highlighted signs of such behaviour in the context of NBN Co's proposed SAU. While NBN Co does refer to the section 151DA authorisations in its SAU in the context of bundling, it does not rely on the operation of Division 16 in Part XIB of the CCA to justify other aspects of the SAU. In addition, given that NBN Co has had to revise and lodge an amended SAU suggests that NBN Co may find it difficult to rely on the statutory authorisations to justify any conduct that is not related to achieving UNWP.

The ACCC considered that the reading of subsection 151DA(4) gives rise to uncertainty as to the range of conduct that NBN Co is authorised to engage in to achieve UNWP. In addition, the ACCC noted that there is no scope for review should circumstances change after conduct has been undertaken. The ACCC recommended that the statutory provisions be "defined with reference to specific conduct, for a specific period of time, and substantiated by evidence that such conduct is reasonable necessary to achieve UNWP."

It is important to emphasise the review's finding that the statutory authorisations have not given rise to conduct that has attracted practical concerns about the operation of Division 16 of Part XIB of the CCA. In addition, there is an absence of evidence suggesting that any unintended consequences have materialised as result of the operation of the statutory authorisations. In relation to the issues raised by Optus, it is understood that such matters have been assessed, or are still the subject of assessment, by the ACCC.

However, it would seem reasonable to continue to monitor the operation of the section 151DA authorisations in order to avoid or limit any potential unintended consequences that may arise as a result of their operation.

It is reasonable that where NBN Co is clearly relying on an authorisation under section 151DA of CCA, that the conduct concerned be monitored to avoid or limit any potential unintended consequences of that conduct.

## 5.3 Defining “reasonably necessary”

The potential for unintended consequences raised the question as to whether the statutory authorisations are too broadly defined. The current wording of the subsections 151DA(2) and (3) authorises NBN Co to engage in certain conduct on that basis that it was “reasonably necessary” to achieve to UNWP. Under the significantly broader authorisation set out in subsection 151DA(4), NBN Co may engage in any conduct, so long as it is “reasonably necessary” to achieve UNWP.

A definition of what exactly constitutes “reasonably necessary” is not provided for in section 151DA, or in Division 16 of Part XIB of the CAA. An absence of specifically defined conduct that NBN Co may engage in under the statutory authorisations – particularly under subsection 151DA(4) – is understandable. The authorisation provisions were enacted to help facilitate the promotion of UNWP for, and at a time in which, a NBN telecommunications market did not exist. It is recognised that the context in which the authorisations were legislated reasonably justifies their general nature.

A general explanation of the concept in relation to section 151DA(4) (as originally proposed) may be found in the Supplementary Explanatory Memorandum to the Telecommunications Legislation Amendment (National Broadband Network Measures – Access Arrangements) Bill 2011. It explains:

*The authorisation will ensure that an NBN corporation can cross-subsidise to achieve uniform national pricing, but also limits the conduct that an NBN corporation may engage in to conduct that is reasonably necessary. The concept of ‘reasonably necessary’ is intended to have its ordinary objective meaning. The word ‘reasonably’ provides a measure of flexibility in assessing the necessity of any cross-subsidisation. This ensures that the ACCC’s powers to regulate the terms and conditions of an NBN corporation’s services are not affected, except to the extent that those terms and conditions are reasonably necessary to achieve uniform national pricing.<sup>18</sup>*

In 2011, former Chairman of the ACCC, Graeme Samuel, made the following remarks in relation to the each of the statutory authorisations:<sup>19</sup>

*It is important to note that in each instance, the authorised conduct is confined to that which is ‘reasonably necessary’ to achieve uniform national pricing. Having a specific additional policy requirement like this is not uncommon for regulated companies – for example, there are reliability obligations on electricity companies, coverage obligations such as the USO and so forth.*

He added that:

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<sup>18</sup> Parliament of Australia, *Telecommunications Legislation Amendment (National Broadband Network Measures—Access Arrangements) Bill 2011*, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillhome%2Fr4496%22#ems>, accessed 26 July 2013.

<sup>19</sup> See ATUG 2011 annual conference, *Telecommunications regulation: the new paradigm*, accessed 24 September 2013.

*Given that the 'authorised conduct' in these new provisions is confined to that which is 'reasonably necessary' to achieve the specified objective of uniform national pricing, it does not amount to a broad 'free for all' for conduct by NBN Co that will inhibit the development of competition in the industry. For NBN Co, as for any other company, the ACCC will carefully scrutinise any matter where it considers there are issues of concern.*

During the public consultation process, stakeholders were asked to consider the meaning of "reasonably necessary" in the in the context of the section 151DA authorisations. They were also invited to comment on what might be required of NBN Co, if anything, to justify conduct authorised under section 151DA of the CCA as "reasonably necessary" to achieve UNWP.

Stakeholders noted that it is normal practice for these concepts to be tested in the courts, and that this has not yet taken place. In addition, no working definition is currently available. The ACCC expressed that it had not undertaken a detailed consideration of what is meant by "reasonably necessary" in this context.

## 5.4 Competition implications for smaller RSPs

Another issue raised during the public consultation process related to the impact of the ACCC 121 POI policy on the nature and scope of service offerings made by smaller RSPs. Such RSPs noted a lack of competition for the provision of backhaul services at the wholesale level, causing the price of backhaul to be very expensive in some service locations. One medium-sized RSP noted that:

*[It's] preferred interconnection points for the NBN are in CBD located Data Centres as is the case with the NBN Interim POI's. Imposing the 121 POI model has seriously and negatively impacted [its] ability to establish a competitive service offering on the NBN. [It's] ability to offer a commercially viable Uniform National RETAIL Price via a direct connect model to the 121 POI's is not plausible at this time due to excessive backhaul costs for some of the more remote locations.*

Another smaller RSP also expressed that the current state of the NBN wholesale market had prevented it from providing a range of services due to a lack of access to POIs and backhaul services.

In one sense, the 121 POI policy is relevant to this review as there is potential for NBN Co to rely on the statutory authorisations in order to implement the 121 POI policy. For example, NBN Co may rely on subsection 151DA(2) to refuse an RSP access to non-Listed POIs. Such behaviour is necessary to enforce the 121 POI policy, but may also result in difficulties for smaller RSPs to compete on the NBN, as outlined above.

Given that the NBN is in the early stage of its rollout, it is too early to conclude on whether the current nature of the market will remain or change direction. In addition, it is important to emphasise that these matters are largely considered beyond the scope of this review. However, the availability of backhaul products and aggregation services for smaller RSPs should be monitored, or given further consideration, as the rollout of the NBN progresses.



# Appendix A: Section 151DA of the Competition and Consumer Act 2010

## Objects

1. The objects of this section are:
  - a. to promote the national interest in structural reform of the telecommunications industry; and
  - b. to promote uniform national pricing of eligible services supplied by NBN corporations by authorising, for the purposes of subsection 51(1), certain conduct engaged in by NBN corporations

Note 1: If conduct is authorised for the purposes of subsection 51(1), the conduct is disregarded in deciding whether a person has contravened Part IV.

Note 2: See also subsection 151AJ(10).

## Authorised conduct--points of interconnection

2. If:
  - a. an NBN corporation is a carrier or carriage service provider; and
  - b. the NBN corporation:
    - i. owns or controls one or more facilities; or
    - ii. is a nominated carrier in relation to one or more facilities; and
  - c. the NBN corporation refuses to permit interconnection of those facilities at a particular location with one or more facilities of:
    - i. a service provider; or
    - ii. a utility; and
  - d. the location is not a listed point of interconnection; and
  - e. the refusal is reasonably necessary to achieve uniform national pricing of eligible services supplied by the NBN corporation to service providers and utilities;

the refusal is authorised for the purposes of subsection 51(1).

Note: For listed point of interconnection, see section 151DB.

### **Authorised conduct--bundling of designated access services**

3. If:
  - a. an NBN corporation is a carrier or carriage service provider; and
  - b. the NBN corporation:
    - i. refuses to supply; or
    - ii. refuses to offer to supply;

a designated access service to a service provider or utility unless the service provider or utility acquires, or agrees to acquire, one or more other designated access services (other than voice telephony facilitation services) from the NBN corporation; and

  - c. the refusal is reasonably necessary to achieve uniform national pricing of eligible services supplied by the NBN corporation to service providers and utilities;

the refusal is authorised for the purposes of subsection 51(1).

### **Authorised conduct--uniform national pricing**

4. If an NBN corporation engages in conduct that is reasonably necessary to achieve uniform national pricing of eligible services supplied by the NBN corporation to service providers and utilities, that conduct is authorised for the purposes of subsection 51(1).

### **Uniform national pricing**

5. For the purposes of this section, uniform national pricing of an eligible service supplied, or offered to be supplied, by an NBN corporation to service providers and utilities is achieved, if, and only if, the price-related terms and conditions on which the NBN corporation supplies, or offers to supply, the eligible service to service providers and utilities are the same throughout Australia.
6. For the purposes of this section, in determining whether there is uniform national pricing of an eligible service supplied, or offered to be supplied, by an NBN corporation, disregard any discrimination by the NBN corporation against another person on the grounds that the NBN corporation has reasonable grounds to believe that the other person would fail, to a material extent, to comply with the terms and conditions on which the NBN corporation supplies, or on which the NBN corporation is reasonably likely to supply, the eligible service.

- 6A. Examples of grounds for believing as mentioned in subsection (6) include:

- a. evidence that the other person is not creditworthy; and
  - b. repeated failures by the other person to comply with the terms and conditions on which the same or a similar eligible service has been supplied (whether or not by the NBN corporation).
7. For the purposes of this section, in determining whether eligible services are characterised as:
  - a. the same eligible service; or
  - b. different eligible services;it is immaterial whether the services are supplied, or offered to be supplied, using:
  - c. the same facilities or kinds of facilities; or
  - d. different facilities or kinds of facilities.
8. For example, the same eligible service could be supplied, or offered to be supplied, using:
  - a. an optical fibre line; or
  - b. terrestrial radiocommunications equipment; or
  - c. a satellite.

## Definitions

9. In this section:

"access virtual circuit service" means an eligible service that is known as:

- a. an access virtual circuit service; or
- b. the access virtual circuit component of a fibre access service.

"connectivity virtual circuit service" means an eligible service that is known as:

- a. a connectivity virtual circuit service; or
- b. the connectivity virtual circuit component of a fibre access service.

"designated access service" means:

- a. an access virtual circuit service; or
- b. a connectivity virtual circuit service; or
- c. a network-network interface service; or

- d. a user network interface service; or
- e. a voice telephony facilitation service.

"eligible service" has the same meaning as in section 152AL.

"listed point of interconnection" has the meaning given by section 151DB.

"network-network interface service" means an eligible service that is known as:

- a. a network-network interface service; or
- b. the network-network interface component of a fibre access service.

"nominated carrier" has the same meaning as in the Telecommunications Act 1997.

"point of interconnection" means a location for the interconnection of facilities.

"price-related terms and conditions" means terms and conditions relating to price or a method of ascertaining price.

"service provider" has the same meaning as in the Telecommunications Act 1997.

"special access undertaking" has the same meaning as in Part XIC.

"telecommunications industry" has the same meaning as in the Telecommunications Act 1997 .

"uniform national pricing" has the meaning given by subsections (5) and (6).

"use" , in relation to a facility, means use:

- c. in isolation; or
- d. in conjunction with one or more other things.

"user network interface service" means an eligible service that is known as:

- a. a user network interface service; or
- b. the user network interface service component of a fibre access service.

"utility" means:

- a. Airservices Australia; or
- b. a State or Territory transport authority; or
- c. a rail corporation (within the meaning of the National Broadband Network Companies Act 2011 ); or

- d. an electricity supply body (within the meaning of that Act); or
- e. a gas supply body (within the meaning of that Act); or
- f. a water supply body (within the meaning of that Act); or
- g. a sewerage services body (within the meaning of that Act); or
- h. a storm water drainage services body (within the meaning of that Act); or
- i. a State or Territory road authority (within the meaning of that Act).

"voice telephony facilitation service" means a service that facilitates the supply of a carriage service that is a carriage service for the purpose of voice telephony.

# Appendix B: Public consultation

Table 5.1: Stakeholder that participated in the public consultation process

Stakeholder	Written submission provided	Follow up interview
Telstra	Yes	Yes
Optus	Yes	Yes
Medium-sized RSP	No	Yes
Fastel	No	Yes
BorderNET	No	Yes
NBN Co	Yes	Yes
ACCC	Yes	Yes

Source: Deloitte Access Economics 2013.

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