

Submission to the Department of Broadband, Communications and the Digital Economy



Vodafone Hutchison Australia Pty Limited ABN 76 096 304 620

**National Broadband Network Legislation
and Access Regime**

August 2009

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Introduction

1. Vodafone Hutchison Australia Pty Limited (**VHA**) welcomes the invitation from the Minister for Broadband, Communication and the Digital Economy for submissions on the legislation covering the access regime for the National Broadband Network (**NBN**) and governing the operations, ownership and control of the National Broadband Network Company (**NBN Co**).¹
2. VHA was formed as the result of a recent merger of Vodafone Australia Limited and Hutchison 3G Australia Pty Limited. VHA markets products and services under the Vodafone and 3 brands. VHA is the third largest telecommunications company in Australia with over 6 million customers. VHA is 50 per cent owned by Vodafone Group plc and 50 per cent owned by Hutchison Telecommunications (Australia) Pty Limited, whose majority shareholder is Hutchison Whampoa Limited.
3. The legislation enacted in connection with the NBN must be underpinned by the principle of wholesale-only, open access. This principle must be enshrined in such a way as to ensure it cannot be compromised over time.

Executive Summary

4. The obligation on NBN Co to operate on a wholesale-only, open access basis should be enshrined in NBN-specific legislation, specifically:
 - (a) NBN Co should be prohibited from operating a retail business which involves marketing and supplying carriage services directly to end-users;
 - (b) NBN Co should be prohibited from supplying services using its network units to entities other than carriage service providers as defined in s87 of the *Telecommunications Act 1997* (Cth) (**Telco Act**); and
 - (c) members of the public should be prohibited from acquiring services directly from NBN Co if those persons do not propose to re-supply the services to end-users outside their immediate circle (s23 of the *Telco Act*).
5. Members of the telecommunications industry may acquire an interest in NBN Co, including as part of a vending in arrangement. However, any such acquisition must be subject to:
 - (a) s50 of the *Trade Practices Act 1974* (Cth) (**TPA**); and
 - (b) legislative provisions to ensure that a carrier, carriage service provider or content service provider (or any associate) does not hold a **controlling interest** in NBN Co at any time.

The importance of this limitation will become more acute over time, as an entity may not hold a controlling interest at the time NBN Co acquires that entity's assets but may come to do so after the Government sells down its interest in NBN Co.

¹ http://www.minister.dbcde.gov.au/media/media_releases/2009/061, accessed 29 July 2009.

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6. Any vending in arrangement should not impair NBN Co's ability to provide access to the NBN on terms that enable access seekers to compete fairly with the provider of the vended in assets.
7. To the extent members of the telecommunications industry are permitted to acquire an interest in NBN Co, this should be done in a manner that meets the following objectives:
 - (a) NBN Co retains its **independence** by ensuring that strict ring fencing arrangements remain in place; and
 - (b) there is **transparency** in respect of dealings between NBN Co and its associates. Transparency can be achieved by ensuring that contracts entered into between NBN Co and its associates are first approved by the Australian Competition and Consumer Commission (**Commission**).
8. NBN Co should not be governed by Part XIC of the TPA but by a streamlined access regime with three principal aspects:
 - (a) core NBN services are 'declared' from the day the NBN commences operation and such declaration involves the setting of price and non-price terms and conditions by the Commission;²
 - (b) after the initial declaration, if NBN Co's wishes to provide services that are not declared it is required to submit a 'supply proposal' to the Commission in relation to the price and non-price terms and conditions on which it will offer the additional service; and
 - (c) following public consultation, the Commission must accept, reject, or recommend amendments that would enable the Commission to accept, the supply proposal. It is likely that upon rejecting a supply proposal the Commission, having had the benefit of the public consultation process, may choose to declare the service and determine terms and conditions of supply.

If the supply proposal is accepted or amended then access to the relevant services is mandated on the terms and conditions contained in the supply proposal.
9. In general, it is unnecessary to impose any additional equivalence obligation on NBN Co if the ring fencing arrangements described below, and a new access regime, are implemented. Equivalence of service will only be relevant in connection with services that NBN Co provides to itself, such as fault detection.
10. The Commission should perform a significant role in relation to the regulation of NBN Co. This would include:
 - (a) declaring core services as referred to in paragraph 8(a);
 - (b) considering NBN Co's supply proposals;
 - (c) considering NBN Co associate agreements (as defined by the *Corporations Act* 2001 (Cth) (**Corporations Act**));

² The concept of declaration in this context is similar to that employed by Part XIC of the TPA where declaration gives rise to an access provider's obligation to comply with standard access obligations: see s152AL of the TPA.

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- (d) ensuring that NBN Co complies with ring fencing arrangements and formulating additional ring fencing arrangements as necessary; and
 - (e) determining access disputes.
11. The ACMA should perform a monitoring role to ensure that no carrier, carriage service provider or content service provider holds, at any time, a controlling interest in NBN Co.
12. The deployment of the NBN should not favour any particular MNO in a manner that is detrimental to retail mobile services competition. This principle requires:
- (a) that the deployment of the NBN complements each MNO's existing infrastructure equally; and
 - (b) the abolition of the Universal Service Obligation (**USO**).

NBN Co to remain a wholesale-only provider

13. VHA welcomes the Government's commitment to ensuring that NBN Co operates on a wholesale-only, open access basis. VHA submits that the obligation that NBN Co only supplies wholesale services should be enshrined in NBN-specific legislation as it is fundamental to eliminating any incentive NBN Co may have to create downstream operations and discriminate between those operations and access seekers.
14. VHA submits that there should be a general prohibition on NBN Co operating a retail business which involves marketing and supplying carriage services directly to end-users. This would be similar to the general prohibition in the *National Gas (South Australia) Act 2008* (SA) which prohibits a covered pipeline service provider from carrying on a 'related business'.³ The term 'related business' is relevantly defined to mean the business of producing, purchasing or selling natural gas or processable gas.⁴ The general prohibition can be further supported by more specific obligations which limit NBN Co's ability to supply wholesale services to certain entities or, alternatively, which limit the services NBN Co can supply without approval from the Commission. Each of these options is described further below.

Limiting the entities to which NBN Co can supply services

15. NBN Co should be prohibited legislatively from supplying services using its network units to entities other than carriage service providers as defined in s87 of the Telco Act. A similar prohibition should also be incorporated as a condition of NBN Co's carrier licence,⁵ and imposed on members of the public if the potential customer does not propose to re-supply those services to end-users outside the immediate circle of the potential customer.⁶

³ Section 139 of the *National Gas (South Australia) Act 2008* (SA).

⁴ Section 137 of the *National Gas (South Australia) Act 2008* (SA).

⁵ NBN Co will likely hold a carrier licence: s42 of the Telco Act.

⁶ The definition of 'immediate circle' in s23 of the Telco Act could be incorporated into the NBN-specific legislation.

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Limiting the services NBN Co can supply

16. NBN Co should be prohibited from providing content services as those services are defined in s15 of the Telco Act. Content services by their nature tend to be retail services.
17. Another option the Government may consider is whether it is desirable to specify exhaustively the services NBN Co can provide such as bitstream services and interconnections services. A reason for doing so is to describe services which could only effectively be used by carriage service providers rather than end-users.

Other considerations

18. To the extent the Government retains an interest in NBN Co, NBN Co should not enjoy the benefits of Crown immunity or derivative Crown immunity.

Ownership of NBN Co

19. VHA understands that although the Government is committed to retaining a majority interest in NBN Co, at least in the initial 5 year period from NBN Co's inception, the Government is prepared to permit private ownership of NBN Co. This private ownership might result from a vending in arrangement between NBN Co and participants in the telecommunications industry.
20. VHA submits that it is fundamental to the achievement of the Government's objective that NBN Co should not have any incentive to discriminate between access seekers by favouring either its own or an associate's downstream operations. Discrimination includes discrimination on price and/or non-price terms and conditions. Permitting unregulated acquisition of an interest in NBN Co by members of the telecommunications industry could undermine the Government's objective as it may result in discrimination between access seekers. Alternatively, it can create the perception of bias which may deter entry by a potential new entrant.
21. VHA is not opposed to members of the telecommunications industry (or any other member of the public) acquiring an interest in NBN Co, including as part of a vending in arrangement. Any such acquisition should be subject to s50 of the TPA. Therefore, to the extent the acquisition has the effect or likely effect of substantially lessening competition in a substantial market in Australia, the acquisition will be prohibited. Having said that, VHA submits that even if any members of the telecommunications industry can acquire an interest in NBN Co, there should be mechanisms in place to ensure that the following objectives are met:
 - (a) NBN Co retains its **independence**; and
 - (b) there is **transparency** in respect of dealings between NBN Co and any of its associates.

The mechanisms that should be implemented to achieve those objectives are dealt with in greater detail below.
22. VHA submits that any vending in arrangement should not involve arrangements which limit NBN Co's ability to provide access to the NBN on terms that enable access seekers to compete fairly with the provider of the vended in assets. For example, arrangements which

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involve NBN Co obtaining access to parts of a vendor's network on unfavourable terms should be avoided.

Retaining NBN Co's independence

23. Ensuring that NBN Co maintains its independence is fundamental to minimising the incentive for NBN Co to discriminate unfairly between access seekers. To this end, ring fencing arrangements should be enshrined in NBN-specific legislation. It is common ground within the telecommunications industry that the accounting and operational separation regimes imposed on Telstra to date have failed.⁷ The mistakes of the past should not be repeated in relation to the NBN. As the Commission recently recognised in its submission to the Department in relation to the discussion paper titled 'National Broadband Network: Regulatory Reform for 21st Century Broadband':⁸

The ACCC's experience is that the current operational separation regime aimed at promoting equivalence is ineffective and does not address Telstra's incentive and ability to discriminate against its competitors. Therefore any measures to improve at the margins the operational separation regime would just be an attempt to develop upon a framework that is, at its core, unable to promote its fundamental objectives.

The ACCC is of the view that functional separation, when successfully implemented, may go some way to addressing concerns regarding equivalence, and is superior to, the current operational separation regime.

24. Significantly tougher ring fencing arrangements have been imposed in other access regimes such as gas. While the *National gas (South Australia) Act 2008* specifies minimum ring fencing requirements, it also confers jurisdiction on the Australian Energy Regulator to impose additional ring fencing requirements if and when required. The minimum requirements include not conducting a related business;⁹ ensuring that 'marketing staff' (as defined in the legislation) do not take part in a related business such as the generation and retail sale of gas;¹⁰ ensuring that related businesses not contract with each other on terms that are different to those that would be entered into with unrelated businesses (see further below); and maintaining separate accounts.¹¹ The Australian Energy Regulator's jurisdiction extends to directing the regulated entity to conduct, structure and arrange its business in specified ways.¹² Other jurisdictions such as the UK, Singapore and New Zealand have also taken a significantly tougher stance on ring fencing arrangements.
25. There will need to be some limit on the ability of a carrier or a carriage service provider to control NBN Co, otherwise there will be no fetter on a retail telecommunications provider

⁷ See for example ACCC 'Robust operational separation a 'must' for Telstra (available at: <http://www.accc.gov.au/content/index.phtml/itemId/699320/fromItemId/2332>).

⁸ at page 8 (available at http://www.dbcde.gov.au/__data/assets/pdf_file/0014/115331/Australian_Competition_and_Consumer_Commission_ACCC.pdf).

⁹ Section 139.

¹⁰ Section 140.

¹¹ Section 141.

¹² Section 145.

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selecting the majority of directors on the Board of NBN Co. It will be difficult to deal with this situation even with strict ring fencing arrangements, particularly in circumstances where the Government will be looking to sell down its interest. For example, if Telstra acquires a minority interest in NBN Co now, there may be no breach of s50 of the TPA because the Government will have a controlling interest. However, if the Government sells down its interest in 5 years, Telstra may then hold a controlling interest. Telstra will then be in a position to select the majority of the Board.

26. VHA submits that the ring fencing arrangements that should be imposed on NBN Co in circumstances where acquisition of interests by members of the public are permitted, should include the following:
- (a) NBN Co cannot acquire any interest in any other carrier, carriage service provider or content service provider as defined in the Telco Act;
 - (b) NBN Co must take all reasonable steps to ensure that none of the following persons holds a **controlling interest** in NBN Co at any time:
 - (i) a carrier, carriage service provider or content service provider (or any of its associates as defined in the Corporations Act); or
 - (ii) a group of carriers, carriage service providers or content service providers (or any of their associates as defined in the Corporations Act);
- Controlling interest could be defined in a manner similar to that set out in the *Broadcasting Services Act 1992* (Cth).¹³ Detailed consideration would need to be given to an appropriate cap on the interests a carrier, carriage service provider or content service provider could acquire in NBN Co;
- (c) any director of NBN Co cannot be a director, officer or employee in any other carrier, carriage service provider or content service provider as defined in the Telco Act;
 - (d) the Chief Executive Officer or Chief Financial Officer of NBN Co cannot also be a director, officer or employee of any other carrier, carriage service provider or content service provider as defined in the Telco Act;
 - (e) any employee of NBN Co cannot be a director, officer or employee, or perform any functions for, any other carrier, carriage service provider or content service provider;
 - (f) NBN Co should put in place electronic, physical and procedural security measures in respect of the offices and computer systems of NBN Co; and
 - (g) NBN Co should be required to prepare, maintain and keep separate accounts in respect of the services it provides using the NBN.

Transparency

27. Transparency is important to ensure that NBN Co operates, and is seen to operate, at arm's length from its associates. To this end, VHA submits that a mechanism similar to

¹³ See for example Schedule 1 to the *Broadcasting Services Act 1992* (Cth).

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that used in the gas access regime should be incorporated into the NBN-specific legislation. That is, NBN Co should not be permitted to enter into contracts with 'associates' without having first obtained approval from the Commission. The term 'associate' will bear the same meaning as that term has in the Corporations Act. The main difference between the proposed mechanism and the current gas access regime is that prior approval from the Commission will be required before NBN Co can enter into an associate contract. Under the current gas access regime, the access provider is only required to notify the regulator of an associate contract; it does not need prior approval.

28. The mechanism would operate as follows in the NBN-specific legislation:
- (a) NBN Co will be prohibited from entering an **associate contract**, varying an associate contract or giving effect to an associate contract, unless the associate contract (or variation to the associate contract) has been approved by the Commission. An associate contract would be a contract between NBN Co and any associate as defined in the Corporations Act.¹⁴
 - (b) The Commission must only approve an associate contract if it is satisfied that the contract:
 - (i) does not contain any provision which has the purpose or likely effect of substantially lessening competition in any market for carriage services or content services; and
 - (ii) is consistent with the **competitive parity rule**, namely, that any carriage services that NBN Co provides to an associate of NBN Co are provided to that associate as if that associate were not an associate.
 - (c) The Commission could also approve an associate contract if it is satisfied that the resulting public benefit would outweigh any resulting public detriment.
 - (d) The Commission could impose conditions on its approval, for example: limiting the duration of the approval or providing that the approval will lapse on a material change in circumstances; or imposing reporting requirements on NBN Co or its associate.
 - (e) If the Commission fails to make a decision on whether to approve an associate contract within 20 business days of receiving an approval application, the Commission would be taken to have approved the relevant contract unconditionally.

¹⁴ The term associate is defined in the Corporations Act to include: section 11:

- (a) a director or secretary of the body;
- (b) a related body corporate, which includes: section 50:
 - (i) a holding company of the body corporate; or
 - (ii) a subsidiary of the body corporate; or
 - (iii) another subsidiary of a holding company of the body corporate; and
- (c) a director or secretary of a related body corporate.

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Services offered by NBN Co

29. The services that could be supplied by NBN Co are unclear at this stage. For example, the potential points of interconnection between access seekers and NBN Co, and the technical requirements necessary to achieve interconnection, remain unclear pending the results of the Government's implementation study. Indeed, as one of the purposes of the NBN is to enable the innovative use of an FTTP technology, the services that could be supplied by NBN Co will evolve.
30. An issue arises as to how the services that can be offered by NBN Co should be identified. VHA submits that identifying such services could be achieved by public consultation. Ideally NBN Co would supply a number of core services. These core services could be adapted by intermediaries to enable the supply of more innovative products. As the Commission has previously submitted:
- the lower the 'layer' in the network at which access is granted and the closer it is to the basic physical infrastructure that makes up the bottleneck:
- the less opportunity there is to discriminate between access seekers
 - the greater the ability of access seekers to control their own costs and supply chain and to differentiate service offerings, innovate and improve service quality.¹⁵
31. In this context, VHA has identified the following high level services that it considers NBN Co should offer:
- (a) fibre infrastructure services which are, typically, long-term leases of unlit optical fibre (commonly known as dark fibre) that allow service providers to install their own equipment (for example, electronics and/or switches) and run their own optical fibre network;
 - (b) backhaul services, which include:
 - (i) managed backhaul services to, for example, base stations; and
 - (ii) managed bitstream services to the premises; and
 - (c) interconnection services which are required, for example, for non-IP based voice calls originating on fixed or mobile networks and terminating on the NBN.
32. Equivalence of service will only be relevant in connection with services that NBN Co provides to itself, such as fault detection.

Optimal access regime

33. NBN Co, will have a natural monopoly over fibre-based services across most of Australia. If unchecked, NBN Co could use its market power to leverage into upstream or downstream markets to the detriment of competition. Therefore, VHA is broadly supportive of an access regime that ensures NBN Co provides its services to access seekers on

¹⁵ ACCC, Appendix G.3, page 186.

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reasonable terms. The access regime for the NBN should be set out in NBN-specific legislation.

NBN Co's provision of services

34. VHA's seeks to ensure that any new access regime promotes the development and provision of innovative networks and services. In particular, it is critical to ensure that regulation preserves the competitiveness of independent mobile telecommunications services, which are likely to provide the only infrastructure-based competition to the NBN. VHA submits that access to the NBN should be regulated by a streamlined access regime with three principal aspects:

- (a) core NBN services are 'declared' from the day the NBN commences operation and such declaration involves the setting of price and non-price terms and conditions by the Commission;¹⁶
- (b) after the initial declaration, if NBN Co's wishes to provide services that are not declared it is required to submit a 'supply proposal' to the Commission in relation to the price and non-price terms and conditions on which it will offer the additional service; and
- (c) following public consultation, the Commission must accept, reject, or recommend amendments that would enable the Commission to accept, the supply proposal. It is likely that upon rejecting a supply proposal the Commission, having had the benefit of the public consultation process, may choose to declare the service and determine terms and conditions of supply.

If the supply proposal is accepted or amended then access to the relevant services is mandated on the terms and conditions contained in the supply proposal.

35. VHA submits that access to specific services provided by NBN Co should be declared from the day the NBN commences operation. This would be similar to the operation of the deeming statement under Part XIC of the TPA. The services to which access should be mandated would be identified by the Commission in consultation with the industry. The access terms that would apply to those services would be determined by the Commission.

36. NBN Co would not be prevented from providing services that did not form part of the initial declaration. However, access to those services would be determined by the process outlined in 34. The Commission could only declare a service where it was satisfied that NBN Co could exercise significant market power in respect of access to those services as determined by reference to such factors as potential for entry, control of essential 'bottleneck' infrastructure, absence of countervailing bargaining power, economies of scale and economies of scope.

37. Given the Government's stated intention to divest its interest in the NBN Co five years after the network is built, VHA sees merit in the Commission providing a longer declaration for the NBN Co's services than would normally be the case.

¹⁶ The concept of declaration in this context is similar to that employed by Part XIC of the TPA where declaration gives rise to an access provider's obligation to comply with standard access obligations: see s152AL of the TPA.

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38. VHA submits that an ex ante access regime should be adopted in respect of access to the NBN. Ex ante regimes have been adopted in other contexts (for example, access to gas transmission pipelines) with greater effect than an ex post regime. The ex ante access regime would involve terms and conditions of access being determined as follows:
- (a) As discussed above, NBN Co would lodge a supply proposal with the Commission with respect to each service before NBN Co commences supplying such services. Similar to the gas access regime, the supply proposal must specify:
 - (i) a 'reference tariff' for 'reference services';
 - (ii) a price for an initial period (for example, no less than 3 years);
 - (iii) a pricing methodology for determining the price for the subsequent period (no more than say 3 years); and
 - (iv) 'queuing' requirements (that is, terms and conditions providing for the priority that a prospective user has, as against any other prospective user, to obtain access to spare capacity. Any queuing requirements must require all access seekers to be treated on a fair and equal basis).
 - (b) The Commission would consider the supply proposal as part of a public consultation process. Any determination of access prices must be transparent and based on robust estimates of costs. The Commission has an excellent opportunity to develop a factually-based methodology for estimating the long-run incremental costs of the NBN Co's various services. The method for setting prices should be based on real world inputs and should be developed by the Commission in conjunction with the deployment of the network.
 - (c) The Commission could do one of three things in respect of a supply proposal:
 - (i) accept the supply proposal if satisfied that it is appropriate;
 - (ii) recommend amendments that would enable the Commission to accept the supply proposal; or
 - (iii) reject the supply proposal.
39. The Commission could itself propose a supply proposal if NBN Co failed to lodge a supply proposal as required. In the event of an access dispute, either the access seeker or the NBN Co could notify the Commission of an access dispute. However, in any such access dispute, the Commission could not determine terms and conditions that differ from those set out in the applicable supply proposal. This would therefore provide NBN Co and access seekers with regulatory certainty regarding the terms and conditions on which it would be able to obtain access to the NBN.
40. Any agreement NBN Co reaches with an associate would be subject to approval by the Commission by reference to the principles outlined in paragraph 28 above. Agreements NBN Co reaches with 'non-associates' would remain confidential and not subject to approval by the Commission.
41. There should be legislative provisions which ensure that an access seeker's ability to access the NBN is not unfairly restricted by agreements NBN Co enters into with other access seekers. For example:

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- (a) NBN Co should not be permitted to provide services on an exclusive basis;
- (b) an access seeker's ability to access the NBN should not be adversely affected by any agreement between NBN Co and another party which ties up more capacity than is necessary to meet that party's reasonably anticipated requirements; and
- (c) consideration should be given to how to limit NBN Co's ability to discriminate unfairly between access seekers.

Capacity limitations

42. VHA submits that the access regime applicable to the NBN should also ensure there are mechanisms to deal with the following matters:
- (a) situations where capacity is unnecessarily tied up by a particular access seeker or access seekers, including as part of a vending in arrangement; and
 - (b) ensuring that the NBN has sufficient capacity to meet current and anticipated future demand.
43. While the precise form of the mechanisms should be the subject of industry debate, VHA submits that the need for such mechanisms as a matter of principle is not controversial. For example, similar regimes exist in Part XIC of the TPA.
44. Under Part XIC of the TPA, an access provider is not subject to the standard access obligations to the extent (if any) to which the imposition of the obligation would:¹⁷
- (a) prevent a service provider who already has access to the declared service from obtaining a sufficient amount of the service to be able to meet the service provider's reasonably anticipated requirements, measured at the time when the request was made; or
 - (b) prevent the access provider from obtaining a sufficient amount of the service to be able to meet the access provider's reasonably anticipated requirements, measured at the time when the request was made.
45. In other words, an access seeker cannot prevent another access seeker obtaining access to the extent that the first access seeker needs access to meet its reasonably anticipated requirements. VHA submits that it may be necessary to consider carefully a similar exception to the standard access obligation in the context of the NBN. VHA acknowledges the difficulty in determining a service provider's 'reasonably anticipated requirements'.
46. Similarly, an access seeker may notify the Commission of an access dispute under s152CM(2) of the TPA if the access seeker and access provider 'disagree about whether the capacity of a facility should be enhanced to enable access'.¹⁸ When making a determination in such an access dispute, the Commission must not make a determination that would have the effect of requiring a party (other than the access seeker) to bear an

¹⁷ Section 152AR(4) of the TPA.

¹⁸ ACCC (March 2004) *Resolution of telecommunications access disputes—a guide*, p 8.

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unreasonable amount of the costs of extending or enhancing the capability of a facility or maintaining extensions to or enhancements of the capability of a facility.¹⁹

47. The issue of capacity constraint may be addressed by market forces. To the extent NBN Co is a wholesale-only provider of services, it would be in its interest to expand its network to meet current and anticipated demand for the service. Similarly, if an access seeker is willing to pay to access additional capacity on the NBN, NBN Co may be motivated to provide that additional capacity. However, there may be circumstances where an access seeker may not be in a position to obtain access in an efficient manner and on reasonable terms and conditions.

The Universal Service Obligation

48. As a general proposition, VHA believes that, as a mobile-only operator, its contribution to the USO is unjust and distorts competition in the markets for telecommunications services. VHA makes a more specific submission here, namely that the roll-out of the NBN renders the USO unnecessary.
49. When the USO was designed it was the only mechanism available to the Government to ensure regional and rural areas had access to basic telephone services. Since then the Government has pursued policies to subsidise the development of mobile, satellite, fixed line and broadband infrastructure and/or services in regional and rural areas. The NBN is the latest and most significant of these developments.
50. The USO should not extend to areas where a comparable, alternative commercial voice telephony service is available. This point is particularly powerful given the impending NBN. In this context, mobile voice telephony should be considered a substitute for fixed voice telephony. All of Australia's mobile network operators provide coverage to at least 94 per cent of the population.
51. The USO levy provides an advantage to the incumbent operator at the expense of other network operators. The ACMA acknowledges that the current USO funding arrangements are unlikely to be economically efficient. In 2007, The ACMA indicated that the arrangements are likely to:
- (a) raise barriers to entry by increasing the costs of commencing or continuing operation as a carrier;
 - (b) require potential entrants to subsidise the incumbent in delivering services to commercially marginal areas; and
 - (c) distort the market by imposing costs on carriers but not on carriage service providers that are providing substitute (and complementary) services.²⁰
52. Evidence cited by the Department of Broadband, Communications and the Digital Economy on international telecommunications policy demonstrates that while Universal Service standards are common, the designated universal service provider generally does

¹⁹ Section 152CQ(1)(f) of the TPA.

²⁰ The ACMA 2007, Submission to Telecommunications Universal Service Obligation Review, November, p25.

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not receive funding. This view is supported in a background paper prepared for the International Telecommunications Union (ITU):

The obligation of non-universal service provider (USP) carriers to fund USP's rural and regional activities can have a number of negative consequences for the promotion of competition. In an environment where competitive carriers are finding it hard to make inroads against the incumbent, the USO regime actually requires competitive carriers to cross-subsidise the USP's activities, and thus could strengthen the USP's position. Thus the USO contribution can act as a disincentive for competitive carriers to provide their own regional and rural services. This can impede prospects of alternative technologies, such as wireless, from entering a market even when such delivery systems are more efficient. This could result in universal service subsidies helping to perpetuate the maintenance of the oldest features of communications services, instead of providing an incentive for firms to build the most efficient networks.²¹

53. The purpose of the USO is to 'ensure that all people in Australia, wherever they reside or carry on business, should have reasonable access to standard telephone services and payphones'.²² The roll-out of the NBN will render the USO unnecessary for every home in Australia will have access to much more than a standard telephone service.
54. In the transition to the NBN, VHA submits that the USO should at most operate as a safety net rather than a standard. To the extent that any USO obligation is considered necessary as an interim measure, it should only apply to parts of Australia that would not otherwise have access to a standard telephony service (or its equivalent).
55. If the Government is not minded to abolish the USO immediately then it should introduce an interim measure which reduces the distorting effect the USO has on competition in the markets for telecommunications services. To the extent that the USO is considered necessary and funding is required then, as a social policy, it should be funded by the Government from consolidated revenue. At a minimum, the USO levy should only be imposed on the market in which the social benefits arise (that is, the fixed line market).

²¹ Xavier, P. 2006, *What rules for Universal Service in IP-enabled NBN environment?* Background paper prepared for the ITU Workshop: What rules for IP-enabled NGNs?, April, p13.

²² *Telecommunications (Consumer Protection and Services Standards) Act 1999*, section 8A.