Submission to the NBN Panel Experts Cost-Benefit Analysis and Review of Regulation: Response to Telecommunications Regulatory Arrangements Paper

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PUBLIC VERSION

Executive Summary

Part XIC

- Telstra - with its perspective as both an access provider and access seeker - welcomes the opportunity to provide the Panel with its views on potential reforms of Part XIC.
- As the telecommunications industry is in the midst of a major transformation, now is not the time to fundamentally redesign Part XIC. A complete review of Part XIC should be undertaken in five years when the current changing industry structure has settled.
- However, targeted changes should be made in Part XIC to substantially improve its operation in the transitional period.
- *First*, Part XIC should include explicit deregulation criteria, consistent with the Government's commitment to reducing the regulatory burden and the progressive shift to a non-vertically integrated industry. As ex ante regulation is an intrusive regulatory solution, the objects of Part XIC should make clear that where there is clear evidence of the emergence of competition, Part XIC should not be the default option to deal with any residual risks to competition. The Australian Competition and Consumer Commission (**ACCC**) has a range of other powers, including under Part XIB, which represent a more proportionate regulatory solution to these risks.
- *Second*, Part XIC (as well as Part XIB and the structural separation regime) should provide that record keeping, reporting and compliance powers are to be exercised having regard to regulatory best practice for reducing compliance costs: e.g. the Productivity Commission's Regulator Audit Framework Report.
- *Third*, providing for merits based review in Part XIC would be consistent with regulatory best practice to incentivise better decision making and promote accountability. A balanced merits-based review process could include a 'gating' mechanism to address 'gaming' risks and use a peer review, inquisitorial approach to limit costs and delays.

NBN Co permitted scope of activities

- The current regulatory 'dividing lines' between NBN Co's upstream monopoly activities and downstream competitive activities are too porous to prevent NBN Co 'mission creep' taking them away from the core objectives as set by the Government. NBN Co should be:
  - Excluded from competitive or prospectively competitive markets.
  - Only allowed to supply services which downstream parties use in resupply to third parties, so as to avoid large customers and Government customers trying to qualify as carriers or carriage service providers.
  - Limited to Layer 2 and self-supply of Layer 3 functionality reasonably required to deliver Layer 2 services.

1. Introduction

The Part XIC access regime has been an important feature of the telecommunications industry since 1997 when, as a government owned entity, Telstra was required to open up its network and services to competitors. Since then, the regime has been responsible for creating competitive tension in the market, resulting in lower prices to end customers, investment in new services and technologies, and significant improvements to productivity.

Telstra's experience with Part XIC comes from being both an access provider and an access seeker. We were the largest access provider, with most of the competitively important regulated services tied to our copper network. However, as the NBN rolls out and Telstra structurally separates, our supply of regulated services will reduce, and our interest will increasingly be as an access seeker for NBN Co regulated services.

Whether from our perspective as an access provider or access seeker, we see ex ante regulation is a substantial market intervention which needs to be carefully used. It is important to regularly review its use, and to make adjustments in the light of experience, new technology and changing markets, so that it continues to best promote competitive outcomes for consumers. This review is timely as it has been 13 years since the last review of Part XIC by the Productivity Commission (**PC**).

Yet, it is also important to be realistic about what can be achieved by a review of Part XIC at this time. The industry is in the early stages of substantial, unprecedented transformation. Part XIC – like most access regimes around the world – was designed to regulate a dominant vertically integrated operator. The role, focus and form of access regulation could be very different in the future world of a non-vertically integrated upstream monopoly. However, until the industry is further into the NBN transition, the picture of the competitive dynamics in that future world will not be clear enough to make decisions about fundamentally reshaping Part XIC, for example more closely aligning it to Part IIIA or removing it altogether.

Accordingly, Telstra proposes that the Panel's review of Part XIC should focus on the following:

- A better framework to facilitate industry to work together on the transition to the NBN, in particular an end-to-end migration process which substantially improves the migration experience of end users (as proposed in our first submission).

- Changes to Part XIC that would substantially improve its operation during the transitional period by sharpening deregulation incentives and applying best regulatory practice principles.

We recommend another review of Part XIC within five years, or when the currently changing landscape has settled.

2. Part XIC has performed poorly at deregulation

While Part XIC has been effective at creating additional regulation, it has proven to perform poorly when it comes to removing regulation. Over time, the ACCC, Australian Competition Tribunal (**ACT**) and the Federal Court have struggled with the question of deregulation. This has resulted in a great deal of uncertainty and cost to industry – costs which may be indirect but no less burdensome. This is best demonstrated by the Wholesale Line Rental (**WLR**) service, which over a

seven year period saw changing approaches to exemption over successive proceedings before the ACCC, ACT, and the Federal Court (see **Schedule 2**).

The 2010 amendments to Part XIC diminished the opportunities and incentives for deregulation:

- *First*, the provisions to exempt a service from declaration were removed and not replaced with an alternative mechanism at the declaration stage, but instead the ACCC could forebear in the Final Access Determination (**FAD**) process. This can require the ACCC and the parties to revisit issues about the current and future state of competition, which are more logically addressed in the primary decision about *whether* to regulate than in the downstream decision about *how* to regulate.

- *Second*, prior to the amendments, the ACCC could declare a service without having to issue pricing principles or decisions on price and non-price supply terms. This provided a 'gate' or incremental step before full regulation which gave the ACCC an option to calibrate the extent of regulation. Post 2010, the ACCC must issue an Interim Access Determination (**IAD**) and FAD in relation to all declared services. So, even if there is a marginal improvement to the LTIE from declaration, the ACCC must undertake a full-blown IAD and FAD process. The opportunity for a 'light handed' regulatory approach has been lost.

- *Third*, by removing the exemption processes, Part XIC left access providers with no formal mechanism by which they could instigate a reduction in the scope of regulation if they believed that market circumstances had changed. Instead, post 2010, decisions about whether and when to consider deregulation are within the discretion of the ACCC. Reviews of declaration decisions are only required every five years which, given the dynamic nature of the telecommunications industry, may not be soon enough to capture important incremental changes in the market which would justify winding back regulation.

Telstra is not proposing that the exemption process be restored – we acknowledge that it was removed because of criticisms about costs, delays and gaming.

However, the objective of, and opportunity for, deregulation should be re-captured in Part XIC by alternative, more efficient mechanisms. More explicitly building deregulation criteria into Part XIC would be consistent with the Government's deregulation agenda.

2.1 Deregulation as one of the objects of Part XIC

The Commonwealth Government's *Ten Principles for Australian Government Policy Makers* include the following principles:[1]

- *Regulation should not be the default option for policy makers: the policy option offering the greatest net benefit should always be the recommended option.*

[1] Australian Government: 'The Australian Government Guide to Regulation' (2014). Located at www.cuttingredtape.gov.au

- *Regulation should be imposed only when it can be shown to offer an overall net benefit.*

The Productivity Commission's Regulator Audit Framework Report (**PC Audit Report**) provides that, in designing regulation, the regulator needs to ask the following two questions (in addition to a LTIE question):[2]

- *Are regulations the best way of achieving the regulatory objectives?*
- *Are regulations designed and implemented to allow compliance at least cost?*

In the absence of explicit deregulation criteria which require these kinds of questions to be asked, there is a risk that the objects of Part XIC will be read as implying a preference for regulation. These risks could play out in two ways. First, services might be regulated notwithstanding clear evidence of effective competition if there is a residual concern that the continued development of the market will not turn out as expected. Second, access services could be declared simultaneously at both lower and higher levels of the network to provide optionality for access seekers.

Telstra believes that decision making would be enhanced under Part XIC by amending the Part XIC objects to more clearly require a test of 'proportionality' between the competitive risks identified by the ACCC and its decisions about *whether* and *how* to regulate. Telstra proposes that:

- At the declaration stage, there should be an assessment of the probability or materiality of the risks to competition in the absence of regulation. The PC Audit Report recommends such a 'risks-based' approach to regulatory decision making. This could be done, for example, by adding a requirement to s 152AB that consideration be given to whether, in the absence of regulation, the development of competition would more likely than not resolve the current competitive problems in the market (and achieve the LTIE).
- If a service is declared, Part XIC could provide that remedies, in the exercise of downstream powers (including making a FAD), are 'proportionate' to the competition risks being addressed. The current 'reasonableness' test under Part XIC has some elements of a proportionality test: e.g. the legitimate business interests of access providers (s 152AH(1)). However, the reasonableness test reads (and tends to be applied) as a 'laundry list' of disparate factors. Section 152AB could be revised to have a sharper focus on identifying the regulatory option offering the greatest benefit at the least regulatory cost.

2.2 More efficient reporting and monitoring processes

A large part of the costs of ex ante access regulation arise from the associated extensive monitoring and compliance reporting requirements.

[2] Productivity Commission, 'Regulator Audit Framework' (2014) at p 6.

The PC Audit Report proposes that regulators also apply a 'risk based' approach to reporting and monitoring requirements:[3]

> *The most important high level principle to minimise the cost of monitoring and compliance while achieving the objectives of the regulation is for the regulator to apply a risk-based and proportionate approach. 'Light-handed' approaches, including allowing businesses flexibility in how they meet their compliance obligations, should be taken where possible.*

Telstra proposes that the ACCC should be required to consider regulatory best practice with the objective of reducing compliance costs when exercising its information gathering or compliance powers under Part XIB, Part XIC or the standard separation requirements.

3. Merits based review is an essential requirement in utility regulation

As a fundamental principle, decisions by government agencies that affect private interests should be subject to effective review mechanisms.[4] Regulatory best practice recognises that ensuring regulatory decisions are subject to independent scrutiny incentivises better decision making and promotes accountability.

The importance of an effective merits review regime is recognised in other infrastructure access regimes. In its submission to the PC's Review of Part IIIA, the ACCC said:[5]

> *the ACCC supports appropriate reviews of decisions in promoting confidence in regulatory decision making and in minimising the risk of regulatory error.*

The recent energy regulation review strongly endorsed retention of merits based review:[6]

> *All 'discretionary' regulatory activity is subject to scrutiny and supervision (whether by courts, tribunals or by other administrative agencies), and the greater the discretion at the decision stage the greater tends to be the ex post supervision (by courts, tribunals, etc.) ... well functioning economic and political systems will tend toward establishment of appropriate checks and balances (e.g. judicial supervision, competitive markets).*

There is no reason why telecommunications - a complex, highly technical and dynamic industry in which there are no straight forward regulatory solutions - should be treated so differently.

We acknowledge that merits review was removed from Part XIC because of criticisms that it was costly, open to 'gaming' and frequently subject to delay. However, these criticisms can be addressed by learning from the experiences of the past and designing a more efficient review process.

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[3] Productivity Commission, 'Regulator Audit Framework' (2014) at p 21.

[4] See Administrative Review Council, 'Administrative Accountability in Business Areas Subject to Complex and Specific Regulation' (November 2008).

[5] ACCC submission to the Productivity Commission Review of the National Access Regime, February 2013 at p 56 (**ACCC February Submission**).

[6] ACCC February Submission at p 57.

We believe a merits review regime designed around the following principles could provide an effective low cost solution to improve accountability:

- A merits review application would have to meet threshold requirements e.g. the materiality of the issues in the application or whether the issues identified were likely to result in a material improvement in the LTIE (i.e. a 'gating' mechanism to guard against gaming or overuse).

- Once through the gate, review of the application would be conducted using an inquisitorial model rather than an adversarial or quasi-judicial model, with a peer review process conducted by a panel of experts rather than a judge and lawyer-led tribunal process.

- The review could take an 'open book' approach – all materials which were before the ACCC, including staff papers, should be available to the panel and the parties in the course of the review.

- Timeframes should be specified for the review.

We describe a possible model in **Schedule 1**.

4. The Panel's questions

Telstra's answers to the questions asked by the Panel are set out in the table at **Schedule 3.**

Schedule 1: A model for a more efficient merits review regime for Part XIC

Given the criticisms of the previous merits review model, and taking into account the objectives of merits review, Telstra proposes a merits review model with the following characteristics:

Threshold Test

- *Limited review*: merits-based review to be limited to particular issues in the primary decision and not the decision as a whole.

- *Threshold criteria*: to pass through the 'gate' to a review, applications would need to establish that:[7] (a) the specific grounds of review are met; or (b) the dispute is commercially significant (assessed according to financial value, e.g. the dispute must exceed the lower of $10 million or 10% of the average annual regulated net revenue of the applicant); or (c) the review issue materially improves the LTIE.

Fast-track Review

- *Peer review, inquisitorial model*: The substantive merits review would take place in an administrative and not adversarial or judicial context. This could be achieved by adopting a peer review model which allows a panel of experts, whose thinking is not legal or judicial in nature, to take a fundamentally inquisitorial role and test the ACCC's and the parties' reasoning. While non-legal experts sit on the ACT, the model remains judge and lawyer driven and defaults to a 'quasi-court' approach. An example of a peer review model is the Takeovers Panel, which is made up of members active in the Australian takeovers and business communities.

    - An inquisitorial merits review could be achieved through a focus on oral submissions limited to the matters requested by the panel in a formal direction (setting out the scope of the review, the matters to be examined and the information and/or evidence the panel wishes to receive from the parties).

    - The panel could question the parties and require them to provide further information. However, the parties could not cross examine each other. Oral submissions may be (but should not be required to be) supported by written submissions.

- *Independent expert's role to assist the panel*: The inquisitorial approach would be assisted by the panel appointing its own investigator to assist the panel, rather than relying on 'duelling' experts of the review parties. The panel's expert would undertake an initial assessment for the panel about whether the threshold test is met. In making their assessment, and in considering the review, the panel's expert would have full access to the ACCC's materials, (including internal and staff papers) and would prepare a report which the panel would use (together with short submissions from the parties) in their decision about whether to accept the review application. If the review was accepted, the panel's expert

[7] These criteria reflect those used in the energy sector's 'limited merits review' regime.

would assist the panel in framing the matters to be considered. This is broadly similar to the way in which counsel assisting is appointed in Royal Commission inquiries, although the person appropriate for the role of assisting the panel is more likely to be an economist or telecommunications expert.

- *No new evidence:* The individual expert and peer review panel could not accept new evidence.

The application for review and both review stages would be characterised by strict timelines (a feature of the 'limited merits review' regime in the energy sector).

Schedule 2: Summary of LCS WLR and PSTN OA proceedings

Date	Event	Description
July 2006	WLR/Local Carriage Service (LCS) (re-) declared by ACCC	The ACCC determined that the declaration should apply to all geographic areas except for the five identified CBD areas. However the ACCC noted the availability of a formal ex post process available through the granting of exemptions from the SAOs. This would allow applicants to seek exemptions from regulation for particular regions.
July 2006	PSTN OA (re-) declared by ACCC	ACCC declared in all areas noting the availability of a formal ex post process available through the granting of exemptions from the SAOs. This would allow applicants to seek exemptions from regulation for particular regions.
July 2007	WLR/LCS exemption application lodged	Telstra sought exemptions from SAOs in 387 Metropolitan exchange service areas (**ESAs**) where competitor DLSAMs have been deployed using ULLS.
October 2007	PSTN OA exemption application lodged	Telstra sought exemptions from SAOs in 387 Metropolitan ESAs and 17 CBD ESAs.
29 April 2008	ACCC draft decision to grant WLR/LCS exemptions	The ACCC released a draft decision to grant Telstra exemptions from the SAOs relating to the supply of the LCS and WLR subject to a number of proposed limitations and conditions.
22 August 2008	ACCC issues final decision granting WLR/LCS exemptions	The ACCC issued a final decision to grant Telstra individual exemptions subject to certain conditions and limitations and apply to 248 metropolitan ESAs.
5 September 2008	ACCC draft decision granting PSTN OA exemptions	The ACCC released a draft decision on Telstra's PSTN OA exemption applications, proposing to grant Telstra exemptions from its SAOs.
29 October 2008	ACCC final decision granting PSTN OA exemptions	The ACCC made two individual exemption orders exempting Telstra from the SAOs in respect of the supply of the PSTN OA service. The individual exemptions were subject to certain conditions and limitations and applied to 248 metropolitan ESAs and 17 CBD ESAs in Sydney, Melbourne, Brisbane, Adelaide and Perth.
September 2008	Chime application to ACT[8]	Appeal of ACCC decision to grant WLR/LCS and PSTN OA exemptions.

[8] Australian Competition Tribunal

Date	Event	Description
22 December 2008	ACT exemption decision for WLR and LCS	ACT rejected Telstra's exemption applications and overturned ACCC decision.
January 2009	Telstra appeal to Full Federal Court lodged	Telstra sought judicial review of ACT WLR and LCS exemption decision.
February 2009	Full Federal Court upholds Telstra's appeal	Orders made remitting WLR and LCS exemptions back to the ACT.
24 August 2009	Final ACT exemption decision – WLR and LCS	ACT issued final exemption orders for WLR and LCS granting Telstra's exemption application subject to certain conditions and limitations.
9 September 2009	Final ACT exemption decision	ACT issued final exemption orders for PSTN OA in both metro and CBD areas subject to certain conditions and limitations.
December 2011	ACCC FAD variation decision for WLR, LCS and PSTN OA	ACCC removed WLR and LCS exemptions in metro areas; and removed PSTN OA exemptions in both CBD and metro areas.
December 2013	ACCC Draft Fixed Services declaration decision	ACCC proposed removal of geographic exclusion of CBD areas for WLR and LCS in declaration service.

Schedule 3: Telstra's responses to the Panel's questions

Issues	Questions	Telstra Position
Functional Focus of Part XIC	• Should Part XIC give greater emphasis to access to lower level functionality or should the status quo, in which this is left to the discretion of the regulator, remain? • If a change to the legislation is the preferred approach, what are the practical implications of a lower level functionality focus (e.g. access to dark fibre)? • Should Part XIC more clearly specify the ACCC's powers in relation to directly regulating access to facilities? How could such access be made available in a timely manner?	We agree that the access remedies should be aligned with the competitive problem justifying access regulation – the control of a bottleneck facility. Often this will mean that access services should be declared at lower levels of the network, but this principle will not necessarily hold true in all cases because of the costs and technical difficulties of providing access at that level. As outlined in our main submission, we believe that better outcomes would be achieved by more sharply focusing the object of Part XIC on the proportionality of remedies and to the underlying competition problems being addressed. In our view, simultaneously regulating at higher and lower levels of the network – thereby creating a 'menu of options' – is more significant than the practical issues of providing access at lower levels of the network. This 'menu approach' increases the costs and risks of regulation, and is not in the LTIE because it undermines the superior outcomes in innovation and price competition which competition based on unbundled network elements is capable of delivering end users. Since resale services were first regulated over a decade ago, technology costs have fallen so far that there are not significant barriers of investment or scale to use of unbundled access services, even by smaller operators, other than potentially in rural and remote areas. In the transformed industry structure brought about by the NBN, pushing regulated access too far down in the network stack could adversely impact the financial viability of the NBN: • Requiring dark fibre access could have significant implications for the NBN business case. The passive optical network (PON) architecture deployed by NBN

Issues	Questions	Telstra Position
		Co is not technically suitable for dark fibre unbundling. • Regulating the Layer 2 service provided by NBN Co should provide access which is functionally low enough in the network stack to provide significant scope for downstream product innovation by access seekers, but without jeopardising NBN Co's economics. • As the NBN is not technically capable of supporting dark fibre access, the regulatory burden of dark fibre access would fall on third party fibre networks. However, these networks are unlikely to be a bottleneck, because of both the availability of a Layer 2 service provided by NBN Co and the relatively limited barriers to third party fibre build in the corporate market segment. The superfast network obligations (**SNOs**) do not constrain third parties building their own fibre networks to connect corporate customers, and there are significant competing fibre networks in areas with concentrations of corporate customers. Telstra considers that any additional regulation of facilities access through Part XIC is unwarranted because facilities access – including Telstra Exchange Building Access (**TEBA**) and duct access – is already regulated through long established and well understood mechanisms, specifically: • Parts 3 and 5 of Schedule 1 of the *Telecommunications Act 1997* (Telco Act). Part 3 of the Telco Act sets out the regime for access to supplementary facilities, which includes exchange buildings (whether owned by Telstra or another carrier). Part 5 of the Telco Act sets out the regime for access to telecommunications transmission towers and underground facilities, which includes ducts access.

Issues	Questions	Telstra Position
		• The ACCC established the Facilities Access Code (**FAC**) in 1999 to govern how access to certain telecommunications facilities owned by telecommunications carriers (including mobile towers and underground ducts) is provided to other carriers seeking to install their equipment on or in those facilities. The FAC was recently reviewed by the ACCC and a number of respondents to the inquiry noted that the FAC worked well in facilitating negotiations between parties.[9] Telstra acknowledges that in the past, access seekers have faced difficulties in accessing some of its exchange buildings. However, that issue was resolved in 2008.[10] The ACCC applied further regulation through the Access to Telstra Exchange Facilities Record Keeping Rule. In addition, Telstra's SSU imposes further equivalence requirements and reporting and compliance measures with respect to exchange capping and the management of queues to access exchanges. With these existing layers of regulation already in place to address facilities access, Telstra sees no need for any additional regulation under Part XIC.
Introduction of 'significant market power' test?	• Should Part XIC focus on parties with significant (or a substantial degree of) market power rather than be of general application as it is at present?	Telstra does not agree that the EU significant market power (SMP) approach provides an appropriate criteria for regulated access in Australia, for the following reasons: • It is discriminatory when applied between competitors of substitutable services and facilities (i.e. where there is no bottleneck). If only the largest provider (because it is regarded as having SMP) is subject to ex ante restrictions on how

[9] Australian Competition & Consumer Commission, *Facilities Access Code,* An ACCC Draft Decision to *vary* 'A Code of Access to Telecommunications Transmission Towers, Sites of Towers and Underground Facilities (October 1999)', May 2013, p 4.

[10] See Telstra media release, 'Telstra condemns unnecessary ACCC court action', 19 March 2009. Further, see *Australian Competition and Consumer Commission v Telstra Corporation Limited* [2010] FCA 790 (28 July 2010).

Issues	Questions	Telstra Position
		it competes then other smaller competitors will potentially be able to invest in products and services without the same regulatory rules applying. It is a principle of Australian competition law and policy that large firms should not be constrained from engaging in vigorous, legitimate competitive behaviour in which their rivals can engage. The mere possession of SMP (i.e. the absence of evidence of taking advantage of that SMP) is not an appropriate trigger to tilt the playing field between competitors. • There is a risk that a generalised SMP test for ex ante access regulation would shift the focus away from access to bottleneck infrastructure and Part XIC would drift even further from alignment with Part IIIA. There is also a risk that if Part XIC was re-based on a SMP test, it could be applied to support ex ante regulation across a range of services, applications and content in which an operator is seen to have market power. Market power issues are more appropriately addressed through ex post powers such as s 46 and Part XIB than through much more intrusive ex ante regulation, which should be reserved for dealing with control of bottleneck facilities. • The EU SMP test is applied in a vertically integrated market structure. Australia is heading down a different path in which structural changes in the market brought about by the NBN will address many of the current market power issues. A bottleneck test for ex ante access regulation seems even more relevant in an industry structure with a predominant wholesale-only provider. However, one aspect of the EU framework which could provide a useful model is the requirement that, if the SMP criteria for regulatory intervention is met, the regulator must determine remedies, including compliance and reporting measures, which are to be 'objective, transparent, proportionate and non-discriminatory'. As we discuss in

Issues	Questions	Telstra Position
		our main submission, more explicitly building in principles of proportionality to the criteria for the ACCC to make regulatory decisions and to set access terms and conditions would be consistent with the Government's focus on ensuring regulation is minimised and works efficiently.
Vectored VDSL 2	• Can existing provisions adequately deal with the issues that are likely to arise (e.g. is it necessary to limit network competition to maximise technical performance, or declare access to services over vectored VDSL2 networks so that the residents of such complexes can enjoy the benefits of competition and choice)? • Are new statutory arrangements required? • How should existing network infrastructure be able to be used in preparing advice for the government on the structure of the Australian wholesale broadband market?	The vectored VDSL 2 issue is such a live issue because of the scope in the SNOs for third party networks to be deployed to 'mass market' multi dwelling units (**MDUs**) to be served by NBN Co, potentially using the same in-building cabling. Telstra considers that this issue is best addressed head-on by considering whether such deployments are consistent with the Government's NBN policy. Our position, as we set out in our first submission, is that whatever policy approach is adopted, a level playing field should apply between all third party network builders. Once the primary policy decision on the extent of facilities-based competition is resolved, the technical and operational issues from the sharing of in-building cabling and standardised wholesale interfaces can be addressed through industry based codes. If the Government's policy to promote facilities-based competition is to be actively promoted to mass market MDUs, consideration may need to be given to an access regime applicable to building owners to deal with the implications of incompatibility of multiple VDSL2 technology deployments.
Declaration process	• Should the legislative framework be more prescriptive in defining markets? How would this be achieved and what would be the consequences of that	Except for addressing the lack of a deregulation test in Part XIC and for a new model of merits based review (see our main submission), Telstra does not support major changes to the declaration process at this time for two reasons:

Issues	Questions	Telstra Position
	action? • Should greater emphasis be given to the promotion of investment and, if so, how? • Should different categories of investment be given greater weight, e.g. investment in networks, infrastructure required to interconnect with networks (e.g. DSLAMs) or services? • Is any-to-any connectivity still relevant? • Is guidance required on the definition of a market? • Should the LTIE criteria be brought closer in content and operation to those set out under the National Access Regime, and if so, how? • Are there services which should be declared on an enduring basis? If so, what would be the duration of declaration? What would be the review mechanisms (bearing in mind the general desirability of minimising	• The attention, resources and energy required to substantially revise Part XIC may distract the industry's focus on resolving migration and transition issues. • The answers are likely to be very different in the future world of a Government-funded nationwide wholesale-only provider which has a formal or de facto network monopoly, compared to how these questions would have been answered in the current industry structure. For example, while NBN Co is a Government Business Enterprise, considerations about its investment incentives as a non-vertically integrated monopoly with access to low cost capital may play out differently to the investment incentives of competing privately funded vertically-integrated operators directly exposed to retail demand. We need to wait until we have a clearer picture of this future world before undertaking a substantial revision of the current access regime.

Issues	Questions	Telstra Position
	the burden of regulation and of ensuring regulations only persist if their benefits clearly exceed their costs)? How effective are those mechanisms? • What are the general views regarding the application of the LTIE test throughout Part XIC?	
Standard Forms of Access Agreements (SFAA)	• Do SFAA processes work effectively and, if not, how could they be improved?	Telstra believes that the solution to the industry's concerns about the SFAA can be found within the current legislative structure. The initial WBAs 'unlock' in two years and it is also likely that within the same timeframe, the ACCC will need to consider SAU amendments to accommodate the mixed technology model. Therefore, we have an opportunity to reconsider NBN Co's approach to the relationship between the SFAA and the SAU in the near term.
Standard Access Obligations (SAOs)	• Do the SAOs need to be revised? If so, what should the SAOs cover? • Do the SAOs that currently only apply to NBN Co (Category B SAOs) need to be applied to other access providers that are wholesale-only? • Should the non-discrimination provisions applying to NBN Co and superfast network operators be	For the reasons set out above, we do not consider that it is the right time to consider substantial changes to the Category A SAOs. The need for and scope of the SAOs which apply to access providers other than NBN Co (and access regulation generally) will need to be considered in the new industry structure brought about by the NBN. High speed networks which are designated as meeting the 'adequately served' criteria logically should be subject to the Category B SAOs because those networks will substitute for the NBN. Some of these networks may be caught by the SNO provisions and therefore subject to the Category B SAOs, but some may not. However, there is a larger question about how access and interconnection should occur

Issues	Questions	Telstra Position
	retained, relaxed or repealed?	between these networks and downstream access seekers. In our first submission, we raised concerns about the costs, operational and technical challenges access seekers would face if they had to directly connect with a large number of individual networks which substitute for the NBN. The more efficient solution is that these third party networks have standardised interfaces. Telstra considers that the Category B SAOs generally represent an appropriate formulation of the non- discrimination principle for a non-vertically integrated upstream provider in NBN Co's position.
Exemptions	• Do anticipatory exemptions still have a role to play, and if so, can the existing arrangements be improved? • Should ordinary individual exemptions for services that have been declared be reinstated?	As set out in our main submission, Part XIC was effective at creating additional regulation. However, Part XIC has performed poorly in terms of removing regulation. A sharper focus on deregulation where appropriate would be consistent with the Government's policy to reduce the burden of regulation. However, we do not propose the re-introduction of the exemption processes. As discussed in our main submission, we believe that, with limited changes, improved incentives for deregulation can be built into the current Part XIC framework by amending the objects of Part XIC to require 'proportionality' between the ACCC's assessment of risks and its decisions whether to regulate and how to regulate. This would be consistent with the 'risk-based' assessment approach to regulation recommended in the PC's Regulator Audit Report.

Issues	Questions	Telstra Position
Access Determinations	• Should access determinations remain an effective method in setting access terms and conditions? • Would a reference offer model better promote investment or would it merely increase disputation? • Is the application of the access determination process to NBN Co (where a service is declared through a SFAA or SAU) reasonable? • Should the criteria for making an access determination be revised and, if so, to what end? • Should the criteria achieve the balance sought or are any adjustments required in order to do so? • Should the ACCC have the power to specify different terms and conditions for different access providers and access seekers? • Should the methodology for determining wholesale prices be specified in legislation? If so, should	We consider that, in the current transitional environment, the current access determination provisions are broadly appropriate. In an environment in which NBN Co is the main supplier and its supply terms are set through SFAA, SAU and/or access determinations, the access regulation 'track' through Part XIC which applies to third party access providers – including the circumstances in which supply terms are set on an ex ante basis – could be quite different to the 'track' applying to NBN Co. However, consideration of substantial revisions of the access determination provisions should be postponed until we know more about what that future environment will look like. Telstra proposes some limited changes to the access determination provisions to improve their efficiency and transparency in the transitional period. • Remove the statutory provisions which provide that procedural fairness does not apply to IADs and binding rules of conduct (**BROC**). This will not unreasonably impair the operation of those processes. Courts recognise that requirements for procedural fairness take content from the nature of the decision making process in which it is to be applied. Hence, the requirements of procedural fairness for an IAD or a BROC process will be more limited than in a FAD. • As discussed in our main submission, it is a fundamental principle that where private parties' interests are affected by decisions of Government and regulators, those decisions should be subject to review. Merits based review is also regulatory best practice because it incentivises better discussion making and promotes accountability. Peer review of the ACCC's decisions achieves this objective and merits-based review can be designed to address gaming risks,

Issues	Questions	Telstra Position
	this be at a high level (e.g. cost based approach) or a more detailed level (e.g. building block methodology)? • Should use of the Ministerial pricing determination to provide guidance to the ACCC be encouraged? • Should specific guidance be provided to the ACCC (e.g. on how to take account of embedded cost subsidies) when determining prices? • Should the ACCC consider non-price factors such as positive and negative externalities? • Should access determinations be subject to merits review? • Should the making of interim access determinations be subject to procedural fairness? • Would it be possible to preserve the effectiveness of the interim determination provisions while also imposing procedural fairness requirements?	costs and delays.

Issues	Questions	Telstra Position
Binding Rules of Conduct (BROC)	• Should the power to make BROCs be removed, retained or expanded? • Should BROCs be subject to merits review and/or procedural fairness? • Would it be possible to preserve the effectiveness of BROCs while also imposing merits review/procedural fairness requirements?	These powers have not been used and are still relatively new. Telstra proposes that they remain in place but that they should be subject to both procedural fairness and peer review and mandatory consultations (such as is to occur with Competition Notices under Part XIB).
Special Access Undertakings (SAUs)	• Should ordinary access undertaking provisions be reinstated? If so, why would they be more effective in promoting regulatory certainty than was previously the case? • Should NBN Co be permitted to make SAUs in relation to declared services? • If there is a compelling case for NBN Co retaining the scope it now has should that scope also apply to other similarly-placed access providers? • Does the criteria for assessing the SAU achieve the balance sought or should it be amended and, if so, to what end?	We consider that the SAU provisions, including as they apply to NBN Co, are appropriate in the existing transitional environment.

Issues	Questions	Telstra Position
	• Does the fixed principles concept serve a useful purpose, and if so should it be given a legislative form to provide greater certainty for the ACCC and infrastructure providers?	
Ministerial Pricing Determinations (MPDs)	• Do concerns around the use of MPDs remain valid and should the power to make a MPD be repealed or retained as a reserve power only? • Is there support for the use of MPDs? In what circumstances could they be used without the independence of the regulator being undermined?	There will continue to be a potentially valuable role for MPDs – even if not used to date. It is not unusual to have a role for the Minister in an access related process e.g. the Ministerial roles in the Part IIIA declaration process and the Migration Plan Principles, Network and Services exemption and SSU Guidance instruments.
Access Agreements and the hierarchy of terms	• Should access agreements continue to have primacy in the regulatory framework? • Is the hierarchy of terms set correctly? If not, how should it be set? • Can the current use of SFAAs by NBN Co be improved and if so, how? • Does NBN Co's potential position in the market place mean its SFAA should formally be reflected in the	We believe it is appropriate for access agreements to continue to have primacy in the regulatory framework. As noted above, we believe that the solution to the industry's concerns about the SFAA can be found within the current legislative structure. The initial WBAs 'unlock' in two years and it is also likely that within the same timeframe, the ACCC will need to consider SAU amendments to accommodate the mixed technology model. Therefore, we have an opportunity to reconsider NBN Co's approach to the relationship between the SFAA and the SAU in the near term.

Issues	Questions	Telstra Position
	hierarchy? • Does NBN Co's potential market power mean that there should be scope for access seekers to have recourse to the ACCC in relation to NBN Co access agreements? • Are additional processes needed to ensure access seeker concerns can be effectively addressed before they enter into access agreements with NBN Co?	
Possible alternative approaches to Part XIC	The Panel suggests consideration of: • repealing the access regime and relying on commercial negotiations and the operation of anti-competitive conduct provisions • requiring the providers of fixed line services to be wholesale only and rely on commercial negotiations and the operation of anti-competitive conduct provisions • relying on the general access regime in the CCA (Part IIIA)	In an environment in which NBN Co is the primary wholesale supplier and its terms are set on an ex ante basis through a SFAA, SAU or access determination, access regulation of other access providers should be both more limited in scope and when applied, take a more 'light handed' approach. However, these issues can be more appropriately addressed when we have a clearer picture of the post transition environment.

Issues	Questions	Telstra Position
	• requiring access providers to supply all services on a wholesale basis and on terms and conditions that are equivalent to the terms and conditions that are supplied to their retail business • requiring access providers to provide services upon request, unless otherwise exempted by statutory criteria or by the regulators, with the regulator setting terms and conditions as necessary. The Panel asks: • should a fundamentally different approach to regulating access to telecommunications services be considered? If a different approach is proposed, what would be its form? What would be its benefits?	
NBN Co supply of eligible services on a wholesale-only basis	• Is the general requirement that NBN Co only supply to carriers and service providers an effective means of giving effect to its wholesale-only obligation?	As discussed in our main submission, the dividing line between NBN Co's upstream monopoly and downstream competitive activities is too ill-defined and porous. NBN Co should be unambiguously prohibited from operating at the retail level in line with the Government's public commitment that it will be a wholesale-only network. The current general restriction limiting NBN Co to supplying carriers and carriage service

Issues	Questions	Telstra Position
		providers (CSPs) is too readily satisfied because the requirements for a customer to qualify as a carrier or CSP are relatively low. The ownership of a single short line link qualifies a person to apply for a carrier licence and a person automatically qualifies as a CSP if they are engaged in any resupply outside their immediate circle. Once classified a carrier or CSP, that person can acquire all of their capacity directly from NBN Co, even if the capacity they resupply is a small part of their overall requirements. The Layer 2 character of the NBN service is unlikely to be much of a hurdle to large corporate or Government customers acquiring directly from NBN Co because they often have sophisticated in-house IT skills or can acquire those skills from systems integrators. The line of business restrictions on NBN Co should be strengthened to apply to capacity which the carrier or CSP uses to resupply third parties and for related ancillary uses (e.g. network management). NBN Co also should be precluded from competitive wholesale markets.
NBN Co's ability to supply to utilities	• Should NBN Co continue to be eligible to supply services to specified classes of utilities?	The exemptions allowing NBN Co to deal directly with utilities should be removed. Home monitoring and control systems and machine to machine applications are anticipated to be growth areas. Downstream service providers will compete against each other to deliver these services. There is no 'market failure' justification for NBN Co being involved in the supply of these services.
NBN Co ability to deal with end-users	• Are there circumstances where NBN Co might be perceived as needing to deal directly with end-users and, if so, the rules that would apply where it was permitted to do so?	Primary responsibility for contacting end users and managing migration must rest with the RSPs – consistent with NBN Co's role as a wholesale only provider. However, Telstra recognises that to make the public education campaign more effective, NBN Co may need to target messages at a premises level as the disconnection date approaches in a rollout area. These issues are best addressed by the industry in developing an end-to-end migration process which clearly allocates responsibilities

Issues	Questions	Telstra Position
		between NBN Co, RSPs and others.
Restricting NBN Co to the supply of Layer 2 services	• Should NBN Co still be limited by law to a particular level of functionality or can this be dealt with satisfactorily by Government direction and ACCC oversight? (noting NBN Co's SAU is now in place and licence conditions can be imposed on NBN Co to limit its operation if required) • Should NBN Co be limited by law to operating at the lowest possible layer of functionality in the OSI stack, (primarily Layer 2 although potentially Layer 3 in some instances)? Why should this limitation apply or not apply? What are the benefits or risk involved?	NBN Co should be explicitly limited to operating at the lowest meaningful connectivity layer to enable complementary investments, innovation and migration to confidently occur and to promote competition by ensuring that access seekers can best differentiate their service offerings. To provide investors with more certainty, this technology restriction should be embedded in the regulatory environment, and not just through a shareholder direction to NBN Co.
Supply of goods and other services	• Should specific restrictions on NBN Co in relation to the supply of goods and services be strengthened or relaxed and if so, why?	We consider that it would be premature to make significant changes.

Issues	Questions	Telstra Position
Restrictions on investment activities	• Are the restrictions on NBN Co's investment activities appropriate and effective? Should they be strengthened or relaxed, and if so, why?	We consider that it would be premature to make significant changes.
Remaining provisions	• Are there any concerns with other parts of the NBN Companies Act, so far as they relate to Division 2 of Part 2 and Part XIC of the CCA that should be addressed?	None at this stage.
Other concerns with the legislation governing NBN Co's operation	• Are there concerns with the wider arrangements?	As set out in our first submission, we believe priority should be given to migration and transition issues. We consider that the most effective approach to achieving better end user outcomes is through industry-based decision making which leads to enforceable industry rules. The following changes could be made in the regulatory framework (including consequential changes in Part XIC) to implement a legislative framework for the process: • Make the ACCC responsible for approval and enforcement of the industry rules. • Provide that the approved industry rules have primacy, such as by providing that the SAOs, access determinations and BROCs do not apply to matters covered by the industry rules (as currently is the case for the Migration Plan).