

AUSTAR United Communications Limited

**Response To National Broadband Network:
Regulatory Reform for 21st Century Broadband**



3 June 2009

INTRODUCTION

AUSTAR United Communications Limited (AUSTAR) is one of regional Australia's leading subscription television providers, with more than 680,000 homes, or over 2.3 million Regional Australians, enjoying our digital television service. Internet and mobile telephony complete AUSTAR's regional product offering. Competitive access to broadband infrastructure remains a critical issue for the future productivity of Australia, and particularly within AUSTAR's regional footprint. The National Broadband Network (**NBN**) will have truly achieved the Australian government's visionary goals if its ultimate outcome is the addressing of underserved regions, alleviation of bottleneck services and the facilitation of a competitive and innovative retail environment, enabling the benefits of superfast broadband access to be enjoyed by all Australians.

AUSTAR welcomes the Australian Government's recent announcement that it will invest up to \$43 billion to establish a National Broadband Network company (**NBN Co**) to build and operate infrastructure for the delivery of broadband throughout Australia. We fully support the Government's vision and welcome the opportunity to respond to the discussion paper "National Broadband Network: Regulatory Reform for the 21st Century".

We support the Government's proposal to establish the new National Broadband Network with at least 10% of Australian homes to be connected with next generation wireless and satellite technologies (in addition to the up to 90% of FTTP coverage) and we commend the Government's recognition that wireless and fixed line communications are complementary. Wireless services are the most efficient and economical solution to the provision of broadband access infrastructure in regional and rural areas of Australia. Indeed, we believe there is merit in the Government considering, through the upcoming implementation study, whether the 90%/10% split of FTTP to wireless should be weighted further in favour of wireless once detailed network design analysis has been undertaken. Through our own analysis, having developed detailed business case plans for the deployment of wireless broadband networks in a number of regional areas of Australia, we believe that wireless is likely to be the most appropriate, sustainable and cost effective technology for more than 10% of Australian homes. We strongly support an approach where the most suitable technology for the NBN is selected on an area by area basis, and the technology selection itself does not need to be exclusive. As wireless is

able to be deployed far quicker than any fixed technology it offers a strategic, economic and immediate interim broadband solution for those regional areas which are not likely to be served by a fibre solution for some years to come. In the long term, wireless services offering mobility and flexibility, and fixed products offering high speeds will coexist as complementary networks which together meet our next generation connectivity needs. In this context, a wireless network that is either complementary to fibre or capable of operating on a standalone basis will be a valuable asset for NBN Co to develop.

We also welcome the Government's clear affirmation of its ongoing commitment to regional and remote areas of Australia. As a significant provider of services to regional and rural Australia alone, we fully support the Government's decision to extend the NBN proposal from 98% to 100% of the population.

By way of further background, at Appendix A, we have provided a brief overview of AUSTAR and its engagement in the roll-out of broadband services in regional and rural Australia to date.

AUSTAR retains a keen interest in the development of the NBN and its associated regulatory structure with a view to gaining access to the wholesale services to be offered by the NBN and to realizing AUSTAR's goal of providing multiple communications products and services on a sustainable and competitive basis to customers in regional and rural Australia.

We note that the discussion paper focuses on and requests submissions on the options for broader reform to the existing telecommunications regulatory regime in the transition period prior to full deployment of the NBN and we have made some comments below. However we have also taken the opportunity to comment briefly on the proposed regulatory reforms that the Government will progress to facilitate the roll-out of the NBN. We note that the Government intends to consult separately with relevant stakeholders on the detail of the legislative amendments to facilitate the roll-out of the NBN before introducing legislation and we look forward to providing further comment at this stage.

RESPONSE TO CHAPTER 2: REGULATORY ENVIRONMENT FOR THE NBN AND THE ROLL-OUT OF FIBRE

Equitable open access principles for the NBN are a critical element in ensuring that the infrastructure investment in the NBN delivers the services required to enable Australia to actively participate in and leverage the benefits of the digital economy into the future. In this regard, AUSTAR strongly supports the Government's decision to establish a wholesale only, open access and structurally independent NBN. As noted by AUSTAR in its earlier regulatory submission on the NBN tender, the risks associated with permitting the NBN to be vertically integrated with any retail service business unit are most prevalent in regional areas of Australia where the NBN would likely become an enduring economic bottleneck. No competing infrastructure is likely to survive in competition with the NBN in many parts of rural and regional Australia – as such the wholesale only, open access basis of the NBN in these areas is critical to the development of innovative and varied retail service offerings.

We note that the approach outlined in Chapter 2 of the discussion paper is not the focus of the current consultation however we have made some preliminary comments below. We look forward to engaging in a more detailed consultation on these issues as they are progressed.

NBN Governance, Ownership and Operations

As noted by the paper, clear rules surrounding the structural elements of the NBN, its governance and ownership are essential prior to private investment in NBN Co and for the benefit of potential customers of NBN Co.

The independent and wholesale only nature of NBN Co should eliminate any incentives for discriminatory behaviour in the provision of services and encourage investment due to the shelter from retail risk. We do, however, agree with the paper's suggestion that without clear established ownership and control rules there is a risk that retail service provider investment in NBN Co may compromise the integrity of the open access regime. We support the Government's intention to legislate to clearly define the governance arrangements for the NBN.

NBN Access Regime and Equivalence

We note that the NBN Co will be required to offer services on a wholesale only basis and that legislation will prevent it from providing retail services. However, structural separation alone is not sufficient to eliminate the incentives or ability of NBN Co to engage in discriminatory behaviour that could favour certain retail providers. A clearly defined access regime based on the principles of equivalence which requires NBN Co to treat all wholesale customers in an equivalent manner will be an essential part of the new regulatory regime for NBN Co. We fully support the Government's intention to require NBN Co to provide access to wholesale customers on non-discriminatory and fair terms and on an equivalent basis.

The paper states that the Government will take into account the following issues when developing the new access regime:

1. Nature of the services to be provided by NBN Co.
2. Mechanism by which price and non-price terms of access will be determined and oversight arrangements.
3. Principles upon which access prices will be determined.

We have commented on each of these issues below.

1. Nature of the Services to be provided by NBNCo

In essence, the services provided by the NBN must be provided to equivalent providers on the same timescales and terms and conditions (including price and service levels); with the same service, system and process reliability and performance; and by means of the same systems and processes.

The nature of the services should encompass both **active bitstream** and **passive unbundled** access products to enable retail providers to create innovative and competitive retail products.

Active Line Access Products

The new regulatory regime must ensure that the active line access products (by which we mean wholesale products based on both the active electronics and the physical elements of the NBN) offered over the NBN:

- are of a high quality, maintaining quality of service across the network;
- are highly configurable and allow for maximum service differentiation and innovation by access seekers;
- are accessible via a virtual interface allowing access seekers to control service provisioning and throttle speed; and
- are provided to access seekers on an equivalent basis.

Passive Line Access Products

Passive line access products (by which we mean wholesale products based on direct access to the physical elements of the NBN) are also critical to facilitate competition both at an infrastructure and service level. Multiple interconnection points must be considered - facilitating competitive access networks (downstream), for example a regional WIMAX access network, and backhaul networks (upstream) will encourage infrastructure competition at different parts of the network. In addition access to the passive layer will enable competitive wholesale service offerings at the active layer. This in turn will enable access seekers to differentiate their service offerings, improve service quality and innovate. Clear interconnection protocols will need to be developed together with transparent operational support systems to facilitate equivalence in provisioning, fault repair and service assurance.

In both cases, the key is for the service descriptions to facilitate high levels of flexibility and configurability. There are obviously key decisions to be made by Government in relation to the services to be provided by NBN Co which will in some respects be dictated by the outcomes of the implementation study and the FTTP architecture deployed. We would welcome the further opportunity to comment on the service and product offerings of NBN Co as they are developed.

2. Mechanism by which price and non-price terms of access will be determined and oversight arrangements: the role of the ACCC.

Price and non-price terms of access should be determined by the ACCC upfront. The ACCC is the expert body with experience in undertaking detailed assessments of risk and the cost of capital for telecommunication networks. The ACCC balances its assessment of risk of investment against the need to protect consumers from excessive charging for services

provided in markets in which there are enduring economic bottlenecks, and is the most appropriate entity to determine both price and non-price terms of access.

3. Principles upon which access prices will be determined.

AUSTAR believes that a cost-based pricing approach is appropriate for both active and passive access products.

Regulated access pricing will need to be nationally averaged to ensure uniform retail prices on a national basis. This is fundamental to ensure retail competition and product innovation throughout Australia, not just in metropolitan and densely populated areas. The benefits of the NBN, in particular health, education, carbon emission reduction and access to government services are all the more crucial in the more isolated areas of Australia.

It is critical that decisions on the approach to pricing are made immediately by NBN Co. to allow certainty for those proposing to invest in NBN Co. by the vending in of assets. There is an obvious tension between an approach which might be taken by the government as an investor, and the private sector as investor and participant in NBN Co. While the government can look to the improvements in GDP and savings in areas such as health and education as great benefits of its investment in NBN Co., the private sector has a different range of concerns and needs to understand the possible rate of return on its investment. The pricing model for wholesale access will be critical to this, so these decisions have to be made now. In AUSTAR's view, the sooner NBN Co is set up as an actual enterprise and can engage as a commercial entity with industry participants, the better for the process, participants and optimal outcomes.

ACCC Oversight

As noted by AUSTAR in previous submissions, a strong oversight and monitoring role is integral to the success of the wholesale-only open access regime. We welcome the Government's decision to use the ACCC in this role.

Facilitation of Network Roll-Out

AUSTAR notes the Government's proposal to expedite the roll-out of fibre networks by simplifying land entry procedures and access to infrastructure. We understand that the Government intends to introduce legislation to this effect in the winter sittings. We support steps by Government to improve and streamline the facilities access regime however it is absolutely critical that any changes to land access and access to infrastructure for network roll-outs encompasses wireless / satellite deployments as well as fibre deployments. In light of the Government's stated intention to deploy at least 10% of the NBN through wireless and satellite technologies, it is fundamental that these deployments (which in most cases will be in the more isolated and rural areas of Australia where the need for the benefits of the NBN is greatest) enjoy the same streamlined arrangements as fibre. We see no justification for distinguishing fibre and wireless in relation to this issue, where the measures being streamlined apply to both types of deployment, such as access to land.

RESPONSE TO CHAPTER 3: TELECOMMUNICATIONS COMPETITION FRAMEWORK

We welcome the Government's commitment to creating appropriate regulatory settings and a market structure that will maximize the benefits for economic efficiency and productivity in the transition to the NBN. As identified, it is important to reform the current regulatory regime in order to improve competition in the interim period before the NBN is fully operational. However, in light of AUSTAR's limited experience as an access seeker on the Telstra network, our response to the questions raised in this chapter are limited to those areas of key relevance.

PART XIC Access Arrangements and Anti-competitive Conduct

In line with our views on how NBNCo should have access prices and terms determined, we would support Option 2 proposed in the discussion paper as being the most appropriate reform of the current regulatory regime for access. A streamlined approach under which the ACCC determines the terms of access once a service is declared would remove much of the delay and uncertainty faced by access seekers today.

Similarly AUSTAR would support a strengthening of the ACCC's enforcement powers in relation to anti-competitive conduct including the power to issue binding rules of conduct.

Separation Arrangements for Telstra

In light of the importance of ensuring a robust regulatory regime during the transitional period to the NBN, AUSTAR, as noted in previous submissions, supports the effective separation of Telstra. The discussion paper addresses Telstra's vertical and horizontal integration.

Vertical Integration

Effective separation of Telstra is critical to ensure that equivalence requirements are met. The current operational separation regime is insufficient to prohibit the discriminatory behaviour that a vertically integrated network operator, such as Telstra, is incentivised to conduct. As noted in our 2008 submission to the Department on regulatory issues associated with the NBN, structural or, at the very least, true functional separation of Telstra is necessary to eliminate discriminatory

behaviour and support equivalence of inputs. We do not believe that a strengthening of the current operational separation regime would deliver equivalence, or any significant change to the issues faced by access seekers to the Telstra network today.

The key elements of an effective separation regime are as noted in our 2008 submission and highlighted above in our comments relating to the structure of NBNCo. In addition to separation, there must be clear equivalence requirements and effective monitoring of the regime by an empowered regulator. The regime must include equivalence obligations to ensure that the retail downstream divisions of Telstra and Telstra's retail competitors (access seekers to the wholesale division) are offered access on equivalent terms including non-price terms such as product / service descriptions, provisioning, fault repair and quality of service.

Our experience as a commercial access seeker of domestic transmission capacity in the past has been disappointing and demonstrates the importance of equivalence in respect of all access terms, not just price. The products offered to us for backhaul (ie in the form of generic capacity as opposed to product-specific transmission services) were completely different from what we understand is offered to Telstra Retail – this difference enables Telstra Retail to provide its services in a more cost-effective, tailored and efficient manner than its retail competitors.

Horizontal Separation

There are key issues relating to Telstra's horizontal integration through its ownership of its HFC cable network and its 50% interest in FOXTEL. AUSTAR would agree with the Government and the ACCC that the control of content rights by an incumbent and powerful telecommunications provider such as Telstra could have negative effects on competition in both the carriage and content sectors. Content services will be a significant driver of innovation and competition over the NBN.

As owner of the HFC network and the existing ubiquitous copper network, and as a potential major investor in NBN Co, Telstra is, and is likely to remain, the most powerful telecommunications operator in the Australian market. The capacity for Telstra to lock up the acquisition of content through its active BigPond service and its FOXTEL interest remains a key risk where Telstra retains significant market power in the communications sector.

The discussion paper suggests two options for possible reform: (1) cross media restrictions on “future” investment by Telstra in the communications and media sector covering restrictions on Telstra acquiring further media assets such as broadcasters, newspapers and exclusive content rights ; or (2) divestiture of the HFC network. AUSTAR has previously proposed, and would suggest that the Government consider as part of Option (1), the additional divestiture of Telstra’s ownership interest in FOXTEL.

As Graeme Samuel noted in his speech to ATUG on 21 May: *“exclusive agreements for the supply of content are not necessarily anti-competitive..... However, concerns could arise if a telecommunications network operator is able to acquire sufficient compelling content on an exclusive basis, such that it limits alternative network owners’ ability to offer attractive packages to consumers.”*

The acquisition of exclusive content is not in itself a concern and is effectively and sufficiently regulated by the existing powers in the *Trade Practices Act 1974 (TPA)* relating to exclusive dealing (s47) and arrangements that result in a substantial lessening of competition (s45). Indeed, the investment in exclusive content has been critical to the development of the subscription television sector, as the sector needed to find a way to differentiate its product from that of the free to air players. The issue is the potential for a powerful telecommunications operator to exploit its power in the platform delivery market to close off content competition, not just in subscription television, but also in broadband service acquisition. We have already seen this in the exclusive content deal that Telstra did for AFL rights for its Bigpond internet service. As the lines between platforms begin to blur as true ‘convergence’ takes hold, the ability for a dominant telco operator to dominate this space and use content rights to reinforce that dominance become even more concerning.

For this reason we would support certain elements of Option (1) and the imposition of cross-media restrictions on Telstra. AUSTAR believes this should go beyond future acquisition and the Government ought to require Telstra to divest its ownership interest in FOXTEL. We would support a restriction on Telstra acquiring future media assets. We do not, however, support a blanket restriction on Telstra or indeed anyone acquiring exclusive content per se. If Telstra is required to divest of FOXTEL and is restricted from acquiring future media assets, we believe

that Telstra's remaining media assets, and acquisition of content for various platforms, can be appropriately monitored by the ACCC through the existing powers under the TPA.

Divestiture of the HFC network in itself and as a standalone measure will not necessarily remove Telstra's incumbent position as a telecommunications operator (due to its current ownership of the copper network and its likely major if not majority ownership of NBNCo in the future). As such its existing ownership of FOXTEL continues to provide a risk of monopolisation in the content sector.

Although it was not raised in the discussion paper in the context of Telstra's horizontal integration, the Government must consider the implications of the anti-siphoning regime in any discussion on control of content. Although in the context of the future NBN we do not believe that the anti-siphoning regime has a place, while it continues to exist, the restrictions that are placed on subscription television broadcasters should clearly be extended to the content offerings provided by Telstra (and indeed any other providers) over alternative communications platforms. There is absolutely no justification for continuing to impose anti-siphoning restrictions on the subscription television sector where equivalent or similar services provided online are not restricted by the list. This issue is further discussed in our comments on Chapter 5 below.

Spectrum Allocation

AUSTAR welcomes the Government's unequivocal confirmation that wireless technologies have an important role to play in the operation of the NBN in particular in regional and rural Australia. We look forward to assisting the Government during the Implementation Study phase.

We note that the Government has stated that spectrum may need to be reserved at appropriate frequencies. The 2.3GHz spectrum licences that AUSTAR holds are likely to be the most appropriate band for deployment of wireless broadband in regional Australia. This is largely due to the extent of international harmonization in this band and the availability of cost effective network equipment with a clear development path. In this regard, we are keen to pursue discussions with the Government on use of that spectrum for NBN deployment.

Wireless networks can be deployed quickly, especially if facilities and land access measures are streamlined as we have suggested. With regional backhaul black-spots already being prioritized, we believe that the Government can swiftly deploy wireless regional access networks bringing clear benefits to the more isolated and remote areas of Australia in a short timeframe while, at the same time, creating a valuable and relatively inexpensive network asset for NBN Co. Wireless should be deployed as a first step to address the long standing needs of underserved communities. This would ease some immediate pressure and will allow sufficient time and resources to be devoted to the immense task of planning the more long term, and higher cost fibre network. Time will be required not only to plan the network, but to also work through community issues such as the debate between aerial and underground cabling. Once the fibre deployment is underway, it will either be complementary to wireless or, in areas where fibre is an uneconomic solution, wireless will remain as the primary network with successive upgrades ensuring services continue to develop overtime. The social benefits of such an approach would be immense and immediately visible.

In the long term, wireless and fixed infrastructure will coexist as complementary networks, which might be commonly or separately held. Wireless offers flexibility and mobility, facilitating not only connectivity for consumers on the move or business travellers visiting a town, but it also provides a level connectivity which cannot be matched by fixed solutions. For instance, wireless is able to provide emergency service vehicles a connectivity solution to facilitate better management of infield information. By comparison, fixed fibre networks offer extreme speeds which are not available with wireless today.

RESPONSE TO CHAPTER 5: THE BIGGER PICTURE

We note that the discussion paper acknowledges that the current telecommunications and broadcasting regulatory frameworks have been unable to keep pace with convergence. This issue will only become more pronounced as the NBN is deployed.

We would urge the Government to commit to review its approach to regulation in a convergent environment earlier than 2011 where possible. We understand that there is a need to consider the implications of the new NBN structural arrangements prior to implementing a new regulatory framework for convergence however a piecemeal approach to the issues of convergence as they arise is unlikely to deliver an optimal solution.

The Government acknowledges that IPTV is one of the challenges posed by convergence. Such services are developing today and without clear regulatory rules around these services, their development and existing services and market structures are at risk. For example, content regulation is being applied inconsistently to equivalent type services which happen to be delivered across different platforms – for example, cable / satellite vs IP.

The application of inconsistent regulation across services differentiated purely on technological grounds cannot be justified under the existing policy framework for broadcasting, namely that services be regulated according to the degree of influence that they exert. The anti-siphoning regime continues to be imposed on subscription television broadcasters while other players in the media industry have no such regulation. Indeed, we do not believe that the 2009 anti-siphoning review can be conducted without acknowledging the issues posed by convergence and the existence of competing services which are not subject to the anti-siphoning regime. The impending deployment of the NBN clearly raises questions as to whether the anti-siphoning regime has any place at all in a converged broadcasting environment.

The discussion paper notes that the challenges posed by convergence call into question our current approaches to regulation in the communications and broadcasting sectors including the assumptions underlying them. It asks the question whether certain regulatory objectives can be better achieved in other ways. The traditional distinctions between the regulatory objectives of broadcasting and telecommunications are sufficiently blurred in a converged environment such

that they may no longer hold true. For example, with the Government funding of the NBN together with the funding of an initiative such as the ABC's new regional broadband hubs, one must ask whether the traditional approach to regulating the delivery of regional content and local news by traditional television broadcasting is appropriate or indeed cost effective for the future. The rollout of the NBN calls into question the level of taxpayer support required for homes in free-to-air digital broadcasting black spot areas post analog switch off. The Government needs to review the overall policy objectives in a holistic manner, recognizing the obvious synergies that the sectors bring in a converged environment.

CONCLUSION

AUSTAR appreciates the opportunity to comment on these critical issues as the Government progresses its plans to build and operate a National Broadband Network.

We look forward to commenting further on the approach to the structure of, and the regulation of, NBN Co and assisting the Government in its plans to deliver superfast broadband to all Australian homes and workplaces.

AUSTAR United Communications

3 June, 2009

APPENDIX A AUSTAR OVERVIEW

AUSTAR United Communications Limited (AUSTAR) is one of regional Australia's leading subscription television providers, with more than 680,000 homes, or over 2.3 million Regional Australians, enjoying our digital television offering. Internet and mobile telephony services complete AUSTAR's regional product offering.

In addition to operational and capital expenses, AUSTAR invested A\$183 million in 2000 to obtain spectrum licences covering 98Mhz of contiguous spectrum in the 2.3GHz band and, following a spectrum swap with Unwired in 2005, obtained 65Mhz in the 3.4-5Ghz band to consolidate the internationally recognised WiMAX spectrum licences into areas which broadly match its regional subscription TV coverage footprint as illustrated in figure 1.

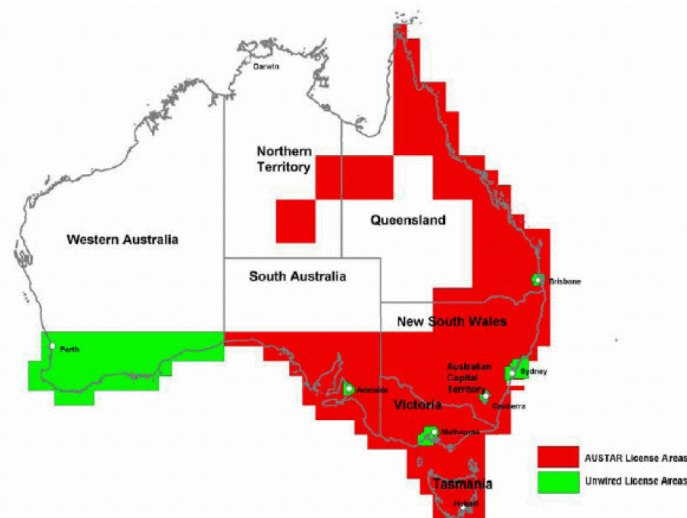


Figure 1: AUSTAR's Spectrum Holding

AUSTAR's investment in spectrum was based on a strong view that our television customers would value the ability to purchase and bundle multiple products with AUSTAR, given our best-in-class customer service facilities and packaging capabilities. Although technology and market developments at the time prevented further investment, AUSTAR retained its interest in investing in a broadband solution and, in 2006, commenced a phased roll out of wireless broadband services, launching services in Wagga Wagga and Tamworth. Shortly after, due to the announcement of the Broadband Connect Infrastructure Program, AUSTAR paused its

deployment in order to coordinate further investment with a broader solution. AUSTAR established the *AUSalliance* consortium with Unwired and SOUL and presented a compelling regional broadband solution which blended fibre, WiMAX and ADSL2+ access technologies.

Although AUSTAR was disappointed with the Broadband Connect Infrastructure Program outcome, we noted some logic in the Optus - Elders partnership being selected as the preferred provider. Given the vast density and topographical differences between metropolitan and regional Australia, adopting a single, national technology approach is not the most efficient solution and is unlikely to be sustainable over the longer term. AUSTAR entered into a spectrum sale agreement to facilitate OPEL's technology neutral approach to ensure that regional Australians would be provided efficient broadband access using a combination of fibre, DSL and WiMAX. It is critical that regional Australia has access to metro equivalent services and prices to participate in the digital economy. However, these services should be provided with fit-for-purpose network solutions to ensure that the long term aims of the NBN are realised nationally.

The termination of the OPEL contract was extremely disappointing for everyone with an interest in service provision in regional Australia. Had the OPEL contract proceeded, households and businesses in regional Australia would be enjoying the benefits of the OPEL network today, with increased competition and increased access to metro equivalent communications services. Having made the decision to cancel the OPEL contract, we believe that it is critical that the Australian government ensure rapid outcomes for consumers in regional Australia as part of any NBN network build, with services that are superior to what would have been available via the OPEL network.

