



# VARIATIONS TO THE NBN CO SPECIAL ACCESS UNDERTAKING

SUBMISSION TO THE  
AUSTRALIAN COMPETITION  
& CONSUMER COMMISSION

April 2013

This submission is made by Vodafone Hutchison Australia Pty Limited (**VHA**) in response to a Consultation Paper issued by the ACCC in April 2013 relating to the ACCC's proposed variations to the amended Special Access Undertaking (**SAU**) submitted by NBN Co Limited and NBN Tasmania Limited (together **NBN Co**).

## **A. VHA supports the ACCC's proposed approach**

VHA congratulates the ACCC on a comprehensive and well-reasoned response to the amended SAU proposed by NBN Co. In its last submission, VHA proposed that the ACCC issue a section 152CBDA Notice (**Notice**) to amend key aspects of NBN Co's SAU. VHA is pleased that the ACCC has decided to adopt that approach.

VHA also congratulates NBN Co for working with industry and the ACCC to get us to this position. It is no small achievement that they have developed a framework that is, on the whole, a comprehensive, well thought through and workable set of arrangements. With the adjustments that the ACCC proposes, VHA believes that NBN Co will establish a SAU that will deliver certainty for provider and access seekers alike, and also establish an effective, sustainable commercial framework (with appropriate regulatory oversight) for the decades ahead.

As identified in VHA's previous submissions, a few key principles are fundamental to establish an effective and appropriate SAU:

- The SAU must provide long-term regulatory certainty to NBN Co, thereby reducing regulatory risk and financing costs for NBN Co over the life of the National Broadband Network (**NBN**). The SAU must also provide commercial certainty to wholesale customers of NBN Co by establishing the parameters for supply and a framework for sustainable and effective long-term relationships.
- The SAU must achieve the correct regulatory balance. The SAU should ensure that there are sufficient regulatory powers to the ACCC to ensure that a monopoly NBN Co remains accountable and is subject to the correct incentives to behave reasonably. Any bias in favour of NBN Co will be amplified over the 30 year term of the SAU and could cause serious aggregate detriment to end users.
- The SAU should complement and enhance the operation of the access regime in Part XIC of the Competition and Consumer Act 2010 (Cth). Fundamentally, the SAU must encourage commercial negotiations but at the same time it should not weaken the level of regulatory oversight of NBN Co. The history of wholesale monopolies demonstrates they have the incentive and ability 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 to end users). An effective oversight regime counter balances this market strength and levels the commercial negotiation playing field.

In VHA's previous submissions, we identified that an incorrect balance had been struck by the SAU. VHA was concerned that NBN Co had unnecessarily curtailed the oversight role of the ACCC and negated key aspects of the Part XIC regime. VHA therefore proposed a few critical and substantive amendments to the SAU to address those issues.

We are pleased that the issues that VHA identified in its previous submissions have been addressed in the Notice. VHA therefore supports the general thrust of the ACCC's proposed approach.

## **B. In general, VHA agrees with proposed substantive amendments to the SAU**

The ACCC has requested feedback on the specific content of the Notice. VHA has set out its more detailed response in **Attachment A** to this submission, but offers these general observations below.

Many of the ACCC's proposed amendments involve the deletion of content from the SAU on the basis that this would then enable the matter to be determined by the ACCC in an access determination or binding rule of conduct (**AD/BROC**). VHA agrees with this approach, but with two key qualifications:

- First, it is important that the ACCC encourages industry collaboration and commercial negotiation. Informal, but active, guidance from the ACCC throughout the discussion and negotiation phases of an industry issue would be very useful in reducing disputation and encouraging commercial resolution. It would ensure that participants understand the regulatory parameters in a timely way and ensure that parties do not diverge too far from each other's perspectives. VHA therefore submits that the ACCC should involve itself in the relevant industry fora debating industry disagreements and should be willing to provide guidance to the industry on its views. As well as assisting the industry it will also ensure that the ACCC has a detailed understanding and appreciation of the key commercial issues. Moreover, active ACCC involvement may reduce the need for the ACCC to formally issue AD/BROC by pre-empting potential concerns with informal guidance on critical issues.

Essentially, the way the ACCC has managed both the Telstra Structural Separation Undertaking and the SAU are a good model for effective regulatory oversight. Industry consultations and discussions have encouraged robust, timely and effective debate of the issues, without the excessive use of formal submissions processes that often cloud issues and delay outcomes.

VHA would recommend to the ACCC that it remain committed to ongoing 'informal' discussions, and ensure that the SAU does not limit this approach.

- Second, the ACCC should include a requirement in the SAU that NBN Co exercises any discretion reasonably and in a manner consistent with the objectives of Part XIC. In the absence of detailed terms in the SAU, NBN Co will have substantially more discretion. Rather than requiring continual intervention by the ACCC via AD/BROC on trivial issues, the ACCC should ensure that the SAU itself constrains NBN Co's discretion. Given the importance of this issue, VHA has set out a more detailed submission in Section D below.

## **C. The Notice should give clear direction on the amendments required**

Section 152CBDA(2) of the Competition and Consumer Act 2010 (Cth) enables the ACCC to give NBN Co a written notice to the effect that NBN Co may "*make such variations to the original undertaking as are specified in the notice*". Accordingly, the ACCC has significant discretion as to the level of detail in describing the required amendments.

VHA submits that the optimal approach is for the ACCC to be prescriptive in the amendments to the SAU that it requires. First, as already proposed, the ACCC could specify the deletion of specific material from the SAU. Second, to the extent that the ACCC requires drafting refinements to be made, the ACCC should be specific as to the precise drafting amendments to the SAU that it requires.

By adopting this approach, the ACCC will reduce the need for extensive further consultation on NBN Co drafting, reduce the risk that the ACCC may need to issue further Notices, and reduce the risk of ultimate rejection of the SAU. Such an approach will benefit all entities involved in the SAU review process.

## **D. NBN Co discretions must be exercised reasonably**

As identified in VHA's previous submissions, NBN Co has retained for itself significant subjective discretions in the SFAA and WBA. These discretions remain in the most recent draft of the WBA issued by NBN Co, notwithstanding repeated requests by industry for NBN Co to remove them from the draft WBA.

It is VHA's concern that where NBN Co retains discretion that is not objectively qualified, NBN Co may exercise that discretion unreasonably to further its own objectives at the expense of the long-term interests of end users. We do not believe that the ACCC should accept this approach.

In the ACCC's *Final Determination – Model Non-Price Terms and Conditions* October 2003 in relation to the determination of model terms and conditions under Part XIC, the ACCC set out the following principle regarding the need for discretions to be exercised objectively:

“Finally, where a contractual term allows for a party to exercise discretion, as a rule, that discretion should be exercised on an objective, rather than subjective basis.”

While the issue identified above is fundamental, the drafting solution to the issue is relatively straightforward and the SAU can easily be amended to include that drafting solution:

- First, NBN Co should be required by the SAU to exercise all of its rights and powers under the SAU, and any Access Agreement based on an SFAA, on a reasonable basis in accordance with Part XIC objectives. Any failure by NBN Co to do so should constitute a breach of the SAU that could be the subject of appropriate enforcement action by the ACCC.
- Second, the SAU should require NBN Co to have regard to Part XIC criteria when resolving a dispute. Such an approach is adopted, for example, by the Facilities Access Code which requires parties to a dispute to have regard to the criteria the ACCC would normally apply to resolve a dispute under the Telecommunications Act. The parties are also required to have regard to any relevant principles or guidelines issued by the ACCC that may be relevant to the arbitration of a dispute.
- Third, the SAU should either:
  - (a) provide an additional right for the parties to seek resolution of an Access Agreement dispute via determinations of the ACCC (if other dispute resolution mechanisms have not resolved the matter); or
  - (b) enable the ACCC to issue directions to NBN Co regarding how a particular dispute, or a particular type of dispute, should be resolved.

Either of these solutions would enable an access seeker to petition the ACCC to intervene in circumstances where a matter raised fundamental regulatory issues, rather than bilateral commercial issues. The ACCC would itself have discretion whether or not to intervene and VHA would expect that the circumstances in which the ACCC would decide to intervene would be very limited.

With these three additional protections in place, VHA could be confident that NBN Co discretions will be exercised reasonably and that NBN Co would be held sufficiently accountable for its daily activities.

To achieve this, VHA proposes that the ACCC should direct NBN Co to make the following amendments to include the following new clause 1.3 in the SAU and the following new clause 1H.5.2 in Schedule 1H of Module1 of the SAU to replace the existing clause 1H.5.2:

**"1.3 Requirement to act reasonably and consistently with Part XIC**

When NBN Co exercises any rights and powers under this Special Access Undertaking or any Access Agreement based on an SFAA, NBN Co agrees that it will act:

- (a) reasonably; and
- (b) in a manner consistent with the objectives of Part XIC."

**"1H.5.2 Dispute resolution objectives**

NBN Co will resolve Disputes:

- (a) in accordance with the Dispute Management Rules, to the extent applicable; and
- (b) in a manner that ensures NBN Co complies with its obligations under Part XIC; and
- (c) in compliance with any written directions given by the ACCC to NBN Co as to the manner in which any particular Dispute, or any category or type of Dispute, must be resolved."

We trust that this submission will assist the ACCC. Please let us know if we can further assist.

**April 2013**

## ATTACHMENT A– DETAILED RESPONSE BY VHA

Topic	Proposed ACCC amendment	VHA's response
<b>Interaction between the SAU and access regime</b>	<p>The ACCC has proposed that NBN Co must directly comply with any terms and conditions specified in the SAU. NBN Co must ensure that the terms of the SFAA are consistent with the SAU. An access seeker may seek access under an SFAA or standalone agreement.</p>	<p>VHA agrees. VHA believes that it is commercially unlikely that NBN Co would enter into a standalone agreement in the absence of relevant AD/BROC. Accordingly, the reasonableness of the SFAA should remain the paramount consideration.</p>
	<p>The ACCC has proposed that NBN Co must ensure that the terms of the SFAA are consistent with any AD/BROC.</p>	<p>VHA agrees. The SAU must require that any SFAA is consistent with any AD/BROC. Access seekers that have executed an Access Agreement (<b>AA</b>) with NBN Co should also be permitted the option to vary their AA to ensure consistency with any AD/BROC that is promulgated during the term of their AA. To not allow this option would result in potentially unfair, discriminatory and anti-competitive outcomes.</p>
	<p>The ACCC has proposed the removal of the proposed mechanism in the SAU for it to make facilities access determinations and for the SFAA to include facilities access terms. Rather, both matters would be addressed by AD/BROC</p>	<p>VHA agrees. The mechanism currently proposed in the SAU has the net effect of constraining ACCC regulatory powers, rather than enhancing them.</p>
	<p>The ACCC has proposed the removal of the proposed procedures for the multilateral forum from the SAU. Rather, such procedures could be determined by the SFAA viand and, if necessary, reviewed by the ACCC under an AD or BROC</p>	<p>VHA agrees. It is not appropriate that NBN Co constrain the process of reviewing the SFAA and any regulatory oversight of this process. Note that in the absence of an established multilateral forum in the SAU it is critically important for these procedures to be finalised in the SFAA as soon as possible. NBN Co should consult with industry on this matter (and finalise the content in the SFAA) and if necessary the ACCC should make an AD/BROC on these matters as soon as practicable.</p>
	<p>The ACCC has proposed that the procedure for replacing Modules will not be specified in the SAU. At the expiry of a Module, NBN Co will follow the statutory SAU variation procedure. Alternatively, the ACCC will make AD or BROC</p>	<p>VHA agrees. The SAU does not need a self-contained procedure for replacing Modules, particularly when the procedure contains bias in favour of NBN Co. The mechanism set out in Part XIC is appropriate and provides the ACCC with all necessary discretion to ensure that Modules remain fair and reasonable.</p>
	<p>The ACCC has proposed that the 10 year term of Module 1 will be reduced to 5 years for those matters subject to mid-term review. At the expiry of that period, NBN Co will follow the statutory SAU variation procedure. Alternatively, the ACCC will make AD or BROC. There will be no automatic extension.</p>	<p>VHA agrees. A shorter period will ensure that Module 1 can be more easily adjusted to reflect lessons learned during the first 5 years of the NBN deployment. Note as arrangements get bedded down longer duration modules on some topics may be acceptable.</p>
	<p>The ACCC has proposed that the criteria it will apply for extending the SAU will be the same as those set out in section 152CBD of the CCA</p>	<p>VHA submits that a preferable approach may be to delete the mechanism for extending the SAU and instead rely on section 152CBE of Part XIC. Such an approach is consistent with the ACCC's approach to other similar provisions.</p>

Topic	Proposed ACCC amendment	VHA's response
<b>Services to which the SAU relates</b>	The ACCC has proposed that the SAU will contain statements that the ACCC may declare services and NBN Co will fulfil its obligations by supplying such services	VHA agrees. The ACCC's proposal will reduce the risk that NBN Co could argue that its obligation to supply a newly declared service is inconsistent with the SAU.
	The ACCC proposes that all "offers to supply" will be obligations to actually supply in the SAU. The ACCC will remove the requirement to enter into an SFAA in order to obtain supply.	VHA agrees. The ACCC's proposal ensures greater legal precision in the application of the SAU and ensures that access seekers can contract with NBN Co on a basis other than the SFAA. In this manner, the proposed amendments give proper effect to Part XIC.
	The ACCC proposes that NBN Co's discretion to offer Layer 3 awareness is expressly limited	VHA agrees. This is a matter for Government policy.
<b>Product development and withdrawal</b>	The ACCC has proposed that the Product Development Forum (PDF) processes will apply for 5 years only, hence will be subject to the statutory SAU variation process and AD/BROC at that time	VHA agrees although we strongly support the need for a long term PDF process. A shorter period for the current PDF arrangements will ensure that the PDF processes can be more easily adjusted to reflect lessons learned during the first 5 years of the NBN deployment. VHA also submits that it is important that NBN Co is subject to obligations to exercise all discretions reasonably in relation to the PDF (see Section D of this submission).
	The ACCC has proposed that the PDF process should include consumer advocacy groups and consumers in general	Consumer consultation is important but a formal role for non-customers of NBN Co seems problematic. VHA has concerns whether the inclusion of consumer advocacy groups and consumers may render the PDF process unwieldy and ambiguous (particularly as consumers are not directly acquiring services from NBN Co). VHA submits that the interests of consumers will already be addressed in the views of wholesale customers of NBN Co (as expressed in the PDF process). Wholesale customers will necessarily wish to address consumer requirements and would be free to seek the support of consumer groupsto bolster their case.
	The ACCC has proposed the removal of the PDF processes relating to confidentiality. Accordingly, the ACCC could determine the processes if they were not resolved by commercial negotiation	VHA agrees in principle, but suggests that the ACCC determine the relevant processes in an AD/BROC as soon as practicable.
	The ACCC has proposed that consultation should occur in relation to all products not yet developed and all variations to existing products	VHA agrees. Consultation provides an important safeguard in ensuring that NBN Co is aware of all issues and concerns.
	The ACCC has proposed that it may disallow the withdrawal of a product or product feature/component	VHA agrees. The SAU should not enable NBN Co to refuse to supply a product or feature that could otherwise be declared (and subject to supply obligations) under Part XIC in the absence of the SAU. The SAU should not weaken the level of regulatory oversight of NBN Co. Note that it may be useful for the SAU to lay out the principles for product withdrawal.

Topic	Proposed ACCC amendment	VHA's response
<b>Price and non-price terms and conditions</b>	The ACCC has proposed that the SAU should enable it to determine prices for new products and zero-priced products via an AD/BROC	VHA agrees. VHA identified the need for greater regulatory oversight of NBN Co pricing in its previous submissions.
	The ACCC has proposed that the SAU pricing should be subject to periodic review and potential rebalancing of prices to ensure revenue neutrality	<p>VHA agrees. VHA identified in its previous submission that NBN Co should be required to comply with ACCC directions to rebalance its prices in certain circumstances. VHA's proposed wording was as follows:</p> <p><i>"NBN Co must comply with any written directions provided to it by the ACCC regarding the rebalancing of its prices to the extent that such directions do not cause NBN Co to contravene any provision of this Special Access Undertaking. Notwithstanding any provision of a Module, NBN Co may exceed any CPI-based price limit if directed in writing to do so by the ACCC."</i></p> <p>As identified in VHA's previous submission, NBN Co should also be required to obtain prior ACCC approval before it implements any pricing that is greater than 20% above cost in contestable markets, or 20% below cost in non-contestable markets (subject to various legitimate exceptions). VHA's proposed wording is as follows:</p> <p><i>"(a) If NBN Co has substantial market power (SMP) in the supply of a service in a market (including if the ACCC notifies NBN Co that it has SMP in that market), NBN Co must not set a price for that service more than 20% greater than its cost of supplying the service in that market, unless:</i></p> <ul style="list-style-type: none"> <li><i>i. the prior written approval of the ACCC has been obtained by NBN Co; or</i></li> <li><i>ii. the pricing is necessary to promote uniform national pricing of that service.</i></li> </ul> <p><i>(b) If NBN Co does not have SMP in the supply of a service in a market, NBN Co must not set a price for that service more than 20% lower than its cost of supplying the service in that market, unless:</i></p> <ul style="list-style-type: none"> <li><i>i. the prior written approval of the ACCC has been obtained by NBN Co; or</i></li> <li><i>ii. NBN Co is meeting competitive pricing in that market for that service; or</i></li> <li><i>iii. NBN Co is offering a short-term promotional discount to stimulate demand; or</i></li> <li><i>iv. the pricing is necessary to promote uniform national pricing of that service."</i> </li></ul>



Topic	Proposed ACCC amendment	VHA's response
<b>Other Proposals</b>	The ACCC has highlighted a mismatch in the timing for the treatment of payment and revenue cash flows. The ACCC has proposed that the long-term revenue constraint methodology be amended to ensure that timing is matched	VHA agrees with these proposals. Note to ensure certainty we would be comfortable if NBN Co proposed guiding principles that the ACCC must consider for some of the issues outlined here. In particular VHA does not consider ongoing debates on gamma in the WACC or depreciation methodologies should be completely open ended and the subject of extensive rework at the expiry of each module.
	The ACCC has proposed that it be given a role to calculate the values of the RAB components and to review expenditure.	
	The ACCC has proposed that the ability of NBN Co to amend the Network Design Rules up to \$100 million should be removed.	
	The ACCC has proposed that the timing mechanism for construction expenditure to be deemed prudently occurred should be clarified	
	The ACCC has proposed that the value of gamma in the WACC, relating to taxation, should be determined at the time, not pre-determined	
	The ACCC has proposed that the methodologies used and factors for calculating CAPEX and OPEX, return on capital, depreciation and tax allowances would not be specified in the SAU. Rather, these matters could be subject to AD/BROC.	
	The ACCC has proposed that the length of the regulatory cycle could be determined by the ACCC, rather than being at NBN Co's discretion	
	The ACCC has proposed that the rollover of the RAB will occur on the basis of prudent expenditure rather than actual expenditure. Any additional mechanisms for determining efficient expenditure could be determined via AD/BROC.	
	The ACCC has proposed changes to the POI procedure to ensure consistency with NBN Co's statutory obligations.	