



NBN CO SPECIAL ACCESS UNDERTAKING FOR THE NBN ACCESS SERVICE

INITIAL SUBMISSION TO THE
AUSTRALIAN COMPETITION
AND CONSUMER COMMISSION

January 2012

Vodafone Hutchison Australia Pty Limited (**VHA**) welcomes the opportunity to comment on the Special Access Undertaking (**SAU**) proposed by NBN Co Limited and NBN Tasmania Limited (together **NBN Co**).

There is little doubt that the National Broadband Network (**NBN**), Telstra's Structural Separation Undertaking (**SSU**) and the Government's recent reform of the telecommunications access regime together present an unprecedented opportunity to deliver fundamental change to the fixed line telecommunications market. These three initiatives could finally deliver the long awaited level competitive playing field that will foster innovation and investment in the Australian telecommunications market. This is vital for Australia's long term economic future.

VHA recognises the central importance of the SAU to ensure that the NBN is a success. The SAU is essential not only to provide certainty to NBN Co regarding cost recovery and product definition, but also to:

- establish the ground rules for sustainable and effective long-term commercial relationships between NBN Co and its customers; and
- devolve important powers to the ACCC (and establish the ground rules for the use of these powers) to ensure the effective operation of the telecommunications access regime in Part XIC of the *Competition and Consumer Act 2010* (Cth) (**Part XIC**).

The SAU proposed by NBN Co is a comprehensive and well thought through document which meets a wide range of industry needs and addresses a number of VHA's concerns. Overall, the structure of the SAU is appropriate and NBN Co has covered the key issues that need to be addressed.

VHA agrees that it is vital for NBN Co to establish long-term certainty in regard to the recovery of the costs of building the NBN. A 30-year SAU is not unreasonable to achieve this objective - provided the SAU also establishes a regulatory and commercial framework that ensures that access seeker requirements are met and that there are effective means of managing the inevitable need to change many facets of the commercial arrangements of the NBN. In assessing the SAU, the ACCC must ensure that the right long-term arrangements are in place to ensure that commercial relationships can be established and that effective regulatory oversight arrangements are in place to protect access seekers and NBN Co.

VHA welcomes the cost recovery approach undertaken by NBN Co. Such an approach is also consistent with the ACCC's recent adoption of a Building Block Methodology / Regulatory Asset Base (**BBM-RAB**) as its favoured costing methodology for fixed telecommunications networks. VHA believes there may be a few refinements to the specific application of the BBM-RAB cost methodology proposed by NBN Co and will make a submission on this in the next round of formal consultation.

The critical long-term importance of the SAU to Australian telecommunications regulation means that the Australian Competition and Consumer Commission (**ACCC**) should only accept an optimal, balanced and reasonable SAU. In VHA's view, there are a number of important refinements required, that mean that the requisite threshold for ACCC acceptance has not yet been achieved. Having said this, NBN Co's proposed SAU goes a long way to establishing the appropriate long-term regulatory and commercial framework for the NBN. With some essential and judicious adjustments, the SAU will meet NBN Co and the industry's needs and will ultimately be in the Long Term Interest of End Users (**LTIE**) under Part XIC.

VHA understands that the ACCC will undertake at least two rounds of formal, submission based consultation. This first round is intended to give the industry an initial opportunity to identify general issues with the SAU. The second round will focus on specific issues and the

drafting detail. Consistent with this approach, VHA has identified in this submission only its initial general comments. VHA will make a more detailed submission during the second round of ACCC public consultation, including submissions on the SAU costing methodology.

An important reform to Part XIC introduced by the Government last year was the ability for the ACCC to seek a variation to the SAU under section 152CBDA of Part XIC before the ACCC makes a final decision to accept (or reject) the SAU. This was an important reform because it allows the SAU assessment and public consultation process to be less adversarial and more constructive. The ACCC has much greater scope to focus on determining what adjustments are necessary for acceptance of the SAU as opposed to simply whether or not the SAU should be rejected. VHA submits that the ACCC should consider exercising its section 152CBDA powers as a means to address industry and ACCC concerns with the SAU, but that any notice given under section 152CBDA(2) should itself be the subject of further consultation.

Importantly, as part of the SAU assessment process, VHA urges the ACCC to also undertake the very constructive approach that it undertook as part of the assessment of Telstra's SSU where the ACCC worked with Telstra and the industry to refine and adjust the SSU. VHA believes that the industry forum that was held during the SSU played a vital role in delivering what VHA believes was a positive outcome. VHA would suggest that at least two multilateral forums held early in the SAU assessment process and near the end would deliver a better outcome than solely relying on a submission based consultation process.

VHA looks forward to working with NBN Co and the ACCC to ensure the refinement of the SAU over the coming months.

VHA's principal concern: SAU must provide for more effective ACCC oversight

VHA's principal concern with the SAU is that it does not provide for sufficient ACCC involvement and oversight in the negotiation and ongoing application of the Wholesale Broadband Agreement (WBA).
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First and foremost the SAU must establish a framework that ensures that commercial negotiation is the primary focus of commercial arrangements. It is essential that commercial discipline and solid business relationships be the principal way that NBN Co meets the needs of its customers. Both customers and suppliers must be motivated to resolve their differences amicably and efficiently. However, one of the lessons of the last 15 years of access to Telstra's copper access network is that there must also be effective regulatory oversight to ensure that both the access provider and seeker operate in an environment where they are required to be responsive and reasonable.

In other words, effective regulatory oversight promotes optimal commercial outcomes.

While VHA recognises that NBN Co has provided for ACCC oversight in a number of important areas, VHA believes that there are a number of additional areas where ACCC involvement will be important. VHA considers that greater ACCC involvement and oversight in the negotiation and application of the WBA is critical for three important reasons:

- First, it is imperative that NBN Co remains accountable to the ACCC. NBN Co will become an effective monopoly in many locations throughout Australia so will not otherwise be subject to normal competitive disciplines. A fundamental basis for the Part XIC regime is to enable the ACCC to impose such disciplines via direct regulatory oversight.

- Second, ACCC oversight protects against manifest errors in NBN Co decisions. Notwithstanding the best of intentions, errors will arise. Such errors have the potential to severely impact on access seekers and consumers. ACCC oversight enables NBN Co errors to be efficiently identified and corrected.
- Third, NBN decisions must remain consistent with Part XIC objectives. The objective of Part XIC is to promote the LTIE. The various instruments promulgated by NBN Co, and its conduct pursuant to those instruments, should continue to be guided by that overriding objective. ACCC involvement is critical in ensuring that Part XIC objectives remain paramount.

Moreover, a greater level of ACCC involvement is particularly important given:

- the lengthy 30 year term of the SAU: any adverse issues could potentially endure for many decades and result in significant long-term harm to Australian consumers;
- the critical importance of the National Broadband Network to Australia, including as a key driver of GDP growth and Australia's global competitiveness in the 21st century; and
- the potential for privatisation of NBN Co during the term of the SAU.

Reflecting the intended co-existence of the WBA and SAU, VHA's submission is split into three components that emphasise the need for greater ACCC involvement in the application of the SAU *before*, *during* and *after* the term of a Wholesale Broadband Agreement (**WBA**).

1. Application of SAU before a WBA is executed

VHA has two primary concerns relating to the application of the SAU *before* a WBA is executed (including negotiation of a new WBA upon the expiry of an existing WBA). During this time period, negotiations would occur between NBN Co and access seekers to determine the bilateral terms of supply under a WBA based on the NBN Co 'Standard Form of Access Agreement' (**SFAA**).

(a) ACCC's powers to resolve pre-WBA negotiations must be expanded and refined

Clause 6 of the SAU enables the ACCC to resolve disputes arising during the negotiation of a WBA. The ACCC's powers to resolve those disputes should be expanded and the current drafting refined.

As the ACCC will be aware, the need for effective oversight of NBN Co during WBA negotiations has been of significant industry concern. On 30 September 2011, the Chairman of the ACCC responded to this concern and relevantly commented:

"The NBN will be a national, wholesale-only, fixed line network monopoly. As the interests of monopolies and consumers are not always the same, it is necessary that there is a robust regulatory regime in place to address excessive prices and ensure fair access to the network. ... The Parliament has recognised the key role that the ACCC should play overseeing NBN access issues. The ACCC therefore expects that NBN Co will structure its access arrangements to allow for regulated outcomes should this prove necessary."¹

¹ ACCC Media Release, "ACCC reinforces NBN access regulatory role" <http://www.accc.gov.au/content/index.phtml/itemId/1010026/fromItemId/621277>

On 11 November 2011, the ACCC wrote to a number of access seekers outlining that:

- The ACCC's expectation is that NBN Co will submit a SAU that will "*establish the regulatory framework under which access seekers would enter into Access Agreements with NBN Co*".
- While acknowledging the desirability of commercially agreed outcomes, the ACCC "*considers it continues to be of importance that access seekers have the opportunity to seek regulatory recourse in the absence of such agreement, and particularly prior to entering into long-term Access Agreements*".

VHA agrees with these public views expressed by the ACCC. Not only is it *important* that access seekers can seek regulatory recourse, it is *critical* to the effective regulation of NBN Co that effective recourse to the ACCC exists before the execution of a WBA.

Many jurisdictions with a telecommunications access framework utilise a 'Reference Interconnect Offer' (**RIO**) mechanism. The RIO has a role akin to the SFAA as a standard form of agreement that an access seeker can immediately accept. Such jurisdictions require the RIO to be subject to independent review and regulatory sign-off. However, in the absence of Part XIC providing an equivalent mechanism for ACCC endorsement of the SFAA, it is important that the SAU devolves sufficient powers to the ACCC to ensure effective oversight of the content of SFAA and WBA. The content of a SFAA must be reasonable.

Clause 6 (regulatory recourse) of the SAU does provide for limited recourse to the ACCC during negotiation of a WBA. However, clause 6 requires important further refinement to ensure that it will deliver optimal regulatory outcomes:

- First, clause 6 of the SAU currently adopts a bilateral approach to the resolution of pre-WBA disputes. However, disputes impact not only on individual WBAs, but also (via NBN Co non-discrimination obligations) on the terms of supply by NBN Co to all access seekers. VHA therefore submits that dispute resolution should involve scope for wider industry consultation:
 - interested third parties should be permitted to make submissions on the subject of the dispute, thereby ensuring that the wider industry perspective can also be considered in any arbitration;
 - where multiple parties dispute the same issue, the disputes should be capable of consolidation and a multilateral approach adopted; and
 - the content of the SFAA, as well as individual WBAs, should be subject to dispute resolution to ensure sufficient scope exists for effective ACCC oversight.
- Second, clause 6.1(g) of the SAU currently requires the ACCC to make a decision by adopting only the terms proposed by either NBN Co or the access seeker. The ACCC is not permitted to materially deviate from those terms. VHA submits that this approach is unnecessarily inflexible and ignores scope for a compromise (for example, a 10 day notice period could be a compromise between 5 and 15 days). The ACCC should be permitted greater scope to

identify its own solutions, consistent with Part XIC objectives, particularly if a dispute raises broader industry or regulatory concerns.

- Third, an access seeker should be permitted to execute a WBA before a dispute is resolved on the basis that the outcome of the dispute will be applied to the executed WBA. The dispute outcome should then be retrospectively applied as a backdated variation to the executed WBA. In this manner, delays in dispute resolution will not impede supply (or give NBN an unfair bargaining advantage). Moreover, time lines for the resolution of disputes could then be extended to ensure proper industry consultation and ACCC consideration.

(b) The SAU must give meaningful effect to AD and BROCC, not render them redundant

The SAU should give meaningful effect to access determinations (**AD**) and binding rules of conduct (**BROCC**), not render these regulatory instruments redundant. Any SFAA published by NBN Co should be consistent with AD and BROCC. Access seekers should be permitted to incorporate or adopt the whole or any part of an AD or BROCC when signing a WBA based on an SFAA. NBN Co is sufficiently protected via the SAU overriding any inconsistent AD or BROCC.

VHA is concerned that the current drafting of the SAU not only ignores the potential for AD and BROCC, but also renders them of no practical effect. In VHA's view, this approach is inconsistent with the policy framework in Part XIC and is not in the LTIE:

- First, NBN Co has currently proposed that an executed WBA will not contain a mechanism to automatically incorporate the terms of an AD or BROCC into the WBA.
- Second, the SAU contains no obligation on NBN Co to ensure that its SFAA is consistent with, or incorporates any of the terms of, any AD or BROCC. In this manner, it remains open to NBN Co to ignore any AD or BROCC when formulating or amending the terms of its SFAA.
- Third, clause 2.6(a) of the SAU only permits entry into an Access Agreement based on the execution of an SFAA. The SAU does not permit an access seeker to adopt any of the terms of an AD or BROCC into a WBA. In this manner, the SAU has expressly altered the intended operation of Part XIC by preventing access seekers from seeking supply under the terms of an AD or BROCC.

If the SAU were accepted in its current form, access seekers would not have any practical ability to access any of the terms of an AD or BROCC. The disapplication of AD or BROCC in this manner cannot be regarded as 'reasonable' or consistent with Parliament's intended operation of Part XIC.

For this reason, VHA submits that the SAU must be amended by NBN Co to recognise the important role of AD and BROCC in addressing matters not covered by an SAU. An SAU cannot simply disapply the role of AD and BROCC and render these regulatory instruments redundant. Parliament intended that AD and BROCC should be important instruments in the ongoing regulation of NBN Co.

VHA understands NBN Co's concern that it does not wish to be subject to 'open-ended' oversight by the ACCC. However, as a *quid pro quo* for providing greater certainty to NBN Co, it is important that the SAU devolves the ACCC with meaningful

oversight powers and that existing regulatory instruments are given meaningful application and effect.

VHA submits that two important amendments to the SAU are required to strike an appropriate balance between the need for regulatory certainty by NBN Co, and the need for AD and BROCC to have a meaningful role:

- First, the SAU should expressly require that any SFAA published by NBN Co must be consistent with AD and BROCC (except to the extent the AD or BROCC is inconsistent with an SAU). Such an amendment will give proper and meaningful effect to the intended legislative hierarchy in Part XIC.
- Second, access seekers should be permitted to incorporate or adopt the whole or any part of an AD or BROCC when signing a WBA based on an SFAA (except to the extent the AD or BROCC is inconsistent with an SAU). Such an approach is consistent with the intended practical operation of the Part XIC access regime and preserves the utility of AD and BROCC for access seekers.

In both instances, the ACCC's role is not 'open-ended'. NBN Co is adequately protected as its SAU will continue to override any AD or BROCC to the extent of any inconsistency. Accordingly, NBN Co will have certainty in relation to those matters in which it has sought certainty, including cost recovery and service definition.

VHA would welcome further discussion on this matter to ensure that the arrangements proposed meet the needs of industry and NBN Co. VHA believes that this is a key area that warrants a productive industry discussion with NBN Co to establish an appropriate and effective process in the SAU to determine when and how ADs and BROCCs may be applied by the ACCC.

2. Application of SAU during the term of a WBA

VHA has four primary concerns relating to the application of the SAU *during* the term of an executed WBA. During this period, an access seeker would be acquiring services under the terms of the WBA.

(a) NBN Co must document its mechanism for aligning WBAs on a non-discriminatory basis

When NBN Co amends its SFAA, or enters into a WBA with more favourable terms, the SAU should require NBN Co to offer those terms to all other WBA signatories in the same class. Such an approach gives effect to the ACCC's guidelines on non-discrimination and will avoid uncertainty and disputes. The SAU should also contain a mechanism for NBN Co to seek ACCC approval for differentiated offers.

As the ACCC is aware, section 152AXC(1) of Part XIC requires that NBN Co does not discriminate between access seekers when complying with its category B standard access obligations. In its draft Part XIC non-discrimination guidelines of December 2011, the ACCC clarified that:

“...network access providers that give access seekers in the same class an opportunity to request that their Access Agreement be amended to incorporate the

difference in term, condition or treatment, will not be taken by the ACCC to have discriminated between access seekers...”²

VHA strongly supports this pragmatic approach. However, while this interpretation is set out in the ACCC guidelines, it is not binding on NBN Co. To date, NBN Co has not documented in the WBA, SFAA or SAU the manner in which it intends to align WBA so as to give effect to its non-discrimination obligations. In the absence of a process ‘locked down’ in the SAU, significant uncertainty will exist regarding the practical application of the non-discrimination provisions. The precise application of section 152AXC could well become the subject of future litigation.

To reduce uncertainty and avoid future disputes, VHA submits that it is important that the mechanism for amending executed WBAs is expressly documented in the SAU. The SAU should require that when NBN Co amends its SFAA, or enters into a WBA with more favourable terms, NBN Co must offer those same terms to all other WBA signatories in the same class.

VHA further submits that the SAU should formally require NBN Co to seek permission from the ACCC to offer a differentiated offer to a particular class of access seeker, such approval given if the differentiated offer seeks to overcome a discriminatory situation or preserve a level playing field. The ACCC would then seek industry comment and assess the proposal to ensure that it delivers a non-discriminatory outcome, and that it promotes Part XIC objectives such as the LTIE.

The inclusion of these mechanisms in the SAU will resolve much of the current uncertainty regarding the practical application of the non-discrimination obligations to the WBA, as well as ensuring that the Part XIC regime operates in the manner intended by Parliament.

(b) The ACCC must have an oversight role in the resolution of WBA disputes

The SAU should require that WBA dispute resolution is subject to appeal to the ACCC, but only if the ACCC agrees to hear the appeal (following consideration of a petition). VHA would expect the ACCC to only hear appeals in exceptional circumstances.

For the reasons identified previously in this submission, it is critical that the ACCC maintains an effective and ongoing role in the application of the WBA during its term. Such a role is necessary:

- first, to ensure NBN Co remains accountable to the ACCC;
- second, to protect against manifest errors in ACCC decisions; and
- third, to ensure that NBN decisions remain consistent with Part XIC objectives.

VHA submits that the optimal manner for such ACCC oversight to occur is for the SAU to require that the WBA dispute resolution process is subject to an ultimate right of appeal to the ACCC.

² ACCC, “Part XIC non-discrimination guidelines” (December 2011) p4

Specifically, if a party were dissatisfied with the outcome of an arbitral award under the dispute management process currently established by NBN Co's WBA, it could petition the ACCC in certain limited circumstances. The other party would be provided an opportunity to respond to that petition. The ACCC would consider that petition and consider whether the circumstances were such that it should intervene and hear the appeal. The ACCC would have no obligation to hear the appeal and would only be able to intervene in limited and defined circumstances.

VHA would expect the ACCC to only hear appeals in exceptional circumstances, recognising that a commercial arbitration would normally be sufficient to resolve a dispute. However, if the ACCC were concerned by the outcome of an arbitral decision, it would have scope to address that concern. The ACCC could exercise its discretion to hear an appeal, for example, if the arbitral award contained a manifest error or was contrary to the objectives of Part XIC (such as denying access to certain key aspects of service in a manner contrary to the standard access obligations).

Again, VHA believes that, as part of the SAU assessment process, the ACCC should facilitate a discussion between industry and NBN Co about this issue to ensure that the ACCC's role is appropriate and the interests of industry and NBN Co are appropriately balanced.

(c) Certain discretions conferred on NBN Co by the WBA must be subject to ACCC oversight

The SAU should require certain WBA discretions given to NBN Co to be subject to direct ACCC oversight thereby ensuring accountability, protecting against error, and ensuring consistency with Part XIC. Moreover, the SAU should require NBN to exercise all of its discretions in the WBA reasonably.

VHA accepts that any regulatory oversight by the ACCC needs to be appropriate so that access seekers do not raise inconsequential matters or cause significant administrative burden for NBN Co and other customers. On the other hand, it is also clear that NBN Co should exercise its discretion reasonably and should be ultimately accountable to the ACCC.

VHA has proposed above that the optimal means for ensuring such accountability in most instances is to provide a final right of appeal to the ACCC in the context of dispute resolution. The ACCC would itself determine whether it considered it appropriate to intervene (and, indeed, the ACCC is the entity best placed to make that decision at that time). However, there are some discretions exercisable by NBN Co in the administration of the WBA that are so fundamental to the effective operation of the Part XIC regulatory regime that direct ACCC involvement is required.

Specifically, there are a number of issues where currently NBN Co has a right to exercise an unfettered discretion that could fundamentally change the operation of the WBA in a manner that could have a significant adverse impact on access seekers. These key discretions are listed in the table in the **Attachment** to this submission. VHA submits that these key discretions should be subject to direct ACCC oversight via a right for an access seeker to apply directly for ACCC review of an NBN decision instead of seeking commercial arbitration in the event of a dispute.

VHA submits, however, that this should only occur in limited but important circumstances, such as where Part XIC objectives such as the promotion of the LTIE are at stake. These circumstances should be clearly defined so that ACCC

intervention would only occur in those limited circumstances. That said, this residual role is necessary to ensure that there is appropriate and effective regulatory oversight.

VHA also submits that the ACCC should consider whether the SAU should expressly require NBN Co to act reasonably and with regard to the objectives of Part XIC when exercising any discretion. In the event that NBN Co were to act unreasonably, the ACCC would then have effective recourse against NBN Co under the SAU. Again, such an approach would ensure greater NBN Co accountability, protect against error, and ensure Part XIC objectives remain paramount.

(d) The mechanism for SAU-WBA alignment must be more reasonable

The SAU should require the mechanism in clause F3 of the WBA (for ensuring the alignment of the WBA with the SAU) to be made more reasonable.

VHA agrees that WBA signatories must be given sufficient opportunity to align their executed WBAs with the SAU. VHA therefore supports the continued inclusion of clause F3 in the WBA.

However, VHA has a number of important concerns with the proposed operation of clause F3. VHA believes it is important that the SAU address those concerns by requiring that all WBAs contain an SAU-WBA alignment mechanism consistent with drafting included in the SAU. This alignment mechanism should also be applied to the current SAU-WBA alignment (noting that otherwise the existing operation of clause F3 of the WBA would apply to the current SAU-WBA alignment, potentially defeating the purpose of amending clause F3).

VHA proposes that at least the following amendments must be made to the existing SAU-WBA alignment mechanism to ensure its effective application in a fair and reasonable manner:

- Customers should be permitted to accept the NBN adjustment offer in part or in whole. At present, customers are only permitted to accept a bundled package of amendments (which may contain both acceptable and unacceptable provisions).
- In the event of a dispute over the content of an adjustment notice, the dispute should be capable of being escalated to the ACCC for resolution given that the alignment of the SAU and WBA is ultimately of a regulatory nature.
- Consultation on the alignment of the SAU with the WBA should occur on an industry-wide basis, not a bilateral basis. The non-discrimination obligation effectively requires a multilateral approach.
- Where multiple parties dispute the same alignment issue, the disputes should be consolidated.
- Interested third parties should be able to make submissions on the subject of the dispute given that all parties are potentially affected by the outcome.
- The time frame for consultation should be extended and should include scope for access seekers to identify the amendments they seek to reflect the SAU.

- Access seekers should be permitted to initiate the adjustment process by giving an adjustment notice to NBN Co, if NBN Co does not propose an adjustment notice within the time period.

3. Application of SAU after termination or expiry of a WBA

VHA believes there are two areas of ambiguity relating to the application of the SAU *after* the expiry or termination of an executed WBA. During this period of time, an access seeker would normally be negotiating to continue to acquire services from NBN Co under an alternative WBA.

(a) The SAU must provide for interim supply upon a WBA expiry while a new WBA is negotiated

The SAU should provide for interim supply to continue beyond the expiry or termination of a WBA on the existing WBA terms until a new WBA is executed.

VHA is concerned that the literal application of the current WBA and SAU would mean that once a WBA expires or is terminated, NBN Co would cease to supply services to an access seeker:

- Discontinuation of supply upon the expiry of a WBA is unnecessary and unreasonable in most instances. Such an approach does not recognise the practical reality and industry convention that any supply (if required) would continue on an interim basis until a new WBA was executed.
- VHA understands that only in the most exceptional of cases has supply of declared services under Part XIC been discontinued where such supply is still sought by an access seeker. Indeed, the standard access obligations arguably restrict the ability of NBN Co to discontinue supply.

For this reason, VHA submits that it is important that the SAU provide for interim supply to continue beyond the expiry or termination of a WBA on the existing WBA terms until a new WBA is executed. Such an approach is consistent with the standard access obligations, consistent with industry practice, and is necessary to ensure adequate time for the commercial negotiation of a new WBA (including the resolution of any disputes arising during pre-WBA negotiations).

(b) The SAU must preserve continuity of supply between consecutive WBAs

The SAU should preserve the continuity of supply between consecutive WBAs by stating that certain provisions of the WBA will not apply where the access seeker enters into a new WBA or is subject to interim supply.

Again, VHA is concerned that the literal application of the WBA and SAU could lead to severe disruption to customers and unnecessary cost and expense. The WBA, for example, contains provisions that require disconnection of services and removal of equipment upon its expiry. Such provisions should not be applied where an access seeker is seeking continuing supply over consecutive WBAs.

VHA submits that the SAU should provide that the following provisions of the WBA do not apply where the access seeker either enters into a new WBA or is subject to interim supply:

- NBN Co's ability under clause F13.1 of the WBA to immediately cease supplying products to the customer, refuse to accept any further orders, or cease-fulfilling then-current orders;
- the requirement under clauses F13.5 and F13.6 of the WBA for customers to (within 60 days of expiry) to disconnect any connections between the customer's network and the NBN, disconnect any connections made to the NBN by the customer on behalf of end users, and remove all of the customer's (and end users') equipment from any NBN Co sites; and
- costs for installation, reactivation, modification or removal under the WBA product catalogue.

Attachment: Key discretions conferred on NBN Co by the WBA that should be subject to specific ACCC oversight

Discretion	Explanation
<p>Outcomes from the Product Development Forum (PDF)</p>	<p>New product development will be a key issue for all WBA customers. While VHA considers that the PDF and related processes (PDF Processes) are an acceptable way of achieving a consultative process to develop new products, VHA is concerned that NBN Co has absolute discretion in relation to a number of aspects of the process:</p> <ul style="list-style-type: none"> • prioritisation of product ideas under clause 5.2 of the PDF processes; • the decision as to whether to develop a product under clauses 6.4, 6.5 and 6.6 of the PDF processes; • finalisation of a product solution under clause 9 of the PDF processes; and • service levels and service rebates applicable to new products (envisaged by clause 3.7 of schedule 6 of the SAU). <p>These discretions are of particular concern to VHA as the dispute resolution procedure under the WBA does not apply. New products are key to innovation in the industry and for consumers. NBN Co's discretions in relation to new products should therefore be subject to direct ACCC oversight.</p> <p>VHA appreciates that Schedule 9 of the SAU provides some oversight in relation to the PDF processes. However, the operation of these processes is subject to the discretion of NBN Co. Greater ongoing ACCC oversight is required particularly when a significant number of access seekers have sought the new product but NBN Co has decided not to introduce it.</p>
<p>Pricing of New Products</p>	<p>VHA recognises NBN Co's obligation to consult with customers in relation to the pricing for new products under clause 3.6 of schedule 6 the SAU. Further, VHA accepts that NBN Co is required to comply with the prudent design condition in relation to product related network changes under schedule 9 and to comply with the requirements of the SAU. However, NBN Co will still have residual discretion in product pricing that could be exercised in a manner adverse to certain access seekers. Accordingly, VHA submits that specific but limited ACCC oversight of NBN pricing for new products is desirable. Intervention would only occur when NBN Co's pricing is clearly distorting the market.</p>
<p>Outcomes from the Contract Development Process (CDP)</p>	<p>The CDP under the WBA is key to reaching agreement on a long term commercial agreement between NBN Co and its customers for supply of NBN services. The CDP is not subject to dispute resolution under the WBA. NBN Co is very much in control of this process and it has little incentive to agree to the commercial positions of customers. For this reason, the ACCC should have oversight over certain aspects of the process:</p> <ul style="list-style-type: none"> • decisions not to proceed with the resolution of key issues under clause 6.3 of the CDP; • decisions to amend the WBA as a result of resolution of a key issue under clause 7.5 of the CDP; and • rights to unilaterally change the CDP under clause 14 of the CDP. <p>While VHA appreciates that under clause 7.5 of the CDP some reference has been made to seeking a BROCC from the ACCC, the circumstances in which this option is available to customers is limited. NBN Co is first required to issue a proposed change to the WBA, and it is under no obligation to do. This needs refinement, particularly as the drafting may purport to fetter the ability of an access seeker to seek a BROCC.</p>

Discretion	Explanation
Ongoing Contract Development Process	The current CDP only applies for the duration of the short term WBA. This means that there is no formal mechanism for access seekers to seek changes to the long term WBA and that there is no role for the ACCC if NBN Co rejects a need to change the WBA. This is a critical missing element of the interplay between the SAU and the WBA that VHA submits should be addressed in the SAU via specific ACCC oversight.
Withdrawal of Products	Subject to the existing provisions of the SAU, NBN Co has an absolute discretion to withdraw products (or components or features of products) under the WBA. VHA appreciates that the SAU provides that NBN Co may not withdraw key products, components and features. However, VHA is concerned the products to which it has committed and to which its end users are connected may be withdrawn without an appropriate replacement. Any withdrawal of any product (or components or features) should be subject to appropriate but limited oversight by the ACCC.
Major NBN Upgrades	<p>A major NBN upgrade is defined in the WBA and the SAU as an upgrade which:</p> <ul style="list-style-type: none"> • requires a customer to take particular actions to continue to use a product component, associated product feature or ancillary service after the implementation of that upgrade; • results in a product component, associated product feature or ancillary service no longer being supplied by reason of that upgrade; or • requires a customer to commit material capital expenditure in response to the implementation of the upgrade. <p>The nature of major NBN upgrades therefore is those that could have significant impact on customers. NBN Co maintains complete discretion as to implementation of major NBN upgrades, subject to compliance with the relevant notice periods in the SAU and WBA. VHA submits that due to the potential impact of major NBN upgrades, any decision to proceed with such an upgrade should be subject to appropriate but limited oversight by the ACCC.</p>
Development of the Operations Manual	The operations manual is a key document governing the relationship between NBN Co and its customers. It includes terms relating to such key issues as on-boarding, activations, fault management, billing, the NBN Co service portal and reporting. This document is able to be changed on 30 days notice to customers. VHA appreciates the inclusion of the formal development process for the operations manual which is proposed by clause 1.2 of the WBA, however VHA is still concerned by NBN Co's absolute discretion to make changes. As a change to the operations manual may significantly change the nature of NBN Co's services, any such change should be subject to the appropriate but limited oversight of the ACCC.
Unilateral Changes to the WBA	Further to our previous point, NBN Co has significant rights to unilaterally change the WBA which are summarised in clause F4 of the WBA. VHA is concerned by these unilateral rights which may result in customers having to comply with unfavourable changes. VHA submits that any unilateral change made to the WBA should be subject to full ACCC oversight.