



**Submission by AAPT Limited to the Department of
Broadband, Communications and the Digital Economy in
response to *National Broadband Network: Regulatory Reform
for 21st Century Broadband*, a discussion paper dated April
2009**



Introduction

1. AAPT Limited (**AAPT**) welcomes the opportunity to comment on the Department of Broadband, Communications and the Digital Economy's (the **Department's**) *National Broadband Network: Regulatory Reform for 21st Century Broadband*, a discussion paper dated April 2009 (**discussion paper**) exploring options for reform of the existing telecommunications regulatory regime.
2. AAPT is pleased that the Australian Government has recognised the issues plaguing the current regulatory regime and that it appears ready to make the effort to try and address these issues with a comprehensive review.
3. This is a critical issue for AAPT and many other service providers who have been struggling for many years now under a regulatory regime that clearly has not delivered a level playing field and many consumers and businesses around Australia are paying the price for this failure.
4. Unfortunately, the current telecommunications regulatory environment is failing to provide the appropriate incentives for industry outcomes in favour of sustainable competition. This is evidenced by the high number of access disputes and Telstra's approach of legally challenging almost all arbitral decisions relating to key bottleneck services such as the unconditioned local loop service (**ULLS**) and the line sharing service (**LSS**). Accounting separation and operational separation have been tried but have both been spectacularly unsuccessful.
5. There are many examples of issues impacting competition such as the two largest carriers refusing to respect consumer's (both residential and business) ability to change providers by choosing not to participate in the "fast – churn"

process or wholesale prices being based on retail prices rather than the cost of supply.

6. AAPT fully supports the Australian Government's initiative to improve the availability of fast broadband services across Australia and considers that the proposed wholesale only approach will benefit consumers as it represents a significant improvement from the current market structure where Telstra, the incumbent, is both dominant and highly vertically and horizontally integrated. Telstra's dominance is apparent, for example, in the fixed line voice sector where Telstra controls 72% of all fixed line retail voice subscriptions in 2007/2008 while Optus, its nearest rival, held only an 11% share¹. Similarly, in broadband, Telstra had a 58% share of retail subscriptions in 2007/2008².
7. AAPT agrees with the Australian Competition and Consumer Commission (ACCC) that the National Broadband Network (NBN) project provides the opportunity to finally correct earlier mistakes where Telstra was left with control of both the bottleneck copper access network and retail operations conducted over that network³. These mistakes have led to very serious implications for the development of competition in the telecommunications industry.
8. AAPT considers that the separation arrangements (ie wholesale only) proposed for the NBN operator will ensure that it has a clear incentive to treat access seekers on an equivalent basis. It will deliver a level playing field with the chance to fairly compete and this will be to the benefit of consumers and businesses across Australia.
9. AAPT is pleased, however, that the Australian Government acknowledges that the NBN will take several years to build and that improvements to the existing

¹ Speech by Graeme Samuel, ATUG Regional Conference, Canberra, 21 May 2009, page 3

² Speech by Graeme Samuel, ATUG Regional Conference, Canberra, 21 May 2009, page 3

³ Speech by Graeme Samuel, ATUG Regional Conference, Canberra, 21 May 2009, page 3

regime need to be implemented as a matter of urgency so as to be able to deliver better outcomes for consumers and businesses in the short to medium term.

AAPT considers that this will ensure early improvements to competition in the telecommunications industry and will help facilitate a future transition to the NBN environment.

Summary of recommended reforms

10. In summary, AAPT strongly urges the Government to make the following reforms:
 - *to the current access arrangements* (Part XIC of the Trade Practices Act (TPA)):
 - replace the negotiate-arbitrate model with a price setting approach whereby the ACCC sets prices for all declared services but allows parties to negotiate alternate terms and conditions (any price differential must not be greater than say 3% to 5 %). These alternate arrangements would need to be subject to ACCC oversight whereby the ACCC would have the ability to reject arrangements which were not in the long term interests of end users;
 - revoke the access undertaking provisions; and
 - revoke the exemption application provisions;
 - *to the current competition notice regime* (Part XIB of the TPA):
 - revoke the requirement for the ACCC to undertake consultation before issuing a competition notice;

- give the ACCC the power to impose binding rules of conduct when issuing a competition notice; and
- amend the competition notice regime so that instead of having a discretion to, the ACCC should have an obligation to issue a competition notice if it has reason to believe a carrier or carriage service provider (C/CSP) has engaged in or is engaging in anti-competitive conduct;
- ***to the current separation regime:***
 - abandon the current accounting and operational separation regime as no amount of strengthening of the current regime will achieve the goal of equivalence of access; and
 - introduce a new robust functional separation regime to address the underlying incentives of a vertically integrated incumbent to discriminate in favour of itself and to deliver appropriate equivalence of inputs. The model adopted should be representative of the highest possible form of functional separation possible given the current position today; and
- ***to the current facilities access regime:*** integrate the facilities access regime into Part XIC; and
- ***to the current universal access regime:*** Telstra should be solely responsible for the cost of the USO as there is no evidence that the costs outweigh the benefits.

Telecommunications competition framework

Part XIC access arrangements

Deficiencies in the regulatory process

11. AAPT agrees with each of the criticisms of Part XIC detailed in the discussion paper, specifically:
 - the negotiate-arbitrate model is ineffective because it is too slow (with arbitrations often taking up to two years to complete), cumbersome and open to gaming; and
 - the access undertaking process has been used as a gaming device to create delays in the arbitration process and instead of providing an opportunity for increased certainty it has been used to create uncertainty about the final price that will apply for a particular declared service.

12. AAPT also agrees with the ACCC comment that where an access provider has market power as well as a strong incentive to deny access to competitors, an access regime based on the negotiate-arbitrate model may have difficulties delivering timely access on reasonable terms and conditions⁴.

13. This is demonstrated by the fact that:
 - since 1997, the ACCC has been notified of a total of 157 telecommunications access disputes (in contrast with the three access disputes notified across all other sectors of the economy)⁵;
 - over the past 24 months, judicial review has been sought in respect of almost all final arbitral determinations made by the ACCC (as of 6 May 2009, there

⁴ Speech by Graeme Samuel, ATUG Regional Conference, Canberra, 21 May 2009, page 7

⁵ Speech by Graeme Samuel, ATUG Regional Conference, Canberra, 21 May 2009, page 7

were 15 final arbitral determinations before the Federal Court – all relating to ULLS and LSS)⁶.

14. AAPT also agrees with the ACCC that the ability of access providers to propose access terms and conditions in access undertakings has also failed to expedite or provide greater certainty under the current regime⁷.
15. The ACCC notes that 34 access undertakings have been submitted under Part XIC for different telecommunications services and that only five of these were considered to be in the long term interests of end users and therefore were not acceptable under the TPA. Four of the ACCC's decisions to reject access undertakings have been appealed unsuccessfully to the Australian Competition Tribunal (ACT)⁸.
16. AAPT, through its related entities PowerTel Limited and Request Broadband Limited, has experienced, for several years now, a continuous and apparently never ending cycle of arbitrations and related Federal Court appeals and has also been involved in several access undertaking processes and their related ACT appeals.
17. AAPT has been very frustrated at the expense incurred and the uncertainty created by these activities and considers that both competition and efficient investment has been inhibited as a result with consumers and businesses bearing the ultimate consequences.
18. In addition, because the ACCC is itself consumed by constant litigation cycles it has been unable to focus on other critical enablers to competition such as ease of customer switching from both Telstra and Optus to other competitive service providers.

⁶ Speech by Graeme Samuel, ATUG Regional Conference, Canberra, 21 May 2009, page 7

⁷ Speech by Graeme Samuel, ATUG Regional Conference, Canberra, 21 May 2009, page 7

⁸ Speech by Graeme Samuel, ATUG Regional Conference, Canberra, 21 May 2009, page 7

19. One additional criticism which has really only recently surfaced and which was not mentioned in the discussion paper relates to the exemption application provisions in Part XIC. AAPT considers that Telstra has used the exemption application provisions to, by alternate means to the declaration review process, try and obtain regulatory roll-back. This has caused significant industry uncertainty and disruption.
20. Telstra was initially successful in persuading the ACCC of its arguments in the wholesale line rental (**WLR**) and local carriage service (**LCS**) and public switched telephone network originating access (**PSTN OA**) exemption applications that these services should no longer be declared in metropolitan areas. AAPT along with many other access seekers is heavily reliant on access to WLR/LCS and PSTN OA services from Telstra in metropolitan areas. The decision by the ACCC alarmed these access seekers who could see their very future survival being placed at risk.
21. AAPT considers that once the ACCC has declared a service for a specified time that it should remain declared for that period of time. This helps create certainty and is an enabler for competition and efficient investment.
22. To have large portions of a declaration removed mid-way through the declaration period causes alarm, significantly impacts investment decisions, defeats the purpose of the declaration in the first place and introduces a whole new layer of expense with merits reviews and related requests for judicial review.
23. AAPT considers that even if Telstra is not ultimately successful with its exemption applications it will view them as being successful because it caused disruption, uncertainty, expense to be incurred and delayed investment in infrastructure by competitors.

24. AAPT is also fearful that Telstra will be buoyed by this recent success and will seek to employ the exemption application provisions more widely across a greater range of declared services to achieve the same result.
25. AAPT considers that the current inadequacies of the negotiate-arbitrate model the access undertaking process and the exemption application provisions in Part XIC are stifling competition and investment and need urgent reform.

Options for reform

26. The discussion paper details two options for reform:
 - retain negotiate-arbitrate model with amendments to make it work more effectively; and
 - replace the negotiate-arbitrate model with the ability for the ACCC to make up-front determinations on price and non-price terms of access.
27. AAPT considers that the negotiate-arbitrate model has failed and history has shown that it is simply not appropriate for the Australian telecommunications industry. In AAPT's view, the changes suggested in the discussion paper to reduce delays and gaming opportunities under the negotiate-arbitrate model appear to only tinker with the fundamental concerns that AAPT has with the negotiate-arbitrate model.
28. Until incentives are reset, a negotiate-arbitrate model cannot work when Telstra (and other access providers with market power) have no interest or incentive to negotiate in the first place and can use the negotiate-arbitrate model to force access seekers into continuous loops of expensive, lengthy and time consuming arbitrations and Federal Court appeals.

29. AAPT considers that the only reform that should be contemplated is the replacement of the negotiate-arbitrate model with the ability for the ACCC to make up-front determinations on price and non-price terms of access.
30. The discussion paper describes this new approach operating in the following way:
- once the ACCC has declared the service it could determine the terms of access for that service within a specified time period (either through accepting an access undertaking or setting the access terms). The ACCC decision on access terms would be subject to merits review by the ACT;
 - the terms of access for a service determined by the ACCC would be available to all access seekers on request, though parties would be free to negotiate and agree alternate terms and conditions;
 - where appropriate the ACCC could determine different terms for different access providers and or access seekers;
 - the ACCC would specify the duration of the regulatory decisions, during which time the terms of access could not be altered except in limited circumstances; and
 - the ACCC would start proceedings to put new decisions in place before the old ones expired.
31. AAPT strongly supports the proposed approach of granting the ACCC the ability to make up-front determinations on price and non-price terms of access. The ACCC is clearly the most experienced and well equipped entity to make binding determinations on price and non-price terms of access. Such powers are

available in the UK and NZ. The ACCC is an independent regulator and AAPT considers that it is unquestionably the right entity to be granted these powers.

32. However, AAPT also believes that competition and consumer benefits would be improved if the ACCC more fully adopted a cost based approach to pricing determinations rather than using “interim arrangements” whereby wholesale prices are pegged to retail prices, ie a retail minus retail costs approach.
33. While AAPT acknowledges that merits review is an important accountability mechanism, is best regulatory practice, incents high quality decision making and enables error correction, AAPT strongly believes that a merits review of the ACCC’s determination of the terms of access should not be permitted at the current time given Telstra’s approach to legally challenge almost every decision as a matter of course. Should a revised regime sufficiently reset the incentives and the environment, this could be reviewed in two to three years.
34. In forming this view AAPT is prepared to give up the right to request a merits review of the terms of access which it considers to be unfavourable. This is not something AAPT has given up lightly, for example the ACCC has recently set indicative prices for mobile terminating access service (**MTAS**) which are not favourable to AAPT and which ignore MTAS cost estimates produced by the ACCC’s own independently developed cost model. In addition, the ACCC has recently issued exemption orders which exempt Telstra from the standard access obligations (**SAOs**) in relation to the WLR/LCS and PSTN OA declared services in a significant proportion of metropolitan areas where AAPT is dependant on those services.
35. AAPT recognises that not all ACCC decisions will be favourable but it is prepared to give up the right to a merits review in order to ensure that Telstra does not have access to it either because AAPT fears that Telstra will misuse that right by appealing every ACCC decision. AAPT considers that this is not

in the interests of the industry as a whole and ultimately consumers and businesses across Australia.

36. AAPT also questions whether the ACT has the requisite skills and abilities to set prices for declared services. The ACCC is really the only place with the proper resources, skill sets and experience with such complex matters often involving the analysis of very complex cost models to assess the costs of delivery of these services.
37. Telstra and all other industry players would of course continue to have access to judicial review of the ACCC's determinations on the terms of access.
38. AAPT agrees with the proposal that the terms of access for a service determined by the ACCC should be available to all access seekers on request, though parties would be free to negotiate and agree alternate terms and conditions. AAPT considers that it is critical for a healthy downstream wholesale market that access seekers with greater network reach or with higher total spend with Telstra Wholesale are able to leverage efficiencies that are reflected in the price of the acquisition of services.
39. For example, this would permit larger C/CSPs to acquire services from Telstra in bulk and then on sell them (with or without additional functionality) to downstream C/CSPs which do not wish to have, or are not ready for, a direct contractual relationship with Telstra.
40. These sorts of arrangements can deliver a better outcome for all parties involved. Telstra has fewer contractual relationships to manage, larger C/CSPs can offer competitive services to smaller downstream C/CSPs and smaller downstream C/CSPs don't need to enter into a direct contractual relationship with Telstra which can be a costly, time consuming and a complex relationship to manage. Every one wins and ultimately consumers and businesses acquiring

retail telecommunications services are the ultimate beneficiaries as they can receive services from a larger range of suppliers who may be better able to cater to their niche requirements.

41. An additional argument in support of allowing a price differential between access seekers relates to the fact that some access seekers may acquire services from Telstra in a way which involves less cost to Telstra. Examples might include the installation of additional points of inter-connect by the access seeker or investment by the access seeker in automated ordering and provisioning systems.
42. One option that AAPT considers would help address these issues would be to permit the negotiation of alternate terms of access (as proposed in the discussion paper) so long as the difference between the negotiated price and the price determined by the ACCC is not greater than 3% to 5%. These arrangements would need to be subject to ACCC oversight where the ACCC would have the ability to reject arrangements which were not in the long term interests of end users. AAPT is particularly concerned here about Telstra Wholesale giving a discount to Telstra Retail only or to Telstra Retail and Optus only. This could create a significant advantage for one or two players in the market and would defeat the objective of a level playing field.
43. AAPT disagrees that the ACCC should be able to determine different terms of access for access seekers and or access providers. AAPT considers that if the ACCC sets a price for MTAS, for example, then that price should apply to all mobile network operators (**MNOs**), ie Telstra, Optus and Vodafone/Hutchison. AAPT is aware that in some jurisdictions, the regulator does set different access prices. For example in the UK Ofcom has accepted a series of undertakings from each of the mobile network operators which specify differing prices for MTAS. AAPT considers that the price of MTAS should be based on the cost incurred by an efficient provider using best in use technology. The actual costs

incurred by an MNO should therefore be irrelevant. AAPT is unable to see any benefit to competition or investment incentives in setting differential pricing for access providers. Access seekers and access providers will (with the limitations discussed above) be able to negotiate alternate terms of access.

44. AAPT considers that while it is in the interests of certainty that the ACCC cannot change the terms of access during the specified duration, AAPT considers that it may be important for the ACCC to be able to add to the terms of access, without changing the existing terms. This will mean that if an access provider misbehaves in some way which is not covered by the existing terms of access that the ACCC can consider making a change to the terms of access to address new issues as they arise. Appropriate time limits would need to be set to ensure such amendments are introduced quickly and efficiently.
45. Consequently, AAPT strongly urges the Government to make the following two additional reforms to Part XIC:
 - the access undertaking provisions should be revoked; and
 - the exemption application provisions should be revoked.

Transitional issues

46. AAPT considers that in the period of transition:
 - all current declarations should continue up to the period specified in each of the individual declarations; and
 - arbitrations should continue to their conclusion, final arbitral determinations and indicative prices should remain valid but only until such time as the ACCC makes a determination on the terms of access under the new

provisions to be introduced in Part XIC as part of the regulatory reform process. However, access seekers should have to option of continuing with an arbitration to ensure that backdating benefits possible through the arbitration process are not lost.

Part XIB anti-competitive conduct provisions

Deficiencies in the regulatory process

47. As noted in the discussion paper, Part XIB of the TPA prohibits a service provider with a substantial degree of market power from engaging in conduct which has either the effect or purpose of substantially lessening competition. The adoption of an effects based test as opposed to s46 in Part IV of the TPA which requires proof of the purpose of substantially lessening competition means that Part XIB should be a much more powerful tool for controlling anti competitive behaviour of a dominant player in the telecommunications industry.
48. AAPT considers that despite its promise, the Part XIB competition notice regime has been a disappointment because it has failed to restrict Telstra's anti-competitive conduct. One clear example of Part XIB's ineffectiveness relates to Telstra's February 2004 decrease in its retail price of a DSL service to a price point below which it sold the same DSL service to downstream C/CSPs on a wholesale basis.
49. AAPT agrees with the comments made in the discussion paper that Part XIB processes take too long and appear to be too procedurally cumbersome and more importantly have not resulted in any successful prosecutions.
50. In addition, AAPT considers that there appears to be a reluctance on the part of the ACCC to use the Part XIB competition notice regime for fear that it will not withstand a legal challenge. The ACCC publicly deny the existence of such a

reluctance which is understandable as they wouldn't want to encourage those wishing to participate in anti-competitive conduct. However, AAPT considers that the poor success rate of Part XIB actions has resulted in an apparent reluctance by the ACCC to use the competition notice regime.

51. AAPT strongly agrees with the comment in the discussion paper that it is necessary to retain and improve Part XIB given the existing structure of the telecommunications industry.

Options for reform

52. The discussion paper details four options for reform:

- remove the requirement to undertake consultation before issuing a competition notice;
- require the ACCC when issuing a competition notice to provide guidance to the recipient on how to rectify the anti-competitive conduct and have the competition notice removed;
- give the ACCC the power to impose binding rules of conduct when issuing a competition notice (currently the ACCC can only seek injunctions or financial penalties); and
- abolish the competition notice regime and empower the ACCC to issue binding rules of conduct.

53. AAPT supports the proposal to remove any requirement for the ACCC to undertake consultation before issuing a competition notice.

54. The requirement for a consultation notice was introduced to address Telstra's concerns that it could be taken by surprise by the issuing of a competition notice.
55. AAPT considers that it would be very unlikely that Telstra would be taken by surprise by the issuing of a competition notice. Telstra has substantial market power in many telecommunications markets and it would (or at least should) be very cautious of any activity it undertook where it could be considered to be taking advantage of that market power.
56. Consequently, AAPT considers that Telstra would itself know when it was putting itself at risk of being issued a competition notice. In addition, Telstra would be in receipt of complaints by competing service providers if they were acting in a way that was impacting competition. These complaints would constitute further warnings of a possible impending competition notice.
57. AAPT supports the removal of a requirement for the ACCC to consult before issuing a competition notice because as discussed above it is not required but also because it adds an additional requirement on the part of the ACCC before issuing a competition notice which simply serves to limit the effectiveness of the competition notice regime to deal with anti-competitive behaviour as and when it occurs but also to act as a deterrent to act in an ant-competitive manner.
58. Telstra has even recently used the difference between a consultation notice issued by the ACCC and a subsequent competition notice to successfully challenge the validity of the competition notice in the Federal Court.
59. AAPT urges the Government to remove the requirement of prior consultation before the issue of a competition notice from Part XIB.

60. AAPT does not support the introduction of a requirement on the ACCC to provide guidance to the notice recipient on how to rectify the anti-competitive conduct and thereby have the competition notice removed.
61. AAPT considers that such a requirement could cause delays to the issuance of competition notices. Competition notices need to be issued as soon as the ACCC has reason to believe the recipient is engaging in or has engaged in anti-competitive conduct.
62. AAPT considers that in the overwhelming majority of cases, if not all cases, the recipient will know precisely what conduct is being complained of and what actions are required to address the complaint.
63. AAPT fully supports the proposal to empower the ACCC to impose binding rules of conduct when issuing competition notices. AAPT agrees with the comments made in the discussion paper that such a mechanism would provide certainty on the outcome of competition notices for all parties and would be more likely to lead to the timely resolution of the conduct of concern.
64. However, AAPT does not support the proposal to abolish the competition notice regime and replace it with the power for the ACCC to issue binding rules of conduct. AAPT still has hope that after the reforms discussed above that the competition notice regime will become an effective tool for the ACCC to respond quickly and effectively to anti-competitive conduct.
65. Retaining the competition notice regime will enable the ACCC to issue a competition notice as soon as it has reason to believe the recipient is engaging in anti-competitive conduct. Depending on the circumstances, the ACCC will have a discretion as to whether or not to include binding rules of conduct. For example, the ACCC may decide not to include binding rules of conduct if it was

uncertain of the exact formulation at the time. This should not delay the issuing of a competition notice.

66. Consequently, AAPT favours retaining the competition notice regime but empowering the ACCC to include binding rules of conduct if it chooses to do so in a competition notice.

Additional reforms

67. AAPT considers that it is possible for the whole purpose of the competition notice regime to be defeated by a reluctance on the part of the ACCC to issue competition notices. Under the current regime, the apparent reluctance to use may be perfectly justifiable and while the reforms discussed above may well remove such reluctance, AAPT is still very concerned about the issue.
68. Consequently, AAPT considers that the competition notice regime should be amended such that instead of providing a discretion for the ACCC to issue a competition notice if it has reason to believe a C/CSP has engaged in or is engaging in anti-competitive conduct that the ACCC is in fact under an obligation to do so.

Separation arrangements for Telstra

69. AAPT agrees with the comments made in the discussion paper that Telstra is the dominant player in most telecommunications markets and is one of the most integrated telecommunications companies in the world.
70. Telstra is both vertically and horizontally integrated. It provides wholesale and retail services, operates a fixed line copper network connecting every premises in Australia and the largest hybrid fibre coaxial cable (HFC) network and owns 50% of Foxtel.

Vertical integration

71. AAPT considers that Telstra's level of vertical integration means that Telstra has the ability and the incentive to favour its own retail business over its downstream wholesale customers when providing access to various services.
72. Previous separation measures introduced to address this issue (ie the enhanced accounting separation regime in 2002 and the operational separation regime in 2005) have failed spectacularly.

Options for reform

73. The discussion paper details the following options for reform:
 - strengthening the current operational separation regime that applies to Telstra; and
 - introduce a stronger form of separation such as a functional separation regime similar to those introduced in the UK and NZ and being considered as a regulatory remedy within the European Union.
74. AAPT considers that the current separation regime cannot, and will never be able to, achieve the goal of equivalence of access, non-discrimination and that no more time, money or effort should be spent pursuing this mechanism.
75. A robust separation regime that properly adopts key principles and addresses the underlying incentives of the vertically integrated incumbent to discriminate in favour of itself is the only way to address this issue.

76. AAPT agrees with the discussion paper that the key principles for the effective functional separation regime could include:

- ***arms length transactions between business units:*** ie requiring the network owner to conduct transactions with its retail units in the same way as it deals with downstream C/CSPs. Transparency should be ensured by giving the ACCC regulatory oversight of these transaction;
- ***creation of discrete organisational divisions:*** these would need to be ring-fenced from other divisions and have separate business systems. At this stage AAPT is not able to put forward a preferred model (eg should there be just two divisions: wholesale and retail or three divisions: wholesale, retail and networks). AAPT considers that further industry consultation should be considered to fine tune these important and complex matters;
- ***price equivalence measures:*** requiring the retail division to pay the same for access as other downstream C/CSPs. This is a critical requirement and noticeably absent from the current separation regime;
- ***non-price equivalence measures:*** requiring the same key access products and systems are used to provide support to the retail unit and the downstream C/CSPs;
- ***equivalence of information:*** requiring downstream C/CSPs and the retail unit to have equivalent access to information relating to the services;
- ***governance arrangements:*** a reasonable approach to supporting a robust separation would require each unit to employ its own separate staff and have control and transparency on movement between units and remuneration and incentives schemes based on the unit not the whole of business performance;

- *effective enforcement provisions:* to ensure breaches are dealt with quickly and effectively and that incentives for compliance are set.

77. AAPT considers that there are an almost infinite number of possible models that could be considered a fit with these key principles. These models would need to be considered before determining the appropriate one for Australia. This process would need to be informed by models adopted overseas. Consequently, the industry should be consulted again on these matters after a draft model is proposed.
78. However, AAPT considers that the model should represent the highest possible form of functional separation possible.

Facilities access regime

Vertical integration

79. As noted in the discussion paper under Schedule 1 of the Telecommunications Act, carriers are required to provide other carriers with access to certain facilities such as exchanges and ducts (ie the facilities access regime).
80. AAPT agrees with the criticisms of the facilities access regime identified in the discussion paper, namely:
- the ACCC is an arbitrator of last resort which could lead to even greater delays under Part XIC;
 - it does not allow for interim determinations and backdating of final arbitral determinations and backdating of final determinations which means there is less regulatory uncertainty for access seekers; and

- the facilities access code contains a number of steps that provide potential scope for disputes.

81. While AAPT has never invoked the access dispute provisions under Schedule 1 of the Telecommunications Act, it considers that these deficiencies are a considerable deterrent to doing so.

Options for reform

82. The discussion paper details the following options for reform:

- makes the facilities access regime consistent with Part XIC; and
- integrate the regime within Part XIC.

83. AAPT supports the proposal that the facilities access regime should be made consistent with Part XIC and suggests that the easiest way to do this is to integrate the facilities access regime under Part XIC.

Telecommunications consumer safeguard framework

84. The object of Universal Service Obligation (**USO**) is to ensure that all people in Australia, wherever they reside or carry on business, should have reasonable access on an equitable basis to standard telephone services and payphones. Telstra is currently the sole carrier providing services under this obligation.

85. AAPT understands the Government's commitment to ensuring all people in Australia continue to have reasonable access to standard telephone services and payphones and accepts that there have been a number of concerns about the USO.

86. AAPT has limited its submissions to the issue of the funding arrangement for the USO.
87. The current funding model provides an industry-funded subsidy to Telstra (\$145m in 2008/2009) in recognition of the costs associated with delivering universal services. This model assumes that the costs outweigh the benefits but AAPT does not believe this to be the case.
88. AAPT agrees with each of the funding criticisms identified in the discussion paper, namely:
 - that the funding arrangements give Telstra an unfair advantage over other carriers with Telstra recovering substantial revenues from its customers in rural and remote areas which are likely to outweigh its costs;
 - Telstra receives a number of intangible benefits from providing the USO, including:
 - the ability to provide non USO services to customers at marginal cost over the same infrastructure;
 - a ubiquitous presence which is very valuable in terms of a greater capacity to respond to customers that require it, for example Banks with branch offices spread around the country including rural areas; and
 - brand enhancement and corporate reputation;
 - in countries such as the UK, Singapore, the Netherlands, Finland and Germany the universal service [provider is required to meet the equivalent obligation but is not compensated for doing so.



89. For these reasons, AAPT considers that Telstra should be responsible for the so called “cost” of the USO.