

AUSTAR United Communications Limited

Response to the Legislative Framework for the National Broadband Network Company



30 July 2009

INTRODUCTION

AUSTAR United Communications Limited (**AUSTAR**) is regional Australia's leading subscription television provider, with more than 680,000 homes, over 2.3 million regional Australians, enjoying our digital television service. Internet and mobile telephony complete AUSTAR's product offering. Competitive access to broadband infrastructure remains a critical issue for the future productivity of Australia, and this is particularly so within AUSTAR's regional footprint.

AUSTAR commends the Government's decision to pursue this nation-building infrastructure project. We believe it will ultimately address the disparity between metropolitan and regional and rural Australia in the availability of telecommunications and broadband services. We look forward to working with, and supporting, the Government in this project and appreciate the opportunity to comment on the legislative framework for the National Broadband Network company (**NBNCo**).

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.

Some of the key issues relating to the legislative framework were highlighted in the Government's earlier discussion paper, *Regulatory Reform for 21st Century Broadband*. AUSTAR's views were summarised in our response to this paper dated 3 June 2009 (**June 09 Regulatory Response**), a copy of which is attached at Attachment A. We refer you in particular to CHAPTER 2 of this response.

As previously articulated, AUSTAR fully supports the Government's vision, however we believe that the success of this project will depend on the detail of the regulatory, technical, financial and operational frameworks supporting NBNCo. It is difficult at this stage, without a clearer understanding of the different aspects of the project, to identify all of the issues that need to be addressed in the legislative framework for NBNCo. The project issues relating to the regulatory and legislative framework of NBNCo will develop and change as the Implementation Study progresses and details become clearer. For this reason, we would stress that our comments

are preliminary in nature at this stage. Once the structure of NBNC_o is better understood, further issues will no doubt arise and the legislative framework should be structured to cater for change during the set up and build phase of the project.

We have provided further comment below on some of the issues previously raised by AUSTAR in our June 09 Regulatory Response and have highlighted some areas which we believe require immediate focus by the Lead Adviser to the NBN Implementation Study.

PART I - LEGISLATIVE FRAMEWORK

NBN ACCESS REGIME AND EQUIVALENCE

We refer you to Chapter 2 of our June 09 Regulatory Response for AUSTAR's views on what types of products and services will need to be offered by NBNC_o. In particular, our view that NBNC_o should provide both active bitstream and passive unbundled access products.

We support the Government's intention to legislate to ensure that NBNC_o operates on a wholesale-only, open-access basis and is prohibited from providing retail services. As previously expressed, however, a number of additional issues need to be addressed and considered to limit the incentive for discriminatory behaviour in relation to certain retail providers. Structural separation in isolation would not be sufficient, especially in light of potential future ownership. We have addressed a number of issues below which need consideration:

Pricing Equivalence

The principle requires NBNC_o to treat all wholesale customers in an equivalent manner. The principle can be easily articulated, for example, "NBNC_o must be obliged to provide access on non-discriminatory terms", however the implementation of this principle in practice is complex. For example, should the availability of volume discounts be prohibited? Volume discounts are commercially attractive and in some cases justifiable; however, if permitted, they would merely reinforce the status quo, reduce the ability of smaller players to compete and discourage innovation at the retail level. Similarly, should wholesale pricing be offered on a nationally averaged basis or should the pricing models take a geographically, de-averaged approach? As

previously articulated, AUSTAR supports nationally averaged pricing to ensure uniform retail prices on a national basis. However the ability of this model to be sustainable if the network deployments are developed in distinct geographic areas, with different consortiums and investors, is very uncertain at this point in time.

The pricing model is a fundamental aspect of the equivalence regime and, of course, a fundamental aspect of the investor model for NBNC0. In many cases, the two are directly in conflict. What will make sense from an investor's perspective (for example, the need to secure guaranteed revenue streams generated by NBNC0 as soon as possible) will necessarily challenge the principle of pricing equivalence. An infrastructure project of this size and expense would normally try to de-risk the project, in order to provide increased certainty to potential investors and financiers, by securing key anchor tenant arrangements as soon as practicable. According to normal industry and commercial practice, securing such anchor tenants would often necessitate offering discounted prices to secure their early commitment or participation. These arrangements, whilst they can be considered commercially sensible to the extent that they lock in recurring revenue as early as possible while also reducing the overall funding requirement and securing long-term customers for NBNC0, are likely to reinforce the incumbency of the current imbalanced market structure and should be prohibited.

For example, if we imagine in the not-too-distant future that NBNC0, having developed a detailed rollout and implementation plan, decides that the best way in which it can reduce its overall funding requirement is to undertake a single national, or a series of regional, auction(s) of dedicated, potentially partitioned, capacity on the NBN network. This access would most likely come packaged with some sort of preferential access rights (which they are paying for) and presumably a discounted per unit price equivalent to what would otherwise be readily available to the rest of the market on a per-unit basis as the NBN network is progressively rolled out across the country. Faced with the opportunity to immediately get a step-up on its competition from a comparative cost basis and secure potentially guaranteed access on preferential terms, this auction would have the potential to attract significant interest from market participants whether they be ISPs, free-to-air or subscription television operators, or content providers. However, realistically a telecommunications incumbent (Incumbent A) has arguably the most to lose, and possibly the most to gain, from securing this advantage (or at least

blocking its competitors from being able to do so), and so one could assume Incumbent A would use its superior financial firepower to aggressively bid for and ultimately win these auctions.

In this instance, suddenly Incumbent A has secured a huge strategic advantage in the form of significantly discounted, equivalent cost-per-subscriber or -service, which, combined with its existing technological scale and financial superiority, will enable it to wage a price war (if necessary) which would restrict the ability of its competitors to make positive or sufficient economic returns, and thus consolidate its long-term incumbency in an NBN world. By gaining a per-unit cost advantage at the wholesale level, then Incumbent A will be able, if it chooses to do so, price its retail services to the margin allowed by the standard access price paid by all of its other competitors, thus ensuring complete price control over the market. This scenario, if allowed to happen, would enable Incumbent A to secure victory over its rivals before the first customer is installed on the new NBN network

To demonstrate this potential scenario with simplified numbers, let's assume the following regarding Incumbent A and one of its standard competitors (for this example titled "Telco2"):

- Telco2 rents access from NBNCo at a standard wholesale access price (for a standalone broadband service) at \$20/month
- Incumbent A, by winning the preferential access auction, receives an equivalent 30% discount on this standard wholesale rate, which translates to \$14/month
- Incumbent A's marginal cost to serve this type of customer is \$10/month. Telco2, having significantly smaller scale, has a 50% higher cost to serve per customer, so therefore their cost to serve is \$15/month
- In order to achieve a reasonable return on capital employed, Telco2 targets a long-term EBITDA margin of say 25%

By taking the above assumptions, the average monthly cost to serve a broadband customer for Incumbent A on the NBN would be \$24/month, for Telco2 it would be \$35/month. In order for Telco2 to achieve its targeted return on capital, this implies it would charge a retail price (incl. GST) of \$47/month ($\$35/(1-25\%) = \47). However, let's now assume that Incumbent A wishes to launch a punitive price war to drive as many of its competitors out of the market as possible, or at the very least discourage aggressive new entrants. By leveraging its superior wholesale margin and operating leverage, Incumbent A could price its retail product at Telco2's monthly

cost of \$35/month. Telco2 would be forced to lower its retail price to be in line with Incumbent A's and would therefore make a zero margin. This would not be economically viable, and would therefore restrict and discourage competition in the industry long-term. Incumbent A, meanwhile, would still be making a return per customer of \$11/month, or an equivalent return on its capital of 31% ($\$35 - \$24 = \$11$; $\$11/\$35 = 31\%$)

The tension between these two aspects of NBNC's structure needs to be carefully considered now in order to provide regulatory parity for access seekers and certainty for investors.

Equivalence of Non-price Terms

It is imperative that the Government also legislate to ensure that non-price terms of access are provided on an equivalent basis. In this regard, areas of particular importance are that equivalent products must be provided:

- with the same quality of service
- on similar timescales
- with the same systems and processes
- with the same commercial information provided (eg rollout plans).

Compromising any of these issues could lead to future anti-competitive behaviour. These issues are critical where any retail provider owns a significant percentage of NBNC or otherwise has significant control over NBNC.

ACCC Oversight

Due to the complexity of the pricing and non-price terms of access for telecommunications services and products, it seems likely that the principle of equivalence can only be effectively implemented through the oversight role that has been proposed for the ACCC. We fully support a strong and robust oversight role for the ACCC and believe it is fundamental to the success of an open-access, wholesale-only regime.

In this regard, it is appropriate that the ACCC be authorised to monitor the principles of equivalence in NBNC_o. The ACCC will require clear and transparent regulated rights of access to the costs of each NBNC_o deployment, the ongoing operational costs and processes of NBNC_o, the pricing structures proposed and other terms of access. We support a model whereby the ACCC has power to determine, in conjunction with NBNC_o, the terms of access and pricing upfront.

Notwithstanding this, the key principles for determining price and non-price terms of access can be articulated through the legislative framework, for example that pricing be cost-based using international, best practice economic principles.

Ownership Restrictions

The legal structural separation of any future retail provider or investor from NBNC_o is not sufficient to prevent future abuse. The principles of equivalence to be implemented in legislation will go some way to reducing this issue however we believe that there should be legislative caps on the percentage ownership of NBNC_o by any one entity or group. If a blanket limit on ownership is not forthcoming, then a legislative ownership restriction based on market share should be implemented. For example, an entity or group with a certain percentage market share cannot own or control more than a certain percentage of NBNC_o. These limits will become critical during any privatisation phase.

OWNERSHIP AND INVESTMENT AND DIVESTURE

AUSTAR does not oppose the idea that the Government has an initial stake in NBNCo, particularly when industry has not been able to find a way to ensure the ubiquitous availability of affordable high speed broadband services. The Government's vision, which is possible from a public policy perspective, is a network which can support services which are not necessarily commercially viable but which deliver other social and economic benefits to our society. What will be challenging for the Government and for any commercial investors in NBNCo is working out at what point and on what terms it will be appropriate for the Government to exit, and how any such exit will impact on the future availability of, and price for, services provided by NBNCo. Many of the limitations in the telecommunications environment today are due to the pricing behaviours of Incumbent A, and the inability of the regulatory environment to find a path between the expectations of Incumbent A as the incumbent, with its private shareholders, and the needs of new entrants who look to provide innovative services at a layer above the underlying network.

AUSTAR does not have any particular views on this exit, however we recognise that there will be challenges from an investment perspective in light of public policy objectives for NBNCo.

As suggested above, we do, however, recommend that caps on ownership stakes be considered in the legislative framework to support the open access regime. Removing the capacity to conduct anti-competitive behaviour at the wholesale access layer is likely to be a more effective tool than monitoring and enforcing complex regulatory obligations.

OTHER RIGHTS AND OBLIGATIONS

The legislative framework will need to confer clear rights of access to infrastructure and information to enable swift and effective network deployment. These rights should extend to any network deployment, be it fibre or wireless.

AUSTAR suggests that the legislative framework should not include any restrictions or stipulations around technology choices for NBNCo. The legislative framework should be technology neutral in its application and approach.

PART II - CONVERGENCE AND MEDIA REFORM

In the Government's previous consultation on "*Regulatory Reform for 21st Century Broadband*", it indicated that a regulatory review of convergence-related issues was premature in light of the significant changes that the NBN will bring to the sector, and stated that a review of convergence-related regulation would not be conducted until 2011.

As previously submitted, this position is not sustainable. We believe that clarity around the regulatory issues of convergence faced by the media and telecommunications sector today is a critical step in the future success of the NBN. Many commentators have cited the importance of content and media in driving many of the services likely to be deployed over the NBN. It is acknowledged that current broadcasting and communications regulation has not been able to keep pace with convergence. It is critical therefore that these issues be overcome in tandem with the development of the NBN regulatory and legislative framework. We refer you to our earlier comments at Chapter 5 of our June 09 Regulatory Response.

PART III – AREAS OF IMMEDIATE FOCUS FOR LEAD ADVISER

INVESTMENT STRUCTURE

We understand that the current proposal by Government is that the NBN will initially be deployed by a Government controlled entity, NBNCo, which may have up to 49 percent private ownership. Ultimately, the Government plans to sell its interest in NBNCo. Interested private entities may propose vending in particular network assets as a means of securing an equity position in NBNCo.

Many questions have been raised about the actual costs of meeting the Government's stated coverage requirement, and the need for a cost / benefit analysis of the proposed investment.

From AUSTAR's perspective, this is not the key issue. The social benefits which will flow from higher speed broadband services are well known, particularly in areas of regional and rural Australia where certain services not currently available could be delivered via the NBN. High speed broadband facilitates the availability of innovative services such as remote diagnosis services for patients in regional areas, remote appliance power management and monitoring, distance learning for schools and universities, and remote monitoring of irrigation canal systems.

Such services are not just about making it easier to download movies, but rather they create a step change in the manner in which citizens participate in Australian society. For the Government, higher speed broadband services could also provide significant improvements to the healthcare budget, improvements in the quality of education services, increased accessibility of Government services, and overall major improvements in the quality of life for many Australians, particularly those in regional areas. There will be significant GDP improvements as a result. Economists have attributed a variety of values to such improvements, but whichever value is used, no doubt there will be real improvements in economic output and productivity.

The viability of the investment case, from the Government's perspective, improves when considering such a large upfront investment, particularly in times of nation building and stimulus packages. However, the investment case is not yet clear for the private sector. Private companies cannot use GDP benefits as a rationale for investing shareholder funds into high risk projects. Accordingly, until the specifics of the wholesale pricing regime and any amended regulatory regime are well known and understood, it is difficult to understand how a third party can make an investment in NBNC0. There is no doubt that any company looking at an investment in NBNC0 will need to undertake a full cost benefit analysis once it has more information, however this may not be possible until the Implementation Study has been completed, if in fact details of wholesale pricing and the open access regime will not be made available to relevant industry participants until the conclusion of that study.

Another impact of the current uncertainty about how this project will progress is the reduction of investment in any competitive infrastructure. With so much uncertainty in the market there is little investment being undertaken and this is unlikely to change until the specifics of the NBN environment are known.

It is AUSTAR's view that the sooner NBNCo becomes operational and decisions are made about product structure, regulatory rules and pricing models, the better placed industry participants will be to form views on participation in the project.

TECHNOLOGY CHOICE

While we support the Government's desire to deliver fibre connections to as many Australian homes as possible, the focus on fibre should not overshadow the very significant and immediate contribution that wireless, and in some cases satellite technologies, could make to improving access to broadband services, particularly in regional areas. The focus on fibre, which will take many, many years to roll out, has also unfairly left some to argue that those communities that miss out on fibre, or that have to wait for a number of years before they receive it, are going to be significantly disadvantaged.

Wireless services are the most efficient and economical solution for 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 percent / 10 percent split of fibre 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, as well as looking at similar broadband network rollouts internationally, we believe that a wireless service is the most appropriate, sustainable and cost effective technology for much more than 10 percent 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 services are able to be deployed far quicker than any fixed-line alternative, 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 longer term, wireless services offering mobility and flexibility, and fixed-line products offering super high speeds, will co-exist as complementary networks, which together meet the country's 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 NBNCo to develop.

Further, regardless of the level of Government subsidy that would apply, it does not make any commercial sense to limit the building of a wireless network to only 10 percent of the population, particularly given the benefits of portability and interoperability inherent in the wireless product. Interoperability of standards-based, wireless networks ensures that services have utility in other markets, both domestic and international. AUSTAR believes that the rapid deployment of a WiMAX wireless broadband network using 2.3Ghz spectrum provides an excellent opportunity for NBNCo to provide immediate, affordable, high speed broadband services to many Australians. The rollout of this high speed wireless broadband network, which could potentially be executed in partnership between the Government and private business, with the Government possibly funding 'non-commercial' sites, would help drive demand for services and applications that are supported by higher speed broadband. This would in turn drive demand for the subsequent and longer-term rollout of a fibre network. Importantly, if this wireless network is built to the highest specifications, and the wireless technologies continue to scale, mature and improve their capabilities over time, in speed, service quality and economic efficiency, then this may reduce, or at least scale down, the obligations of NBNCo to build out fibre in less economic regions. This would dramatically improve the overall business case for NBNCo and improve its ability to satisfy potential investor concern over uneconomic, and potentially unnecessary fibre builds.

CONCLUSION

AUSTAR appreciates the opportunity to comment on these critical issues in the development of the NBN project.

We would be happy to discuss or provide more detailed information on any of the issues raised in this submission.

AUSTAR United Communications

30 July, 2009

ATTACHMENT A:

AUSTAR United Communications Limited Response To National Broadband Network:
Regulatory Reform for 21st Century Broadband

3 June 2009

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.

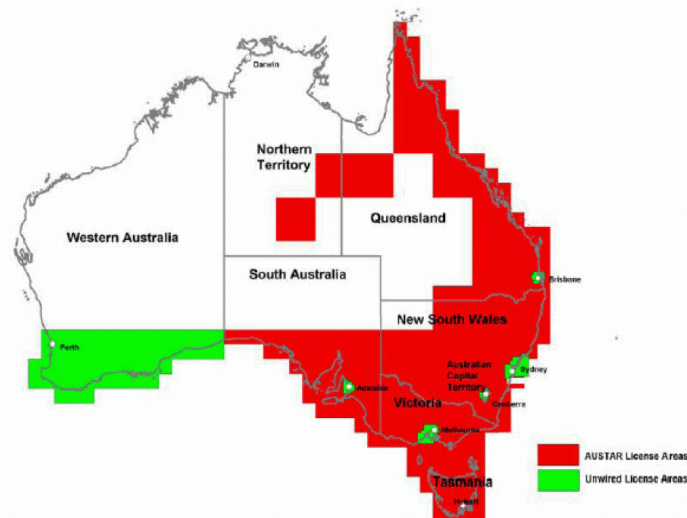


Figure 1: AUSTAR's Spectrum Holding

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.

