



NBN CO SPECIAL ACCESS UNDERTAKING FOR THE NBN ACCESS SERVICE

SUBMISSION TO THE
AUSTRALIAN COMPETITION
AND CONSUMER COMMISSION

March 2012



Summary

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

This submission is made by VHA in response to the Supplementary Consultation Paper on the SAU issued by the ACCC on 10 February 2012 and is the second submission made by VHA on the SAU.

VHA believes that the National Broadband Network (**NBN**), Telstra's Structural Separation Undertaking (**SSU**) and the Government's reforms to the access regime provide an unprecedented opportunity to deliver a level competitive playing field in Australia's fixed-line telecommunications markets. These reforms address many of the policy concerns associated with Telstra's vertical integration and the need for a national next generation broadband network with a wholesale-only focus.

The assessment of the NBN Co's SAU is one of the single most important opportunities that the ACCC has to shape the evolution of telecommunications regulation in Australia for the coming decades. The decisions that will be made by the ACCC over the coming months will have a lasting impact on competition in the telecommunications industry. Within this context, it is important that the ACCC's oversight role is embedded in the SAU so that new information, evolving market dynamics or rapid advances in technology can be addressed in a timely and prudent manner.

An effective regulatory regime must acknowledge that NBN Co will own and control natural monopoly access infrastructure. While VHA recognises NBN Co's wholesale only focus, without appropriate regulatory controls the history of monopolies demonstrates that such firms have the ability and the incentive to use their substantial market power to raise prices, reduce volumes or investment, retain unreasonable discretions, and shift costs and risks to wholesale customers (and hence ultimately end users). These outcomes are detrimental to economic efficiency; they have the effect of lowering productivity and reducing consumer welfare across the entire economy.

The SAU has a number of important functions:

- first, the SAU provides regulatory certainty to NBN Co, thereby reducing regulatory risk in cost-recovery and reducing financing costs for NBN Co over the life of the NBN, reducing the overall NBN cost;
- second, the SAU provides commercial certainty to wholesale customers of NBN Co by establishing the parameters for wholesale service supply and the ground rules for the development of sustainable and effective long-term commercial relationships;
- third, and most importantly from VHA's perspective, the SAU devolves critical oversight powers to the ACCC (and establishes the basis 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**).

At this stage, VHA has significant reservations regarding the balance struck by the proposed SAU in relation to the factors identified above. The current draft SAU is too heavily in favour of providing regulatory certainty to NBN Co and does not devolve sufficient oversight powers to the ACCC or provide sufficient commercial



certainty for NBN customers. Given the critical long-term importance of the SAU, it is important that refinements are made to the current draft SAU to ensure an optimal balance is struck.

The interplay between the SAU and the Wholesale Broadband Agreement

VHA supports NBN Co's approach where:

- the SAU establishes the long term commitments in regard to cost recovery and provides a commercial framework that NBN Co will commit to over an extended period; and
- the Wholesale Broadband Agreement (**WBA**) is NBN Co's commercial terms of supply and is a Standard Form of Access Agreement (**SFAA**) that is bound by the commitments of the SAU.

In effect, the SAU establishes the long term 'rules of the game' for commercial interaction and the WBA deals with the commercial arrangements that NBN Co and access seekers abide by on a day to day basis.

If this arrangement is established effectively then both long term and short term requirements for NBN Co and its customers would be effectively and efficiently delivered. It would give long term certainty for crucial elements of the NBN but deliver commercial flexibility for NBN Co and its customers to deliver appropriate terms of supply as new requirements develop.

For this framework to be successful there must be effective regulatory oversight by the ACCC that NBN Co is complying with the SAU and the WBA. At this stage, VHA does not believe that this has been achieved. As currently drafted the SAU (and WBA) allows too much discretion to NBN Co and does not allow an appropriate role for the ACCC. In our detailed comments below, we outline a number of additional elements of the SAU that need to be included before we believe the balance has been appropriately established.

Principles for improving NBN Co's SAU

There are three areas where changes to the proposed SAU are required if it is to have the effect of promoting the Long-Term Interest of End-users (**LTIE**). A SAU, which is capable of acceptance by the ACCC, must:

1. provide for more effective ACCC oversight.
2. strike an appropriate balance between the interests of NBN Co and those of access seekers; and
3. impose constraints on NBN Co's ability to depart from economically efficient outcomes.



1. Effective ACCC oversight

The proposed SAU does not provide the ACCC with sufficient involvement and oversight in the negotiation and ongoing application of the WBA. The past 15 years of the telecommunications access regime has demonstrated that effective regulatory oversight is essential to ensure that the commercial arrangements for access providers and, to a lesser extent, access seekers are responsive and reasonable.

The SAU, as a regulatory instrument, should provide certainty of access on reasonable terms to access seekers and reduce regulatory costs for both access providers and access seekers. Within this context, the ACCC's involvement is necessary for three reasons: first, it is essential for imposing discipline on NBN Co via direct regulatory oversight; second, it will protect access seekers and consumers against manifest errors in NBN Co decisions; and third, it ensures NBN Co's decisions are consistent with achieving the welfare-enhancing outcomes envisaged by the object of Part XIC of the *Competition and Consumer Act 2010*.

2. Balancing the interests of NBN Co and access seekers

NBN Co has, by design, a mandated monopoly over the provision of wholesale fibre access services to Australian premises. These services are essential to the retail provision of fixed broadband services and will become increasingly important to the provision of convergent services such as subscription television services or mobile services provided by, for instance, femto cells. In these circumstances, negotiations over NBN Co's provision of access to essential bottleneck infrastructure will be undertaken in an environment where there is significant asymmetrical bargaining power and that imbalance will materially advantage NBN Co.

3. Appropriate constraints on NBN Co discretions

The proposed SAU does not provide NBN Co with a strong incentive to consistently deliver outcomes that promote the long-term interests of end-users. There is too much discretion for NBN Co to put its own commercial interests ahead of its retail service providers (and their downstream customers). It has the ability to set prices that depart substantially from underlying costs and it does not have to provide services that it is readily capable of supplying. Such behaviour will not deliver the outcomes one might expect in a competitive market.

VHA is comfortable for NBN Co to have the ability to set prices or determine its product offering provided we are assured that NBN Co will do so in a manner that promotes the LTIE, promotes any-to-any connectivity and encourages economically efficient use of its infrastructure. This requires the SAU to contain incentives and self-enforcing constraints on NBN Co's behaviour, particularly in relation to NBN Co's level of pricing discretion, its contract development process and its dispute resolution mechanisms.



VHA's proposed drafting solutions

To assist the ACCC and NBN Co, VHA has focussed this submission on identifying a set of simple and practical drafting solutions which are essential to improving the SAU. Such drafting solutions are intended to provide a foundation for a section 152CBDA notice by the ACCC or to assist NBN Co to address VHA and industry concerns.

A brief summary of VHA's proposed changes to the SAU is set out in Table 1. Further detail on the reasons for each change and proposed drafting solutions is set out in VHA's response to the ACCC's questions. VHA has set out its response in tabular format for the convenience of the ACCC, adopting the ACCC's subject headings from its Supplementary Consultation Paper.

VHA proposes 16 changes to the SAU that will substantially improve the framework created by the SAU. In particular a number of the proposed solutions will ensure that the interplay between the SAU and WBA is improved and the appropriate regulatory oversight is established. This is vital for the SAU to meet the Long Term Interests of End Users criteria. Without them there would be a substantial imbalance in favour of NBN Co which would mean that there would be an inefficient and uncertain outcome for access seekers and consumers.

Table 1: Summary of changes required to the proposed SAU

Solution	Brief description of solution	Relevant section of SAU
1	Expand and significantly improve the application of clause 6 (regulatory recourse) of the SAU.	6
2	Provide for a limited final right of appeal to the ACCC from any SFAA/WBA dispute resolution.	6, Schedule 12
3	Provide for direct ACCC oversight of a few important discretions contained in the SFAA/WBA.	3, 6, Schedules 6 & 11
4	Impose an overriding obligation of good faith and reasonableness in relation to the SFAA/WBA.	Schedule 11
5	Amend the review procedure for the SAU in the manner proposed by the ACCC.	6, Schedule 9
6	Require a new clause in the SFAA/WBA that NBN Co must comply with the SAU.	Schedule 11
7	Adopt the ACCC's proposed amendments to ensure greater consultation and transparency.	Schedules 8 & 11
8	Require the SAU to be interpreted consistently with Part XIC with ambiguities resolved by AD/BROC.	2



9	Include reasonable service levels and appropriate service level rebates in the SFAA/WBA.	5, Schedules 6 & 11
10	Include pricing methodology commitments in the SAU.	3, Schedules 5 & 6
11	Undertake a formal review of the WACC to confirm its reasonableness, including on a periodic basis.	Schedule 7
12	Create incentives for efficient CAPEX and OPEX expenditure, as well as greater ACCC oversight.	Schedule 7
13	Provide for interim supply to continue beyond the expiry or termination of an SFAA/WBA.	Schedule 11
14	Disapply the SFAA/WBA cessation of supply provisions where supply continues under a new AA.	Schedule 11
15	Ensure that the WBA/SFAA non-price terms included in the SAU are objectively reasonable.	Schedule 11
16	Require the SAU-WBA alignment mechanism to be modified to ensure it is reasonable.	2, Schedule 11



VHA's response to the ACCC's questions

No	ACCC's consultation issues	VHA's response
2.1	Are there terms and conditions that are not contained in the SAU which you consider should be established prior to parties entering into long-term Access Agreements (AA)?	<p>REGULATORY CONTEXT</p> <p><u>Issues and concerns:</u></p> <p>As VHA identified in its first submission, most 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 express mechanism for ACCC endorsement of the SFAA/WBA, it is important that the SAU devolves sufficient powers to the ACCC to ensure effective oversight of its content.</p> <p>Indeed, the statutory intent of Part XIC is that NBN Co complies with the Category B standard access obligations (SAOs) by supplying access to declared services on a reasonable basis. The SAU is an undertaking by NBN Co to supply declared services as required by the SAOs, so must necessarily also require NBN Co to supply services under any the SFAA/WBA on a reasonable basis. The requirement for reasonableness is reinforced by sections 152CBD(2) and 152AH of the CCA.</p> <p>As the ACCC identifies in its Discussion Paper, one way to achieve a more reasonable SFAA is for more detailed terms and conditions to be included in the SAU in the form of an undertaking that VHA will include those terms in its SFAA/WBA. However, VHA considers that this approach is inefficient and gives rise to long-term commercial inflexibility, particularly as the SAU is not intended to be regularly updated.</p> <p><u>Proposed solution – Solution 1</u></p> <p>VHA submits that the same overriding objective of reasonableness could be achieved in a more effective and efficient way. The existing dispute resolution procedure in clause 6 (regulatory recourse) of the SAU should be expanded and improved as identified in Section 3.1 below. Clause 6 already provides for ACCC oversight to resolve disputes over terms and conditions in an Access Agreement (AA). The outcome of those individual disputes already flows through into NBN Co's SFAA/WBA as well as existing executed AA. Accordingly, clause 6 provides the foundation for a broader SAU drafting solution to the issue of reasonableness of the SFAA/WBA. VHA has referred to this solution as "Solution</p>



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		<p>1" in this submission and has provided more detail below.</p> <p>If Solution 1 approach were adopted, any concerns regarding the reasonableness of particular SFAA/WBA provisions could be resolved by the ACCC on a case-by-case basis, on request from industry participants, with specific regard to Part XIC policy objectives. The industry could then have greater confidence that any terms included by NBN Co in an SFAA/WBA would be reasonable over the proposed lengthy term of the SAU.</p>
<p>3.1</p>	<p>Are the types of disputes that may be notified through the dispute resolution process sufficient to resolve disputes between NBN Co and access seekers about access to the relevant services? In providing your views, please consider that the ACCC has powers under Part XIC of the CCA for setting terms and conditions of access to declared services, such as making Access Determinations (AD) and Binding Rules of Conduct (BROC), and can issue Procedural Directions (PD) in relation to negotiations.</p> <p>Is the dispute resolution procedure likely to result in the effective resolution of disputes? Are the dispute resolution timeframes, the permitted ACCC decisions, and the criteria to be applied by the ACCC when making a decision, likely to result in the effective resolution of disputes?</p>	<p>REGULATORY RECOURSE DISPUTES</p> <p><u>Issues and concerns:</u></p> <p>As identified above, VHA believes that appropriate regulatory oversight of the operation of the SAU and the content of the WBA is fundamental in ensuring that the SAU is overall 'reasonable' under sections 152CBD(2) and 152AH of the CCA. It is VHA's view that the current SAU does not achieve an appropriate outcome.</p> <p>At this stage the role of the ACCC in the SAU and WBA is limited. For example Clause 6 (regulatory recourse) only enables a party to seek ACCC determination of issues when negotiating an AA. This does <u>not</u> result in effective or satisfactory resolution of disputes in a manner consistent with Part XIC objectives. Amendments are therefore required. VHA's key concerns are as follows:</p> <ul style="list-style-type: none"> • Clause 6 implements a WBA/SFAA outcome for the entire industry based on a dispute in which only one individual party may make a submission to the ACCC. There is little practical scope in the current drafting for the ACCC to seek wider industry submissions and consult with all stakeholders. • Clause 6 is limited to disputes that arise before the execution of an AA by a party engaged in negotiations with NBN Co at that time. Clause 6 does not enable resolution of wider industry concerns arising from the Contract Development Process, unless a party that happens to be negotiating an AA at that time notifies that same concern as a dispute. • The Contract Development Process provides a procedure to agree terms only during the term of the current short term WBA. It does not apply on an ongoing basis. A similar process could be embodied in the SAU so that it applies for the term of the SAU and therefore applies throughout the term of each WBA. In effect, the WBA is a document that will evolve over time and hence it is important that the Contract Development Process continues to apply at all times.



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	<p>Is it appropriate that the ACCC only has a choice of adopting one set of terms and conditions proposed by the parties without amendments? For instance, there may be a scenario where the ACCC considers that neither set of terms and conditions promotes the long-term interests of end-users.</p> <p>Is it clear that the ACCC decisions under the dispute resolution processes will be binding on all parties?</p> <p>Overall, are the regulatory recourse dispute resolution provisions contained in NBN Co's proposed SAU consistent with the legislative criteria in section 152CBD of the CCA?</p>	<ul style="list-style-type: none"> • Once a party has executed an AA, it currently loses the ability to seek ACCC regulatory intervention under clause 6. As all parties will ultimately sign a WBA/SFAA, this means clause 6 may have little practical ongoing operation. Accordingly, clause 6 cannot currently be used as a practical means to seek alignment of the SFAA/WBA with any Access Determination (AD) or Binding Rules of Conduct (BROC). In this manner, the SAU gives clause 6 little meaningful ongoing role, notwithstanding its critical importance as the primary means by which a party can obtain regulatory recourse and ACCC oversight to ensure the reasonableness of the SFAA/WBA. • In resolving a dispute, the ACCC is currently limited to deciding between two competing alternatives so has little scope to implement a broader industry solution consistent with Part XIC objectives. Limiting the ACCC's choice to two alternatives does not recognise that a compromise may be necessary (e.g., 5 days as a compromise between 10 days and 2 days). The drafting solutions proposed by the parties could also be extreme positions, neither of which is appropriate or consistent with Part XIC objectives. <p>VHA believes that these concerns, in aggregate, create a significant bias in dispute resolution in favour of NBN Co. There is limited scope for the ACCC to align disputes with Part XIC objectives. The powers devolved to the ACCC are unreasonably constrained. Over the proposed 30 year term of the SAU, such bias is neither reasonable nor in the long term interests of end users.</p> <p><u>Proposed solution – Solution 1</u></p> <p>VHA submits that these issues and concerns can be addressed with relatively few amendments to clause 6. VHA's proposed "Solution 1" seeks to eliminate the drafting bias in clause 6 without compromising the integrity of the SAU. VHA proposes that clause 6 should be redrafted as follows:</p> <p>(a) As well as having the ability to raise a dispute at any time before executing an AA, a party should be able to raise a dispute under clause 6 of the SAU for ACCC determination <u>after</u> it has executed an AA in any of the following circumstances:</p> <ul style="list-style-type: none"> • if NBN Co amends the underlying WBA/SFAA and the party disagrees with the amendment; or • if an issue is raised by the industry with NBN Co and is unable to be resolved, including in the context of the current and proposed Contract Development Process; or • if a party considers that any term of the WBA/SFAA is inconsistent with any term of an AD or BROC; or



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		<ul style="list-style-type: none"> • if a party is intending to negotiate a new AA within the next 6 months, but only in respect of amendments to apply under that new AA. <p>(b) Clause 6 of the SAU currently adopts a bilateral approach to the resolution of disputes. However, disputes impact not only on individual WBAs, but also (due to the potential for carry-over of ACCC determinations into the SFAA/WBA and existing AA) on the terms of supply by NBN Co for all access seekers. VHA therefore submits that clause 6 should provide scope for wider industry consultation by the ACCC:</p> <ul style="list-style-type: none"> • interested third parties should be permitted to make submissions to the ACCC on the subject matter of a dispute, thereby ensuring that the wider industry perspective (and alternative drafting solutions) can also be considered by the ACCC in the dispute resolution process; and • where multiple parties dispute the same issue, or multiple disputes concern a related issue, the disputes should be capable of consolidation into a multi-party proceeding. <p>(c) Any limitations on size and timing of submissions should be set by the ACCC based on the circumstances of the dispute. Based on VHA's experience, some disputes can be highly complex and hence a 'one size fits all' procedure, as currently contemplated by the SAU, is both inappropriate and impractical. Rather than proscribing submission deadlines and a maximum length for submissions, the SAU should only set out guidelines for the ACCC.</p> <p>(d) Clause 6.1(g) of the SAU currently requires the ACCC to make a decision by adopting only the WBA 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 regulatory or commercial compromise (for example, a 10 day notice period could be a compromise between 5 and 15 days). The ACCC should be permitted scope to identify its own solutions, consistent with Part XIC objectives, particularly if a dispute raises broader industry or regulatory concerns.</p> <p>(e) 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 be extended to ensure proper industry consultation and ACCC consideration.</p> <p>(f) Any provision in the WBA/SFAA should be subject to the clause 6 procedure, irrespective of whether it relates</p>



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		<p>to an ancillary service or any other service not covered by the SAU. Clause 6 should apply not only to the WBA/SFAA, but also to <i>any documents, procedures, systems and specifications referenced in the WBA/SFAA</i> and hence directly or indirectly forming part of the terms of supply of the declared services. Clause 6 must have comprehensive application.</p> <p>(g) The SAU should be amended to include a process similar to the Contract Development Process to provide a forum to agree changes to the WBA on an ongoing basis. This would reinforce our proposed amendments to clause 6 so that disagreements are appropriately escalated to the ACCC for determination. When adopted in the SAU, the procedures in the Contract Development Process should also be scrutinised by the ACCC to ensure they are reasonable – and any bias in favour of NBN Co should be removed</p> <p>VHA considers that if clause 6 were amended in this manner, it would become consistent with the legislative criteria in section 152CBD and 152AH of the CCA. Such a dispute procedure would provide the industry with confidence that the terms of supply by NBN Co would be 'reasonable' in the manner intended by Part XIC.</p>
3.2	<p>Are the commitments in the SAU likely to satisfy the legislative criteria for the proposed term of the SAU? Please identify those commitments that do. Are there commitments in the SAU that are unlikely to satisfy the legislative criteria for the proposed term of the SAU? Please identify these commitments.</p> <p>Do the obligations in the SAU for NBN Co to review the SAU and give variations to the ACCC mean that the commitments in the SAU are likely to be reasonable and in the long-term interests of end-users for the proposed term?</p>	<p>TERM, VARIATION, WITHDRAWAL AND EXTENSION OF THE SAU</p> <p><u>Issues and concerns:</u></p> <p>The bias identified above in relation to the drafting of clause 6 is symptomatic of a more general bias within the SAU and SFAA/WBA. This bias is evident, for example, in the extent to which NBN Co has given itself unilateral discretions or has not included requirements for objective reasonableness in the WBA.</p> <p>VHA considers that the SAU does not yet adopt an appropriate balance between, on the one hand, the legitimate business interests of NBN Co and, on the other hand, the long term interests of end users and the interests of persons who have rights to use the declared services as required by section 152CBD(2).</p> <p>VHA believes that there are significant advantages in establishing SAU arrangements that operate for a number of decades. This will provide both NBN and the industry with an extended period of regulatory certainty and avoid recurring periods of regulatory disputation. However at this stage, because of the inherent biases in NBN Co's favour, VHA agrees with the ACCC's comments that the 30 year period of the SAU has the effect of exacerbating this bias. That said, if the bias in the SAU is removed, a longer term may appear more reasonable for the SAU.</p> <p>VHA also agrees with the ACCC's comments that the process for <i>reviewing</i> the SAU must be made more reasonable. The current review procedure itself contains some bias in favour of NBN Co. The ACCC has already articulated the</p>



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	<p>Does the good faith review obligation in clause 1.2 of Schedule 9 (Review and Variation of Aspects of SAU) enhance the effectiveness or independence of the reviews that NBN Co is required to conduct under the SAU?</p>	<p>relevant concerns in its Discussion Paper and VHA agrees with those concerns.</p> <p><u>Proposed solution – Solutions 1, 2, 3, 4 and 5</u></p> <p>Rather than requiring a comprehensive redrafting of the SAU and SFAA/WBA, VHA again believes that a more pragmatic and efficient solution can be adopted. A number of small but significant changes can be made to the SAU to adjust the balance in favour of end users and to reduce bias:</p> <p>(a) First, as identified in 'Solution 1' above, the ACCC should have an effective oversight role in relation to the SFAA/WBA and AA terms by amending clause 6 of the SAU in the manner proposed above.</p> <p>(b) Second, a party should have a general right of appeal to the ACCC from dispute resolution under the AA. However, the ACCC's oversight role should be limited. VHA has referred to this as "Solution 2":</p> <ul style="list-style-type: none">• 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 should have the right to 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). <p>(c) Third, the ACCC should have a greater oversight role in the context of particular procedures and processes in SFAA/WBA. This issue is addressed in further detail below in the context of the relevant procedures and processes and is referred to by VHA as "Solution 3".</p> <p>(d) Fourth, the SAU should impose an overriding obligation on NBN Co to exercise its rights and powers in the SFAA/WBA, and exercise any discretion, reasonably and in good faith in accordance with Part XIC objectives. An</p>



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		<p>overriding requirement for objective reasonableness would give the industry greater confidence that the ACCC could intervene under the SAU if it were apparent that NBN Co were acting unreasonably when applying and administering the terms of supply. As the ACCC will appreciate, there is a lot of 'devil in the detail' in the drafting of the SAU and WBA/SFAA. An overriding obligation of reasonableness is a more effective and efficient solution than the ACCC attempting to amend every instance where NBN Co has given itself an unreasonable discretion (or attempt to regulate such instances under generic competition laws). VHA has referred to this solution as "Solution 4".</p> <p>(e) Fifth, the review procedure of the SAU should be amended as proposed by the ACCC to remove the current bias. VHA has referred to this solution as "Solution 5".</p>
4.1	<p>Are there any significant issues caused by references to 'the WBA' or other documents in the SAU? Have references to 'the WBA' or 'Access Agreements' been used appropriately in the SAU? Have the terms 'Access Seeker' and 'Customer' been used appropriately in the SAU? Do the recitals or assertions of fact in the SAU assist in the interpretation of other parts of the SAU?</p>	<p>COMMON APPROACHES TO THE OPERATION OF THE SAU</p> <p><u>Issues and concerns:</u></p> <p>VHA agrees with the ACCC's comments that drafting refinements are required to the SAU so that important terms such as 'WBA', 'Access Agreement', 'Access Seeker' and 'Customer' are appropriately used. While this may seem like a drafting nuance, the implications of this drafting are significant for the long-term reasonable application of the SAU.</p> <p>VHA has a particular concern with the drafting of clause 2.6 of the SAU. As VHA understands it, clause 2.6(a) could be intended to be NBN Co's non-price undertaking to comply with the SAOs by supplying access to the declared services on the terms of the WBA. Clause 2.6(b) then purports to 'cover the field' and indicate that where the SAU does not specify a term or condition, it will be as set out in the WBA. However, there is some ambiguity whether clause 2.6 is intended to be a binding undertaking by NBN Co or an assertion of fact.</p> <p>Moreover, clause 2.6 makes no mention of the terms of any Access Determinations (AD) or Binding Rules of Conduct (BROC) issued by the ACCC. As the SAU overrides the terms of any AD or BROC, the current drafting of the SAU arguably has the effect of precluding access seekers from acquiring services from NBN Co under the terms of an AD or BROC as an alternative to an SFAA. Such an approach is directly contrary to the intent of Part XIC and has the effect of removing the ACCC's principal means to regulate NBN Co.</p> <p><u>Proposed solution – Solution 1</u></p>



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		<p>VHA agrees with the ACCC that the recitals and assertions of fact contained in the SAU should be carefully reviewed. Ambiguity should be removed. Statements of fact should be redrafted as obligations where they are intended to set out the manner in which NBN Co will comply with the Category B standard access obligations.</p> <p>Clause 2.6(a), in particular, should be amended to permit supply by NBN Co under the terms of an AD or BROCC. Clause 2.6(a) should not limit supply by NBN Co only to supply under the SFAA/WBA as such an approach is inconsistent with Part XIC and 'unreasonable' in the context of sections 152CBD(2) and 152AH of the CCA.</p>
4.2	<p>Are there any other systems, documents and processes that should be included in the SAU? Are the features or qualities that NBN Co has specified for these systems, documents and processes appropriate?</p> <p>Has NBN Co proposed to undertake consultation at appropriate times in the SAU? Do the consultation processes cover the issues that are likely to require input from access seekers, the ACCC or the general public?</p> <p>Are the consultation processes set out adequate? Do they give interested parties sufficient time to consider and comment on issues? Do the consultation processes sufficiently set out the obligations of NBN Co to communicate/provide reasons for its decisions? Is the extent to which</p>	<p>COMMON APPROACHES RELATING TO OBLIGATIONS</p> <p><u>Issues and concerns:</u></p> <p>VHA submits that it is important that <u>all</u> systems, documents and processes associated with the WBA/SFAA are reasonable. In access agreements, the devil is often in the detail. Critical time periods or aspects of supply can be included in underlying operational documents. Such documents can have a significant impact on the overall commercial reasonableness of the supply arrangements. By way of example:</p> <ul style="list-style-type: none"> • 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 unilaterally amended by NBN Co 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 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 appropriate oversight by the ACCC. <p>Rather than requiring all systems, documents and processes to be formally documented in the SAU, VHA again submits that simpler and more efficient SAU drafting solutions can be adopted – as identified below.</p> <p><u>Proposed solution – Solutions 3, 6 and 7</u></p> <p>VHA has identified a list of key NBN discretions in the Annexure to its first submission as follows:</p>



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	<p>the SAU requires NBN Co to take into account material provided through consultation processes sufficient? Should there be greater ACCC oversight of consultation processes? Does the SAU provide sufficient opportunity for the ACCC to review consultation processes in order to assess whether they have been effective?</p> <p>Do the publishing obligations in the SAU provide sufficient detail and types of information? Is there other information that access seekers or other members of the public would require in relation to the supply of the NBN Access Service? Is the proposed timing and location of publication appropriate?</p> <p>Are the constraints on NBN Co contained in the SAU in relation to its exercise of contractual rights effective and reasonable?</p>	<ul style="list-style-type: none"> • outcomes from the Product Development Forum; • pricing of new products; • outcomes from the Contract Development Process; • ongoing Contract Development Process; • withdrawal of products; • major NBN upgrades; • development of the operations manual; and • unilateral changes to the WBA. <p>VHA repeats its first submission that there should be direct ACCC oversight in relation to each of these discretions as part of VHA's proposed "Solution 3". Specifically, an access seeker should have the ability to apply directly for ACCC review of an NBN decision instead of seeking commercial arbitration in the event of a dispute.</p> <p>The ACCC has also identified a concern that, if the SAU imposes an obligation on NBN Co to exercise its discretion under the WBA in a particular way, this may not be enforceable given that an executed AA overrides the SAU. As a solution, VHA suggests that a clause is included in the SAU stating that NBN Co must include the following clause in its SFAA:</p> <p style="padding-left: 40px;">"XX. NBN Co agrees to comply with the terms and conditions of the Special Access Undertaking submitted by NBN Co Limited and NBN Tasmania Limited to the ACCC and subsequently accepted by the ACCC on <i>[Date]</i>(SAU). In the event of any inconsistency between a term in the SAU and a term in this WBA, the obligation contained in this clause XX shall prevail."</p> <p>If this clause is included in the SFAA, it will automatically flow through to every AA and give key non-price undertakings in the SAU primacy over each AA. VHA refers to this solution as "Solution 6".</p> <p>In relation to consultation and transparency:</p> <ul style="list-style-type: none"> • VHA agrees with the ACCC's reservations regarding the adequacy of the consultation processes in the SAU. VHA agrees that where an action affects a particular party to the exclusion of others, consultation should be required with that party. Any actions that have a broader effect, should require more general consultation. If an outcome



No	ACCC's consultation issues	VHA's response
		<p>to an individual action is intended to be applied generally, then that matter should involve general consultation.</p> <ul style="list-style-type: none"> VHA generally agrees that greater transparency of NBN Co operations is beneficial, provided that no third party confidential information is disclosed. VHA agrees with the concerns identified by the ACCC that greater evidentiary disclosures are required to assist consultation and ACCC review processes. The ACCC also has the ability to issue record keeping rules and disclosure directions to NBN Co under Division 6 of Part XIB of the CCA, so could take steps to address transparency issues at a later date if the SAU proved inadequate. <p>VHA has referred to the adoption of the ACCC's proposed amendments to ensure greater consultation and greater transparency as "Solution 7".</p>
5.1	<p>What services supplied by NBN Co fall outside the scope of this service description? Are there any services supplied by NBN Co for which this is unclear?</p> <p>Does the SAU provide terms and conditions of access in relation to all the services which NBN Co supplies that downstream users require in order to supply carriage services or content services?</p> <p>Does the service description in the SAU sufficiently describe the service that NBN Co purports to supply? Are there any missing essential elements in the service description?</p> <p>Does the service description in the SAU accurately describe the service? Are there any elements of</p>	<p>NBN ACCESS SERVICE</p> <p><u>Issues and concerns:</u></p> <p>VHA believes that greater clarity is required in relation to the supply of backhaul transmission services by NBN Co for mobile base stations. For example, it may not be appropriate to require mobile backhaul transmission to be connected to a UNI-D or UNI-V port in a standard Network Termination Device, as apparently contemplated by clause 2 of Schedule 3 of the SAU. Greater clarity is critical for VHA and other operators who may wish to acquire transmission services from NBN Co.</p> <p>VHA does have some reservations regarding the completeness of NBN Co's service descriptions, particularly over the 30 year term of the SAU. VHA's reservations would be partly addressed if the ACCC's powers to issue AD and BROCC were properly recognised in the SAU. If a concern arose regarding incomplete coverage, the ACCC should have scope to determine the issue via an AD or BROCC. However, there are two current problems with the manner in which the SAU addresses AD and BROCC:</p> <ul style="list-style-type: none"> First, it is not clear the extent to which the SAU purports to 'cover the field' in respect of service descriptions so as to exclude the operation of AD and BROCC, particularly in relation to missing elements and ambiguity. Second, as identified previously, the SAU does not appear to allow a party to contract with NBN Co on any basis other than the WBA, hence excluding the relevance of AD and BROCC. <p>VHA also suggests that clarification is included that a Fibre Access Virtual Circuit includes both GPON and point to point fibre links. If the service definition is only intended to cover GPON, then it should be clear that point to point</p>



No	ACCC's consultation issues	VHA's response
	<p>the service description that are unclear or ambiguous?</p> <p>How does the service description for the NBN Access Service compare against the principles that the ACCC has previously specified for service descriptions?</p> <p>Is the service description sufficiently technology neutral to remain applicable as technology changes in the future, particularly given the proposed term of the SAU?</p> <p>Is an appropriate interconnection protocol specified in the service description?</p> <p>How should appropriate mechanisms for handling congestion in shared network elements be specified? What are appropriate mechanisms?</p> <p>Should a stand-alone low committed information rate product suitable for voice-only services be supplied?</p>	<p>fibre is subject to AD and BROCC.</p> <p>Proposed solution – Solution 8</p> <p>VHA proposes a simple solution to the issue of incomplete service definitions and omitted services, namely to include an interpretation provision in the SAU that indicates that ambiguities will be resolved in favour of Part XIC objectives and that omissions can be addressed by AD or BROCC.</p> <p>Specifically, a new interpretative clause could be included in the SAU that stated:</p> <p style="padding-left: 40px;">“XX. If there is any ambiguity in the drafting of the SAU, NBN Co must adopt the interpretation that best gives effect to the objectives of Part XIC. If there is any ambiguity or dispute regarding whether a particular matter is addressed by the SAU, NBN Co agree to comply with the terms or any AD or BROCC addressing that matter to the extent of that ambiguity”.</p> <p>VHA refers to this solution as “Solution 8”.</p>
5.2	Is the 'Product Component' construct reasonable? What are the effects of the product component-	PRODUCT COMPONENTS



No	ACCC's consultation issues	VHA's response
	<p>based product construct on downstream markets in which carriage services or content services are supplied?</p> <p>Is the definition of 'Product Component' to include product components other than the AVC, CVC, UNI and NNI appropriate? What is the effect of including product components identified within the Initial Product Roadmap or offered for supply by NBN Co at the date of acceptance of the SAU in the definition of 'Product Component'?</p> <p>Does the limitation that the NBN Access Service is only to be supplied through the 'Product Components' adversely affect the supply of the NBN Access Service to access seekers?</p> <p>Are the definitions of the AVC, CVC, UNI and NNI satisfactory and complete?</p> <p>Are the clauses around product components likely to remain reasonable for the proposed term of the SAU?</p>	<p><u>Issues and concerns:</u></p> <p>VHA has concerns regarding the manner in which backhaul transmission services would be supplied by NBN Co in the context of the 'Product Component' construct. VHA has already identified this issue in further detail above and has proposed "Solution 8" as one way in which such issues could be addressed.</p> <p>VHA agrees with the ACCC's observation that the SAU does not include a commitment to supply additional product components as they are introduced. VHA shares the ACCC's reservations whether the clauses around product components are likely to remain reasonable for the proposed term of the SAU.</p> <p><u>Proposed solution – Solution 8:</u></p> <p>These issues raises the same questions as in Section 5.1, namely the extent to which an AD or BROCC issued by the ACCC could address any omissions or ambiguities in the SAU in relation to the types of services that NBN Co will supply. VHA's proposed "Solution 8" is a drafting solution for the SAU that may resolve this issue.</p> <p>In effect, VHA is proposing that the SAU should expressly permit scope for AD and BROCC to continue to operate where a matter is not, at face, addressed by the SAU. However, the AD and BROCC would still be subject to the terms of the SAU in relation to other matters, such as pricing and cost-recovery, hence providing sufficient regulatory certainty to NBN Co.</p>
5.3	Are the definitions of the ancillary	ANCILLARY SERVICES



No	ACCC's consultation issues	VHA's response
	<p>services accurate and complete? Are there ancillary services supplied by NBN Co which would fall outside the scope of the definition but which should be included?</p> <p>What are the consequences of the exclusion of the ancillary services, for example, the Facilities Access Service, from the NBN Access Service?</p> <p>Is it sufficiently clear which commitments in the SAU do and do not apply to ancillary services?</p>	<p>Issues and concerns:</p> <p>VHA agrees with the ACCC's concerns regarding the ancillary services as set out in the Supplementary Consultation Paper.</p> <p>Section 152CJA(1) of the CCA states that NBN Co must not supply an "eligible service" unless the service has been declared by the ACCC, or NBN Co has published an SFAA setting out the terms and conditions of access to the service, or an SAU relating to the service is in operation. An eligible service is defined in section 152AL(1) of the CCA as a listed carriage service or a service that facilitates the supply of a listed carriage service. VHA considers that the ancillary services facilitate the supply of listed carriage services. Accordingly, in VHA's view, NBN Co is not permitted to supply the ancillary services unless NBN Co sets out the terms of supply in the SAU or its SFAA/WBA, unless the ACCC declares the ancillary services.</p> <p>The consequence of excluding ancillary services from the SAU is that NBN Co must include the terms of supply for the ancillary services in its WBA/SFAA. However, there is no requirement for NBN Co to ensure that the terms of supply of such ancillary services are reasonable. VHA agrees with the ACCC that this is an important omission from the SAU.</p> <p>Proposed solution – Solution 1:</p> <p>VHA's proposed "Solution 1" is that <i>any</i> provision in the WBA/SFAA should be subject to the clause 6 procedure, irrespective whether it relates to an ancillary service. If this proposal were accepted, then the supply of ancillary services in the SFAA would become subject to ACCC oversight and the concerns regarding reasonableness would be effectively addressed.</p>
5.4	<p>Are the commitments in the SAU with regard to service level regimes sufficient to ensure that the SAU promotes the long-term interests of end-users and is reasonable for the proposed term of the SAU?</p> <p>Should service levels be specified in the SAU for the NBN Access</p>	<p>SERVICE LEVELS</p> <p>Issues and concerns:</p> <p>VHA agrees with the ACCC's comments regarding service levels. Service levels must be included in the SAU and appropriately applied to all of NBN Co's services, including wireless and satellite.</p> <p>As the ACCC will be aware, in a monopoly scenario there is a risk that the supplier may seek to increase profits by reducing the quality of service (and hence saving costs). Service levels are an important guard against this incentive.</p>



No	ACCC's consultation issues	VHA's response
	<p>Service?</p> <p>Is the process described in the SAU appropriate for the development of a service level regime?</p> <p>Are the quality criteria specified by NBN Co (network performance, service delivery, communication with customers and planned and unplanned event management) sufficient to define the service level regime for the fibre network?</p> <p>Are there additional criteria that should be specified?</p> <p>Should the service level regime also apply to the wireless and satellite networks?</p>	<p>Service levels are clearly in the long term interests of end users as required by section 152CBD(2) and 152AH of the CCA.</p> <p>Service levels should also include rebates payable to access seekers if the service levels are not achieved. Telstra, for example, has agreed to a similar rebate regime in the context of its recent Structural Separation Undertaking. An automatic rebate mechanism creates stronger incentives for compliance and reduces the need for the ACCC to take potentially costly steps to enforce the SAU.</p> <p>The ACCC can learn from recent experience in Singapore. There have been constant issues with OpenNet (the operator of Singapore's Next Generation National Broadband Network) meeting service levels. Connections which are due to be made in 3 days are taking up to 6 weeks to fulfil. Access seekers in Singapore complain that the penalties for non-compliance are such that that OpenNet has no incentive to be more efficient or customer-orientated.</p> <p>VHA agrees with the ACCC that NBN Co's statement of intent with regard to future service levels is insufficient, particularly as it is not clear what the proposed service levels would be or what the consequences of NBN Co contravening those service levels would be. There is no certainty that any service levels proposed by NBN Co would be reasonable or meaningful in the absence of ACCC oversight.</p> <p><u>Proposed solution – Solution 9:</u></p> <p>VHA has referred to the need for reasonable service levels and appropriate service level rebates to be included in the SAU as "Solution 9". If NBN Co's intent is that it will introduce service levels after the SAU is accepted, then a clean mechanism must be included in the SAU for ACCC oversight and determination of those service levels to ensure that they are reasonable and meaningful <i>before</i> supply commences.</p>
5.5	<p>Is the approach to product development likely to promote efficient investment in network capacity and network upgrades?</p> <p>Do the product development, variation and withdrawal processes apply to a sufficiently broad range of NBN Co's products?</p>	<p>PRODUCT DEVELOPMENT AND WITHDRAWAL</p> <p><u>Issues and concerns:</u></p> <p>The ACCC has identified a number of concerns with the proposed product development and withdrawal processes. VHA shares those concerns.</p> <p>New product development will be a key issue for all WBA customers. While VHA considers that the Product Development Forum (PDF) and related processes are an acceptable way of achieving a consultative process to</p>



No	ACCC's consultation issues	VHA's response
	Is it in the long-term interests of end-users for the Product Development Forum to be open to participation by NBN Co's customers only (as opposed to access seekers)?	<p>develop new products, VHA is concerned that NBN Co has absolute discretion in relation to a number of critical aspects of the PDF and related processes, including:</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), noting VHA's concerns raised in relation to Section 5.4 above. <p>These discretions are of particular concern to VHA as the dispute resolution procedure under the SFAA/WBA has not been applied to the PDF. As the ACCC will appreciate, new products are critical to continued innovation in the industry in the long-term interests of end users.</p> <p>VHA appreciates that Schedule 9 of the SAU provides some limited scope for oversight in relation to the PDF processes. However, the operation of these processes is at the discretion of NBN Co, so cannot be regarded as independent or effective. Greater ongoing ACCC oversight is required, particularly when a significant number of access seekers have sought a new product but NBN Co has decided not to introduce it.</p> <p>In relation to product withdrawals, NBN Co also has absolute discretion to withdraw products (or components or features of products) under the SFAA/WBA. VHA appreciates that the SAU provides that NBN Co may not withdraw key products, components and features, but the SAU is subject to the SFAA/WBA hence it is not clear the extent to which that undertaking is intended to constrain NBN Co. Moreover, VHA is concerned that 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.</p> <p><u>Proposed solution – Solution 3:</u></p> <p>VHA submits that these key product development and withdrawal discretions should be subject to direct ACCC</p>
Are the criteria for determining whether a product variation or enhancement is minor appropriate?		
Are the criteria to which NBN Co may have regard when determining whether to develop a product idea submitted by a customer appropriate and in the long-term interests of end-users?		
Do the processes by which NBN Co will determine whether to develop, and consult with customers on, product ideas provide an appropriate balance between the interests of NBN Co and its customers?		
Are the PDF Processes likely to provide for effective and transparent engagement between NBN Co and its customers regarding product development?		
Are there appropriate processes for		



No	ACCC's consultation issues	VHA's response
	<p>resolving disputes between NBN Co and its customers that arise under the Product Development Forum Processes?</p>	<p>oversight via a right for an access seeker to apply directly for ACCC review of an NBN decision. "Solution 3" could be applied. The WBA/SFAA should require NBN Co to comply with the ACCC's determination.</p> <p>VHA's proposed "Solution 6" would also assist in resolving these issues by requiring that a provision is included in the SFAA/WBA that NBN Co must comply with the SAU. Given that the SFAA/WBA provides the basis for any executed AA, this clause would be included in every AA. Accordingly, this solution prevents any AA overriding key obligations in the SAU and addresses potential inconsistencies between the SAU and AA.</p>
<p>Are the confidentiality and intellectual property terms in the PDF Processes appropriate? Do they discourage or prevent customers from participating in the Product Development Forum?</p>		
<p>Do you consider that the review process for the customer engagement and Product Development Forum Processes is appropriate and in the long-term interests of end users?</p>		
<p>Is there sufficient involvement of other interested parties in the review process?</p>		
<p>Do the product withdrawal processes in the SAU provide an appropriate balance between the interests of NBN Co and its customers? Should the SAU provide greater detail about how NBN Co will consult with customers?</p>		
<p>Should product withdrawal be subject to dispute resolution</p>		



No	ACCC's consultation issues	VHA's response
	<p>procedures?</p> <p>Are the commitments around product development, variation and withdrawal likely to be appropriate and in the long-term interests of end-users for the proposed term of the SAU?</p>	
6.1	<p>What are the potential impacts of NBN Co's proposed price structures on downstream markets?</p> <p>Will NBN Co's proposed price structures promote the efficient use of and investment in infrastructure?</p> <p>Are the proposed price structures reasonable, and are they likely to remain reasonable over the proposed term of the SAU?</p> <p>Are the proposed price structures reasonably necessary to achieve uniform national wholesale pricing?</p>	<p>PRICE STRUCTURES</p> <p><u>Issues and concerns:</u></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. Moreover, 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.</p> <p><u>Proposed solution – Solution 3:</u></p> <p>VHA submits that specific but limited ACCC oversight of NBN pricing for new products is desirable. An access seeker should have the ability to apply directly for ACCC review of an NBN decision. Intervention should only occur when NBN Co's pricing is not consistent with Part XIC objectives. "Solution 3" could therefore be applied. The WBA/SFAA should require NBN Co to comply with the ACCC's determination.</p> <p>VHA also believes that this issue could be addressed by including pricing methodology commitments in the SAU, as proposed in VHA's "Solution 10" below.</p>



No	ACCC's consultation issues	VHA's response
6.2	<p>Is the scope of the initial prices included in the SAU likely to provide sufficient certainty to access seekers to make efficient investments? Should the SAU specify initial prices for a broader range of NBN Co's products?</p> <p>Are the maximum regulated prices for NBN Co's price controlled offers likely to be reasonable? In particular, do these prices decrease the possibility of price shocks for access seekers and end-users in migrating to the NBN?</p> <p>Is the 'anchor' effect of the price controlled offers likely to provide reasonable certainty to access seekers over prices for other products NBN Co intends to offer at the commencement of the SAU?</p> <p>Does the setting of prices for new product components and product features provide a reasonable balance between the interests of NBN Co and its customers? Should the SAU set out principles and/or a more detailed process by which NBN Co will set prices for new products? Should the ACCC have a role in relation to setting initial</p>	<p>INITIAL PRICES</p> <p><u>Issues and concerns:</u></p> <p>VHA agrees with the ACCC's comments that initial prices are specified only for a limited set of basic product components. Accordingly, NBN Co has significant discretion regarding the pricing of all other product components, product features and ancillary services. This discretion is constrained only by the Long Term Revenue Constraint which seems unlikely to impose an actual effective price constraint for around a decade. Further, when the Constraint is in place there may be circumstances where NBN Co's pricing relativities between products are unreasonable. For example there may be some products that provide too much of a contribution to the overall costs of NBN Co and this has the effect of limiting competition in certain markets.</p> <p><u>Proposed solution – Solution 10:</u></p> <p>VHA has proposed a solution to this issue in its comments below in section 6.3 as "Solution 10".</p>



No	ACCC's consultation issues	VHA's response
	<p>prices for new products?</p> <p>Is the 'anchor' effect of currently supplied products likely to provide reasonable certainty to access seekers over the initial prices for new products introduced throughout the proposed term of the SAU?</p> <p>Will the processes by which NBN Co will consult with customers on prices for new products ensure that prices are set reasonably over the proposed term of the SAU?</p> <p>Are the dispute resolution processes in relation to prices for new products likely to ensure prices are set reasonably over the proposed term of the SAU?</p>	
6.3	<p>Are the price controls in the SAU likely to ensure that NBN Co's prices are reasonable, and are likely to remain reasonable over the proposed term of the SAU? Are they likely to provide sufficient certainty to access seekers to make efficient investments?</p> <p>Is the process by which NBN Co can request ACCC approval to increase prices by an amount greater than</p>	<p>PRICE CONTROLS</p> <p><u>Issues and concerns:</u></p> <p>As mentioned above, NBN Co currently has too much discretion to set pricing within its Long-Term Revenue Constraint in a non-transparent manner, creating a risk that it may set pricing to promote its own commercial interests. NBN Co currently has the ability to price below cost in contestable markets, and price above cost in non-contestable markets, in circumstances well beyond those necessary to achieve a uniform national price.</p> <p>NBN Co's significant pricing discretion could be exercised in a manner contrary to the long-term interests of end users. Accordingly, there is a need to include mechanisms in the SAU that prevent NBN Co exercising its discretion in a manner inconsistent with Part XIC objectives. One way to achieve this result is to provide for direct ACCC oversight</p>



No	ACCC's consultation issues	VHA's response
	<p>permitted by the price controls reasonable? Should the ACCC's decision on NBN Co's pricing proposal be limited to either accepting or rejecting the proposal? Is the timeframe for the ACCC to make a decision on NBN Co's pricing proposal reasonable?</p> <p>Is the process for NBN Co to review the price controls at the SAU review period reasonable? Should the ACCC have the ability to initiate a review of the price controls? Are there sufficient provisions to prevent NBN Co from avoiding or circumventing the price controls by withdrawing/introducing new product components or features, or by removing discounts, rebates and allowances?</p> <p>Is the anti-avoidance provision likely to prevent NBN Co from avoiding the price controls by introducing new charges for product components or product features for which customers were not previously charged?</p>	<p>of NBN Co pricing, as suggested by VHA in the context of "Solution 3" above for new products. However, VHA considers that a more granular approach is also required that creates the appropriate pricing incentives for NBN Co and provides greater long-term certainty to the industry.</p> <p>To address this issue, VHA proposes that pricing transparency should be increased and pricing principles should be applied. Such an approach would be more consistent with the historic application of access regulation in Australia. Such an approach would also be more consistent with the approach in the electricity industry in which distribution network service providers must submit a pricing methodology for regulatory approval.</p> <p>Under chapter 6A of the National Electricity Rules, for example, Transmission Network Service Providers must have in place an approved pricing methodology that allocates regulated revenue between categories of services and that determines the structure of prices that it may charge for each of the categories of services it provides. A similar approach should be adopted by NBN Co in its SAU.</p> <p>Moreover, price discrimination and excessive pricing is not expressly prohibited in Australia, but rather relies on the application of sections 46 and 151AJ(2) of the CCA. However, these sections are much harder to apply in the absence of NBN Co vertical integration and are costly to enforce, even in the context of competition notices under Part XIB. Reliance on these sections alone is unlikely to provide effective regulatory constraints on NBN Co in relation to pricing matters if regulatory constraints are not included in the SAU.</p> <p>NBN Co could, for instance, implement pricing structures that encourage adoption of its core services and retard the development of services it regards as a competitive threat. This is particularly relevant for VHA given NBN Co's corporate plan suggests "advanced mobile networks could provide a competitive threat".¹ VHA regards such sentiments as unfortunate because they mischaracterise the inherently complementary nature of fixed and mobile services in the minds (and actions) of many consumers.</p> <p>VHA is therefore concerned that NBN Co could use the Initial Cost Recovery Period to entrench pricing structures that are detrimental to the long-term interest of end-users. NBN Co should not be permitted discretion to adopt pricing structures that could have the effect of discriminating over the types of services offered over its networks unless there is clear technical reason for such discrimination to exist. Pricing structures established during the Initial Cost</p>

¹ NBN Co (2010), *Corporate Plan 2011-2013*, 15 December, p29.



No	ACCC's consultation issues	VHA's response
	<p>Is the process for applying the price control to bundles of products likely to be reasonable?</p> <p>Is NBN Co's proposed long-term revenue constraint methodology reasonable? If so, is it likely to remain reasonable over the proposed term of the SAU? Does the long-term revenue constraint methodology encompass all relevant costs and revenues?</p> <p>Is the approach to deferring cost recovery through the proposed initial cost recovery mechanism reasonable? What are the implications for NBN Co's prices over the initial loss recovery period and for the later years of the SAU period? Should NBN Co be required to allocate costs between services supplied in competitive and non-competitive markets? If so, how might these costs be allocated? How might this requirement change over the proposed term of the SAU? Is NBN Co's approach to determining the allowance for construction-in-progress reasonable? Is this approach likely to remain reasonable over the</p>	<p>Recovery Period will not be addressed until the pricing constraints established by the LTRC are in force. This could take many years. It is critical, therefore, that the additional discretion afforded NBN Co during its initial years is subject to appropriate constraints so that it cannot be used to distort competition or unduly influence consumer decisions in the provision of fixed broadband services or in related markets.</p> <p><u>Proposed solution – Solution 10:</u></p> <p>VHA proposes as "Solution 10" that NBN Co should include a <i>pricing methodology commitment</i> in the SAU for those markets in which NBN Co has substantial market power:</p> <ul style="list-style-type: none"> • VHA considers that a cost-based pricing assessment will improve transparency and promote reasonableness in NBN Co's pricing. Such an assessment will be necessary for determining whether NBN Co is below minimum price bounds on contestable services (which is detrimental to competition) or above maximum price bounds on non-contestable services (which is detrimental to downstream users, including end users). • In markets where NBN Co does have substantial market power, NBN Co should be subject to maximum price constraints. For example, prices cannot be more than 15% higher than NBN Co's own cost-based price assessment for supplying the service. The price bounds need not be disclosed to the market, but should be made available to the ACCC on a confidential basis. • In markets where NBN Co does not have substantial market power, it should be subject to requirement that it does not price below its long-term incremental cost, without the written permission of the ACCC. The existing section 45(1AA) of the CCA may provide a useful model for this minimum constraint, but the requirement to prove an anti-competitive purpose should be removed. <p>A <i>pricing methodology commitment</i> would maintain NBN Co's price discretion while providing access seekers with assurances that there are reasonable limits on that discretion.</p> <p>A cost assessment would be necessary to ensure that the ACCC can determine whether pricing is within the maximum and minimum price constraints and hence 'reasonable'. However, VHA submits that the ACCC should use NBN Co's historic accounts for such assessments, not construct forward-looking cost models. The emphasis should be on convenience and a prompt ACCC review process.</p> <p>Any pricing methodology should ensure that the prices of services are based on the costs of providing those services. However, overly fragmented approaches to cost-based pricing should not apply in circumstances where NBN Co is</p>



No	ACCC's consultation issues	VHA's response
	<p>proposed term of the SAU? Are the methodologies for determining depreciation and tax allowances reasonable? Is it likely that these methodologies will remain reasonable over the proposed term of the SAU? Are the asset lives used in the calculation of depreciation and tax reasonable?</p> <p>What, if any, further economic modelling is required from NBN Co to assess whether the SAU is reasonable?</p> <p>Does NBN Co commit to supplying the ACCC with sufficient information to enable it to assess whether NBN Co is complying with the commitments made in Schedule 7 (Long Term Revenue Constraint Methodology)?</p> <p>What aspects, if any, of the long-term revenue constraint methodology reasonably necessary to achieve uniform national wholesale pricing?</p>	<p>setting a uniform national price for the basic access service in order to give effect to Government policy or is otherwise cross-subsidising prices in rural areas in Australia pursuant to Government policy, provided that such cross-subsidies are transparent to the ACCC.</p>
6.4	<p>Is NBN Co's proposed long-term revenue constraint methodology reasonable? If so, is it likely to remain reasonable over the proposed term of the SAU?</p>	<p>LONG-TERM REVENUE CONSTRAINT (LTRC)</p> <p>VHA agrees with the issues identified by the ACCC in its discussion paper relating to the long-term revenue constraint. Again, there are many lessons that have been learned from the regulation of the electricity industry in Australia.</p>



No	ACCC's consultation issues	VHA's response
	Does the long-term revenue constraint methodology encompass all relevant costs and revenues?	VHA's principal concern is with the determination of prices within the LTRC. VHA's proposed solution is " Solution 10 " above. Price controls are of added importance given the LTRC will not become binding until after the Initial Cost Recovery Period.
	Is the approach to deferring cost recovery through the proposed initial cost recovery mechanism reasonable? What are the implications for NBN Co's prices over the initial loss recovery period and for the later years of the SAU period?	The other challenge with the LTRC is that it will not become binding until after the Initial Cost Recovery Period. As the ACCC has indicated, the initial cost recovery methodology is not a standard feature of most regulatory frameworks. For that reason, additional measures may be required in the SAU to promote inter-temporal efficiency, particularly in the transition to the LTRC. The proposed SAU is focused on promoting stable prices over the SAU period and reducing the "price shock" for consumers from migrating to the NBN, while at the same time giving NBN Co the opportunity to recover its costs. However, the reasonableness of the proposed SAU cannot be assessed on whether it achieves NBN Co's corporate objectives in an economically efficient manner, rather it must be assessed in light of the incentives the SAU will create for NBN Co if its revenue is significantly above or below expectations or if its operating costs are significantly above or below expectations.
	Should NBN Co be required to allocate costs between services supplied in competitive and non-competitive markets? If so, how might these costs be allocated? How might this requirement change over the proposed term of the SAU?	Inadequate cost recovery in NBN Co's initial years could lead to sustained pricing power in its later years.VHA believes that it is important that the LTRC applies to all NBN Co revenue, not just services covered by the SAU. That is, NBN Co should allocate costs between competitive and non-competitive markets. As the ACCC is aware, there are many approaches to how such costs could be allocated however VHA is less concerned by the chosen allocation method and more concerned by whether NBN Co is systematically biased in how it allocates costs between these markets. The determination of bias requires judgment by the regulator and the ACCC should therefore focus on developing a cost allocation method where NBN Co has an incentive to disclose a true and fair of its costs.
	Is NBN Co's approach to determining the allowance for construction-in-progress reasonable? Is this approach likely to remain reasonable over the proposed term of the SAU?	NBN Co should not have any scope to invent or impose charges for services in the future to allow it to recover incremental revenue over and above the LTRC. VHA suggests that this could be clarified in the SAU.
	Are the methodologies for determining depreciation and tax allowances reasonable? Is it likely that these methodologies will	



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	<p>remain reasonable over the proposed term of the SAU? Are the asset lives used in the calculation of depreciation and tax reasonable?</p> <p>What, if any, further economic modelling is required from NBN Co to assess whether the SAU is reasonable?</p> <p>Does NBN Co commit to supplying the ACCC with sufficient information to enable it to assess whether NBN Co is complying with the commitments made in Schedule 7 (Long Term Revenue Constraint Methodology)?</p> <p>What aspects, if any, of the long-term revenue constraint methodology are reasonably necessary to achieve uniform national wholesale pricing?</p>	
<p>6.5</p>	<p>Is NBN Co's approach to the WACC reasonable? Is it likely to encourage efficient investment in and use of infrastructure?</p> <p>Is a risk margin of 350 basis points likely to reasonably reflect NBN Co's systematic risk over the proposed term of the SAU? Is the appropriate risk margin likely to vary over the proposed term of the</p>	<p>WACC</p> <p><u>Issues and concerns:</u></p> <p>VHA agrees with the ACCC's suggested approach to the proposed WACC for NBN Co, namely that the ACCC will determine whether the WACC identified by NBN Co is commensurate with the risks faced by NBN Co. VHA agrees with the ACCC that the WACC should be subject to periodic review and updating over time.</p> <p>The determination of the WACC should accord with the Government's competitive neutrality policy, but there needs to be an acknowledgment that no private companies in Australia exhibit the very low financial risk profile that NBN Co faces. The risk that NBN Co faces under the SAU is lower than most private sector companies. If NBN Co does not earn</p>



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	<p>SAU?</p> <p>Should the ACCC assess NBN Co's WACC against a return on capital calculated using the weighted average of the cost of debt and the cost of equity?</p> <p>Is it reasonable to use a benchmarking approach to assess NBN Co's WACC? Which industries are likely to provide appropriate benchmarks for assessing NBN Co's WACC?</p> <p>Is it reasonable that the SAU does not set out a process for periodically reviewing the WACC approach within the SAU period?</p> <p>Is the process for NBN Co to review the WACC approach at the SAU review period likely to ensure NBN Co's WACC remains reasonable over time?</p>	<p>its regulated revenue today, the SAU gives NBN Co the opportunity to earn that revenue plus capital costs in the future. This is in stark contrast to private sector companies which have no such certainty. Even the least risky private sector companies are likely to face less risk than NBN Co. Therefore, it is reasonable to expect the WACC for NBN Co would be well below the rate observed for even the least risky of Australian companies. VHA therefore suggests that the 'risk margin' of 350 basis points identified by NBN Co is on the high side.</p> <p>Notwithstanding VHA's view on the proposed size of the 'risk margin', VHA would not typically expect the 'risk margin' to vary significantly given the certainty for the opportunity of cost recovery provided by the SAU over most of the proposed term. Of course, toward the end of the proposed SAU period if there remains a significant amount of unrecovered initial costs then the prospect of recovery will diminish. However, it is far from clear that the remedy in such circumstances is to increase the 'risk margin'. (If this was to occur in a private company it would be more akin to a write-down in an asset's value). Events such as the GFC, which effect systemic risk in the equity market, may create circumstances whereby a review of the 'risk margin' is warranted.</p> <p>Proposed solution – Solution 11:</p> <p>VHA supports NBN Co's approach to the WACC, which is based on a defined mark-up on the risk-free rate, however it also agrees that the ACCC should undertake a detailed review of NBN Co's proposed WACC before accepting the SAU. The WACC should be periodically updated at reasonable intervals.</p> <p>VHA refers to the need for the ACCC to undertake a formal review of the WACC and be periodically updated as "Solution 11".</p>
6.6	<p>Will the prudency mechanisms proposed by NBN Co be effective in encouraging prudent capital expenditure by NBN Co? Are they an effective substitute for ACCC oversight of expenditure?</p> <p>Are the <i>Network Design Rules</i> sufficiently detailed to ensure that</p>	<p>PRUDENCY</p> <p>Issues and concerns:</p> <p>VHA believes that it is important that NBN Co only incurs expenditure where it is efficient. VHA agrees with the concerns expressed by the ACCC in relation to the current prudency measures, namely:</p> <ul style="list-style-type: none"> • Prudent CAPEX: NBN Co has too much discretion (and there is insufficient ACCC oversight) to determine whether NBN Co CAPEX has been prudently incurred under its prudent design and cost conditions. The SAU does



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	<p>they will only allow prudent capital expenditure to be included in the RAB?</p> <p>Will the proposed customer engagement model be effective in encouraging prudent capital expenditure over the proposed term of the SAU? Are there examples of other industries where customer engagement has been effective? Should customer engagement processes apply to other aspects of NBN Co's proposed prudence mechanisms?</p> <p>Will the operating expenditure principles proposed by NBN Co be effective in encouraging prudent operating expenditure by NBN Co? Are they an effective substitute for ACCC oversight of expenditure? Are there any other aspects of the SAU that may encourage prudent operating expenditure?</p> <p>Are the 'deemed prudent' categories reasonable? Are these categories sufficiently defined to ensure that they only encompass prudent expenditure ?</p> <p>Is the annual compliance process sufficient to assess compliance</p>	<p>not provide sufficient scope for ACCC oversight. It also remains an open question whether the network design rules are consistent with a prudent network design. NBN Co has significant scope to deviate from the network design rules.</p> <ul style="list-style-type: none"> • Efficient OPEX: There is no scope for regulatory oversight in relation to OPEX nor do there appear to be any incentives for NBN Co to efficiently manage its OPEX. The basis for classification of OPEX and CAPEX is not clearly defined. • Deemed prudence: The deeming of certain expenditure to be prudent gives too much discretion to NBN Co. NBN Co's discretion should be reduced, potentially by providing a mechanism for greater ACCC oversight. <p>All of these issues with the current drafting of the SAU give rise to concerns that CAPEX and OPEX may not be prudently or efficiently incurred by NBN Co.</p> <p>Again, lessons can be learned from the electricity industry. The regulatory framework adopted in that context is to provide incentives to only expand or augment a transmission network where it is efficient to do so. The Australian Energy Regulator may only approve forecast CAPEX in certain circumstances. Transmission Network Service providers are also subject to a detailed regulatory investment test for transmission.</p> <p>Proposed solution – Solution 12:</p> <p>Greater ACCC oversight and removal of some of NBN Co's discretion is important, as proposed by the ACCC.</p> <p>However, VHA submits that any solution must create the correct incentives for NBN Co to incur efficient expenditure, not simply rely on ACCC oversight to determine whether expenditure is 'prudent'. A regulatory regime will be much more effective if it creates the appropriate incentives, rather than relying only on ACCC oversight. Again, lessons can be drawn from the electricity industry, particularly the extent to which administrative decisions have been the subject of lengthy reviews.</p> <p>This is particularly important in relation to OPEX. VHA agrees with the ACCC's assessment that NBN Co's approach differs from other common regulatory frameworks. Large public monopolies have, in the past, been characterised by operating inefficiencies, which emerged due to a lack of competition and a lack of robust regulation. The proposed SAU does not provide any assurance that operating inefficiencies will not emerge and grow within NBN Co. Greater safeguards and incentives for operational efficiency are required. One safeguard option might be domestic benchmarking where, for example, NBN Co could be required to ensure that any wage-related OPEX it recovers uses a</p>



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	<p>with the prudency commitments? Is sufficient information provided by the annual compliance reports to enable the ACCC to determine whether expenditure has been prudently incurred?</p> <p>Will the prudency mechanisms be effective in encouraging prudent expenditure over the proposed term of the SAU? Will the processes for reviewing the prudency and customer engagement processes ensure that they remain effective over time?</p> <p>What aspects, if any, of the prudency mechanisms are reasonably necessary to achieve uniform national wholesale pricing?</p>	<p>rate of per capita wage growth that is no greater than the wider economy.</p> <p>VHA refers to the need for greater ACCC oversight in prudency, and the need for incentives to ensure CAPEX and OPEX is efficiently incurred, as "Solution 12".</p>
<p>7.1</p>	<p>Should the SAU contain commitments around the scope of the WBA? If so, are the current commitments likely to be effective, and are they sufficient and reasonable?</p> <p>Are the consultation obligations in the SAU relating to development of the WBA reasonable? Should they apply more broadly, to 'Access Seekers' and not just 'Customers'?</p> <p>Is it sufficiently clear to whom and</p>	<p>WBA DEVELOPMENT AND ACCESS AGREEMENT CHANGE MANAGEMENT</p> <p>Issues and concerns:</p> <p>NBN Co has significant rights to unilaterally amend the WBA which are summarised in clause F4 of the WBA. VHA is concerned that these unilateral rights could be exercised in a manner that may result in access seekers becoming subject to unreasonable supply terms.</p> <p>The Contract Development Process (CDP) under the WBA is also critical 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 in control of this process and it has little incentive to agree to the commercial positions of customers.</p> <p>While VHA appreciates that clause 7.5 of the CDP refers to an access seeker obtaining a BROCC from the ACCC, this is</p>



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	in what circumstances these commitments apply?	<p>unlikely to be a practical solution for access seekers. Moreover, NBN Co has drafted the terms of the CDP in a manner which purports to contractually restrict an access seeker's statutory right to obtain a BROCC, contrary to the intent of Part XIC. NBN Co has reserved discretion for itself that it can exercise in a manner which purports to prevent an access seeker obtaining a BROCC: NBN Co is first required to issue a proposed change to the WBA and it is under no obligation to do.</p> <p>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.</p> <p><u>Proposed solution – Solutions 1 and 3:</u></p> <p>VHA also submits that WBA development and AA change management should be covered by dispute resolution under clause 6 of the WBA, as proposed by VHA as part of "Solution 1". Solution 1, if adopted in the form proposed by VHA, would ensure that the terms of any SFAA/WBA/AA would remain reasonable. "Solution 1" also provides that a process similar to the Contract Development Process should be embodied in the SAU to provide a forum to discuss changes to the WBA on an ongoing basis.</p> <p>VHA also submits that WBA development and AA change management under the CDP could be subject to direct ACCC oversight via a right for an access seeker to apply directly for ACCC review of an NBN decision, as part of "Solution 3". The ACCC should have oversight over specific aspects of the CDP, including: 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. Any determination by the ACCC should be binding on the parties.</p>
Are customers provided with reasonable notice of changes to be made to their Access Agreements by NBN Co under the SAU?		
Are customers provided with a reasonable opportunity to consult with NBN Co regarding possible changes to their Access Agreements? The ACCC notes that clause 14.3 of Schedule 11 (Non-price Terms and Conditions) does not currently set out specific timeframes in which consultation is to occur.		
Is NBN Co's obligation to 'reasonably consider' any feedback given by a customer or the ACCC reasonable?		
Is NBN Co's undertaking to only implement a change that is consistent with an interim Access Determination or Binding Rules of Conduct reasonable?		
Are the 'Changes to Access Agreements' provisions reasonable, and are they likely to remain reasonable over the proposed term of the SAU? Please outline those		



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	<p>aspects of the provisions that you consider to be reasonable and/or unreasonable.</p> <p>Is it sufficiently clear to whom and in what circumstances these commitments apply?</p>	
7.2	<p>Does the SAU enhance the likelihood that reasonable contractual dispute resolution processes will be able to be agreed to in Access Agreements? For example, in the event that access seekers and NBN Co cannot agree to a contractual dispute resolution process, is there sufficient scope for regulatory intervention to resolve the issue?</p> <p>Does the SAU ensure that access seekers will have access to a dispute resolution process for resolving contractual disputes that is independent and free from bias?</p> <p>Are the dispute resolution terms and conditions reasonable and described with sufficient specificity?</p> <p>Are the provisions relating to the appointment of resolution advisors, selection of arbitrators and timeframes for each stage of the</p>	<p>DISPUTE MANAGEMENT</p> <p><u>Issues and concerns:</u></p> <p>VHA agrees with the ACCC that the dispute resolution procedures should provide for the efficient, consistent and unbiased resolution of disagreements that arise under the Access Agreement. There are a number of concerns with the current SFAA/WBA dispute resolution process, including that the manner for appointing independent experts is not independent of NBN Co.</p> <p>It is also critical that the ACCC maintains an effective and ongoing role in the <i>application</i> of the WBA during its term for three important reasons:</p> <ul style="list-style-type: none"> • 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



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	<p>dispute resolution process reasonable?</p> <p>Do interested parties consider that it is reasonable to conduct arbitrations in accordance with the <i>Commercial Arbitration Act 2010</i> (NSW)?</p> <p>Is the proposed process reasonable, and is it likely to remain reasonable over the proposed term of the SAU?</p> <p>Is it sufficiently clear to whom and in what circumstances these commitments apply?</p>	<p>objectives remain paramount.</p> <p>Moreover, a greater level of ACCC involvement is particularly important given:</p> <ul style="list-style-type: none"> • 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. <p><u>Proposed solution – Solutions 1 and 2:</u></p> <p>VHA believes that concerns regarding the reasonableness of the current dispute resolution procedure in the SFAA/WBA could be addressed by "Solution 1" above, as such matters could become the subject of ACCC determinations to ensure that they were reasonable.</p> <p>In addition to this solution, 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. VHA has referred to this as "Solution 2" and has provided greater detail regarding this solution earlier in this submission.</p>
7.3	<p>Is NBN Co's proposed commitment in relation to default management reasonable, and likely to remain reasonable over the proposed term of the SAU?</p> <p>Is it sufficiently clear to whom and in what circumstances the commitment applies?</p>	<p>DEFAULT MANAGEMENT (AND CIRCUMSTANCES BEYOND EXPIRY OR TERMINATION)</p> <p><u>Issues and concerns:</u></p> <p>While not directly related to default management, VHA believes there are two areas of ambiguity relating to the application of the SAU <i>after</i> 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.</p> <p>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. However, 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</p>



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		<p>WBA was executed.</p> <p>The literal application of the WBA and SAU could also 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 WBA.</p> <p>VHA is concerned that these issues were not been identified in the ACCC's Supplementary Consultation Paper, notwithstanding that VHA identified these issues in its first submission. VHA believes that these issues should be addressed to prevent NBN Co using its substantial market power to impose unreasonable terms on access seekers when negotiating future AA.</p> <p><u>Proposed solution – Solutions 13 and 14:</u></p> <p>First, 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:</p> <ul style="list-style-type: none">• 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).• 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. <p>VHA has referred to this solution as "Solution 13".</p> <p>Second, 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,</p>



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		<p>namely:</p> <ul style="list-style-type: none"> • 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. <p>VHA has referred to this solution as "Solution 14".</p> <p>In relation to default management, VHA assumes that the ACCC will ensure that any non-price terms included in the SAU are objectively reasonable on the basis that the ACCC proposes and consistent with the ACCC's historic model non-price terms applicable to supply under Part XIC. VHA's "Solution 15" is for the ACCC to ensure that any WBA/SFAA non-price terms included in the SAU are objectively reasonable and consistent with the ACCC's historic model non-price terms.</p>
7.4	<p>Do the risk management and liability provisions clearly describe the types of liability (that is, the legal responsibilities, duties and obligations) of each party?</p> <p>Do the risk management and liability provisions clearly describe the indemnities (that is, the circumstances where one party will compensate the other party for the losses resulting from the first party's actions)?</p>	<p>RISK MANAGEMENT AND LIABILITY</p> <p><u>Issues and concerns:</u></p> <p>VHA agrees with the ACCC's concerns that the wording of clause 13(a) of Schedule 11 of the SAU enables NBN Co to modify the liability and indemnity commitments set out in the SAU by including 'limiting' terms and conditions in the WBA.</p> <p>VHA agrees with the ACCC's comments that the risk management and liability provisions should apply to both the access provider and access seekers, and should place risk with the party which has the ability to manage the risk. VHA is concerned that NBN Co is seeking to shift risk, and hence cost, to access seekers in a number of ways within the WBA, including via the liability provisions.</p>



No	ACCC's consultation issues	VHA's response
	<p>Does the scope of the proposed risk management and liability regime enable NBN Co and its customers to efficiently operate and invest in their services, networks and facilities?</p> <p>Are the risk management and liability provisions, reasonable and are they likely to remain reasonable over the proposed term of the SAU?</p> <p>Is it sufficiently clear to whom and in what circumstances the commitments apply?</p>	<p><u>Proposed solution – Solutions 1 and 6:</u></p> <p>VHA's proposed amendments to clause 6 of the SAU as part of "Solution 1" would enable the ACCC to determine the reasonableness of the risk management and liability provisions in the WBA/SFAA in the event of a dispute, so would go a long way towards addressing these issues.</p> <p>VHA's proposed "Solution 6" would also ensure that a provision was included in the SFAA/WBA that NBN Co would comply with the SAU, preventing 'limiting' terms and conditions being included in the WBA.</p>
7.5	<p>Is the proposed confidentiality regime appropriate, taking into account the wholesale only structure of NBN Co? Do the confidential information provisions clearly describe NBN Co's and its customers' rights and obligations in respect of the disclosure and use of customer confidential information?</p> <p>Are the confidential information provisions reasonable, and are they likely to remain reasonable over the proposed term of the SAU?</p> <p>Is it sufficiently clear to whom and in what circumstances the commitments apply?</p>	<p>CONFIDENTIAL INFORMATION</p> <p><u>Issues and concerns:</u></p> <p>VHA agrees with the ACCC's concerns, namely that the circumstances in which confidential information may be disclosed by NBN Co under the SAU are largely within NBN Co's control via the cross-references to the WBA.</p> <p><u>Proposed solution – Solution 1:</u></p> <p>Again, VHA's proposed amendments to clause 6 of the SAU as part of "Solution 1" would enable the ACCC to determine the reasonableness of the confidential information provisions in the WBA/SFAA in the event of dispute, so would go a long way towards addressing these issues.</p> <p>VHA also suggests that some of the confidentiality protections relating to system security that have been incorporated into Telstra's Structural Separation Undertaking could usefully be replicated in NBN Co's SAU, even though many of these provisions were directed at operational ring-fencing.</p>



No	ACCC's consultation issues	VHA's response
7.6	<p>Do the billing and payment provisions clearly describe NBN Co's commitments in respect of billing and payment disputes? Is it sufficiently clear to whom and in what circumstances the commitments apply?</p> <p>Do the billing and payment provisions create an incentive for NBN Co to provide accurate and timely billing?</p> <p>Are the billing and payment provisions reasonable, and are they likely to remain reasonable over the proposed term of the SAU?</p> <p>Do the credit management provisions clearly describe NBN Co's rights and obligations in respect of credit management? Is it sufficiently clear to whom and in what circumstances the commitments apply?</p> <p>Do the credit management provisions enable NBN Co to respond to changes in customer circumstances over time?</p> <p>Are the credit management provisions reasonable, and are they likely to remain reasonable over</p>	<p>BILLING, PAYMENT AND CREDIT MANAGEMENT</p> <p><u>Issues and concerns:</u></p> <p>VHA agrees with the ACCC's concerns that the billing and payment commitments are contained in the WBA and hence NBN Co has significant discretion to set these details. VHA agrees that this has the effect of creating a lack of clarity around the scope of customers' rights and obligations under the SAU with respect of billing and payment disputes.</p> <p>In VHA's experience, most of the disputes in the ongoing application of access agreements relate to billing and payment measures. A failure to resolve such disputes on a reasonable basis can result in significant costs for access seekers and administrative burden. Moreover, if NBN Co's billing systems were deficient in any way, it would be important that access seekers were able to resolve these issues efficiently.</p> <p><u>Proposed solution – Solution 1:</u></p> <p>Again, VHA's proposed amendments to clause 6 of the SAU as part of "Solution 1" would enable the ACCC to determine the reasonableness of the billing, payment and credit management provisions in the WBA/SFAA in the event of dispute, so would go a long way towards addressing these issues.</p>



No	ACCC's consultation issues	VHA's response
	the proposed term of the SAU?	
7.7	<p>Is the specification of the POI locations sufficient to promote the long-term interests of end-users, comply with the Category B SAOs, and likely to be reasonable, and remain reasonable over the proposed term of the SAU?</p> <p>Will the proposed POI review mechanism ensure that the locations of POIs promote the long-term interests of end-users and comply with the Category B SAOs over the proposed term of the SAU?</p> <p>Is it sufficiently clear to whom and in what circumstances the commitments apply?</p> <p>Should the SAU include a commitment that NBN Co will permit interconnection at its facilities, including the POIs it owns and controls directly and those it leases from Telstra, consistent with its obligation under section 152AXB(4) of the CCA?</p> <p>Are the circumstances and criteria for the creation of a temporary POI adequate?</p> <p>Should the SAU include a</p>	<p>POINTS OF INTERCONNECT</p> <p><u>Issues and concerns:</u></p> <p>VHA agrees with the ACCC's comments and observations. VHA assumes that the ACCC will propose amendments to ensure the relevant processes are reasonable.</p> <p><u>Proposed solution – Solution 15:</u></p> <p>VHA's proposed "Solution 15" is for the ACCC to ensure that any WBA/SFAA non-price terms included in the SAU are objectively reasonable and consistent with the ACCC's historic model non-price terms.</p>



No	ACCC's consultation issues	VHA's response
	commitment that temporary POIs will close and provide details about the criteria, timeframe and processes for closure?	
7.8	<p>Are the situations where NBN Co proposes to take responsibility for procuring access to common property reasonable, and are they likely to remain reasonable over the proposed term of the SAU?</p> <p>Is it sufficiently clear to whom and in what circumstances the commitments apply?</p>	<p>ACCESS TO COMMON PROPERTY</p> <p>Issues and concerns:</p> <p>VHA agrees with the ACCC's comments and observations. VHA assumes that the ACCC will propose amendments to ensure the relevant processes are reasonable.</p> <p>Proposed solution – Solution 15:</p> <p>VHA's proposed "Solution 15" is for the ACCC to ensure that any WBA/SFAA non-price terms included in the SAU are objectively reasonable and consistent with the ACCC's historic model non-price terms.</p>
7.9	<p>Does the proposed process for how NBN Co will inform and consult with customers in relation to major NBN upgrades assist customers with the planning and provision of services to end-users? Are the proposed timeframes for providing notice of upgrades adequate? Do the matters that NBN Co will consult on assist customers to minimise disruptions to existing services?</p> <p>Does the proposed process for how NBN Co will inform and consult with customers in relation to major NBN upgrades minimise the operational and cost impact on the</p>	<p>MAJOR NBN UPGRADES</p> <p>Issues and concerns:</p> <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>



No	ACCC's consultation issues	VHA's response
	<p>provision of services by customers?</p> <p>To what extent do the commitments about major NBN upgrades in the SAU affect incentives for investment in downstream markets?</p> <p>Should NBN Co also supply information to, and consult with, access seekers or the general public about major NBN upgrades?</p> <p>Are the commitments reasonable, and are they likely to remain reasonable over the proposed term of the SAU?</p> <p>Is it sufficiently clear to whom and in what circumstances the commitments apply?</p>	<p>Proposed solution – Solutions 1, 3 and 15:</p> <p>VHA submits that major NBN upgrades should be subject to direct ACCC oversight via a right for an access seeker to apply directly for ACCC review of an NBN decision as part of “Solution 3”.</p> <p>VHA also submits that major NBN upgrades should be brought within the scope of dispute resolution under clause 6 of the WBA as part of “Solution 1”.</p> <p>VHA’s proposed “Solution 15” is also for the ACCC to ensure that any WBA/SFAA non-price terms included in the SAU are objectively reasonable and consistent with the ACCC’s historic model non-price terms.</p>
7.10	<p>Do the SAU provisions clearly describe NBN Co’s commitments in respect of access to the NBN Co platform?</p> <p>Are NBN Co’s commitments in respect of access to the NBN Co platform in the long term interests of end-users? Are they likely to remain so over the proposed term of the SAU?</p> <p>Does the proposed content and</p>	<p>ACCESS TO NBN CO PLATFORM</p> <p>Issues and concerns:</p> <p>VHA agrees with the ACCC’s concerns and comments regarding access to the NBN Co platform. The terms and conditions of access to NBN Co’s platform must be reasonable. VHA assumes that the ACCC will propose amendments to ensure the relevant processes are reasonable.</p> <p>Proposed solution – Solutions 1 and 15:</p> <p>Again, VHA’s proposed amendments to clause 6 of the SAU as part of “Solution 1” would enable the ACCC to determine the reasonableness of the provisions relating to access to NBN Co’s platform in the WBA/SFAA (or to be added to the WBA/SFAA) in the in the event of dispute, so would go a long way towards addressing these issues.</p> <p>VHA’s proposed “Solution 15” is for the ACCC to ensure that any WBA/SFAA non-price terms included in the SAU are</p>



No	ACCC's consultation issues	VHA's response
	functionality of the NBN Co platform assist customers to efficiently invest in and operate their services, networks and facilities? Is it sufficiently clear to whom and in what circumstances the commitments apply?	objectively reasonable and consistent with the ACCC's historic model non-price terms.
7.11	<p>Does the proposed process for how NBN Co will provide information about the rollout of the network assist access seekers and customers to efficiently invest in and operate their services, networks and facilities? Are the proposed timeframes for providing information adequate? Is the information that NBN Co will provide adequate? Is it sufficiently clear where this information will be published?</p> <p>Should NBN Co commit to providing construction and service rollout progress information to 'Access Seekers' as well as 'Customers'?</p>	<p>ROLLOUT INFORMATION</p> <p><u>Issues and concerns:</u></p> <p>VHA agrees with the ACCC's comments and observations.</p> <p><u>Proposed solution – Solution 15:</u></p> <p>VHA's proposed "Solution 15" is for the ACCC to ensure that any WBA/SFAA non-price terms included in the SAU are objectively reasonable and consistent with the ACCC's historic model non-price terms.</p>
8	<p>Are the commitments made by NBN Co in the SAU sufficiently clear and unambiguous that they will be enforceable by a Court?</p> <p>Does the design of the SAU provide</p>	<p>ENFORCEMENT OF SAU COMMITMENTS</p> <p><u>Issues and concerns:</u></p> <p>The SAU should require the mechanism in clause F3 of the WBA (for ensuring the alignment of the WBA with the SAU)</p>



No	ACCC's consultation issues	VHA's response
	<p>effective arrangements for enforcement of the commitments in the SAU?</p> <hr/> <p>Does the SAU include sufficient reporting commitments to assess compliance with the SAU? If not, what other reporting obligations would be required, and how should these obligations be established?</p>	<p>to be made more reasonable.</p> <p>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.</p> <p>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)</p> <p><u>Proposed solution – Solution 16:</u></p> <p>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:</p> <ul style="list-style-type: none"> • 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



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		<p>amendments they seek to reflect the SAU.</p> <ul style="list-style-type: none">• 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. <p>VHA has referred to this solution as "Solution 16".</p>