

25 February 201

Committee Secretary
Senate Standing Committee on Environment and Communications
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Secretary,

iiNet Ltd welcomes this opportunity to submit comments to the Senate Standing Committee's inquiry into the National Broadband Network Companies Bill 2010 and Telecommunications Legislation Amendment (National Broadband Network Measures - Access Arrangements) Bill 2010.

The iiNet group is strongly customer focused with 1.3 million broadband, telephony and Internet Protocol TV (IPTV) services nationwide. We are Australia's second largest DSL provider and employ 2000 staff in four countries.

We have invested significantly in network infrastructure in Australia in order to develop our own unique style of award winning products and services. We are active in the market as a competitive innovator and effective industry consolidator.

The company is enthusiastic about the National Broadband Network (NBN), and the increased market opportunities it will bring for the ISP and the broader Australian community.

Perhaps half of the premises in Australia have been denied access to true broadband competition, but the NBN changes all that. Not only do we double the available market for our services, but the proposed NBN pricing looks attractive for both iiNet and our customers.

As a big player at the forefront of product innovation and customer service, iiNet is best placed to reap the benefits of the NBN world.

We welcome the greater clarity around the National Broadband Network, and the rollout is commencement.

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Nevertheless, our attached submission proposes a number of suggested amendments in relation to access arrangements to ensure a more level playing field for all superfast broadband networks and protect the future viability of the NBN.

Yours sincerely

Steve Dalby
Chief Regulatory Officer

**Submission on behalf of iiNet Limited
to**

Senate Standing Committee on Environment and Communications

**National Broadband Network Companies Bill 2010; and Telecommunications
Legislation Amendment (National Broadband Network Measures - Access
Arrangements) Bill 2010**

**THE NBN ACCESS BILL WILL NOT PREVENT OTHER FIBRE PROVIDERS FROM CHERRY-
PICKING ATTRACTIVE MARKETS**

The intention of the proposed Layer 2 bitstream service rules

The NBN Access Bill¹ seeks to amend the Telco Act² to set technical and open access requirements on carriers building or upgrading fixed-line superfast access networks after 25 November 2010.³

The Access Bill also seeks to similarly amend the Competition Act⁴ to require declaration of a Layer 2 bitstream service, to ensure that when this service is supplied over a new superfast broadband network the supply is subject to the open access and equivalence requirement applying to NBN services.⁵

These amendments are in accordance with the Implementation Study's recommendations to provide a more level playing field for all superfast broadband networks.⁶

The Implementation Study noted that a particular reason for the level playing field arrangements was to reduce the scope for vertically-integrated providers to advantage themselves over independent retail service providers using the NBN services.⁷

The problem

Drafting and timing issues

However, as it is currently drafted, the Access Bill will not prevent other fibre providers from cherry-picking NBN Co's revenue streams. This is for 2 reasons:

¹ *Telecommunications Legislation Amendment (National Broadband Network Measures—Access Arrangements) Bill 2010*.

² *Telecommunications Act 1997*.

³ Explanatory Memorandum to the *National Broadband Network Companies Bill 2010* and the *Telecommunications Legislation Amendment (National Broadband Network Measures—Access Arrangements) Bill 2010 (Explanatory Memorandum)*, p 13.

⁴ *Competition and Consumer Act 2010*

⁵ *Ibid*, p 14.

⁶ Department of Broadband, Communications and the Digital Economy, *National Broadband Network Implementation Study (Implementation Study)*, 6 May 2010, pp 463-67.

⁷ *Ibid*, pp464-65.

- 1 some of the proposed sections of the Telco Act and Competition Act refer to “networks” when they should refer to “network units”, thereby not capturing existing network owners who are cherry-picking NBN Co’s revenue streams by upgrading isolated sections of their networks; and
- 2 the proposed provisions commence on a day to be fixed by Proclamation or otherwise 12 months after the Access Bill receives the Royal Assent. This will allow existing network owners to circumvent the Access Bill’s provisions during this lengthy time period before the rules commence.

Over-reaching

And even if the drafting of the Access Bill is amended to capture newly built or upgraded sections of networks, the framework of the proposed provisions over-reaches by targeting network builds or upgrades by *all* carriers, rather than being clearly linked to vertically- integrated network owners.

The fix

To overcome these issues, proposed amendments to the Access Bill are attached. In summary, the amendments:

- 1 replace several references to “networks” in the proposed sections with “network units”, thereby capturing all sections of superfast broadband networks built or upgraded after 25 November 2010, whether undertaken by an existing network owner or a new entrant;
- 2 then limits the scope of the rules so that ordinarily the provisions only apply to vertically-integrated network owners;
- 3 provide flexibility by granting the Minister with a discretionary power to:
 - a. exempt from the rules specific sections of networks built or upgraded by vertically-integrated network owners; or
 - b. designate that specific sections of networks built or upgraded by any network owner are subject to the rules; and
- 4 provide for the proposed provisions to commence upon the day the Bill receives Royal Assent.

The reasons submitted for these recommended amendments are also provided below.

REASONS FOR REQUESTED AMENDMENTS TO CHERRY-PICKING RULES

1. “NETWORKS” ALLOW CHERRY-PICKING, “NETWORK UNITS” DO NOT

A discrepancy appears in the Access Bill where the term “networks” is referred to in some of the proposed sections of the Telco Act and Competition Act, when the correct term should be “network units”. As defined under the Telco Act, “networks” has a much broader and indefinite meaning than “network units”. The effect of this is that an existing fibre provider could cherry-pick NBN Co’s high-value markets by upgrading relatively small or distinct sections of their networks and circumvent the intended operation of these provisions.

1.1 The definitions under the Telco Act

Under the Telco Act, “telecommunications network” means “a system, or series of systems, that carries, or is capable of carrying, communications by means of guided and/or unguided electromagnetic energy.”⁸ It is implied that where the Access Bill refers to a “network”, it is referring to a “telecommunications network”⁹ and therefore the relevant definition under the Telco Act applies.

On the other hand, there are 4 types of “network unit” under the Telco Act, providing a more specific definition than “telecommunications network”. The most basic of these is a single “line link” connecting distinct places in Australia, where the line link is at least 500 metres in length.¹⁰ A “line link” means a “line”, or if a line is connected to another line, and the second line constitutes or forms part of a line link, then the first mentioned line and the second line link together constitute a line link.¹¹ Further, “line” means “a wire, cable, optical fibre, tube, conduit, waveguide or other physical medium used, or for use, as a continuous artificial guide for or in connection with carrying communications by means of guided electromagnetic energy.”¹²

Therefore, it is evident that “network units” are a subset of “telecommunications networks”, since combining various network units will create “a system, or series of systems, that carries, or is capable of carrying, communications by means of guided and/or unguided electromagnetic energy.” The effect of the different meanings of these terms under the Access Bill means that existing network owners arguably would be permitted to upgrade particular network units—for example, the physical infrastructure in an entire Exchange Service Area (**ESA**) which could make that part of the telecommunications network capable of providing a superfast carriage service—without having to comply with the proposed obligations in the Access Bill.

1.2 Example: Closure of the South Brisbane exchange

The current situation in the South Brisbane ESA is that Telstra is going to close the South Brisbane exchange and replace its copper infrastructure with optical fibre based

⁸ *Telecommunications Act 1997*, s 7.

⁹ See, for example, proposed s141(1)(b) where the use of the word “network” is impliedly referring to the “telecommunications network” described in s141(1)(a).

¹⁰ *Telecommunications Act 1997*, s 26. The other types of network units are: (a) each of the line links where multiple line links connect distinct places in Australia, and the sum of those line links is at least 5 kilometres in length (s 27); (b) a designated radiocommunications facility (s 28); and (c) a facility specified in a Ministerial determination (s 29).

¹¹ *Telecommunications Act 1997*, ss 30(1)-(2).

¹² *Telecommunications Act 1997*, s 7.

Fibre to the Premises (FTTP) infrastructure. For the purposes of proposed s 152AGA of the Competition Act, Telstra's FTTP infrastructure would:

- (a) be capable of being used to supply one or more Layer 2 bitstream services to customers;
- (b) be capable of being used to supply a superfast carriage service to customers;¹³
- (c) not be the national broadband network;
- (d) come into existence after 25 November 2010;¹⁴ and
- (e) not be used wholly to supply carriage services to a single government or corporate end-user.

It therefore appears that Telstra's FTTP infrastructure in the South Brisbane ESA would be a "designated superfast telecommunications network" under the proposed provisions of the Competition Act. Indeed, it would be consistent with the objectives of the Access Bill if Telstra's FTTP upgrade of the South Brisbane ESA was captured by the proposed provisions in the Competition Act and Telco Act. It is evident from the Explanatory Memorandum that the objective of proposed s 141 of the Telco Act¹⁵ is to require owners of network units to supply a Layer 2 bitstream service where:

- (a) those network units are part of a telecommunications network that came into existence after 25 November 2010; or
- (b) if the network unit existed prior to 25 November 2010, it is altered or upgraded after that date with the result being that the network unit becomes capable of being used to supply a superfast carriage service.

The Explanatory Memorandum indicates this clearly at pp 164-165:

*... To be covered, the **network unit** must be part of a telecommunications network that either:*

- *comes into existence after 25 November 2010; or*
- *if it existed prior to that date—it is altered or upgraded after 25 November 2010, with the result being that the **network unit** becomes capable of being used to supply a superfast carriage service.*

...

¹³ Indeed, Telstra has stated that the FTTP infrastructure will deliver "ultrafast broadband": Telstra Corporation Limited, *Important News for South Brisbane Exchange Residents*, available at: <<http://www.fibretosouthbrisbane.com.au/>>.

¹⁴ The FTTP infrastructure could come into existence as early as March 2011. Although construction activity commenced in September 2010 (see: Telstra Corporation Limited, *Important News for South Brisbane Exchange Residents*, FAQ, available at: <<http://www.fibretosouthbrisbane.com.au/#q18>>), arguably, Telstra's FTTP network can only be considered to come into existence once it is capable of providing broadband services to end-users. Telstra anticipated that migration of its first services onto the FTTP network would occur in March 2011, however, the severe flooding in Queensland is likely to affect the proposed FTTP rollout schedule. See: Letter from Telstra to the Australian Competition and Consumer Commission (ACCC), *Closure of South Brisbane Exchange*, 14 January 2011, available at: <<http://www.accc.gov.au/content/index.phtml/itemId/946529>>.

¹⁵ Similarly, this objective applies to proposed s 152AGA of the Competition Act: "*The definition reflects the type of networks that will be subject to the requirements relating to Layer 2 bitstream services under proposed Part 7 of the [Telco] Act, inserted by item 86 above*", Explanatory Memorandum, p 170.

*Examples of the alteration or upgrading of a **network unit** could include extending an existing network, for example, by adding new line links, or upgrading the operation of a **network unit** so that it will support higher-speed broadband services...*

[Emphasis added]

However, on a closer inspection of the proposed legislation, it is apparent that the objectives of the Access Bill in this regard are not reflected in the actual provisions of the Bill. As a result, owners of telecommunications networks would arguably be able to avoid future obligations intended by the Access Bill. With respect to the South Brisbane ESA, proposed s 152AGA(d) of the Competition Act may be interpreted in such a way that:

- (a) although Telstra's FTTP upgrade would come into existence after 25 November 2010, Telstra's broader national "telecommunications network"—which the FTTP upgrade in the South Brisbane ESA would be part of—has been in existence for many years prior to 25 November 2010. Arguably, the broad meaning of "network" under s 152AGA(d)(i) allows this provision to be interpreted so that it can only apply to new entrants in the market building their first telecommunications network; and
- (b) if Telstra's FTTP upgrade is otherwise considered to be an alteration or upgrade of its existing national "telecommunications network", then arguably, Telstra's telecommunications network would not have become "capable of being used to supply a superfast carriage service to customers" as a result of the FTTP upgrade for the purposes of s 152AGA(d)(ii). This is because Telstra is likely to already have existing *network units* outside of the South Brisbane ESA that are capable of being used to supply a superfast carriage service to customers, and these form part of its national telecommunications network. Therefore, the broad meaning of "network" allows this provision to be interpreted so that it can only apply to owners of existing telecommunications networks that do not currently have any network units capable of supplying a superfast carriage service to customers.

The application of these proposed provisions is not intended to be limited only to new network owners, or existing network owners who are currently unable to supply a superfast carriage service. Rather,

*The **network units** which are proposed to be covered are **any network unit which belongs to a telecommunications network** which is not the NBN, and which is used, or is capable of being used, to supply a superfast carriage service to customers (actual and prospective) anywhere in Australia.*¹⁶

[Emphasis added]

Therefore, in order to give proper effect to the intention of the proposed provisions and to ensure vertically-integrated carriers are prevented from favouring their retail businesses over other access seekers,¹⁷ it is submitted that "networks" be substituted for "network units" as recommended in the table of amendments below.

¹⁶ Explanatory Memorandum, p 164.

¹⁷ Ibid, p 56.

2. THE ACCESS BILL SHOULD PRIMARILY APPLY TO VERTICALLY-INTEGRATED CHERRY PICKERS

Proposed s 141 of the Telco Act and s 152AGA of the CCA are broad in the sense that they would¹⁸ potentially apply to owners of network units supplying fixed-line carriage services to:

- (a) both wholesale and retail customers;
- (b) wholesale customers only; and
- (c) retail customers only.

The purpose of the level playing field arrangements in relation to Layer 2 bitstream services is to prevent vertically-integrated providers cherry-picking high-value markets at a disadvantage to other retail service providers, and to NBN Co.

The Implementation Study identifies this:

The Implementation Study has considered multiple possible policy responses to [the cherry-picking] threat. Options included:

- *Imposing technical standards on new FTTP networks ...*
- *Imposing open and equivalent access wholesale conditions on carriers building or upgrading to new, fixed-line superfast access networks in Australia, in relation to services offered over these networks, so that vertically-integrated network owners are not able to gain unfair advantage at a retail level;*
- ...
- ...
- ...

*On balance, we believe the first two of these measures are appropriate.*¹⁹

The Explanatory Memorandum also indicates this clearly at p.13 (repeated at p.48) and p.56:

*In particular, the Study noted the scope for competing providers to target high-income and low-cost, high-density areas, **operate as vertically-integrated providers and advantage themselves over independent retail service providers (RSPs) on the NBN, and ignore technical specifications employed by NBN Co.***²⁰

and

¹⁸ Assuming the drafting issues raised in Part 1 of this submission are corrected.

¹⁹ Implementation Study, pp 464-65.

²⁰ Explanatory Memorandum, p 13.

*Equivalent obligations will **prevent vertically integrated carriers from favouring their retail businesses** over other access seekers. This should bolster retail competition and thereby deliver better outcomes for end-users²¹*

[Emphasis added]

Therefore, to overcome the mischief that the level playing field amendments is intended to meet, these provisions should only apply to vertically-integrated owners of network units, unless there is a case-by-case reason that the provisions should apply to other persons.

In other words, proposed sub-sections 141(2) and (3) of the Telco Act should be amended so that owners of network units must not use a unit captured by proposed sub-section 141(1) to supply a fixed-line carriage service to *retail customers* in Australia unless it openly supplies a Layer 2 bitstream services. The recommended amendments in the table below reflect this submission. Similar amendments are also suggested to the Competition Act, by inserting proposed sub-section 152AGA(f)(i).

The recommended amendments have also been drafted to reflect the language adopted in s 577A of the Telco Act, i.e. the provisions regarding the structural separation of Telstra. Hence, not only should owners of network units be prevented from cherry-picking high-value markets, but also anyone in a position to exercise control over those network units. Given that the provisions in the Telco Act relating to the structural separation of Telstra were enacted to overcome the issues with Telstra being vertically-integrated, it is appropriate that the provisions relating to Layer 2 bitstream services are targeted towards vertically-integrated access providers. It is submitted that this would also be consistent with the general framework of the Access Bill with respect to vertically-integrated access providers.²²

To the extent that the Minister considers it is appropriate to exempt a particular vertically-integrated network owner from the level-playing field rules, proposed sub-sections 141(5) to (9) already provide the Minister with this power.

Arguably, a negative consequence of the recommended amendments could be that non-vertically-integrated network owners could engage in cherry-picking. Under our proposed amendment to sub-sections 141(2) and (3) the owners/controllers of network units supplying a fixed-line carriage service to only wholesale customers would not have to offer a Layer 2 bitstream service. However, it is submitted that an owner/controller of a network unit purely operating at a wholesale level is unlikely to have any incentive to unfairly discriminate against any specific customers.²³ In the event a non-vertically-integrated owner or controller of a network does seek to undermine the Government policy, it is suggested that the Minister be given power to make a determination designating that a specified network owner/controller will be subject to the rules in respect of a specified network unit or units. Proposed sub-sections 141(3A) to (3D) to the Telco Act and sub-section 152AGA(f)(ii) to the Competition Act allow for this.

²¹ Ibid, p 56.

²² For example, the Access Bill “specifies that the current SAOs, as specified under the CCA, will not apply to NBN Co. These obligations are designed for vertically integrated access providers who provide services to their own retail units and to access seekers” (Ibid, p 10). The Implementation Study also identified a number of options for level playing field arrangements, including: “requiring new superfast broadband networks to provide open and equivalent access to wholesale services, particularly to ensure any integrated retail operations could not be unfairly advantaged” (Ibid, p 49).

²³ This is also acknowledged in the Explanatory Memorandum, at pp 35-38.

3. THE CHERRIES COULD ALL BE PICKED WITHIN 12 MONTHS AFTER THE ACCESS BILL RECEIVES THE ROYAL ASSENT

Part 3 of Schedule 1 to the Access Bill is proposed to commence on a single day to be fixed by Proclamation or otherwise 12 months after the Access Bill receives the Royal Assent.²⁴ Without speculating as to what single day may be fixed by Proclamation, 12 months after the Access Bill receives the Royal Assent at best could be expected to be sometime in the middle of 2012, on the basis that the Access Bill is passed by both houses of Parliament by the middle of this year. It is submitted that allowing the industry such a substantial period of time to adjust to the new requirements—which may be well over 18 months from the date the Access Bill was first made public—is likely to result in network owners using that time to circumvent the Access Bill’s intended provisions.

For example, in the case of the South Brisbane ESA, the proposed provisions relating to Layer 2 bitstream services could potentially not apply to Telstra until sometime in the middle of 2012. Even if the Access Bill is amended as recommended in the table above so that Telstra’s FTTP infrastructure is captured by the Bill because Telstra’s “network units” would have come into existence after 25 November 2010, Telstra would still not be compelled to provide access to its FTTP network until sometime around mid-2012. However, it could be too late for other access seekers in the South Brisbane ESA by that time, as Telstra is likely to have already migrated most of the South Brisbane exchange community onto the new network.²⁵ Indeed, the agreement that Telstra has entered into with the Queensland Government requires the South Brisbane exchange to be formally closed by January 2013.²⁶

It is clear that the objective of this generous period before the commencement of Part 3 of Schedule 1 to the Access Bill is to allow the industry time to adjust to the new requirements.²⁷ However, given that the industry is already aware of the proposed provisions, and that it will have ample time to be fully across the amendments by the time the Access Bill passes both houses of Parliament, it is reasonable for the commencement period to be on the day that the Bill receives the Royal Assent. Indeed, the threshold date of 25 November 2010 was selected as that was the date the Access Bill was introduced into the House of Representatives, and hence the date from which the public became aware of the proposed amendments.²⁸ Therefore, if the Bill receives the Royal Assent by the middle of the year, then the industry would have had knowledge of the new Layer 2 bitstream service requirements for over 6 months, since it was made aware at least from 25 November 2010.

It is submitted that a period of at least 6 months is sufficient for the industry to adjust, and therefore it is reasonable for Part 3 of Schedule 1 to the Access Bill to commence on the day the Bill receives the Royal Assent. The ACCC has previously determined that a minimum of 6 months is appropriate for Telstra to provide access seekers with notice of

²⁴ Access Bill, s 2(1).

²⁵ Telstra has scheduled for the entire South Brisbane exchange community to have been moved to the new FTTP network by December 2012. Telstra has also indicated that as the upgrade progresses, it will be using “community briefings, door knocking, press ads and letterbox drops” to keep the South Brisbane community up-to-date and informed on how the community will be connected. See: Telstra Corporation Limited, *Important News for South Brisbane Exchange Residents*, Community Information, available at: <<http://www.fibretosouthbrisbane.com.au/>>.

²⁶ Telstra Corporation Limited, *Important News for South Brisbane Exchange Residents*, Community Information, available at: <<http://www.fibretosouthbrisbane.com.au/>>.

²⁷ Explanatory Memorandum, p 14.

²⁸ *Ibid*, p 165.

a Major Network Modernisation and Upgrade (**MNMU**).²⁹ A MNMU is defined in such a way that it may result in the Unconditioned Local Loop Service (**ULLS**)—which is a declared service under Part XIC of the Competition Act—no longer being supplied to access seekers in an ESA or the quality of the ULLS being adversely affected.³⁰ It is therefore submitted that if 6 months has been determined to be a reasonable period of time to give notice to an access seeker that a declared service may no longer be supplied to them, then 6 months is more than a reasonable period of time for a fibre provider to become aware of its obligations to provide open access to its Layer 2 bitstream service.

Alternatively, if the Department considers that the commencement of Part 3 of Schedule 1 to the Access Bill should not be on the day the Bill receives the Royal Assent, then it is submitted that provision should be made so that the Minister has the power to fix an earlier commencement date to apply to specified fibre builds, for example, Telstra's FTTP network in the South Brisbane ESA. The "Alternative Option" recommended amendment in the table above reflects this alternative submission.

²⁹ ACCC, *ULLS Access Dispute, Telstra / Chime, Reasons for Final Determination*, April 2010, p 189, available at: <<http://www.accc.gov.au/content/index.phtml/itemId/963889>>.

³⁰ ACCC, *Access Dispute between Chime Communications Pty Ltd (Access Seeker) and Telstra Corporation Limited (Access Provider), Unconditioned Local Loop Service (ULLS), Access Dispute Notified under section 152CM of the Trade Practices Act 1974 on 26 June 2008. Final Determination under Section 152CP of the Trade Practices Act 1974*, 7 April 2010, Schedule 7, available at: <<http://www.accc.gov.au/content/index.phtml/itemId/963889>>.

PROPOSED AMENDMENTS TO CHERRY-PICKING PRICES

Proposed provision in the Access Bill	Recommended amendments
<p>Section 2 (Commencement)</p>	<p>In the table under sub-section (1) omit Provision 4.</p> <p><u>Alternative Option:</u></p> <p>Omit from column 2 of Provision 4:</p> <p><i>A single day to be fixed by Proclamation.</i></p> <p><i>However, if any of the provision(s) do not commence within the period of 12 months beginning on the day this Act receives the Royal Assent, they commence on the day after the end of that period.</i></p> <p>Substitute:</p> <p>(a) <i>A single day to be fixed by Proclamation.</i></p> <p>(b) <i>However, if any of the provision(s) do not commence within the period of 12 months beginning on the day this Act receives the Royal Assent, they commence on the day after the end of that period.</i></p> <p>(c) <i>The Minister may, by notice in the Gazette, fix a single day for this Part to commence with respect to a specified network unit. The day to be fixed by the Minister must not be later than the commencement day in paragraph (a) or (b).</i></p>
<p>Item 86 of Schedule 1— Proposed s 140 of the Telco Act (Simplified outline of Layer 2 bitstream services)</p>	<p>Omit “network” from paragraphs (a)-(c), substitute “network unit”.</p>
<p>Item 86 of Schedule 1— Proposed s 141(1) of the Telco Act (Supply of Layer 2 bitstream services— Scope)</p>	<p>Omit “network” from paragraphs (c)-(e), substitute “network unit”.</p>
<p>Item 86 of Schedule 1— Proposed s 141(2) of the Telco Act (Supply of Layer 2 bitstream services—Sole vertically-integrated owner or controller of network unit)</p>	<p>In the heading of the sub-section after “owner”, insert “or controller”.</p> <p>After “owner”, insert “or controller”.</p> <p>After “fixed-line carriage service”, insert “to retail customers in Australia”.</p>
<p>Item 86 of Schedule 1— Proposed s 141(3) of the Telco Act (Supply of Layer 2 bitstream services— Multiple vertically-integrated owners or controllers of network unit)</p>	<p>In the heading of the sub-section after “owners”, insert “or controllers”.</p> <p>After “owners”, insert “or controllers”.</p> <p>After “owner”, insert “or controller”.</p> <p>After “fixed-line carriage service”, insert “to retail customers in Australia”.</p>

Proposed provision in the Access Bill	Recommended amendments
<p>Item 86 of Schedule 1— Proposed s 141(3) of the Telco Act (Supply of Layer 2 bitstream services— Determining the rules apply to other owners or controllers of network unit)</p>	<p>After the subsection, insert:</p> <p><i>Particular powers of Minister</i></p> <p>(3A) <i>The Minister may, by written instrument, determine that a specified owner or controller of a specified network unit is to comply with the requirements in subsections (3B) and (3C).</i></p> <p><i>Note: For specification by class, see subsection 46(3) of the Acts Interpretation Act 1901.</i></p> <p>(3B) <i>If there is only one owner or controller of the network unit, the owner or controller of the network unit must not:</i></p> <p>(a) <i>use the unit, either alone or jointly with one or more other persons, to supply a fixed-line carriage service to customers in Australia; or</i></p> <p>(b) <i>allow or permit another person to use the unit to supply a fixed-line carriage service to customers in Australia.</i></p> <p>(3C) <i>If there are 2 or more owners or controllers of the network unit, an owner or controller of the network unit must not:</i></p> <p>(a) <i>use the unit, either alone or jointly with one or more other persons, to supply a fixed-line carriage service to customers in Australia; or</i></p> <p>(b) <i>either alone or together with one or more other owners or controllers, allow or permit another person to use the unit to supply a fixed-line carriage service to customers in Australia.</i></p> <p>(3D) <i>Subsections (3B) and (3C) have no application unless the Minister exercises his power under subsection (3A).</i></p>
<p>Item 86 of Schedule 1— Proposed s 141(4) of the Telco Act (Supply of Layer 2 bitstream services— Offence)</p>	<p>Omit “(2) or (3)”, substitute “(2), (3), (3B) or (3C)”.</p>
<p>Item 86 of Schedule 1— Proposed s 141(5) of the Telco Act (Supply of Layer 2 bitstream services— Exemptions)</p>	<p>After “owner”, insert “or controller”.</p> <p>Omit “(2) and (3)”, substitute “(2), (3) and (3A)”.</p>
<p>Item 86 of Schedule 1— Proposed s 141(6) of the Telco Act</p>	<p>Omit “(2) and (3)”, substitute “(2), (3) and (3A)”.</p>

Proposed provision in the Access Bill	Recommended amendments
(Supply of Layer 2 bitstream services—Exemptions)	
Item 86 of Schedule 1— Proposed ss 141(7)-(9) of the Telco Act (Supply of Layer 2 bitstream services—Exemptions)	Insert “(3A),” before “(5)”.
Item 86 of Schedule 1— Proposed s 141(10) of the Telco Act (Supply of Layer 2 bitstream services—Definitions)	Insert: <i>controller means a person who is in a position to exercise control over the network unit. Note: For control of a company, see section 577P.</i>
Item 93 of Schedule 1— Proposed s 152AGA of the Competition Act (Designated superfast telecommunications network)	Omit paragraph label “(a)”, substitute “(aa)”. Before paragraph (aa), insert: (a) a network unit is: (i) part of the infrastructure of a telecommunications network in Australia; or (ii) used, or for use, in or in connection with a telecommunications network in Australia; and In paragraph (aa), insert “or network unit” after “telecommunications network”. Omit “the network” from paragraph (b), substitute “a network unit”. Omit “network” from paragraphs (d)-(e), substitute “network unit”. In paragraph (e), omit “,” after “company”, substitute “; and”. Insert: (f) an owner or a person in a position to exercise control over the network unit, uses the unit, either alone or jointly with one or more other persons, to supply a fixed-line carriage service to: (i) retail customers in Australia; or (ii) customers in Australia where subsections 141(3B) or (3C) of the Telecommunications Act 1997 apply, Omit “network” before “is a designated superfast telecommunications network ”, substitute “network unit”.

