

EXPOSURE DRAFT

2008-2009-2010

The Parliament of the
Commonwealth of Australia

HOUSE OF REPRESENTATIVES

EXPOSURE DRAFT (15/02/2010)

National Broadband Network Companies Bill 2010

No. , 2010

(Broadband, Communications and the Digital Economy)

**A Bill for an Act relating to certain companies
associated with the national broadband network,
and for other purposes**

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EXPOSURE DRAFT

1 **A Bill for an Act relating to certain companies**
2 **associated with the national broadband network,**
3 **and for other purposes**

4 The Parliament of Australia enacts:

5 **Part 1—Preliminary**
6

7 ^{^1} **Short title**

8 This Act may be cited as the *National Broadband Network*
9 *Companies Act 2010*.

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T Part 1 T Preliminary T

T T T T

Section T^2T

1 **^2 Commencement**

2 This Act commences on the day after this Act receives the Royal
3 Assent.

4 **^3 Objects**

5 (1) The main objects of this Act, when read together with Part XIC of
6 the *Trade Practices Act 1974*, are as follows:

7 (a) to provide a regulatory framework for NBN corporations that
8 promotes the long-term interests of end-users of carriage
9 services or of services provided by means of carriage
10 services;

11 (b) to ensure that NBN Co remains in Commonwealth majority
12 ownership for an initial period;

13 (c) to provide for the transfer of the Commonwealth's remaining
14 equity in NBN Co to other persons within 5 years after the
15 national broadband network is built and fully operational,
16 subject to:

17 (i) NBN Co's governance arrangements; and

18 (ii) NBN Co's business record; and

19 (iii) market conditions; and

20 (iv) any other relevant matters;

21 (d) to provide a framework for restrictions on private ownership
22 or control of NBN Co.

23 (2) The other objects of this Act, when read together with Part XIC of
24 the *Trade Practices Act 1974*, are as follows:

25 (a) to ensure that the supply of an eligible service by an NBN
26 corporation is on a wholesale basis;

27 (b) to ensure that an NBN corporation does not supply a content
28 service;

29 (c) to ensure that an NBN corporation provides open access to
30 eligible services on a non-discriminatory basis.

31 **^4 Simplified outline**

32 The following is a simplified outline of this Act:

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T T TT

Section T^5T

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- An NBN corporation must not supply an eligible service to another person unless the other person is:
 - (a) a carrier; or
 - (b) a service provider.
- An NBN corporation must not supply a content service.
- A condition of a carrier licence held by an NBN corporation may require the NBN corporation to supply a specified carriage service.
- A condition of a carrier licence held by an NBN corporation may prohibit the NBN corporation from supplying a specified carriage service.
- Under provisions called the Commonwealth majority ownership provisions, the Commonwealth must retain majority ownership of NBN Co.
- The Commonwealth majority ownership provisions cease to have effect when the Communications Minister declares that, in his or her opinion, the national broadband network should be treated as built and fully operational.
- The Commonwealth's remaining equity in NBN Co must be transferred to other persons within 5 years after the making of the Communications Minister's declaration. The Finance Minister may extend that 5-year period.
- NBN Co must take all reasonable steps to ensure that an unacceptable private ownership or control situation does not exist in relation to NBN Co.

26 ^5 Definitions

27 In this Act:

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Section T⁵T

- 1 *ACCC* means the Australian Competition and Consumer
2 Commission.
- 3 *Board* means the board of directors of NBN Co.
- 4 *carriage service* has the same meaning as in the
5 *Telecommunications Act 1997*.
- 6 *carrier* has the same meaning as in the *Telecommunications Act*
7 *1997*.
- 8 *carrier licence* has the same meaning as in the
9 *Telecommunications Act 1997*.
- 10 *carry* has the same meaning as in the *Telecommunications Act*
11 *1997*.
- 12 *charge* has the same meaning as in the *Corporations Act 2001*.
- 13 *Commonwealth majority ownership provisions* means sections
14 ¹⁹ and ²⁰.
- 15 *communications* has the same meaning as in the
16 *Telecommunications Act 1997*.
- 17 *Communications Minister* means the Minister who administers
18 this Act.
- 19 *constitution*, in relation to NBN Co, has the same meaning as in
20 the *Corporations Act 2001*.
- 21 *content service* has the same meaning as in the
22 *Telecommunications Act 1997*.
- 23 *content service provider* has the same meaning as in the
24 *Telecommunications Act 1997*.
- 25 *debenture* has the same meaning as in the *Corporations Act 2001*.
- 26 *declared pre-termination period* has the meaning given by section
27 ²¹.
- 28 *declared sale deferral period* has the meaning given by section
29 ²⁵.

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Section T^5T

1 **declared service** has the same meaning as in Part XIC of the *Trade*
2 *Practices Act 1974*.

3 **Department of Finance** means the Department administered by the
4 Finance Minister.

5 **eligible service** has the same meaning as in section 152AL of the
6 *Trade Practices Act 1974*.

7 **engage in conduct** means:
8 (a) do an act; or
9 (b) omit to perform an act.

10 **Federal Court** means the Federal Court of Australia.

11 **Finance Minister** means the Minister who administers the
12 *Financial Management and Accountability Act 1997*.

13 **financial product** has the same meaning as in Chapter 7 of the
14 *Corporations Act 2001*.

15 **hybrid-security issuer company** has the meaning given by section
16 ^26.

17 **listed carriage service** has the same meaning as in the
18 *Telecommunications Act 1997*.

19 **listed disclosing entity** has the same meaning as in the
20 *Corporations Act 2001*.

21 **listing market**, in relation to a listed disclosing entity, has the same
22 meaning as in the *Corporations Act 2001*.

23 **listing rules** of a market has the same meaning as in the
24 *Corporations Act 2001*.

25 **national broadband network** means a national telecommunications
26 network for the high-speed carriage of communications, where an
27 NBN corporation has been, is, or is to be, involved in the creation
28 or development of the network.

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T Part 1 T Preliminary T

T T T T

Section T^5T

- 1 **NBN Co** means NBN Co Limited (ACN 136 533 741), as the
2 company exists from time to time (even if its name is later
3 changed).
- 4 **NBN corporation** means:
5 (a) NBN Co; or
6 (b) NBN Tasmania; or
7 (c) a company that is a wholly-owned subsidiary of NBN Co.
- 8 **NBN Co sale scheme** has the meaning given by section ^26.
- 9 **NBN Co subsidiary** means a company that is a subsidiary of NBN
10 Co.
- 11 **NBN Tasmania** means NBN Tasmania Limited (ACN 138 338
12 271), as the company exists from time to time (even if its name is
13 later changed).
- 14 **sale-scheme hybrid security** has the meaning given by section ^27.
- 15 **sale-scheme trust deed** has the meaning given by section ^26.
- 16 **sale-scheme trustee** has the meaning given by section ^26.
- 17 **securities** (except in section ^27) includes:
18 (a) shares; and
19 (b) debentures.
- 20 **service provider** has the same meaning as in the
21 *Telecommunications Act 1997*.
- 22 **subsidiary** has the same meaning as in the *Corporations Act 2001*.
- 23 **telecommunications network** has the same meaning as in the
24 *Telecommunications Act 1997*.
- 25 **unacceptable private ownership or control situation** has the
26 meaning given by section ^41.
- 27 **voting share** has the same meaning as in the *Corporations Act*
28 *2001*.

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T T TT

Section T^6T

1 *wholly-owned subsidiary* has the same meaning as in the
2 *Corporations Act 2001*.

3 **^6 Crown to be bound**

- 4 (1) This Act binds the Crown in each of its capacities.
- 5 (2) This Act does not make the Crown liable to a pecuniary penalty or
6 to be prosecuted for an offence.
- 7 (3) The protection in subsection (2) does not apply to an authority of
8 the Crown.

9 **^7 Extension to external Territories**

10 This Act extends to every external Territory.

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T T T T

TPart 2T Operations of NBN corporationsT

TDivision 1T Simplified outlineT

Section T^8T

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2 **Part 2—Operations of NBN corporations**

3 **Division 1—Simplified outline**

4 **^8 Simplified outline**

5 The following is a simplified outline of this Part:

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- An NBN corporation must not supply an eligible service to another person unless the other person is:
 - (a) a carrier; or
 - (b) a service provider.
- An NBN corporation must not supply a content service.
- A condition of a carrier licence held by an NBN corporation may require the NBN corporation to supply a specified carriage service.
- A condition of a carrier licence held by an NBN corporation may prohibit the NBN corporation from supplying a specified carriage service.

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2 **Division 2—Rules about supply of services by NBN**
3 **corporations**

4 **^9 Supply of eligible services to be on a wholesale basis**

- 5 (1) An NBN corporation must not supply an eligible service to another
6 person unless the other person is:
7 (a) a carrier; or
8 (b) a service provider.
- 9 (2) The Communications Minister may, by legislative instrument,
10 exempt a specified eligible service from the scope of
11 subsection (1).
- 12 (3) An exemption under subsection (2) may be unconditional or
13 subject to such conditions (if any) as are specified in the
14 exemption.
- 15 (4) Before making an instrument under subsection (2), the
16 Communications Minister must consult the ACCC.

17 **^10 Content services not to be supplied**

- 18 (1) An NBN corporation must not supply a content service.
- 19 (2) The Communications Minister may, by legislative instrument,
20 exempt a specified content service from the scope of
21 subsection (1).
- 22 (3) An exemption under subsection (2) may be unconditional or
23 subject to such conditions (if any) as are specified in the
24 exemption.
- 25 (4) Before making an instrument under subsection (2), the
26 Communications Minister must consult the ACCC.

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T T T T

TPart 2T Operations of NBN corporationsT

TDivision 2T Rules about supply of services by NBN corporationsT

Section T^11T

1 **^11 Carrier licence condition**

2 A carrier licence held by an NBN corporation is subject to a
3 condition that the NBN corporation must comply with any rules in
4 section ^9 or ^10 that are applicable to the NBN corporation.

5 Note: See also section 62E of the *Telecommunications Act 1997*.

6 **^12 Service provider rule**

7 (1) In addition to the rules mentioned in section 98 of the
8 *Telecommunications Act 1997*, the rule set out in subsection (2) of
9 this section is a service provider rule for the purposes of that Act.

10 (2) If an NBN corporation is a service provider, the NBN corporation
11 must comply with any rules in section ^9 or ^10 that are applicable
12 to the NBN corporation.

13 **^13 Power to declare carrier licence conditions not limited**

14 Sections ^9 and ^10 do not, by implication, limit the conditions
15 that may be declared under section 63 of the *Telecommunications*
16 *Act 1997*.

17 **^14 Power to determine service provider rules not limited**

18 Sections ^9 and ^10 do not, by implication, limit the rules that may
19 be determined under section 99 of the *Telecommunications Act*
20 *1997*.

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T T T T
Operations of NBN corporations T T Part 2 T
Special carrier licence conditions T T Division 3 T

Section T^15 T

1

2 **Division 3—Special carrier licence conditions**

3 **^15 Conditions about supply of carriage services by NBN**
4 **corporations**

5 *Mandatory services*

6 (1) A condition of a carrier licence held by an NBN corporation may
7 require the NBN corporation to comply with section 152CJB of the
8 *Trade Practices Act 1974* in relation to a specified eligible service
9 that is supplied, or is capable of being supplied, by the NBN
10 corporation (whether to itself or other persons).

11 Note 1: This means that the service will become a declared service, and the
12 NBN corporation will be subject to a standard access obligation to
13 supply the service under section 152AXB of the *Trade Practices Act*
14 *1974*.

15 Note 2: For declaration of carrier licence conditions, see section 63 of the
16 *Telecommunications Act 1997*.

17 Note 3: For specification by class, see subsection 13(3) of the *Legislative*
18 *Instruments Act 2003*.

19 (2) A condition covered by subsection (1) has no effect in relation to
20 an eligible service if, immediately before the time when the
21 condition comes into force, the service, to the extent that it is
22 capable of being supplied by the NBN corporation concerned, is a
23 declared service.

24 *Prohibited services*

25 (3) A condition of a carrier licence held by an NBN corporation may
26 prohibit the NBN corporation from supplying a specified carriage
27 service to carriers or service providers.

28 Note 1: For declaration of carrier licence conditions, see section 63 of the
29 *Telecommunications Act 1997*.

30 Note 2: For specification by class, see subsection 13(3) of the *Legislative*
31 *Instruments Act 2003*.

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TPart 2T Operations of NBN corporationsT

TDivision 3T Special carrier licence conditionsT

Section T^16T

1 *Power to declare carrier licence conditions not limited*

2 (4) Subsections (1) and (3) do not, by implication, limit the conditions
3 that may be declared under section 63 of the *Telecommunications*
4 *Act 1997*.

5 **^16 Consultation with ACCC**

6 *Scope*

7 (1) This section applies if the Communications Minister is required
8 under section 64 of the *Telecommunications Act 1997* to give an
9 NBN corporation a notice in relation to a condition covered by
10 subsection ^15(1) or (3) of this Act.

11 *Consultation with ACCC*

12 (2) Before giving the notice, the Communications Minister must
13 consult the ACCC.

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T T T T
Ownership and control of NBN Co T Part 3 T
Simplified outline T T Division 1 T

Section T^17 T

1

2 **Part 3—Ownership and control of NBN Co**

3 **Division 1—Simplified outline**

4 **^17 Simplified outline**

5 The following is a simplified outline of this Part:

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- Under provisions called the Commonwealth majority ownership provisions, the Commonwealth must retain majority ownership of NBN Co.
- The Commonwealth majority ownership provisions cease to have effect when the Communications Minister declares that, in his or her opinion, the national broadband network should be treated as built and fully operational.
- The Commonwealth's remaining equity in NBN Co must be transferred to other persons within 5 years after the making of the Communications Minister's declaration. The Finance Minister may extend that 5-year period.
- This Part sets out rules about how an NBN Co sale scheme is to be carried out.
- NBN Co must take all reasonable steps to ensure that an unacceptable private ownership or control situation does not exist in relation to NBN Co.

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T T T T

TPart 3T Ownership and control of NBN CoT

TDivision 2T Commonwealth ownership and control of NBN CoT

Section T^18T

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2 **Division 2—Commonwealth ownership and control of NBN**
3 **Co**

4 **Subdivision A—Commonwealth majority ownership provisions**

5 **^18 Commonwealth majority ownership provisions**

6 This Subdivision sets out the Commonwealth majority ownership
7 provisions.

8 **^19 Commonwealth to retain majority ownership of NBN Co**

- 9 (1) The Commonwealth must not transfer any of its shares in NBN Co
10 if the transfer results in a breach of subsection (2).
- 11 (2) Neither the Commonwealth nor NBN Co is allowed to do anything
12 to cause or contribute to any of the following results:
- 13 (a) that the Commonwealth no longer holds shares in NBN Co
14 that carry the rights to exercise at least 51% of the total
15 voting rights attached to the voting shares in NBN Co;
- 16 (b) that the Commonwealth no longer controls the exercise of at
17 least 51% of the total voting rights attached to the voting
18 shares in NBN Co;
- 19 (c) that the Commonwealth no longer holds at least 51% of the
20 total paid-up share capital of NBN Co;
- 21 (d) that the Commonwealth is no longer entitled to hold at least
22 51% of the total rights to any distribution of capital or profits
23 of NBN Co on winding-up;
- 24 (e) that the Commonwealth is no longer entitled to hold at least
25 51% of the total rights to any distribution of capital or profits
26 of NBN Co, otherwise than on winding-up.

27 Note: This section ceases to have effect at the time worked out under section
28 ^21.

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1 **^20 Compliance by NBN Co**

2 (1) NBN Co must take all reasonable steps to ensure that a situation
3 described in paragraph ^19(2)(a), (b), (c), (d) or (e) does not exist.

4 (2) NBN Co commits an offence if:
5 (a) NBN Co engages in conduct; and
6 (b) NBN Co's conduct contravenes subsection (1).

7 Penalty for contravention of this subsection: 500 penalty units.

8 Note: This section ceases to have effect at the time worked out under section
9 ^21.

10 **Subdivision B—Termination of Commonwealth majority**
11 **ownership provisions**

12 **^21 Termination of Commonwealth majority ownership provisions**

13 The Commonwealth majority ownership provisions cease to have
14 effect when the Communications Minister declares under
15 paragraph ^22(1)(c) or (2)(a) that, in his or her opinion, the
16 national broadband network should be treated as built and fully
17 operational.

18 **^22 Declaration by Communications Minister—whether national**
19 **broadband network should be treated as built and fully**
20 **operational**

21 *Initial declaration*

22 (1) During the period:
23 (a) starting at the commencement of this section; and
24 (b) ending at the end of 30 June 2018;
25 the Communications Minister must:
26 (c) declare, in writing, that, in his or her opinion, the national
27 broadband network should be treated as built and fully
28 operational; or
29 (d) declare, in writing, that the period:
30 (i) starting immediately after the declaration is made; and

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TDivision 2T Commonwealth ownership and control of NBN CoT

Section T^22T

1 (ii) ending at a specified time;
2 is a ***declared pre-termination period*** for the purposes of this
3 Act.

4 *Subsequent declarations*

5 (2) During a declared pre-termination period, the Communications
6 Minister must:
7 (a) declare, in writing, that, in his or her opinion, the national
8 broadband network should be treated as built and fully
9 operational; or
10 (b) declare, in writing, that the period:
11 (i) starting immediately after the declaration is made; and
12 (ii) ending at a specified time;
13 is a ***declared pre-termination period*** for the purposes of this
14 Act.

15 (3) Subsection (2) is recursive, that is, the first reference in that
16 subsection to a declared pre-termination period includes a
17 reference to a period that is a declared pre-termination period
18 because of any other application or applications of
19 paragraph (2)(b).

20 *Maximum duration of declared pre-termination period*

21 (4) A declared pre-termination period must not be longer than 12
22 months.

23 *Matters to which Communications Minister must have regard*

24 (5) In deciding whether to make a declaration under this section, the
25 Communications Minister must have regard to the following
26 matters:
27 (a) the extent to which the national broadband network has been
28 built;
29 (b) the extent to which the national broadband network is
30 operational;
31 (c) matters relating to the security of the national broadband
32 network;

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Commonwealth ownership and control of NBN CoT TDivision 2T

Section T^23T

1 (d) such other matters (if any) as the Communications Minister
2 considers relevant.

3 *Tabling in Parliament*

4 (6) The Communications Minister must cause a copy of a declaration
5 under this section to be tabled in each House of the Parliament
6 within 15 sitting days of that House after making the declaration.

7 (7) If a declaration under paragraph (1)(d) or (2)(b) is tabled in
8 accordance with subsection (6), the Communications Minister must
9 also table a statement to the effect that the Commonwealth
10 majority ownership provisions continue in operation.

11 *Declaration is not a legislative instrument*

12 (8) A declaration under this section is not a legislative instrument.

13 **Subdivision C—Sale by the Commonwealth of its shares in** 14 **NBN Co**

15 **^23 When NBN Co sale scheme may be entered into and carried out**

16 (1) An NBN Co sale scheme may be entered into and carried out
17 before or after the Commonwealth majority ownership provisions
18 cease to have effect under section ^21.

19 Note: For *NBN Co sale scheme*, see section ^26.

20 (2) If the Commonwealth majority ownership provisions are in force,
21 an NBN Co sale scheme must be consistent with the
22 Commonwealth majority ownership provisions.

23 **^24 When NBN Co sale scheme must be entered into and carried** 24 **out**

25 *Scope*

26 (1) This section applies if, at a particular time (the *network*
27 *declaration time*), the Communications Minister makes a
28 declaration under paragraph ^22(1)(c) or (2)(a) that, in his or her

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T T T

TPart 3T Ownership and control of NBN CoT

TDivision 2T Commonwealth ownership and control of NBN CoT

Section T^24T

1 opinion, the national broadband network should be treated as built
2 and fully operational.

3 *Timetable*

4 (2) The Finance Minister must ensure that the Commonwealth's
5 remaining equity in NBN Co is transferred, or progressively
6 transferred, to other persons within 5 years after the network
7 declaration time.

8 (3) The Finance Minister may, by written instrument, extend or further
9 extend the 5-year period referred to in subsection (2), so long as
10 the extension or further extension is for a period of not more than
11 12 months.

12 (4) In deciding whether to extend or further extend the 5-year period
13 referred to in subsection (2), the Finance Minister must have regard
14 to the following matters:
15 (a) NBN Co's governance arrangements;
16 (b) NBN Co's business record;
17 (c) market conditions;
18 (d) such other matters (if any) as the Finance Minister considers
19 relevant.

20 *Declaration by Finance Minister—whether conditions suitable for* 21 *an NBN Co sale scheme*

22 (5) After the network declaration time, an NBN Co sale scheme must
23 not be entered into or carried out unless the Finance Minister has
24 previously made a declaration under paragraph ^25(1)(a) or (2)(a).

25 Note: For *NBN Co sale scheme*, see section ^26.

26 *Tabling in Parliament*

27 (6) The Finance Minister must cause a copy of an instrument under
28 subsection (3) to be tabled in each House of the Parliament within
29 15 sitting days of that House after the making of the instrument.

30 *Extension instrument is not a legislative instrument*

31 (7) An instrument under subsection (3) is not a legislative instrument.

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1 **^25 Declaration by Finance Minister—whether conditions suitable**
2 **for an NBN Co sale scheme**

3 *Initial declaration*

- 4 (1) Within 5 days after the Communications Minister makes a
5 declaration under paragraph ^22(1)(c) or (2)(a) that, in the
6 Communications Minister’s opinion, the national broadband
7 network should be treated as built and fully operational, the
8 Finance Minister must:
- 9 (a) declare, in writing, that, in the Finance Minister’s opinion,
10 conditions are suitable for the entering into and carrying out
11 of an NBN Co sale scheme; or
 - 12 (b) declare, in writing, that the period:
 - 13 (i) starting immediately after the declaration is made; and
 - 14 (ii) ending at a specified time;
- 15 is a ***declared sale deferral period*** for the purposes of this
16 Act.

17 *Subsequent declarations*

- 18 (2) During a declared sale deferral period, the Finance Minister must:
- 19 (a) declare, in writing, that, in his or her opinion, conditions are
20 suitable for the entering into and carrying out of an NBN Co
21 sale scheme; or
 - 22 (b) declare, in writing, that the period:
 - 23 (i) starting immediately after the declaration is made; and
 - 24 (ii) ending at a specified time;
- 25 is a ***declared sale deferral period*** for the purposes of this
26 Act.
- 27 (3) Subsection (2) is recursive, that is, the first reference in that
28 subsection to a declared sale deferral period includes a reference to
29 a period that is a declared sale deferral period because of any other
30 application or applications of paragraph (2)(b).

31 *Maximum duration of declared sale deferral period*

- 32 (4) A declared sale referral period must not be longer than 12 months.

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1 *Matters to which Finance Minister must have regard*

- 2 (5) In deciding whether to make a declaration under this section, the
3 Finance Minister must have regard to the following matters:
4 (a) NBN Co's governance arrangements;
5 (b) NBN Co's business record;
6 (c) market conditions;
7 (d) such other matters (if any) as the Finance Minister considers
8 relevant.

9 *Tabling in Parliament*

- 10 (6) The Finance Minister must cause a copy of a declaration under this
11 section to be tabled in each House of the Parliament within 15
12 sitting days of that House after making the declaration.
- 13 (7) If a declaration under paragraph (1)(b) or (2)(b) is tabled in
14 accordance with subsection (6), the Finance Minister must also
15 table a statement to the effect that, in the Finance Minister's
16 opinion, conditions are not suitable for the entering into and
17 carrying out of an NBN Co sale scheme.

18 *Declaration is not a legislative instrument*

- 19 (8) A declaration under this section is not a legislative instrument.

20 **^26 NBN Co sale scheme**

21 *Object*

- 22 (1) The object of this section is to define the expressions *NBN Co sale*
23 *scheme*, *sale-scheme trustee*, *sale-scheme trust deed* and
24 *hybrid-security issuer company*.

25 *NBN Co sale scheme*

- 26 (2) For the purposes of this Act, an *NBN Co sale scheme* is a scheme
27 the object of which is to achieve the transfer, or progressive
28 transfer, of the whole or a part of the Commonwealth's equity in
29 NBN Co to other persons.

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- 1 (3) An NBN Co sale scheme must comply with any rules set out in a
2 determination in force under subsection (4).
- 3 (4) The Finance Minister may make a written determination setting out
4 rules that are to be complied with by an NBN Co sale scheme.
- 5 (5) An NBN Co sale scheme may involve any or all of the following:
6 (a) the transfer by the Commonwealth of any of its shares in
7 NBN Co;
8 (b) the transfer by the Commonwealth of interests in its shares in
9 NBN Co to a company (the *sale-scheme trustee*) in the
10 company's capacity as the trustee of a trust established by a
11 trust deed (the *sale-scheme trust deed*);
12 (c) an investor in NBN Co initially acquiring a particular interest
13 in shares in NBN Co and subsequently acquiring the
14 remaining interests in those shares;
15 (d) the payment by NBN Co of a dividend;
16 (e) the reduction of NBN Co's share capital;
17 (f) the cancellation of a particular parcel of shares in NBN Co
18 held by the Commonwealth;
19 (g) NBN Co buying back shares in itself;
20 (h) the issue of securities in NBN Co;
21 (i) the redemption of redeemable preference shares in NBN Co
22 held by the Commonwealth;
23 (j) the alteration of NBN Co's constitution;
24 (k) the issue by the Commonwealth or NBN Co of sale-scheme
25 hybrid securities;
26 (l) an arrangement under which one or more designated
27 companies (each of which is called a *hybrid-security issuer*
28 *company*) issue sale-scheme hybrid securities;
29 (m) the guarantee by the Commonwealth of obligations of a
30 hybrid-security issuer company in relation to sale-scheme
31 hybrid securities (for example, obligations to make payments
32 of interest or dividends);
33 (n) an agreement of the kind known as a securities lending
34 arrangement, where the securities lending arrangement
35 relates to shares in NBN Co.
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1 (6) In determining whether a scheme is an NBN Co sale scheme,
2 regard must be had to the economic and commercial substance of
3 the scheme.

4 (7) Subsections (5) and (6) do not, by implication, limit subsection (2).

5 *Designated company*

6 (8) For the purposes of this section, a *designated company* is:

7 (a) a wholly-owned Commonwealth company; or

8 (b) a body corporate specified in a written declaration made by
9 the Finance Minister under this paragraph.

10 *Legislative instruments*

11 (9) A determination under subsection (4) is a legislative instrument,
12 but section 42 (disallowance) of the *Legislative Instruments Act*
13 *2003* does not apply to the determination.

14 (10) A declaration under paragraph (8)(b) is not a legislative instrument.

15 (11) To the extent that an NBN Co sale scheme is in writing, it is not a
16 legislative instrument.

17 *Definitions*

18 (12) In this section:

19 *interest in a share* has the meaning given by section ^47.

20 *transfer*, in relation to an interest in a share, includes the creation
21 of the interest.

22 *wholly-owned Commonwealth company* has the same meaning as
23 in the *Commonwealth Authorities and Companies Act 1997* (in
24 working out whether a company is covered by this definition,
25 ignore any sale-scheme hybrid securities issued by the company).

26 ^27 Sale-scheme hybrid securities

27 (1) For the purposes of this Act, a *sale-scheme hybrid security* is:

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- 1 (a) an interest-bearing security that is issued on the basis that it
2 will or may be redeemed in exchange for a share or shares in
3 NBN Co; or
4 (b) a share that is issued on the basis that it will or may be
5 redeemed in exchange for a share or shares in NBN Co; or
6 (c) any other security or financial product that is issued on the
7 basis that it will or may be redeemed in exchange for a share
8 or shares in NBN Co; or
9 (d) an option to acquire a share or shares in NBN Co; or
10 (e) an interest-bearing security that is issued on the basis that it
11 will or may be converted to a share or shares in NBN Co; or
12 (f) any other security or financial product that is issued on the
13 basis that it will or may be converted to a share or shares in
14 NBN Co; or
15 (g) an interest-bearing security that is issued on the basis that it
16 will or may be exchanged for a share or shares in NBN Co;
17 or
18 (h) any other security or financial product that is issued on the
19 basis that it will or may be exchanged for a share or shares in
20 NBN Co; or
21 (i) a security, or a financial product, that:
22 (i) is specified in a written declaration made by the Finance
23 Minister under this subparagraph; and
24 (ii) relates directly or indirectly to NBN Co.
25 (2) A security or financial product covered by a paragraph of
26 subsection (1) may (but need not) include a charge, pledge or lien.
27 (3) A security covered by paragraph (1)(a), (e) or (g) may be issued in
28 or outside Australia, and may be denominated in:
29 (a) Australian currency; or
30 (b) a currency other than Australian currency.
31 (4) A share covered by paragraph (1)(b) may be issued in or outside
32 Australia, and any rights or obligations may be denominated in:
33 (a) Australian currency; or
34 (b) a currency other than Australian currency.

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- 1 (5) A security or financial product covered by paragraph (1)(c), (f), (h)
2 or (i) may be issued in or outside Australia, and any rights or
3 obligations may be denominated in:
4 (a) Australian currency; or
5 (b) a currency other than Australian currency.
- 6 (6) An option covered by paragraph (1)(d) may be issued in or outside
7 Australia, and the exercise price may be denominated in:
8 (a) Australian currency; or
9 (b) a currency other than Australian currency.
- 10 (7) A declaration under subparagraph (1)(i)(i) is a legislative
11 instrument, but section 42 (disallowance) of the *Legislative*
12 *Instruments Act 2003* does not apply to the declaration.
- 13 (8) In this section:
14 *security* has the same meaning as in Chapter 7 of the *Corporations*
15 *Act 2001*.

16 **^28 Exemption from stamp duty—transfer by the Commonwealth** 17 **of its shares in NBN Co etc.**

- 18 (1) In this section:
19 *designated matter* means any of the following matters, where the
20 matter relates to the entering into or carrying out of an NBN Co
21 sale scheme:
22 (a) the transfer by the Commonwealth of:
23 (i) a share in NBN Co held by the Commonwealth; or
24 (ii) an interest in such a share;
25 (b) an agreement relating to a transfer covered by paragraph (a);
26 (c) the receipt of money by the Commonwealth, or by a person
27 acting on behalf of the Commonwealth, in respect of a
28 transfer covered by paragraph (a);
29 (d) the transfer by the sale-scheme trustee of:
30 (i) a share in NBN Co held by the trustee; or
31 (ii) an interest in such a share;

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- 1 where the transfer is in accordance with the sale-scheme trust
2 deed;
- 3 (e) an agreement relating to a transfer covered by paragraph (d);
4 (f) the receipt of money by the sale-scheme trustee or by a
5 person acting on behalf of the sale-scheme trustee, in respect
6 of a transfer covered by paragraph (d);
7 (g) the reduction of NBN Co's share capital;
8 (h) the cancellation of a particular parcel of shares in NBN Co
9 held by the Commonwealth;
10 (i) NBN Co buying back shares in itself;
11 (j) the issue of securities in NBN Co;
12 (k) the redemption of redeemable preference shares in NBN Co
13 held by the Commonwealth;
14 (l) the issue of sale-scheme hybrid securities;
15 (m) the receipt of money by the Commonwealth, or by a person
16 acting on behalf of the Commonwealth, in respect of the
17 issue of sale-scheme hybrid securities;
18 (n) the receipt of money by a hybrid-security issuer company, or
19 by a person acting on behalf of a hybrid-security issuer
20 company, in respect of the issue of sale-scheme hybrid
21 securities;
22 (o) the redemption, exchange or conversion of sale-scheme
23 hybrid securities;
24 (p) the transfer by a hybrid-security issuer company of a share in
25 NBN Co held by the company;
26 (q) the grant of a charge, pledge or lien (whether in connection
27 with sale-scheme hybrid securities or otherwise);
28 (r) an agreement relating to a matter covered by paragraph (c),
29 (f), (g), (h), (i), (j), (k), (l), (m), (n), (o), (p) or (q);
30 (s) an agreement of the kind known as a securities lending
31 arrangement, where the securities lending arrangement
32 relates to shares in NBN Co;
33 (t) any other matter that is specified in the regulations.

34 ***interest in a share*** has the meaning given by section ^47.

35 ***transfer***, in relation to an interest in a share, includes the creation
36 of the interest.

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- 1 (2) Stamp duty or other tax is not payable under a law of a State or
2 Territory in respect of:
3 (a) a designated matter; or
4 (b) anything done (including a transaction entered into or an
5 instrument or document made, executed, lodged or given)
6 because of, or for a purpose connected with or arising out of,
7 a designated matter.
- 8 (3) However, the rule in subsection (2) does not apply:
9 (a) in such circumstances as are specified in the regulations; or
10 (b) in relation to stamp duty, or other tax, of a kind specified in
11 the regulations; or
12 (c) in relation to stamp duty, or other tax, of a kind specified in
13 the regulations, in such circumstances as are specified in the
14 regulations.

15 **^29 Authorisation of borrowing—issue of sale-scheme hybrid** 16 **securities**

17 To the extent to which the issue of sale-scheme hybrid securities
18 under an NBN Co sale scheme involves a borrowing of money by
19 the Commonwealth, that borrowing is authorised by this section.

20 Note: Section 37 of the *Financial Management and Accountability Act 1997*
21 provides that an agreement for the borrowing of money by the
22 Commonwealth is of no effect unless the borrowing is authorised by
23 an Act.

24 **^30 Appropriation—costs incurred in connection with an NBN Co** 25 **sale scheme**

- 26 (1) The Consolidated Revenue Fund is appropriated to the extent
27 necessary for the purposes of the payment or discharge of the costs,
28 expenses and other obligations incurred by the Commonwealth in
29 connection with the formulation, entering into, or carrying out, of
30 an NBN Co sale scheme.
- 31 (2) The costs, expenses and obligations covered by subsection (1)
32 include (but are not limited to) the following:
33 (a) legal and accounting fees;
34 (b) costs of undertaking due diligence inquiries;

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- 1 (c) underwriting fees;
2 (d) costs associated with an offer document;
3 (e) marketing expenses;
4 (f) other administrative and logistical expenses;
5 (g) calls on indemnities granted by the Commonwealth;
6 (h) calls on guarantees given by the Commonwealth;
7 (i) obligations to make payments of amounts in relation to
8 sale-scheme hybrid securities issued by the Commonwealth
9 (for example, payments of interest).

10 **^31 Assistance given by NBN Co or the Board in connection with an**
11 **NBN Co sale scheme**

12 *Giving assistance on own initiative*

- 13 (1) NBN Co may, on its own initiative, assist the Commonwealth in
14 connection with the formulation, entering into, or carrying out, of
15 an NBN Co sale scheme.
- 16 (2) A member of the Board may, on the member's own initiative,
17 assist the Commonwealth in connection with the formulation,
18 entering into, or carrying out, of an NBN Co sale scheme.

19 *Giving assistance when requested by Communications Minister*
20 *and Finance Minister*

- 21 (3) NBN Co must, when requested in writing by the Communications
22 Minister and the Finance Minister to do so, assist the
23 Commonwealth in connection with the formulation, entering into,
24 or carrying out, of an NBN Co sale scheme. The assistance is to be
25 given within the period, and in the form and manner, specified in
26 the request.
- 27 (4) The Board must, when requested in writing by the
28 Communications Minister and the Finance Minister to do so, assist
29 the Commonwealth in connection with the formulation, entering
30 into, or carrying out, of an NBN Co sale scheme. The assistance is
31 to be given within the period, and in the form and manner,
32 specified in the request.

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1 *Directions of Communications Minister and Finance Minister*

2 (5) The Communications Minister and the Finance Minister may, by
3 written notice given to NBN Co, give directions to NBN Co about
4 the exercise of NBN Co's powers under subsection (1). NBN Co
5 must comply with the direction.

6 (6) The Communications Minister and the Finance Minister may, by
7 written notice given to a member of the Board, give directions to
8 the member about the exercise of the member's powers under
9 subsection (2). The member must comply with the direction.

10 *Immunity*

11 (7) To avoid doubt, the giving of assistance as mentioned in
12 subsection (1), (2), (3) or (4), the making of a request under
13 subsection (3) or (4), or the giving of a direction under
14 subsection (5) or (6), does not result in a contravention of, or give
15 rise to a liability or remedy under:

- 16 (a) a provision of the *Corporations Act 2001*; or
17 (b) if NBN Co is a listed disclosing entity—the listing rules of a
18 listing market in relation to NBN Co; or
19 (c) a rule of common law or equity (other than a rule of
20 administrative law).

21 *Consequences of a contravention*

22 (8) A contravention of subsection (3), (4), (5) or (6) is not an offence.
23 However, a contravention of subsection (3), (4), (5) or (6) is a
24 ground for obtaining an injunction under Part 6.

25 **^32 Giving of assistance—ancillary provisions**

26 (1) The assistance mentioned in subsection ^31(1), (2), (3) or (4) may
27 take the form of:

- 28 (a) the giving of information; or
29 (b) the giving of financial assistance (within the meaning of
30 Part 2J.3 of the *Corporations Act 2001*); or
31 (c) the giving of a financial benefit to a related party (within the
32 meaning of Chapter 2E of the *Corporations Act 2001*); or

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- 1 (d) the provision, by NBN Co's directors or employees, of
2 facilities, information and other assistance in connection with
3 the conduct of:
4 (i) a due diligence procedure or a similar process; or
5 (ii) a market briefing or a similar process.
- 6 (2) Subsection (1) does not, by implication, limit the forms in which
7 assistance may be given.
- 8 (3) Section ^31 does not, by implication, limit any rights that are
9 conferred on shareholders by other laws.
- 10 (4) Section ^31 does not authorise the imposition of taxation (within
11 the meaning of section 55 of the Constitution).
- 12 (5) Section ^31 does not, by implication, limit:
13 (a) the executive power of the Commonwealth to enter into an
14 agreement; or
15 (b) the capacity of NBN Co, or of a member of the Board, to
16 enter into an agreement with the Commonwealth.
- 17 Note: This ensures, for example, that the Commonwealth can enter into a
18 co-operation agreement with NBN Co or with a member of the Board.

19 **^33 Reimbursement of expenses incurred in giving assistance**

- 20 (1) This section applies if:
21 (a) assistance is given under section ^31; and
22 (b) NBN Co or a member of the Board incurs expenses in
23 relation to the giving of that assistance.
- 24 (2) The Finance Minister may authorise the payment by the
25 Commonwealth to NBN Co, or to the member, as the case may be,
26 of an amount equal to so much of those expenses as the Finance
27 Minister considers reasonable.
- 28 (3) The Consolidated Revenue Fund is appropriated for the purposes
29 of making payments under subsection (2).
- 30 (4) This section does not, by implication, limit the executive power of
31 the Commonwealth to make a payment to NBN Co or to a member
32 of the Board.

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1 **^34 Commonwealth to be bound by Chapters 6CA, 6D and 7 of the**
2 ***Corporations Act 2001***

3 (1) Despite subsection 5A(4) of the *Corporations Act 2001* (but
4 subject to subsection 5A(5) of that Act), Chapters 6CA, 6D and 7
5 of the *Corporations Act 2001* bind the Crown in right of the
6 Commonwealth to the extent to which those Chapters deal with the
7 formulation, entering into, or carrying out, of an NBN Co sale
8 scheme.

9 (2) Subsection (1) has effect despite anything in the *Corporations Act*
10 *2001*.

11 (3) For the purposes of subsection (1), if Chapter 6CA, 6D or 7 of the
12 *Corporations Act 2001* is repealed and replaced by another
13 provision of that Act that deals with fundraising or securities
14 regulation, the reference in that subsection to that Chapter of that
15 Act is to be read as a reference to the replacement provision.

16 *Chinese wall arrangements*

17 (4) The Commonwealth does not contravene subsection 1043A(1) of
18 the *Corporations Act 2001* by entering into a transaction or
19 agreement at any time in relation to:

- 20 (a) shares in NBN Co; or
21 (b) sale-scheme hybrid securities; or
22 (c) an NBN Co sale scheme;

23 merely because of information in the possession of an officer or
24 employee of the Commonwealth if:

25 (d) the decision to enter into the transaction or agreement was
26 taken on its behalf by a person or persons other than that
27 officer or employee; and

28 (e) it had in operation at that time arrangements that could
29 reasonably be expected to ensure that:

30 (i) the information was not communicated to the person or
31 persons who made the decision; and

32 (ii) no advice with respect to the transaction or agreement
33 was given to that person or any of those persons by a
34 person in possession of the information; and

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1 (f) the information was not so communicated and no such advice
2 was given.

3 (5) A reference in subsection (4) to an *officer* of the Commonwealth
4 includes a reference to the holder of an office under a law of the
5 Commonwealth.

6 ^35 Reduction of NBN Co's share capital

- 7 (1) This section applies to a reduction of NBN Co's share capital if:
8 (a) the reduction relates to the formulation, entering into, or
9 carrying out, of an NBN Co sale scheme; and
10 (b) the reduction is part of an overall arrangement or plan that
11 involves:
12 (i) the replacement of a particular type of share with one or
13 more other types of share; and
14 (ii) the replacement of the reduced share capital.
- 15 (2) Notice of the reduction does not have to be given to NBN Co's
16 creditors.
- 17 (3) NBN Co's creditors are not entitled to object to the reduction.
- 18 (4) The reduction does not have to be confirmed by a court.
- 19 (5) Subsections (2), (3) and (4) have effect despite anything in
20 Part 2J.1 of the *Corporations Act 2001*.

21 ^36 Alterations of NBN Co's constitution—notice to debenture 22 holders

- 23 (1) This section applies to an alteration of NBN Co's constitution if
24 the alteration relates to the formulation, entering into, or carrying
25 out, of an NBN Co sale scheme.
- 26 (2) A notice of a general meeting specifying an intention to propose a
27 resolution for the alteration does not have to be given to:
28 (a) trustees for debenture holders; or
29 (b) debenture holders.
- 30 (3) A court is not empowered to cancel the alteration.

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- 1 (4) Subsections (2) and (3) have effect despite anything in the
2 *Corporations Act 2001*.

3 **^37 Alteration of NBN Co's constitution—Ministerial instrument**

- 4 (1) The Communications Minister and the Finance Minister may, by
5 legislative instrument, alter NBN Co's constitution if:
6 (a) the alteration relates to the formulation, entering into, or
7 carrying out, of an NBN Co sale scheme; and
8 (b) the effect of the alteration is to:
9 (i) remove, restrict or limit any rights, privileges or
10 immunities of the Commonwealth, the Communications
11 Minister or the Finance Minister; or
12 (ii) remove a provision that prohibits an act or thing without
13 the consent of the Commonwealth; or
14 (iii) in the case of a provision that prohibits an act or thing
15 without the consent of the Commonwealth—remove the
16 requirement to obtain that consent; or
17 (iv) remove a provision that prohibits an act or thing without
18 the consent of the Communications Minister and the
19 Finance Minister; or
20 (v) in the case of a provision that prohibits an act or thing
21 without the consent of the Communications Minister
22 and the Finance Minister—remove the requirement to
23 obtain that consent; or
24 (vi) remove a provision that prohibits an act or thing unless
25 the Commonwealth directs otherwise; or
26 (vii) in the case of a provision that prohibits an act or thing
27 unless the Commonwealth directs otherwise—remove
28 that power of direction; or
29 (viii) remove a provision that prohibits an act or thing unless
30 the Communications Minister and the Finance Minister
31 direct otherwise; or
32 (ix) in the case of a provision that prohibits an act or thing
33 unless the Communications Minister and the Finance
34 Minister direct otherwise—remove that power of
35 direction.

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- 1 (2) Before making an instrument under subsection (1), the
2 Communications Minister and the Finance Minister must consult
3 the members of the Board.

4 *Immunity*

- 5 (3) To avoid doubt, the making of an instrument under subsection (1)
6 does not result in a contravention of, or give rise to a liability or
7 remedy under:
8 (a) a provision of the *Corporations Act 2001*; or
9 (b) if NBN Co is a listed disclosing entity—the listing rules of a
10 listing market in relation to NBN Co; or
11 (c) a rule of common law or equity (other than a rule of
12 administrative law).

13 *Other powers not limited*

- 14 (4) If NBN Co's constitution is altered by an instrument under
15 subsection (1), this Act does not prevent the further alteration of
16 that constitution.

17 **^38 Use by the Commonwealth of information obtained from NBN**
18 **Co or the Board**

- 19 (1) This section applies to information obtained under section ^31.
20 (2) The Commonwealth, or an associated person, may use the
21 information for a purpose in connection with the formulation,
22 entering into, or carrying out, of an NBN Co sale scheme.
23 (3) The Commonwealth, or an associated person, may disclose the
24 information for a purpose in connection with the formulation,
25 entering into, or carrying out, of an NBN Co sale scheme.
26 (4) If subsection (2) or (3) does not apply, the Commonwealth, or an
27 associated person, may use or disclose the information for a
28 purpose in connection with the Commonwealth's capacity as a
29 shareholder in NBN Co, so long as the use or disclosure does not
30 involve giving the information to a person who is not an associated
31 person.

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- 1 (5) To avoid doubt, the use or disclosure of information as mentioned
2 in subsection (2), (3) or (4) does not result in a contravention of, or
3 give rise to a liability or remedy under:
4 (a) a provision of the *Corporations Act 2001*; or
5 (b) if NBN Co is a listed disclosing entity—the listing rules of a
6 listing market in relation to NBN Co; or
7 (c) a rule of common law or equity (other than a rule of
8 administrative law).
- 9 (6) In this section:
- 10 ***associated person*** means:
11 (a) a Minister; or
12 (b) an individual who holds an office under, or is employed by,
13 the Commonwealth; or
14 (c) a person appointed or engaged under the *Public Service Act*
15 *1999*; or
16 (d) a person who performs services for or on behalf of the
17 Commonwealth in connection with:
18 (i) the formulation, entering into, or carrying out, of an
19 NBN Co sale scheme; or
20 (ii) the Commonwealth's capacity as a shareholder in NBN
21 Co.

^39 Agreements relating to the protection of information obtained from NBN Co or the Board

- 22 (1) The Finance Minister may, on behalf of the Commonwealth, enter
23 into an agreement with NBN Co, or with one or more members of
24 the Board, relating to the protection of information:
25 (a) that is obtained under section ^31; and
26 (b) the publication of which might be expected to prejudice
27 substantially NBN Co's commercial interests.
28
29 (2) The agreement may be enforced as if it were a contract.
- 30 (3) This section does not, by implication, limit the executive power of
31 the Commonwealth to enter into agreements.
32

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Section T^40T

1 **^40 NBN Co's obligations to disclose information**

2 To avoid doubt, the mere fact that particular information was
3 requested, required or given under section ^31 is not a ground on
4 which NBN Co can be required to disclose or notify that, or any
5 other, information under:

- 6 (a) a provision of the *Corporations Act 2001*; or
7 (b) if NBN Co is a listed disclosing entity—the listing rules of a
8 listing market in relation to NBN Co.

EXPOSURE DRAFT

T T T

TPart 3T Ownership and control of NBN CoT

TDivision 3T Private ownership and control of NBN CoT

Section T^41T

1

2 **Division 3—Private ownership and control of NBN Co**

3 **^41 Unacceptable private ownership or control situation**

4 (1) For the purposes of this Act, an *unacceptable private ownership or*
5 *control situation*, in relation to NBN Co, has the meaning given by
6 the regulations.

7 (2) Regulations made for the purposes of subsection (1) may make
8 provision in relation to a matter by conferring a power to make a
9 decision of an administrative character on the ACCC.

10 (3) Before the Governor-General makes a regulation for the purposes
11 of subsection (1), the Communications Minister must consult the
12 ACCC.

13 **^42 Prohibition of unacceptable private ownership or control** 14 **situation**

15 (1) NBN Co must take all reasonable steps to ensure that an
16 unacceptable private ownership or control situation does not exist
17 in relation to NBN Co.

18 (2) NBN Co commits an offence if:
19 (a) NBN Co engages in conduct; and
20 (b) NBN Co's conduct contravenes subsection (1).

21 Penalty for contravention of this subsection: 500 penalty units.

22 **^43 Remedial orders**

23 (1) If an unacceptable private ownership or control situation exists in
24 relation to NBN Co, the Federal Court may, on application by the
25 Communications Minister, the ACCC or NBN Co, make such
26 orders as the court considers appropriate for the purpose of
27 ensuring that that situation ceases to exist.

28 (2) The Federal Court's orders include:
29 (a) an order directing the disposal of shares; or

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T T TT
Ownership and control of NBN CoT TPart 3T
Private ownership and control of NBN CoT TDivision 3T

Section T^44T

- 1 (b) an order restraining the exercise of any rights attached to
2 shares; or
3 (c) an order prohibiting or deferring the payment of any sums
4 due to a person in respect of shares held by the person; or
5 (d) an order that any exercise of rights attached to shares be
6 disregarded.
- 7 (3) Subsection (2) does not, by implication, limit subsection (1).
- 8 (4) In addition to the Federal Court's powers under subsections (1) and
9 (2), the court:
- 10 (a) has power, for the purpose of securing compliance with any
11 other order made under this section, to make an order
12 directing any person to do or refrain from doing a specified
13 act; and
14 (b) has power to make an order containing such ancillary or
15 consequential provisions as the court thinks just.
- 16 (5) The Federal Court may, before making an order under this section,
17 direct that notice of the application be given to such persons as it
18 thinks fit or be published in such manner as it thinks fit, or both.
- 19 (6) The Federal Court may, by order, rescind, vary or discharge an
20 order made by it under this section or suspend the operation of
21 such an order.

22 **^44 Record-keeping and giving of information**

- 23 (1) The regulations may make provision for, or in relation to, requiring
24 a person to do any or all of the following:
- 25 (a) keep and retain records, where the records are relevant to an
26 NBN Co ownership or control matter;
- 27 (b) give information to the Communications Minister that is
28 relevant to an NBN Co ownership or control matter;
- 29 (c) give information to the ACCC that is relevant to an NBN Co
30 ownership or control matter;
- 31 (d) give information to NBN Co that is relevant to an NBN Co
32 ownership or control matter.

33 Note: For *NBN Co ownership or control matter*, see subsection (6).

EXPOSURE DRAFT

T T T T

TPart 3T Ownership and control of NBN CoT

TDivision 3T Private ownership and control of NBN CoT

Section T^44T

1

Statutory declarations

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- (2) The regulations may provide that information given in accordance with a requirement covered by paragraph (1)(b), (c) or (d) must be verified by statutory declaration.

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No self-incrimination

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- (3) An individual is not required to give information in accordance with a requirement covered by paragraph (1)(b), (c) or (d) if the information might tend to incriminate the individual or expose the individual to a penalty.

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Offence

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- (4) A person commits an offence if:

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(a) the person engages in conduct; and

13

(b) the person's conduct contravenes subsection (1).

14

Penalty: 50 penalty units.

15

Regulations may confer discretionary powers on the Communications Minister or the ACCC

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- (5) Regulations made for the purposes of this section may make provision for, or in relation to, a matter by conferring a power on the Communications Minister or the ACCC. For example, the regulations could provide that the Communications Minister may, by written notice given to NBN Co, require NBN Co to give the Communications Minister, within the period and in the manner specified in the notice, specified information about an NBN Co ownership or control matter.

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NBN Co ownership or control matter

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- (6) For the purposes of this section, an ***NBN Co ownership or control matter*** means a matter relevant to:

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(a) an unacceptable private ownership or control situation; or

29

(b) the question of whether an unacceptable private ownership or control situation has existed, is in existence, or will exist.

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EXPOSURE DRAFT

T T T T
Ownership and control of NBN CoT TPart 3T
Private ownership and control of NBN CoT TDivision 3T

Section T^45T

1 *Other information-gathering powers not limited*

2 (7) This section does not limit:

3 (a) Division 6 of Part XIB of the *Trade Practices Act 1974*; or

4 (b) section 155 of that Act.

5 **^45 Validity of acts done in contravention of this Division**

6 An act is not invalidated by the fact that it constitutes an offence
7 against this Division.

8 **^46 Acquisition of property**

9 (1) The Federal Court must not make an order under this Division if:

10 (a) the order would result in the acquisition of property from a
11 person otherwise than on just terms; and

12 (b) the order would be invalid because of paragraph 51(xxxi) of
13 the Constitution.

14 (2) In this section:

15 *acquisition of property* has the same meaning as in paragraph
16 51(xxxi) of the Constitution.

17 *just terms* has the same meaning as in paragraph 51(xxxi) of the
18 Constitution.

EXPOSURE DRAFT

T T T T

T Part 3 T Ownership and control of NBN Co T

T Division 4 T General provisions T

Section T^47 T

1

2 **Division 4—General provisions**

3 **^47 Interest in a share**

4 (1) For the purposes of this Part, a person holds an *interest in a share*
5 if the person has any legal or equitable interest in the share.

6 (2) For the purposes of this Part, a person is taken to hold an *interest*
7 *in a share* if:

8 (a) the person has entered into a contract to purchase the share;
9 or

10 (b) the person has a right (otherwise than because of having an
11 interest under a trust) to have the share transferred to the
12 person or to the person's order (whether the right is
13 exercisable presently or in the future and whether or not on
14 the fulfilment of a condition); or

15 (c) the person has a right to acquire the share, or an interest in
16 the share, under an option (whether the right is exercisable
17 presently or in the future and whether or not on the fulfilment
18 of a condition); or

19 (d) the person is otherwise entitled to acquire the share or an
20 interest in the share; or

21 (e) the person is entitled (otherwise than because of having been
22 appointed as a proxy or representative to vote at a meeting of
23 members of the company or of a class of its members) to
24 exercise or control the exercise of a right attached to the
25 share.

26 (3) Subsection (2) does not, by implication, limit subsection (1).

27 (4) For the purposes of this Part, a person is taken to hold an *interest*
28 *in a share* even if the person holds the interest in the share jointly
29 with another person.

30 (5) For the purpose of determining whether a person holds an interest
31 in a share, it is immaterial that the interest cannot be related to a
32 particular share.

EXPOSURE DRAFT

T T TT
Ownership and control of NBN CoT TPart 3T
General provisionsT TDivision 4T

Section T^48T

- 1 (6) An interest in a share is not to be disregarded only because of:
2 (a) its remoteness; or
3 (b) the manner in which it arose; or
4 (c) the fact that the exercise of a right conferred by the interest
5 is, or is capable of being made, subject to restraint or
6 restriction.
- 7 (7) For the purposes of this section, a person is *entitled to acquire* a
8 share if the person is absolutely or contingently entitled to acquire
9 it, whether because of any constituent document of a company, the
10 exercise of any right or option or for any other reason.

11 **^48 Extra-territorial application**

12 This Part applies both within and outside Australia.

13 **^49 Provision to attract the corporations power and the** 14 **communications power**

- 15 This Part does not apply to NBN Co unless NBN Co:
16 (a) is a corporation to which paragraph 51(xx) of the
17 Constitution applies; or
18 (b) carries on, proposes to carry on, or has the object of carrying
19 on, a business that consists of or includes the supply of a
20 carriage service.

EXPOSURE DRAFT

T T T T

TPart 4T NBN Co's reporting obligationsT

T T T T

Section T^50T

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Part 4—NBN Co's reporting obligations

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^50 Simplified outline

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The following is a simplified outline of this Part:

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- This Part imposes reporting obligations on NBN Co, so long as NBN Co is not a wholly-owned Commonwealth company.
- This Part ceases to have effect when the Commonwealth ceases to hold a majority of the voting shares in NBN Co.

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^51 Application of this Part

11

This Part applies to:

12

(a) NBN Co; or

13

(b) an NBN Co subsidiary; or

14

(c) the members of the Board;

15

if NBN Co is not a wholly-owned Commonwealth company (within the meaning of the *Commonwealth Authorities and Companies Act 1997*).

16

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^52 Financial statements

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(1) The Communications Minister and the Finance Minister may give NBN Co a written direction requiring NBN Co to give the Communications Minister and the Finance Minister a specified financial statement or statements for a specified period or for each specified period.

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(2) NBN Co must comply with a direction under subsection (1).

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(3) The following are examples of periods that may be specified under subsection (1):

(a) the first 3 months of each financial year;

(b) the first 6 months of each financial year;

EXPOSURE DRAFT

Section T^53T

- 1 (c) the first 9 months of each financial year;
2 (d) each financial year.
- 3 (4) The members of the Board must:
4 (a) prepare each statement in accordance with written guidelines
5 given to the Board by the Communications Minister and the
6 Finance Minister; and
7 (b) give the statement to the Communications Minister and the
8 Finance Minister within 2 months after the end of the period
9 to which the statement relates.
- 10 (5) The Communications Minister and the Finance Minister may grant
11 extensions of time in special circumstances.
- 12 (6) A guideline given under paragraph (4)(a) is not a legislative
13 instrument.
- 14 (7) In this section:
15 *financial statements* includes financial statements for the group
16 consisting of:
17 (a) NBN Co; and
18 (b) NBN Co subsidiaries.

19 **^53 Communications Minister and the Finance Minister to be**
20 **notified of significant events**

- 21 (1) If NBN Co, or any NBN Co subsidiary, proposes to do any of the
22 following things, the members of the Board must immediately give
23 the Communications Minister and the Finance Minister written
24 particulars of the proposal:
25 (a) form a company or participate in the formation of a
26 company;
27 (b) participate in a significant partnership, trust, unincorporated
28 joint venture or similar arrangement;
29 (c) acquire or dispose of a significant shareholding in a
30 company;
31 (d) acquire or dispose of a significant business;
32 (e) commence or cease a significant business activity;

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T T T T

T Part 4 T NBN Co's reporting obligations T

T T T T

Section T^54T

- 1 (f) make a significant change in the nature or extent of its
2 interests in a partnership, trust, unincorporated joint venture
3 or similar arrangement.
- 4 (2) The Communications Minister and the Finance Minister may, by
5 writing, exempt the members of the Board from the requirement to
6 notify matters covered by paragraph (1)(a). The exemption may be
7 granted subject to conditions.
- 8 (3) The Communications Minister and the Finance Minister may give
9 written guidelines to the Board that are to be used by the members
10 in deciding whether a proposal is covered by paragraph (1)(b), (c),
11 (d), (e) or (f).
- 12 (4) A guideline given under subsection (3) is not a legislative
13 instrument.

14 **^54 Keeping the Communications Minister and the Finance** 15 **Minister informed**

- 16 (1) The members of the Board must:
17 (a) keep the Communications Minister and the Finance Minister
18 informed of the operations of NBN Co and NBN Co
19 subsidiaries; and
20 (b) give the Communications Minister such reports, documents
21 and information in relation to those operations as the
22 Communications Minister requires; and
23 (c) give the Finance Minister such reports, documents and
24 information in relation to those operations as the Finance
25 Minister requires.
- 26 (2) The members of the Board must comply with requirements under
27 paragraphs (1)(b) and (c) within the time limits set by the Minister
28 concerned.

29 **^55 Corporate plan for NBN Co**

- 30 (1) The members of the Board must prepare a corporate plan at least
31 once a year and give it to the Communications Minister and the
32 Finance Minister.

EXPOSURE DRAFT

- 1 (2) The plan must cover a period of at least 3 years and not more than
2 5 years.
- 3 (3) If NBN Co has subsidiaries, the plan must cover both NBN Co and
4 its subsidiaries. In particular, for each subsidiary the plan must
5 include details of the matters in subsection (6), so far as they are
6 applicable.
- 7 (4) The members of the Board must keep the Communications
8 Minister and the Finance Minister informed about changes to the
9 plan.
- 10 (5) If the Board becomes aware that a particular matter may affect the
11 achievement of the plan, the Board must give the Communications
12 Minister and the Finance Minister a written notice:
13 (a) setting out particulars of the matter; and
14 (b) explaining the effect of the matter on the achievement of the
15 plan.
- 16 (6) The plan must include details of the following matters (so far as
17 they are applicable):
18 (a) the objectives of the company;
19 (b) assumptions about the business environment in which the
20 company operates;
21 (c) the business strategies of the company;
22 (d) the investment and financing programs of the company,
23 including strategies for managing financial risk;
24 (e) financial targets and projections for the company;
25 (f) the dividend policy of the company;
26 (g) non-financial performance measures for the company;
27 (h) community service obligations of the company;
28 (i) review of performance against previous corporate plans and
29 targets;
30 (j) analysis of factors likely to affect achievement of targets or
31 create significant financial risk for the company or for the
32 Commonwealth;
33 (k) price control and quality control strategies for goods or
34 services supplied by the company under a monopoly;
35 (l) human resource strategies and industrial relations strategies.
-

EXPOSURE DRAFT

T T T T

T Part 4 T NBN Co's reporting obligations T

T T T T

Section T^56 T

- 1 (7) The plan must also cover any other matters required by the
2 Communications Minister and the Finance Minister (which may
3 include further details about the matters in subsection (6)).

4 ^56 Consequences of contraventions of this Part

5 A contravention of this Part is not an offence. However, a
6 contravention of this Part is a ground for obtaining an injunction
7 under Part 6.

8 ^57 This Part has effect despite the *Corporations Act 2001* etc.

9 To avoid doubt, the operation of this Part does not result in a
10 contravention of, or give rise to a liability or remedy under:

- 11 (a) a provision of the *Corporations Act 2001*; or
12 (b) a rule of common law or equity (other than a rule of
13 administrative law).

14 ^58 Provision to attract the corporations power and the 15 communications power

16 This Part does not apply to NBN Co unless NBN Co:

- 17 (a) is a corporation to which paragraph 51(xx) of the
18 Constitution applies; or
19 (b) carries on, proposes to carry on, or has the object of carrying
20 on, a business that consists of or includes the supply of a
21 carriage service.

22 ^59 When this Part ceases to have effect

- 23 (1) This Part (other than this section) ceases to have effect at the end
24 of the majority interest sale day for NBN Co.

25 *Majority interest sale day*

- 26 (2) If, in the opinion of the Communications Minister, a particular day
27 is the first day on which a majority of the voting shares in NBN Co
28 are held by a person, or persons, other than the Commonwealth, the
29 Communications Minister must, by written instrument, declare the
30 day to be the *majority interest sale day* for NBN Co.

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1 (3) The declaration under subsection (2) is a legislative instrument, but
2 section 42 (disallowance) of the *Legislative Instruments Act 2003*
3 does not apply to the declaration.

4 (4) The majority interest sale day for NBN Co may be earlier than the
5 day on which the declaration under subsection (2) is registered
6 under the *Legislative Instruments Act 2003*.

7 *Securities lending arrangements*

8 (5) For the purposes of this section, if, under an agreement of the kind
9 known as a securities lending arrangement:

10 (a) at a particular time (the *disposal time*), the Commonwealth
11 disposed of a share in NBN Co (the *borrowed share*) to
12 another person (the *borrower*); and

13 (b) the Commonwealth may come under an obligation to:

14 (i) re-acquire the borrowed share from the borrower at a
15 later time; or

16 (ii) acquire an identical share from the borrower at a later
17 time;

18 the borrowed share is taken to be held by the Commonwealth
19 during the period:

20 (c) beginning at the disposal time; and

21 (d) ending when the obligation mentioned in paragraph (b) is
22 discharged or can no longer arise.

23 *Hybrid-security issuer company*

24 (6) For the purposes of this section, the *Commonwealth* includes a
25 hybrid-security issuer company specified in a written declaration
26 made by the Finance Minister under this subsection.

27 (7) A declaration under subsection (6) is not a legislative instrument.

EXPOSURE DRAFT

T T T T
T Part 5 T Anti-avoidance T
T T T T

Section T^60T

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Part 5—Anti-avoidance

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^60 Anti-avoidance

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(1) An NBN corporation must not, either alone or together with one or more other persons, enter into, begin to carry out or carry out a scheme if it would be concluded that the NBN corporation did so for the sole or dominant purpose of avoiding the application of any provision of this Act in relation to:

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(a) the NBN corporation; or

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(b) any other NBN corporation.

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(2) A contravention of subsection (1) is not an offence. However, a contravention of subsection (1) is a ground for obtaining an injunction under Part 6.

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(3) A contravention of subsection (1) does not affect the validity of any transaction.

16

17

(4) In this section:

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scheme means:

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(a) any agreement, arrangement, understanding, promise or undertaking, whether express or implied; and

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21

(b) any scheme, plan, proposal, action, course of action or course of conduct, whether unilateral or otherwise.

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Part 6—Injunctions

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^61 Simplified outline

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The following is a simplified outline of this Part:

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- The Federal Court may grant injunctions in relation to contraventions of this Act.

^62 Injunctions

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Performance injunctions

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(1) If:

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- (a) a person has refused or failed, or is refusing or failing, or is proposing to refuse or fail, to do an act or thing; and
- (b) the refusal or failure was, is or would be a contravention of this Act;

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the Federal Court may, on the application of the Communications Minister or the Finance Minister, grant an injunction requiring the person to do that act or thing.

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Restraining injunctions

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- (2) If a person has engaged, is engaging or is proposing to engage, in any conduct in contravention of this Act, the Federal Court may, on the application of the Communications Minister or the Finance Minister, grant an injunction:
 - (a) restraining the person from engaging in the conduct; and
 - (b) if, in the Court's opinion, it is desirable to do so—requiring the person to do something.

EXPOSURE DRAFT

T T T T
T Part 6 T Injunctions T
T T T T

Section T^63T

1 **^63 Interim injunctions**

2 *Grant of interim injunction*

3 (1) If an application is made to the Federal Court for an injunction
4 under subsection ^62(2), the Court may, before considering the
5 application, grant an interim injunction restraining a person from
6 engaging in conduct of a kind referred to in that subsection.

7 *No undertakings as to damages*

8 (2) The Federal Court is not to require the Communications Minister
9 or the Finance Minister, as a condition of granting an interim
10 injunction, to give any undertakings as to damages.

11 **^64 Discharge etc. of injunctions**

12 The Federal Court may discharge or vary an injunction granted
13 under this Part.

14 **^65 Certain limits on granting injunctions not to apply**

15 *Restraining injunctions*

16 (1) The power of the Federal Court under this Part to grant an
17 injunction restraining a person from engaging in conduct of a
18 particular kind may be exercised:
19 (a) if the Court is satisfied that the person has engaged in
20 conduct of that kind—whether or not it appears to the Court
21 that the person intends to engage again, or to continue to
22 engage, in conduct of that kind; or
23 (b) if it appears to the Court that, if an injunction is not granted,
24 it is likely that the person will engage in conduct of that
25 kind—whether or not the person has previously engaged in
26 conduct of that kind.

27 *Performance injunctions*

28 (2) The power of the Federal Court to grant an injunction requiring a
29 person to do an act or thing may be exercised:

EXPOSURE DRAFT

T T TT
InjunctionsT TPart 6T
T T TT

Section T^66T

- 1 (a) if the Court is satisfied that the person has refused or failed to
2 do that act or thing—whether or not it appears to the Court
3 that the person intends to refuse or fail again, or to continue
4 to refuse or fail, to do that act or thing; or
5 (b) if it appears to the Court that, if an injunction is not granted,
6 it is likely that the person will refuse or fail to do that act or
7 thing—whether or not the person has previously refused or
8 failed to do that act or thing.

9 **^66 Other powers of the Federal Court unaffected**

10 The powers conferred on the Federal Court under this Part are in
11 addition to, and not instead of, any other powers of the Court,
12 whether conferred by this Act or otherwise.

EXPOSURE DRAFT

T T T T
T Part 7 T Miscellaneous T
T T T T

Section T^67T

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Part 7—Miscellaneous

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^67 NBN Co is not a public authority

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NBN Co is taken for the purposes of the laws of the Commonwealth, of a State or of a Territory:

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(a) not to have been incorporated or established for a public purpose or for a purpose of the Commonwealth; and

8

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(b) not to be a public authority or an instrumentality or agency of the Crown (however described); and

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11

(c) not to be entitled to any immunity or privilege of the Commonwealth;

12

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except so far as express provision is made by this Act or any other law of the Commonwealth, or by a law of a State or of a Territory, as the case may be.

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^68 Public Works Committee Act

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The *Public Works Committee Act 1969* does not apply to an NBN corporation.

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^69 Winding-up of NBN Co not prevented by this Act

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This Act does not, by implication, prevent NBN Co being wound up in accordance with the *Corporations Act 2001*.

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^70 Rights of NBN Co's shareholders, debenture holders and creditors to be subject to this Act

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24
25

The rights of NBN Co's shareholders, debenture holders and creditors are subject to this Act.

26

^71 Delegation

27

(1) The Communications Minister may, by writing, delegate to:

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(a) the Secretary of the Department; or

EXPOSURE DRAFT

T T TT
Miscellaneous T T Part 7 T
T T TT

Section T^72T

- 1 (b) an SES employee, or acting SES employee, in the
2 Department;
3 all or any of the Communications Minister's powers and functions
4 under this Act (other than section ^22).
- 5 (2) The Finance Minister may, by writing, delegate to:
6 (a) the Secretary of the Department of Finance; or
7 (b) an SES employee, or acting SES employee, in the
8 Department of Finance;
9 all or any of the Finance Minister's powers and functions under
10 this Act (other than subsection ^24(3) or section ^25).

11 ^72 Compensation for acquisition of property

- 12 (1) If the operation of this Act or the regulations would result in an
13 acquisition of property from a person otherwise than on just terms,
14 the Commonwealth is liable to pay a reasonable amount of
15 compensation to the person.
- 16 (2) If the Commonwealth and the person do not agree on the amount
17 of the compensation, the person may institute proceedings in the
18 Federal Court for the recovery from the Commonwealth of such
19 reasonable amount of compensation as the Court determines.
- 20 (3) In this section:
- 21 *acquisition of property* has the same meaning as in paragraph
22 51(xxxi) of the Constitution.
- 23 *just terms* has the same meaning as in paragraph 51(xxxi) of the
24 Constitution.

25 ^73 Regulations

- 26 The Governor-General may make regulations prescribing matters:
27 (a) required or permitted by this Act to be prescribed; or
28 (b) necessary or convenient to be prescribed for carrying out or
29 giving effect to this Act.