TELECOMMUNICATIONS REGULATORY ARRANGEMENTS

SUBMISSION TO THE NBN PANEL OF EXPERTS

14 April 2014

EXECUTIVE SUMMARY

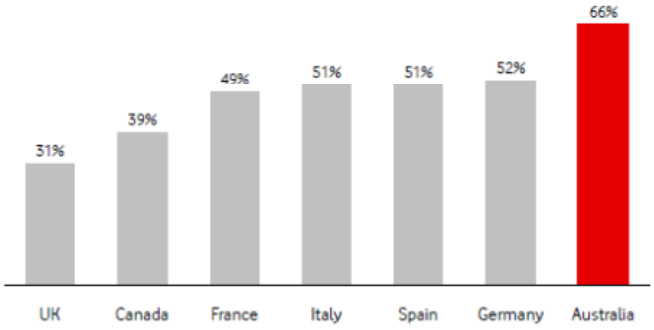
This submission is made by Vodafone Hutchison Australia Pty Limited (**VHA**) in response to the public consultation paper (**Consultation Paper**) issued on 24 March 2014 by the NBN Panel of Experts for the Cost-Benefit Analysis and Review of Regulatory Arrangements for the National Broadband Network (**NBN Panel**).

We welcome the opportunity to propose how Part XIC of the *Competition and Consumer Act 2010 (Cth)* (**Part XIC**) must be improved to more effectively deliver improved telecommunications industry outcomes for the Australian economy and consumers.

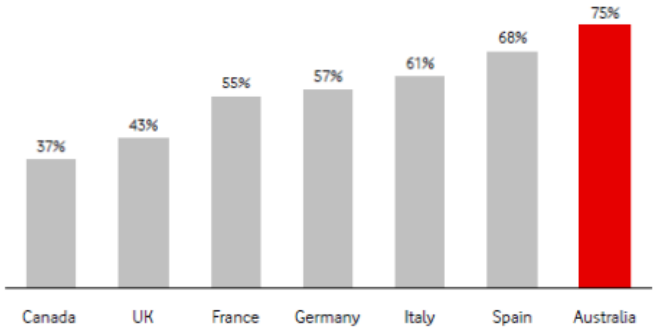
The state of the market

Before we consider refinements to Part XIC, we should consider the market context. Notwithstanding over 20 years of market liberalisation and regulation, Australian telecommunications markets remain highly concentrated. The incumbent operates the most profitable telecoms business in the OECD to the detriment of Australia consumers. The magnitude of the market failure in Australia is evidence by several key indicators:[1]

- Telstra's share of Total Telecoms Revenue in Australia is 66%:



- Telstra's share of industry EBITDA is 75% (in the fixed services sector it likely to be in the high 80's):



[1] Financial assessments undertaken by Vodafone

- Telstra's share of industry Operating Free Cash Flow is 85%:

- Telstra's Operating Free Cash Flow per capita is the highest in the OECD by a substantial margin:

These distortions have meant that Australia is now suffering from:

- **the highest PSTN prices in the OECD**: This is the product of serious structural problems in fixed telecommunications markets in Australia and is a significant policy failure.

- **fixed line broadband penetration rates continue to be below the OECD average.**

- **virtually no effective fixed and mobile competition in regional Australia**: This is of significant benefit to Telstra, positively reinforcing Telstra's enduring, pervasive, and unprecedented market dominance.

This dissatisfactory state of affairs reflects a series of major failures in government policy. Indeed, Australian telecommunications policy has involved a litany of missed opportunities to deliver real market reform. Examples include the privatisation of a vertically-integrated and horizontally dominant incumbent without structural reform, very substantial Government subsidies that have entrenched Telstra's market dominance, and a series of poor regulatory decisions that have entrenched incumbent market dominance and deterred long-term competitive infrastructure investment.

Australia continues to be badly in need of regulatory reform. The structural separation contemplated by the NBN would deliver such reform. However, it needs to be supported by an effective regulatory regime that supports real choice, efficient pricing, greater innovation and large-scale investment. We are hopeful

that this review by the NBN Panel represents the start of a new era in telecommunications regulation in Australia.

In this context, we believe that the objectives of the NBN Experts Panel deliberations should be to create a regulatory framework that:

- promotes a level competitive playing field throughout Australia's telecommunications markets, both fixed and mobile;
- avoids costly and unnecessary infrastructure duplication by enabling infrastructure sharing, particularly as there are many geographical areas where it is uneconomic to deploy competitive infrastructure; and
- provides long-term investment certainty in a regulatory environment that is conducive to the commercial resolution of short-term disputes.

Ensuring the effectiveness of Part XIC

VHA strongly supports the continuation of the telecommunications access regime in Part XIC of the *Competition and Consumer Act 2010 (Cth)* (**Part XIC**). Part XIC is a fundamental part of the regulatory regime necessary to overcome the serious market failures that continue to pervade this market.

As previous studies and reviews have established, Part XIC is critical to effective competition in the Australian telecommunications sector. Moreover, the continuation of Part XIC is consistent with international best practice and is required by law to enable Australia to comply with its international treaty obligations.

Importantly, further refinements to Part XIC are now necessary. Australian telecommunications markets continue to evolve in a dynamic and convergent technological environment. Telecommunications law must keep pace with those changes. The opportunity should be taken to remove any key weaknesses in the current regime. Many of the historical policy trade-offs codified within the drafting of Part XIC should be carefully revisited.

Given the breadth of the NBN Panel's overall task, VHA believes that improvements to the existing regime are much preferable to comprehensive reform. A number of these improvements can be delivered without substantive legislative change.

VHA has identified three key areas of improvement:

- the *ex ante* approach to ACCC determinations creates an unnecessarily high risk of regulatory error;
- the excessive complexity of the telecoms access regimes is increasing costs for the entire sector; and
- insufficient oversight of regulatory decisions is creating a reduced incentive for high quality decision-making.

VHA believes that these remaining issues with Part XIC can be fixed relatively easily. VHA proposes:

- merging the facilities access regime into Part XIC to create a single unified telecoms access regime;
- creating greater flexibility in service declarations so that they can be tailored to specific market failures;
- a simplified Part XIC regime with a focus on reference offers and long-term access undertakings;
- limited review mechanisms to ensure the procedural and substantive quality of ACCC decisions; and

- improved procedures for access undertakings, including consultation requirements pre-lodgement.

In relation to the *National Broadband Network Companies Act 2011 (Cth),* on the whole the framework established is appropriate. NBN Co must continue to:

- supply only to carriers and carriage service providers with no exception for utilities;
- remain focussed on wholesale only and open access;
- be prohibited from dealing with end users, except in situations of retailer insolvency;
- have greater flexibility for investment activities that are consistent with deploying the NBN;
- No longer be subject to the existing anti-competitive restrictions in the Definitive Agreements.

We are happy to provide more detail in relation to any of our concerns or proposals and would be happy to meet with the NBN Experts Panel to discuss this submission.

VHA'S CONCERNS WITH PART XIC

1. Part XIC is critical to effective competition in Australian telecommunications

VHA strongly supports the continuation of the Part XIC access regime.

As many previous studies and reviews have determined, a sectoral access regime for telecommunications is critical to effective competition in Australia's telecommunications markets. As the NBN Experts Panel will be well aware, it has been long established globally that:

- telecommunications infrastructure involves bottleneck 'essential facilities' with high sunk costs and natural monopoly characteristics, giving rise to insufficient competition and market failure;

- that market failure can be manifested by an owner of such infrastructure over-charging for access in order to maximise profits; and

- that market failure is exacerbated where the owner is vertically-integrated and has a commercial incentive to impede wholesale access to favour its retail business.

Moreover, that market failure is further exacerbated in telecommunications markets by such features as legacy incumbent ownership, network effects, first mover advantages, the importance of network interconnection, impediments to customer churn, and control of scarce resources, such as telephone numbers and spectrum. Collectively, these features mean that generic competition law is insufficient in many wholesale telecommunications markets and hence sectoral access regulation is required.

Reflecting such concerns, Australia is subject to reciprocal international legal obligations under the WTO General Agreement on Trade in Services and various Free Trade Agreements. The Australian government is obliged by its international treaty obligations to maintain an effective telecommunications access regime. Section 2 of the WTO Reference Paper on the regulatory framework for basic telecommunications, for example, requires Australia to ensure non-discriminatory interconnection with a major supplier on publicly available terms, subject to regulatory dispute resolution.

In practical effect, Australia is required by sound public policy, international best practice, and international legal obligations to maintain an effective telecommunications access regime.

2. Historically, the Part XIC regime has had well-documented problems

Part XIC was Australia's distinctive solution to the need for an effective telecommunications access regime. In 1997, the Part XIC regime was world-leading and promised to deliver substantive benefits in the context of Australia's newly liberalised telecommunications markets.

Over the years, the Part XIC regime attracted criticism from almost all stakeholders. Access providers criticised the regime as too invasive, overly harmful to investment, and representing a poor substitute to commercial negotiations. Access seekers criticised the regime as slow, unwieldy, ineffective and open to gaming by access providers.

VHA considers that the historical criticism of Part XIC largely reflected the implementation of the access regime. Only a small proportion of that criticism was targeted at the design of the regime

itself. For example, Parliament intended that access ndertakings would deliver greater long-term certainty in the regulatory process, thereby promoting infrastructure investment. Access undertakings were intended to provide flexibility and to emphasise commercial solutions, rather than regulatory outcomes. Yet for a number of reasons, very few access undertakings were ever successful. The arbitration process quickly dominated Part XIC, much to the frustration of all stakeholders. This was compounded by the fact that many arbitral decisions promoted short-term competition outcomes at the expense of long-term infrastructure investment.

Drawing from the lessons of the past, any consideration of Part XIC by the NBN Experts Panel must ensure that the necessary incentives exist for efficient and effective access regime for the telecommunications industry. Most importantly Part XIC should also ensure that the overall regulatory framework ensurages commercial discussions and promotes commercial agreements. If such outcomes fail, Part XIC should provide the necessary legislative disciplines and sufficient information to ensure high quality decision-making by the ACCC.

3. Problems with Part XIC still exist

While Part XIC underwent substantial structural reform in 2010, these reforms have not delivered the desired outcomes. In Vodafone's view, some of these reforms over-compensated for ineffective regulatory processes and outcomes. Accordingly, the correct regulatory balance has not yet been struck.

VHA's three key concerns with Part XIC (and related telecommunications legislation) are as follows:

1. **Unnecessarily high risk of regulatory error:** Dispensing with the negotiate-arbitrate model has led to more efficient regulatory processes, but the current use of *ex ante* determinations has 'outsourced' commercial negotiation and agreement to the ACCC. This is not appropriate for two key reasons:

    - First, an *ex ante* access determination requires complex commercial terms to be addressed by a regulator with imperfect information. The potential for regulatory error is therefore very high indeed. Moreover, errors are difficult to identify and impractical to reverse.

    - Second, access providers have little incentive to ensure that access determinations provide a workable alternative to negotiated commercial agreements. The onus is placed entirely on the ACCC to develop a complete regulatory solution with no meaningful requirement for access providers to assist in the development of a workable solution.

    In our view the Special Access Undertaking (SAU) process that oversaw NBN Co's proposal better facilitated an assessment of the terms and conditions of a declared service. An Undertaking process (properly managed) places the onus on access providers and requires access providers to deliver sufficient information to the ACCC to prove their case. Access providers are required to engage with access seekers to develop suitable proposals.

2. **Regulatory complexity is increasing costs**: Simplification of the regime is urgently required:

    - First, the different regimes for facilities access (Telecommunications Act) and carriage access (Part XIC) have led to inconsistencies. The facilities access regime is premised on *ex post* regulation, while the carriage access regime is premised on *ex ante* regulation.

    - Second, within Part XIC itself, the different regimes for NBN Co and other access providers have increased the complexity of Part XIC while creating some major

anomalies. NBN Co should be subject to the same regime as any other wholesale access provider.

- Third, the new regulatory instruments (such as the SFAA, ADs, and BROCs), have not provided the intended level of regulatory certainty. The hierarchy of instruments is highly complex and open to misinterpretation.

3. **Insufficient oversight of regulatory decisions**: High quality decision-making is absolutely critical in an environment where large and long-term investment decisions are being made. The potential costs of any regulatory error in the context of multi-billion dollar investment decisions can be very high indeed.

   Reduced oversight of ACCC decisions has improved the timeliness of decision-making and avoided costly litigation. However, Part XIC does not necessarily provide the appropriate disciplines to promote high quality decision-making by the ACCC.

   VHA recognises that the ACCC is diligent in its impartial assessment processes and the ACCC has a reputation as one of the best competition regulators in the world. However, costly errors do occur from time to time. Therefore, some level of oversight is desirable. It is vital to get the balance right between efficient and diligent assessments and the ability to critique and review regulatory decisions.

4. The remaining problems with Part XIC can be fixed

The issues with Part XIC identified above can be fixed with a straightforward set of amendments and process adjustments. If these suggestions are implemented, the Part XIC regime will become a much simpler regime that provides the ACCC with greater flexibility, yet subjects ACCC decision-making to an improved light touch apraisal.

These amendments are summarised below and explained in **Attachment A** and are summarised below:

1. **Single unified telecommunications access regime:** Declaration of a service involving the use of infrastructure should be permitted under Part XIC in the same manner as contemplated by Part IIIA. As a result, the facilities access regime could be merged into Part XIC to create a single unified access regime. See VHA's response to "Functional focus" and "Vectored VDSL 2" in the table below.

2. **Declarations should be tailored to market failures and substantial market power:** The ACCC should have flexibility and discretion to make declarations that are confined to particular entities or circumstances. In this manner, declaration could be more targeted at specific market failures and limited to access providers with substantial market power. For example, the ACCC should be permitted to declare "*Service X supplied by Entity Y at locations Z, but only where Entity Y is the only supplier of Service X at those locations*". See VHA's response to "SMP" in the table below.

3. **Simplified Part XIC regime with a focus on reference offers:** While the adoption of *ex ante* access determinations is relatively recent and occurred for legitimate reasons, VHA believes that the approach should be reconsidered. The concepts of SFAA, ADs, facilities access arbitrations, and facilities access codes should be abandoned and replaced by the concept of a reference offer:

   - The matters on which the ACCC is required to make an access determination are inherently commercial, including pricing. The ACCC has been given the onus of

gathering the necessary information in order to make its decision. A more efficient approach would be for the access provider to approach the ACCC with its commercial proposal and supporting evidence, then for the ACCC to undertake public consultation in order to verify that evidence. The onus would then be on the access provider, not the ACCC.

- Most other regimes around the world use the reference offer concept. The Standard Access Obligations (SAOs) can then be refocussed as provisions that describe the mandatory content of reference offers, including any operational separation requirements. See VHA's response to "SFAA", "SAOs", "ADs", and "BROCs" in the table below.

- A key issue with a reference offer regime is how to address the different commercial requirements of different access seekers. As we identify in the discussion on non-discrimination below, a "one size fits all" approach can be avoided with careful reference offer design.The reference offer should contain a range of different options and permutations and (as discussed below) the critical requirement is that that every access seeker should have the right to accept any of these different options and permutations.

4. **Greater use of long-term access undertakings/reference offers:** The role of access undertakings should therefore be (re)elevated within Part XIC and the regulatory procedures for approving and administering access undertakings significantly improved Provided the assessment process is managed effectively, access undertakings promote certainty and ensure regulation is closely aligned with the commercial requirements of access providers and access seekers. See VHA's comments in the next section of this submission as well as VHA's response to "SAOs" and "SAUs" in the table below.

   VHA believes that the access undertaking regime creates clear incentives to adopt realistic commercial solutions. In order for an access undertaking to be accepted, the access provider must be able to establish before the ACCC that its position is commercially reasonable, particularly as access seekers will have the ability to express their views during public consultation. This means that access seekers will be encouraged to develop transparent consultation mechanisms to demonstrate that they have evaluated the needs of access seekers.

   An example is NBN Co's Special Access Undertaking (SAU) which established a 30 year regulatory framework for the NBN. The SAU process encouraged NBN Co to undertake extensive industry negotiations that resulted in industry agreement on a range of issues such as initial pricing and product construct. The ability for NBN Co to amend its SAU was critical to achieving a satisfactory and timely outome. A determination process would have not have involved the same level of review by the industry.

5. **Improved assessments of ACCC decision-making**: The NBN Experts Panel would be aware of the recent consideration of the appropriate review procedure in the context of gas and electricity decisions. An appropriate balance was struck in that context and insights can be taken from that review in the context of an appropriate balance in Part XIC. Judicial review of ACCC decisions may be appropriate under standard administrative law processes to ensure proper procedures are followed.

   In regard to the the substantive content of regulatory decisions VHA is not advocating a return to a burdensome full merits review procedure but there does need to be a general review mechanism developed within the access regime. Importantly, VHA considers that the quality of ACCC decisions should be assessed periodically via independent review by an industry expert, thereby ensuring accountability is maintained. The should be an independent

assessment every four years of the overall economic impact of Part XIC decisions from the perspective of the objectives of Part XIC. The ACCC should be required to have regard to the recommendations of such independent assessments when it makes future decisions. We believe that this is a simple mechanism that would allow for a light touch approach to debate ACCC decisions and also a mechanism that would promote a more general discussion on the performance of the overall decision making performance of the regime to promote competition and deliver optimal outomces for end users.

To assist the NBN Experts Panel in processing VHA's submission, VHA has documented its proposed amendments in a table in the next part of this submission.

6. Consultation on access undertakings before lodgement is fundamental

Access undertakings were intended to promote long-term infrastructure investment and reduce regulatory risk. In practice, such undertakings have been infrequently given and frequently rejected. They have not delivered the outcomes that were desired.

The concept behind an access undertaking was that an access provider would make a binding offer to supply services at a pre-determined price (much like the reference offer concept outlined above). Such access undertakings (including when given in conjunction with anticipatory exemptions) were intended to increase certainty by allowing reasonable commercial terms to be pre-determined and locked in place.

The subsequent failure of the access undertaking regime occurred primarily due to the binary accept/reject decision required of the ACCC. In addition, the regime did not encourage access providers to undertake pre-lodgement consultation with the ACCC or industry. In this manner, the ACCC was faced with little choice but to reject an access undertaking if it encountered an issue or concern.

The past problems with access undertakings are in contrast to the iterative process undertaken for NBN Co's Special Access Undertaking (SAU). The SAU process has delivered an outcome that is satisfactory for access seekers and delivered certainty for NBN Co. However, even the NBN Co SAU process took some 2 years and involved an effective rejection and several false starts. Though, to put this in context, other "first time" regulatory assessments have often taken 12-18 months to complete.

VHA submits that the following approach should therefore be developed by the ACCC as part of its policies and procedures that it develops for the administration of the access regime:

- **Stakeholder consultation and negotiation:** Before submitting an access undertaking, the access provider should be encouraged to consult with all affected industry stakeholders and engage in various workshops in order to identify any stakeholder concerns. The access provider should attempt address any legitimate concerns before it makes any formal approach to the ACCC. In this manner, the access provider will be less likely to include manifestly unreasonable provisions and the industry will be better able to assist the ACCC to identify any potential concerns.

- **Opportunity for ACCC to express views:** Ideally, the ACCC should be privy to the industry consultation process so that it is fully informed of any concerns expressed by the industry and the steps taken by the access provider to address those concerns. The ACCC could also potentially express its own preliminary views on the proposed undertaking during the industry consultation process or initial guidance on its expectations on key issues.

- **Negotiation of draft with ACCC:** Before an undertaking is submitted to the ACCC in final form, it should first be submitted in draft form. The ACCC should have the ability to raise any concerns with the draft undertaking and require the draft to be refined. The process could be relatively informal in the nature of a negotiation but with the ACCC undertaking public consultation to inform its views. The ACCC should have specific powers to shape the content of access undertakings by giving directions as to the required content in the context of its processing of the draft.

- **Formal ACCC review of draft:** Once the access provider is comfortable that it has consulted with all stakeholders (including the ACCC) and has addressed the feedback it has received, it should then formally submit the undertaking to the ACCC. The ACCC should have powers to accept, to require amendment and resubmission, or to outright reject the proposed undertaking.

7. NBN specific issues and concept of non-discrimination

As outlined in the table below, VHA largely supports the regulatory framework that has already been developed for the NBN. NBN Co should remain a wholesale-only provider that offers nationally consistent prices on a non-discriminatory basis.

VHA strongly supports the concept of non-discrimination that is codified in sections 152 AXC and AXD of the *Competition and Consumer Act 2010 (Cth)*. These provisions are critical in ensuring a level playing field in downstream retail markets and must be preserved.

While NBN Co should have commercial flexibility to develop its offer suite, the ACCC should maintain an oversight role to ensure that a level competitive playing field is maintained. In particular, the ACCC must ensure the range of choices is available to all access seekers and that the different needs of different types of customers are being met by NBN Co in a non-discriminatory manner.

In a similar vein, non-discrimination should not engender a 'take it or leave it' approach to commercial negotiation by NBN Co. NBN Co must establish a process that ensures that requests for improvements or changes to its reference offer are appropriately considered and that non-discrimination is not used to justify inertia or lack of flexibility. The ACCC should play a role in ensuring that NBN Co's consultation processes deliver responsive and innovative solutions for its customers.

Given these issues, VHA supports a reference offer model involving a single set of contractual arrangements from which different customers may choose from a range of options that meets their needs. Any new requirements that are sought by one sector of the market should be developed and made available to all.

Some important principles should continue to guide the application of the non-discrimination provisions:

- **Restriction on harmful discrimination:** As an effective monopolist, NBN Co has a real incentive to engage in price and non-price discrimination in a manner that increases its profits and reduces its risk. Such discrimination could introduce severe distortions in downstream markets. Any differentiation should be transparent and subject to oversight by the ACCC to ensure it does not reduce competition.

- **Insufficient differentiation may be discriminatory:** In some circumstances, an approach that fails to treat different operators differently can give rise to discrimination. For example if NBN Co were to offer only one type of ordering and provisioning interface that required

significant IT expenditure, this could raise a significant barrier to entry for small access seekers. NBN Co should therefore be permitted to offer a range of options to its customers, but subject to the requirement that all customers are offered the full set of options.

- **Permission to introduce beneficial differentiation:** A degree of product differentiation may be beneficial. The anti-discrimination provisions should not, and need not, stifle innovation or create unwarranted barriers to entry. NBN Co's offer suite must maintain sufficient flexibility to foster the emergence of new consumer services and new telecommunications business models. Again, this should take place with the oversight of the ACCC.

This is essentially the approach that NBN Co is undertaking. VHA is pleased that NBN Co has identified a range of choices in a number of key areas in its 'offer suite' to address the different needs of its differentiated customer base.

NBN Co should continue to be encouraged to offer a range of choices for access seekers that delivers a vibrant, innovative, flexible and efficient retail market, including in product suite, bandwidth options, service level options, financial and security arrangements, and IT interface arrangements.

VHA also supports NBN Co's Product Development Forum and its commitment to a transparent decision making process as the appropriate way to offer services in a transparent and non-discriminatory way. Such an approach ensures that all access seekers can participate in ensuring that NBN Co is responsive to the industry's needs. Nevertheless, it is important for the ACCC to play an active role in ensuring that NBN Co's consultation processes deliver non-discriminatory outcomes and that a level competitive playing field is preserved.

VHA'S PROPOSED SOLUTIONS

SUBJECT	PART XIC ISSUES	VHA'S PROPOSED SOLUTIONS
Functional focus	• Should Part XIC be extended to allow declaration of access to physical infrastructure?	• Part XIC should be extended to allow declaration of access to underlying physical infrastructure. The current inter-carrier facilities access regime in Schedule 1 of the *Telecommunications Act 1997 (Cth)* (**Facilities Access Regime**) can then be repealed • Consistent with Part IIIA, declaration should not be of the infrastructure itself, but should be of a service comprising the use of that infrastructure. Under Part IIIA, a "service" is defined to include "the use of an infrastructure facility" (s 44B). The concept of declaring use of a facility should be replicated in Part XIC.
Significant market power (SMP)	• Should Part XIC only apply to entities with significant market power (SMP)?	• It is VHA's preliminary view that it may be appropriate to include an SMP threshold in the declaration assessment process. This may deliver a more flexible regime . One approach may be to give the ACCC sufficient discretion to make service declarations that are confined to particular entities, classes of entities, or specific circumstances. The ACCC could then make bespoke service declarations that were tailored to the particular circumstances. For example, the ACCC should be permitted to declare "*Service X supplied by Entity Y at locations Z, but only where Entity Y is the only supplier of Service X at those locations*". This may allow regulatory flexibility for situations where ther is additional infrastructure build that is being undertaing by non-NBN entities.
Vectored VDSL2	• Should exclusive access to in-building cabling be subject to declaration?	• Part XIC applies to carriers and carriage service providers, so only applies in relation to infrastructure that comprises a 'network unit' under the *Telecommunications Act 1997 (Cth).* Customer cabling is not normally a network unit, so is not currently subject to regulation under Part XIC. • International precedent does exist for the regulation of in-building cabling. Hong Kong, for example, has a very high proportion of high rise buildings so requires that in-building networks must be 'open access' and that tenants must be given non-discriminatory access to their telecoms provider of choice.

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		• However, any access to in-building cabling should be addressed outside Part XIC. New statutory arrangements may be required, perhaps as part of the carrier access powers in Schedule 3 of the *Telecommunications Act 1997 (Cth).*
Declaration and the LTIE test	• Should the test for declaration be refined? • What should be the duration of any declaration?	• The concept of 'any-to-any connectivity' is superfluous and should be removed. The concept has been rarely been given any weight by the ACCC in declaration decisions or otherwise. • Under Part XIC, the ACCC has a discretion to commence a declaration inquiry after receiving a request (s 152AM). However, under Part IIIA, a declaration inquiry is mandatory if requested (s44F). Consistent with Part IIIA, a declaration inquiry should be mandatory under Part XIC if an access seeker requests it. • Provided there has been an initial declaration period of three years, subsequent declarations should be permitted for up to 15 years (noting that this wouldonly occur in compelling circumstances). The ACCC should have discretion to set any lesser time period. If the ACCC accepts a long-term access undertaking, the duration of declaration should become co-extensive with term of the access undertaking. • Any person with standing should be able to seek an amendment to a declaration at any time. The ACCC should have the ability to have fast-track declaration inquiries for immaterial amendments.
Standard Forms of Access Agreements (SFAA)	• Do SFAA processes work effectively? • If not, how can SFAA processes be improved?	• The SFAA process in Part XIC does not work effectively as the ACCC cannot review the SFAA to ensure that the terms are reasonable. Australia should implement a 'reference offer/agreement ' framework that would significantly streamline the current regime. Under this approach: o each access provider would develop a reference offer in consultation with industry and the ACCC that set out the terms and conditions of access to the declared service; o the reference offer would be reviewed by the ACCC with scope for the ACCC to accept, reject, or direct amendments to the reference offer; o in circumstances where multiple parties were submitting a reference offer for a declared service (eg MTAS), the ACCC should have the ability to consolidate its consideration of the reference offers (including aligning timeframes) in order to ensure a consistent approach,

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		but without giving rise to any price fixing; and o once the reference offer was accepted, either the access provider or any access seeker could approach the access provider or the ACCC to request variations to the reference offer. A process would be established to allow for orderly assessment of requested changes. NBN Co's Product Development Forum process is a good example of such a mechanism. Note,when changes are made and confirmed by the ACCC, these clauses would be introduced into all reference agreements. • The concepts of SFAA, AD, BROC, access arbitrations, codes, and access undertakings could all be replaced by a reference offer, greatly simplifying the Part XIC regime and Facilities Access Regime.
Standard Access Obligations (SAOs)	• Do the SAOs need to be revised? If so, what should they cover? • Do Category B SAOs need to be applied to other wholesale-only access providers? • Should the category B non-discrimination obligations apply? • Should anticipatory exemptions be reintroduced?	• If a reference offer regime were applied (see above): o the SAOs could be replaced by statutory requirements for the content of reference offers (including non-discrimination obligations), perhaps with detail prescribed by regulations; o the statutory requirements could include operational ring-fencing requirements for wholesale service supply by vertically-integrated entities; o anticipatory exemptions would not be required; particularly as such exemptions were normally given only if an undertaking to provide access had been given in the nature of a reference offer.
Access Determinations (ADs)	• Are ADs an effective method in setting terms and conditions? • Should a reference offer	• A reference offer approach should be adopted for the following key reasons: o The previous negotiate-arbitrate model proved susceptible to gaming by access providers, resulting in a proliferation of access disputes. The ACCC was not able to expeditiously resolve those disputes, resulting in significant uncertainty and cost for access seekers.

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	approach be adopted? • Should the criteria for making ADs be revised? • Should terms be different between parties? • Should any pricing methodology be specified? • Should ADs be subject to merits review or procedural fairness?	o The current Access Determination model places the onus on the ACCC to identify all pricing and terms of access, but the ACCC is not well placed to do so. The ACCC is highly dependent on the information it can obtain from the access provider, so is susceptible to capture. o A reference offer approach requires the access provider to table all information with the ACCC and then justify its approach, thereby placing the onus on the access provider not the ACCC. • Importantly, VHA proposes that a reference offer should be the subject of industry consultation before it is submitted to the ACCC. In this manner, the ACCC can be presented with a list of outstanding issues to determine. The ACCC should be privy to such industry consultation. • All decisions of the ACCC should be subject to requirements of procedural fairness under standard administrative law. In this manner, the procedural quality of ACCC decision-making will be maintained. • The substantive quality of ACCC decisions under Part XIC should be assessed periodically via independent review by an industry expert, thereby ensuring accountability is maintained. The review should be an independent assessment every four years of the overall economic impact of Part XIC decisions from the perspective of the objectives of Part XIC. The ACCC should be required to have regard to the recommendations of such independent assessments when it makes future decisions under Part XIC.
Binding Rules of Conduct (BROCs)	• Should BROC powers be removed, retained or expanded? • Should BROCs be subject to merits review or procedural fairness?	• Under a reference offer approach, BROC powers could be replaced by the ability of the ACCC to direct interim amendments to a reference offer. The exercise of those powers should be subject to requirements of procedural fairness, thereby ensuring sufficient ACCC accountability. • The ability of the ACCC to issue competition notices under Part XIB should include powers for the ACCC to issue a competition notice in relation to any contravention of a provision in Part XIC. In this manner, the ACCC would have an enhanced ability to enforce Part XIC requirements via Part XIB.
Special Access Undertakings	• Should ordinary access undertakings be reinstated?	• Part XIC should contain a clear mechanism whereby access providers can obtain sufficient investment certainty for long-term infrastructure investments. The access undertaking regime

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(SAUs)	• Should NBN Co be permitted to use SAUs for declared services? • Should the criteria for accepting an SAU be amended? • Should fixed pricing principles be legislated?	should continue to provide a long-term regulatory safe-harbour. The regime should be substantially improved. • The distinction between ordinary access undertakings and special access undertakings is unnecessary. An access provider should be able to achieve long-term regulatory certainty irrespective whether the relevant infrastructure is new, upgraded or existing. Existing infrastructure still requires maintenance. • Reference offers can replace short-term undertakings given the concepts overlap. An access undertaking should apply for a minimum period of 3 years. No statutory maximum period should be set. • Before submitting an undertaking, the access provider should be required to consult with the ACCC and the industry. The ACCC should have greater powers to shape the content of access undertakings by giving directions as to the required content, following industry consultation.
Ministerial Pricing Determinations (MPDs)	• Should the power to make MPDs be retained?	• The Minister should not be permitted to issue an MPD without undertaking public consultation and consulting with the ACCC. In order to reduce any scope for adverse political interference, greater political transparency and accountability is required. • Similarly, the reasons for the MPD and the views of the ACCC should be published and tabled in Parliament as well as the MPD itself. A regulation impact statement should also be formally tabled.
Access Agreements (AA) and hierarchy of terms	• Should AAs continue to have primacy in the regulatory framework? • How does the SFAA sit with the hierarchy? • Should regulatory recourse be available while an AA is in effect?	• Vodafone believes that the concept of a reference offer could replace the concept of a commercially negotiated access agreement in its entirety. In practice, there would be no need for bilateral agreements as access could be obtained by adopting the reference offer. Commercial negotiations (bilateral and multilateral) would continue but NBN Co solutions would be offered to the entire customer base on a non-discriinatory basis. There is nothing radical in this notion. It is in effect the way NBN Co currently offers its services.. • A reference offer would be converted into an access agreement by the access seeker signing the access offer as it existed at that point in time.The access provider should be required to offer to the access seeker any amendments to the reference offer that are made after the date of the access agreement. The access seeker should have a discretion whether or not to agree the

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		access agreement to include any or all of those amendments. Note in some circumstances, with appropriate regulatory oversight, NBN Co would be abe to make unilateral changes.
Possible alternative approaches to Part XIC	• Should alternative approaches be required to regulate access?	• Part XIC should remain, but should be amended to introduce the concept of reference offers in the manner identified above. Such an approach is more consistent with international best practice and is used widely in the telecommunications access regimes of other countries.

SUBJECT	NBN COMPANIES ISSUES	VHA'S PROPOSED SOLUTIONS
Wholesale only services	• Should NBN Co only supply to carriers and carriage service providers	• Structural separation of NBN Co is fundamental. NBN Co should only supply to carriers and carriage service providers. This is not an onerous requirement and we are not advocating that interested parties be precluded from becoming NBN Co customers. Non-traditional NBN Co cusomters would merely be required to become carriers or carriage servicep providers and adhere to carrier licence requirements.
Supply to utilities	• Should NBN Co continue to be permitted to supply to utilities?	• NBN Co should not be permitted to supply to utilities, except to the extent those utilities are carriers or carriage services providers. A fundamental premise of the NBN is that it should be wholesale-only as an enabler of retail competition.
Ability to deal with end users	• Should NBN Co be permitted to deal directly with end users?	• NBN Co should not be permitted to deal directly with end users. Such an obligation has been contained in Telstra Wholesale's customer contracts for many years. • The only exception to this requirement should be where a retail provider becomes insolvent and NBN Co is required to advise customers of this, including their ability to select another retailer.
Layer 2 services	• Should greater flexibility be provided to allow NBN Co to operate at layer 3 in the OSI	• NBN Co should be limited by law to supplying at layer 2, but should have the right to seek authorisation from the ACCC to operate at layer 1 and 3 in limited circumstances. • In any such authorisation, the ACCC should be required to undertake public consultation

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	stack?	and to weigh the competition and efficiency considerations.
Supply of other goods and services	• Should NBN Co's restrictions on supplying other services be tightened or relaxed?	• NBN Co should remain as open access and wholesale only. NBN Co should remain focussed on supply of telecoms services at wholesale. The status quo should be maintained. Any obligations or restrictions on NBN Co must be technologically neutral. Note, these restrictions need not be legislated but could be managed in the state of expectations process.
Restrictions on investment activities	• Are the restrictions on NBN Co's activities appropriate and effective?	• NBN Co should be expressly permitted and encouraged to enter into Public Private Partnerships (PPP), outsourcing arrangements, joint ventures and other co-operative ventures where consistent with optimising NBN deployment.
Remaining provisions and concerns	• The panel welcomes any views or concerns on any other parts of the NBN Companies Act. • Stakeholders are invited to raise any issues with the wider NBN arrangements	• VHA has concerns regarding the authorisation of the Definitive Agreements, particular the "substantial adverse event" trigger in the Subscriber Agreement. • VHA believes that this provision has the anti-competitive purpose of preventing NBN Co from supplying mobile services in rural Australia so could impede any infrastructure sharing arrangement between NBN Co and other carriers involving the sharing of mobile and broadband wireless infrastructure.