



**ACCC
COMMUNICATIONS SECTOR
MARKET STUDY
DRAFT REPORT**

**SUBMISSION BY
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Executive summary

VHA Hutchison Australia Pty Limited (**VHA**) welcomes the Australian Competition and Consumer Commission (**ACCC**) consultation on its Communications Sector Market Study Draft Report (**Draft Report**).

As outlined in our previous submission to the Communications Sector Market Study Issues Paper (**Issues Paper**), in VHA's view, the Market Study should first identify market performance problems in wholesale and retail communications markets and then identify the underlying structural causes of these problems. These may stem from market structure, vertical and/or horizontal integration, economies of scale and/or scope, government policies, the incentives and conduct of firms with substantial market power and/or technology developments which require new bottleneck inputs (such as new spectrum bands). The purpose of the Market Study should be to identify barriers to effective competition and the achievement of economic efficiency, and more broadly the long-term interests of end-users. The ACCC should propose actions and recommendations to reduce the impact of these barriers, even if the ACCC cannot solely act on these.

The Draft Report has identified some of these issues including the need for an increased ACCC focus on, and role in, spectrum matters, the need for a sustainable approach to the NBN and ensuring a focus on competition in government subsidy schemes.

There are other aspects of the Draft Report, however, which VHA believes require greater focus and/or explanation. These include the very different competition and consumer issues in regional Australia and the consistency of approach to issues of government policy where there are significant implications for competition and consumers. These include the USO and the barriers to competition between the NBN and mobile networks.

A serious and holistic focus on competition in relation to major spectrum decisions

VHA welcomes the ACCC's proposed increased focus on, and role in, spectrum matters. The ACCC has identified some key decision points at which competition should be taken into account more explicitly. Our experience suggests that this focus on competition needs to be broader than the approach proposed by the ACCC. There are a number of key decisions which have a surprisingly significant impact on the possibilities for smaller firms and new entrants to gain access to spectrum on a level playing field. These include not just competition limits but also the overall quantum of spectrum that is made available, whether significant amounts of spectrum are set aside on highly preferential terms for particular firms (e.g. Commonwealth entities such as NBN), the choice of auction structures, the timing of auctions, reserve prices and whether payment is required in one up-front payment or staggered over time.

A sustainable approach to the NBN which ensures incentives for efficiency and enables consumers to receive the full performance of the NBN

As the most recent and most significant new entrant into fixed services on the NBN, VHA also welcomes the ACCC's focus on NBN's wholesale pricing model. We believe however that there are two separate questions. The first question is whether NBN should be relieved, possibly in one of the three ways proposed by the ACCC, of the requirement to recover its full costs through wholesale prices. The second, and perhaps more important question, is how to ensure ongoing effective incentives for efficiency in the deployment and operation of the NBN. Resolving the first question without resolving the second question may solve a short-term problem but impose substantial inefficiencies in the long-run which are ultimately borne by consumers. Of the three options proposed by the ACCC, only direct budget funding appears to bring with it a (partial) answer to the second question – any additional incentive for efficiency (since government budgetary and review process are likely to provide some incentive). A very similar question arises in relation to incentives for efficiency in relation to NBN's spectrum holdings, since NBN has been permitted to acquire substantial spectrum holdings on highly preferential terms.

Ensuring a focus on competition in government subsidy schemes

While VHA welcomes the ACCC's recommendations in relation to ensuring an appropriate focus on competition in the Mobile Black Spot Program, we are concerned that the Government has since released its Round 3 Program Guidelines and appeared to have ignored the ACCC's recommendations entirely. If the ACCC is serious in its intent to ensure that such subsidy schemes do not harm competition, there are a number of measures which the ACCC could consider. These range from using its information gathering powers to publish the extent of co-location (or lack thereof) on government-funded sites through to a mechanism by which the ACCC could require access and set the price for co-location and/or wholesale roaming services at any sites which have been partially or wholly funded by government.

A consistent and detailed approach to the very different competition and consumer issues in regional Australia

VHA sees the breaking down of barriers to entry in the regional telecommunications market as paramount. The competitive conditions for communications services, in particular mobile, vary markedly across Australia. Competition is intense in metropolitan areas however economies of density, scope and scale hinder widespread deployment of competitive infrastructure outside of these areas. VHA's belief is that Telstra has unmatched advantages in supplying mobile services in regional Australia. This is supported by the detailed and comprehensive financial and economic analyses provided to the ACCC in various

submissions¹, Telstra's market dominance has substantial spill-over impacts that distort competition not only in other regional areas, where there is existing infrastructure competition between the mobile operators, but also in major metropolitan markets where some consumers appear to place substantial value on mobile coverage in regional areas even if they do not actually use that coverage on a regular basis.

As the ACCC will appreciate, market definition is critical in the context of a Part XIC analysis and developments in the communications market require greater emphasis and precision in the ACCC's approach to market analysis. VHA is concerned that the ACCC's current approach to market analysis takes insufficient account of the significant geographic variations in competition, leading to the ACCC's conclusion that there is "reasonably effective" competition in communications markets. This is not a recognised concept under Australian competition law and, even if it were, we do not believe that "reasonably effective" is sufficient for the 7.7 million Australians who live in regional, rural and remote Australia. It is unfortunate that the ACCC has not recognised the significant and unjust competition divide between metropolitan and regional Australia. Only when there is competition, or a credible threat of competition, for all Australian communications users can competition be considered anywhere near "effective" in fixed and mobile telecommunications markets.

We are surprised that the ACCC has identified that competition, cost structures, consumer benefit and many other factors appear to vary significantly in regional Australia, yet does not appear to have offered a substantial or coherent solution to those issues. The ACCC also does not appear to have analysed significant data which would ordinarily be of great interest to a competition authority in examining differing levels of competition. Significant data appears to be readily available to the ACCC, such as market shares of RSPs on each NBN POI and the detailed mobile market share data in the ACCC's Domestic Roaming Inquiry which showed market shares as high as 84 percent in some regional areas. This data and analysis would be extremely useful in giving the ACCC an empirical basis for assessing competition on the ground. We note that in the context of the Adam Internet merger, the ACCC merger team considered that a different and more granular approach to market definition needed to be used, with the merger being refused on the basis that it was likely to substantially reduce competition in South Australia. The ACCC appears to already have access to much more granular market share information than it has published in the Draft Report. We therefore suggest that the ACCC regularly publish this information on market shares in regional areas.

¹ See VHA's submissions to the ACCC's Domestic Roaming Declaration Inquiry [Discussion Paper](#) and [Draft Decision](#).
Vodafone Hutchison Australia Submission on Draft Communications Market Study

Consistency of approach to issues of government policy where there are significant implications for competition and consumers

VHA welcomes the fact that the ACCC has commented on some matters which are clearly government policy decisions beyond the ACCC's direct influence, where the ACCC is (rightly) concerned that those policy decisions may be harming competition and/or consumers. These include, for example, whether government should continue to require NBN to recover its full cost of investment through wholesale prices. However against that context we do not understand why the ACCC has not commented on other issues which, although also matters of government policy also not within the ACCC's direct control, appear to have a clear and detrimental impact on competition and consumers, including plainly anti-competitive subsidy schemes such as the USO.

While the policy solution to the USO may not lie directly with the ACCC, the negative impacts on competition and consumers appear so blatant. On the ACCC and Productivity Commission's numbers, Telstra appears to be provided a subsidy of \$150 million each year at the expense of taxpayers and Telstra's competitors. The implications of such a large cash subsidy are profound as there is no limitation on how that subsidy can be used. Telstra is free to utilise this to subsidise spectrum acquisitions, retail market offerings, investment in infrastructure, and/or reduce debt to access lower levels of interest for financing. None of these are options available to Telstra's competitors. By way of illustration, in the 2016 Regional 1800MHz spectrum auction, Telstra's total spend was \$191 million, which taxpayers and competitors would appear to entirely subsidise in just over one year.

Given that three government reports in a row (the Regional Telecommunications Review, the Productivity Commission and the ANAO) have heavily criticised the opaque and anti-competitive nature of the USO, it is surprising that the USO is mentioned only three times in the ACCC's Draft Report – once to define it, once to indicate that the Productivity Commission has examined the USO and once to indicate that the ACMA became primarily responsible for the USO in 1997. The Productivity Commission specifically and clearly flagged that the USO "effectively stymies competition", yet the ACCC has chosen not to comment on the USO. The Productivity Commission and the ANAO have also identified that the ACCC has existing information gathering powers that it could use to extract information from Telstra which would enable a renegotiation with Telstra. Although the solutions to the USO are not directly within the ACCC's control, it is a matter of government policy which has such clear implications for competition and consumers, and has anti-competitive implications which manifest themselves in areas which are clearly within the ACCC's remit and areas of focus.

There also needs to be a consistent approach to barriers to competition between the NBN and mobile networks. We are concerned by some apparent contradictions in the ACCC's analysis. For example, the ACCC comments that the Regional Broadband Scheme should not be expanded to cover wireless services as this would have the result of protecting NBN from network competition. However, the ACCC does not comment on the arrangements between Telstra and NBN which reduce the incentives and ability of Telstra to compete with NBN and thereby are likely to have had an even larger and actual impact on

preventing inter-platform competition between NBN and wireless networks. Similarly, the set-aside of substantial quantities of spectrum on highly preferential terms for NBN inevitably reduces the ability of mobile operators to offer increased choice and value to consumers through substitutable wireless services. We agree that the ACCC needs to concern itself with actual and potential barriers to competition between different platforms, but do not understand why the ACCC has focused on a possible theoretical future development rather than current anti-competitive agreements which are likely to be having a far more immediate, real and profound impact.

1. Introduction

VHA's submission focuses on those critical factors that we believe negatively impact, or have the potential to negatively impact, competition within the communications market. These include:

1. The current spectrum management framework;
2. Anti-competitive and opaque subsidy schemes;
3. Insufficient network sharing incentives; and
4. NBN wholesale pricing and access arrangements.

Addressing these issues involves changes to future regulation within the ACCC's mandate, but also the development of solutions that are within the ambit of other regulators and policy-makers. These issues should be properly examined by the ACCC with the range of tools and methodologies the ACCC has at its disposal. We urge the ACCC to conduct further detailed analysis that builds on that included in its Draft Report.

In relation to other regulatory issues highlighted in the ACCC's Draft Report, VHA supports the ACCC further examining internet interconnection arrangements. The internet peering arrangements were mandated many years ago and lack an appropriate foundation for encouraging commercial agreements between networks that would promote consumer interests. We also support the removal of regulation of SMS termination services.

VHA also believes a review of the ACCC's competition and price monitoring activities is long overdue given the significant structural and technological changes that have occurred, and continue to occur, in the market for voice and messaging services.

2. The current spectrum management framework

Spectrum is a critical and increasingly important pre-condition to competition in wireless communications markets. Data traffic in Australia is growing exponentially and the industry is soon to reach a critical 'pivot point' in the transition to 5G.

2.1 Spectrum reform and legislation package

As noted in the ACCC's Draft Report, a spectrum reform and legislation package is currently being progressed by the Department of Communications and the Arts. VHA has provided a submission to this process in which we express our support for reform of the existing spectrum management framework because it is complex, inflexible and administratively cumbersome.²

VHA supports the intent of the ACCC's proposed recommendation 27 and encourages the ACCC to take a broader approach which recognises the range of government decisions which can either enable or forestall competition. We share the ACCC's view that the spectrum management framework must do more to promote competition in relevant markets and that the proposed reforms to the regime need to take into account the impact on competition in downstream markets for which spectrum is an input. In our submission, we propose that the objects of the *Radiocommunications Bill 2017* should provide a clear set of overarching policy objectives that reflect the importance of promoting competition, innovation and efficient investment. The inclusion of the concept of "promoting competition in downstream markets" in the objects of the Bill is intended to ensure that competition policy is given appropriate weight in the spectrum management framework.

VHA supports the ACCC playing a greater role in spectrum allocation to promote competition and we are encouraged by the Commissioner's recent statement that the ACCC wants to "consider spectrum holdings holistically rather than in particular bands."³ As set out in our spectrum reform and legislation package submission, licence issue limits are fundamentally directed at preventing monopolisation of spectrum as an essential input into a range of upstream and downstream services. As the regulator with the responsibility for enforcement of the *Competition and Consumer Act 2010 (CCA)*, we are of the view the ACCC will generally be well placed to assess the likely competitive impacts of spectrum allocation. In this context, whenever the ACMA proposes to allocate spectrum by way of a market-based mechanism, we

² See VHA's [submission](#) in response to the Exposure Draft of the Radiocommunications Bill 2017.

³ See ACCC media release: '[ACCC welcomes 5G but flags competition issues](#)', 1 November 2017.

argue that it should be required to proactively consider both whether a licence issue limit may be appropriate and to consult with the ACCC on the issue. The ACMA should then be obliged to have regard to the ACCC's recommendation, even if it is not bound by it. In contrast, as currently drafted, the *Radiocommunications Bill 2017* imposes no general obligation upon the ACMA to turn its mind to whether a licence issue limit may be appropriate and consultation with ACCC is merely an option for the ACMA in determining a licence issue limit.

In relation to the application of section 50 of the CCA, as currently drafted the Bill would enable the ACMA to impose licence issue limits without consulting the ACCC in some circumstances. Even if the ACCC is consulted, the ACMA would not be required to follow its recommendation. In this context it may not be appropriate to exclude ACCC review for all acquisitions of spectrum that are subject to a licence issue limit as contemplated by section 97 of the Bill. This does not mean we support the application of the section 50 'SLC' test in all circumstances. While this is the correct test in our view for general spectrum acquisitions in the market, for new allocations of spectrum VHA considers that a modified version of the 'LTIE' test or possibly, its 'promotion of competition' limb, would be most suitable.

The promotion of competition does not mean setting aside arbitrary amounts of spectrum for new entrants. This is likely only to produce inefficient outcomes that distort competition. Rather, there needs to be a focus by the ACCC on all aspects of the broader spectrum management framework. The imposition of competition limits is merely one of several decisions, all of which have substantial impacts on the ability of firms to compete on a level playing field for spectrum.

2.2 Quantum of spectrum supply and Commonwealth holdings

The most fundamental influence on the ability of smaller firms to acquire sufficient quantities of spectrum is the overall quantum of spectrum supply. If larger quantities of spectrum are made available, smaller firms and new entrants are more likely to be able to acquire spectrum. Indeed, a proper understanding of spectrum management, particularly with respect to its use in telecommunications, is incomplete without a detailed consideration of supply-side dynamics. We note for example that the critical issue of the current constrained spectrum availability for 5G services, and the impact this will have on competition if not resolved, was not addressed in the ACCC's Draft Report.

VHA has provided a submission to the ACMA as part of its consultation on the future use of the 3.6GHz band which, along with the 3.4 and 3.5GHz bands, will be pivotal to the development of 5G services in Australia. In our submission we outline VHA's initial modelling suggesting that the industry requires at least 300MHz of sub-6GHz spectrum to support early stage 5G services. Unfortunately, the ACMA's relatively small proposed allocation of 125MHz in the 3.6GHz band only, via an auction in 2018, means Australia will already be falling short in its competitive 5G needs by the time the first sites are switched on. Meanwhile, 75MHz of metropolitan 3.5GHz spectrum was set aside for NBN under an unusual licensing structure whereby NBN has a free option to take up the various licences at its discretion. This represents

nearly half of the lowest frequency spectrum that could be made available for 5G in Australia in the foreseeable future. The fact that this is set aside for NBN for 15 years, including in major metropolitan areas where NBN is using fixed line technologies and not fixed wireless as per the NBN's stated requirement for this spectrum, is unusual. We would therefore encourage the ACCC to work with the ACMA and government to ensure a clear roadmap for larger quantities of internationally-aligned spectrum. This is likely to produce exponentially better results than arbitrary set asides of scarce amounts of spectrum on the current roadmap.

Should the 75MHz of 3.5GHz spectrum currently held by, or set aside for, NBN for a mere 80,000 premises, be considered for reallocation to 5G mobile services, it will ensure the mobile industry has an opportunity to acquire the 300MHz of the 3.4 - 3.7GHz spectrum band it needs to deliver competitive 5G services to millions of Australian consumers and businesses. VHA is not suggesting that this spectrum be immediately withdrawn from NBN however there should be a serious examination of the alternatives and options and the costs and benefits of each. Other spectrum bands could be fit for use for NBN's fixed wireless network and NBN could be allocated appropriate other spectrum bands which are not primary candidates for 5G. A portion of 5G spectrum auction proceeds could be set aside for NBN's costs incurred in migrating those customers to an alternative spectrum band or alternative technology.

2.3 Auction structures, timings, reserve prices, payment terms and competition limits

A broad set of issues and decisions have a substantial influence on the ability of new entrants and smaller firms to acquire spectrum. For example, one of the most important decisions is whether to auction complementary and/or substitutable spectrum bands in separate auctions, or simultaneously. Auctioning them separately, artificially reduces supply, creates uncertainty, introduces substantial inefficiencies (such as forcing partial and/or repeated network upgrades to radio access equipment), and reduces the ability of bidders to make efficient trade-offs between different spectrum bands (which inevitably penalises smaller firms who have a lower ability to withstand uncertainties or bear increases in cost).

The definition of the lot sizes to be auctioned can also substantially increase or reduce barriers to entry. A current example of this is the ACMA's proposal in the 3.6GHz auction to have only seven lots – six metropolitan lots and only one single regional lot covering all of regional Australia. This is very different to the past practice of defining numerous smaller lots to reduce barriers to entry. For example, in the regional 1800MHz auction, an auction far less significant for competition in communications markets, spectrum was sold in 147 different regional lots. Smaller firms and new entrants will be at a substantial disadvantage given that they have less infrastructure and fewer customers in regional Australia, fewer economies of scale and scope. With just a single regional lot, as currently proposed, they would need to bid and pay for spectrum in areas where they have no plans or ability to use it.

The timing of auctions and reserve prices also have a substantial impact on competition. VHA expressed serious concerns regarding the timing of the 2013 digital dividend auction, the setting of arbitrarily high reserve prices and the ineffective competition limits determined for the auction. VHA was not able to participate in this auction due to the cumulative impact of those decisions.

A further critical factor is the payment terms for spectrum. The ACMA and government have taken a variety of approaches in the past ranging from annual payment terms for apparatus licences. These range from staggered three year payment terms for the 700MHz auction, one-off up-front payments for the full 15 years of new and/or renewed spectrum licences, through to a proposal to require payment for renewal of the 2100MHz licences (well over a billion dollars for the industry) 18 months in advance of the actual date of expiry/renewal of the licences. Each of these options clearly has substantially different implications for raising or lowering barriers to smaller firms and/or new entrants. The fact that neither VHA nor TPG bid for 700MHz spectrum at the 2013 digital dividend auction (for which payment terms were single upfront payments), and the fact that both bid and won 700MHz spectrum at the 2017 auction (which offered staggered payments over three years) is of course not conclusive proof, but in VHA's view indicates that payment terms can have a significant influence. The fact that the staggered payment terms included an indexation factor to cover the government's cost of capital should mean that, from a Treasury perspective, government is indifferent to upfront or staggered payment terms, while this can make a significant difference to competition for spectrum and therefore in downstream markets.

Allocation or competition limits also have a significant impact on competition. However, a narrow focus which only addresses competition limits and does not ensure a focus on the promotion of competition in the numerous prior, and often more important, decisions will often put the ACCC in the position of attempting to "shut the gate after the horse has bolted".

3. Anti-competitive and opaque subsidy schemes

As we set out in our submission to the ACCC Issues Paper, the Australian communications market continues to be characterised by an alarming range of internal and external subsidies and other competitive distortions. While we accept that the ACCC cannot directly ensure that anti-competitive subsidy systems are dismantled, we are surprised that the ACCC seems relatively disinterested in assessing the impact that such schemes are likely to be having on competition.

These range from the \$300 million a year USO, to \$220 million in Mobile Black Spot Program funding and hundreds of millions in state-based direct subsidies for mobile network build, which are structured in a manner which make competition for these subsidies impossible or ineffective. As we noted in our submissions to the ACCC's Domestic Roaming Declaration Inquiry, over the last ten years, some \$2 billion in subsidies have been provided to Telstra to support its mobile network expansion. This has effectively created a \$2 billion barrier to entry that has entrenched Telstra's monopoly position in regional, rural and remote areas.

The Federal government has also proposed to introduce the Regional Broadband Scheme which, if enacted, is effectively a new tax of ~\$400 million each year, rising to \$814 million each year by 2022. We note the ACCC's comments on the Regional Broadband Scheme and its proposed recommendation 29 outlining a preference for direct budget funding for non-commercial NBN services to regional, rural and remote Australians. We also note the ACCC's proposed recommendation 5 and while, in our view, an asset revaluation of the NBN is not appropriate at this point in time, we do consider that there needs to be greater transparency of the cross subsidy arrangements for non-commercial services. Also, the NBN involves a significant taxpayer investment and, as such, further synergies and opportunities to maximise the value from this investment need to be front of mind for policy-makers. One example VHA has suggested is permitting mobile operators to use the NBN for transmission for small cells. The NBN Cell Site Access Service is already providing backhaul for macro sites however it is not suited for small cells, which are low capacity sites requiring minimal bandwidth. As convergence of fixed and mobile broadband services continues, it is clear that the provision of an NBN service for small cells is the missing link in NBN's service offering.

We find it surprising that the government is proposing to introduce yet another large subsidy mechanism into the telecommunications sector (the Regional Broadband Scheme) without following through on its commitment to review the large, inefficient and anti-competitive subsidy regime already in place (the USO). VHA believes there are many potential benefits to reforming the USO arrangements in combination with the current NBN cross-subsidy arrangements and NBN's role as the default Statutory Infrastructure Provider across Australia. Given the USO was set up a funding mechanism to provide subsidies for uneconomic infrastructure it seems obvious that the USO scheme should be brought into the technology agnostic NBN reality. The most obvious benefit is the capturing of economies of scope, deriving from the ability of existing infrastructure to deliver both broadband and voice services. The cost savings that are feasible through the economies of scope of a single network and the revenues associated with existing USO subsidies should mean that the extent of losses attributable to the supply of services in non-commercial areas should be reduced.

It is concerning that the ACCC has not grappled with the fact that three government reports in a row have issued damning findings in relation to the USO. The ACCC's own data⁴ reveals that almost half of the

⁴ The Department of Communications and the Arts report on "Band 4" services which is a reasonable proxy for regional copper services. The USO calculation was done on the basis of 810,000 copper services, which matches reasonably well to the ACCC September 2007 published number of Band 4 services of 792,000. By June 2017 the ACCC reports this had reduced to 416,000 Band 4 services.

regional copper services Telstra is being paid to maintain have been shut down while the Productivity Commission's Final Report into the USO revealed that almost half of Telstra's payphones have also been shut down.

This indicates that there is an anti-competitive subsidy of around \$150 million each year flowing to the largest and most profitable telecommunications provider at the expense of its competitors and taxpayers, which it is free to utilise to subsidise spectrum acquisitions, retail market offerings, investment in infrastructure, and/or reduce debt to access lower levels of interest for financing. Indeed the ability of competitors to compete is undermined by the contributions which they are forced to make into the USO. While the Productivity Commission has separately reviewed and provided recommendations on the USO, the Communications Market Study is an entirely appropriate context within which the ACCC should at least compile a complete list of the numerous subsidies and distortions which could be undermining competition and provide recommendations for prioritisation of the order in which government should look to address those subsidy schemes and recommendations on the appropriate way to ensure that these distortions are minimised in the long term. The ACCC should also outline how it will take account of the possibility of anti-competitive subsidies in the various areas of the market in which it has expressed a particular interest or focus. For example, if the ACCC is to take a greater interest in spectrum allocation and management, it cannot ignore the fact that Telstra's spectrum acquisitions may be effectively partly or fully subsidised not only by taxpayers, but also Telstra's competitors.

In addition to the USO, taxpayers are continuing to fund the Mobile Black Spot Program which, as the ACCC has noted, appears to have been implemented with insufficient weight given to competition in allocating funding. Unfortunately, there is an increasing likelihood that government initiatives such as the Mobile Black Spot Program become a mechanism through which taxpayer funds further entrench Telstra's incumbency position in mobile services across regional areas. Despite relying on a seemingly competitive tender process to select mobile network operators to provide base stations in areas with inadequate mobile coverage, in reality, Telstra faces little competition across areas where other mobile network operators lack backhaul capacity to support the cost-effective rollout of new base stations and/or areas where they do not have coverage in areas contiguous to the black spots (since Telstra's mobile network is over 1.5 million square kilometres larger than any other mobile network). The ACCC has noted the concerns which have been raised by ACCAN about the terms and conditions relating to backhaul access and pricing under the Mobile Black Spot Program in its recent paper titled 'Measures to address regional mobile issues.' VHA agrees with the ACCC's proposal to seek changes to these so that they are aligned with the declared DTCS, but we reiterate our concern that Telstra routinely engages in conduct which seeks to place access to DTCS beyond the practical reach of access seekers.

We also contend that the co-location arrangements under the Mobile Black Spot Program have been unsuccessful, with less than four percent of Telstra's round one towers being shared. During the finalisation of the funding feed for the Program, VHA was presented with co-location and transmission terms which were plainly inconsistent with the spirit and the letter of the Program's Guidelines. The detailed terms greatly favoured Telstra and had been negotiated with Telstra without any consultation

with potential access seekers. Telstra thereby negotiated a specification for co-location space on its towers which Telstra knew was substantially less than the minimum required for the standard space and weight requirements of co-location seekers and therefore rendered co-location on most sites practically impossible. Further, Telstra insisted on standard co-location pricing despite having received substantial subsidies (~50 percent) for the capital costs of building its base stations. Telstra also defined the transmission service it was obliged to provide in a manner which effectively doubled the cost of transmission compared to commercially available rates and insisted that this was the only structure under which transmission to black spot sites could be procured.

Providing funds to one mobile network operator to expand coverage that only benefits one group of customers is not the most effective use of public funds. We are encouraged that the ACCC has identified the Mobile Black Spot Program as an area for improvement, suggesting the provision of roaming be a requirement for winning bidders. However, we note the government has apparently chosen to ignore the ACCC's suggestions in the latest round of the Mobile Black Spot Program which is currently out to tender. Without roaming in place for base stations funded under this round and previous rounds of the Program, it is not clear whether this would deliver much, if any, benefit.

If the ACCC is serious in its intent to ensure that such subsidy schemes do not harm competition, there are a number of measures which the ACCC could consider. These range from using its information gathering powers to publish the extent of co-location (or lack thereof) on government-funded sites through to a mechanism by which the ACCC could require access and set the price for co-location and/or wholesale roaming services at any sites which have been partially or wholly funded by government.

4. Insufficient network sharing incentives

There is credible evidence of market failure in Australia's mobile markets in the Telstra-only mobile network areas. This market failure is caused by the inability of the mobile market in these areas to sustain more than one mobile infrastructure competitor. These regional markets have natural monopoly characteristics, or, at the least, it is uneconomic for competitors to duplicate infrastructure.

Given Australia's large land mass, small population and relatively low urban density, in many places it only makes sense to build one mobile network. However, this does not mean that consumers cannot receive the benefits of competition as multiple operators can compete on the basis of one mobile network through various forms of network sharing.

The most efficient form of mobile network sharing is a domestic roaming arrangement involving wholesale roaming payments to one network operator. VHA has provided extensive and compelling evidence of the benefits of roaming in terms of increased investment, coverage and competition as part of the ACCC's Domestic Roaming Declaration Inquiry. Domestic roaming has been successfully implemented in virtually every other large western economy and has successfully brought increased coverage and competition to countries including the USA, Canada, New Zealand, Spain and France. VHA

finds it extraordinary that the ACCC has decided not to declare domestic roaming and has failed to intervene in a market where Telstra is clearly dominant, with the ACCC acknowledging Telstra has a regional market share as high as 84 percent in some areas.

Two forms of mobile network sharing are already mandated in Australia, namely the sharing of backhaul transmission (via the Part XIC access regime) and the sharing of space on mobile towers (via the facilities access regime). VHA's strong advocacy for the declaration of roaming is due to the fact that these existing forms of passive mobile network sharing do not overcome the structural and cost impediments faced by mobile network operators to deploy competing networks in the Telstra monopoly areas.

While the facilities access regime has been relatively successful in preventing outright refusals to supply by infrastructure owners, in many cases it is VHA's experience that commercial arrangements are strongly biased towards vertically-integrated infrastructure owners. As outlined in our submissions to the ACCC's Domestic Roaming Declaration Inquiry, VHA believes that the facilities access regime has been effective in promoting commercial arrangements for passive sharing where both carriers wish to share a tower. However, there are still various mechanisms that can be used by a carrier to impede access if it did not wish to share a tower (e.g. building a tower that can only host one occupant; reserving spare capacity on the tower for itself; over-charging for access; and/or locating a competitor at an unnecessarily lower height hence giving the competitor less geographic signal coverage). We note the ACCC will shortly commence a public review of the Facilities Access Code and we look forward to seeing further details of this review and providing a submission in due course.

The ACCC's recent regulatory actions, which have reduced prices for managed transmission services for certain routes, will have a markedly positive influence on the viability of competitive services in particular areas. With that said, the fundamental model of managed transmission services envisioned by the DTCS is ineffective and merely involves one of the many technology solutions for providing wholesale transmission capacity. As outlined in our submission to the ACCC's Issues Paper, it is not possible to characterise the Part XIC access regime as an effective regime while it allows the incumbent to maintain an argument that key declared services do not exist and cannot be effectively bought by access seekers.

Not only has this practice occurred under the Mobile Black Spot Program, as outlined above, but more broadly Telstra continues to assert that access seekers cannot purchase both DTCS and other managed transmission products. Telstra insists that it is permitted to charge a substantial premium on regulated pricing by artificially exploiting minor differences it has created (and which are of relatively low value to access seekers) between the regulated product and the commercial products which it makes available. Further, Telstra maintains that VHA can only acquire the regulated DTCS if we exclusively purchase the DTCS. That is, access seekers cannot procure both the regulated DTCS and different transmission products on a commercial basis. This practice effectively prevents access seekers from realising the benefits of the DTCS FAD since it is practically impossible to dismantle all existing transmission services and order new DTCS services without substantial disruption to the access seeker's business and customers. Telstra's refusal to supply DTCS can be assessed by the ACCC under the new section 46 of the CCA, or indeed under

Part XIB at any time. Separately, we note the ACCC will shortly commence a public review of the DTCS declaration and we look forward to seeing further details of this review and providing a submission in due course.

5. NBN wholesale pricing and access arrangements

VHA has recently entered the fixed broadband market as a NBN RSP. While the NBN has enormous potential to support Australia's future growth by capturing the economic and social benefits of the digital economy, the current NBN wholesale pricing model and the barriers to entry posed by NBN's 121 POIs are issues that need to be carefully monitored by the ACCC. As we note in our submission to the Issues Paper, the ACCC cannot play a passive role in the ongoing development of the NBN and the evolving market structures in the fixed market. The ACCC should take a holistic view of the impact of NBN commercial and regulatory arrangements to promote the best outcome for end users.

The NBN has the potential to deliver a level competitive playing field in the fixed market, however as a government-owned monopoly, and one which is currently required to ensure that its wholesale prices recover its full costs (whether efficiently incurred or not), there may be an incentive for NBN to constrain competition. With low margins for RSPs due to high NBN wholesale charges, the incentives to bypass the NBN entirely will continue to grow unless a solution is found. Meanwhile, the technological convergence between what is offered on mobile and fixed line networks will continue, particularly with the introduction of 5G. While the full long-term implications of this convergence are not obvious, we note that NBN's current pricing model is likely to be unintentionally accelerating substitution of NBN fixed services by wireless services as the NBN charging model penalises RSPs for purchasing sufficient capacity to provide uncongested throughput whereas wireless networks generally do not.

VHA agrees that greater competition from new technologies is likely to lead to positive outcomes for consumers. We agree with the ACCC that regulation should not constrain competition with NBN and that NBN requires the flexibility to respond to these developments (proposed recommendation 21). The ACCC should examine where existing policy settings are both benefitting NBN's relative competitive position (e.g. its favourable spectrum arrangements) and hindering it. An example of the latter is the NBN-Telstra definitive agreements which we understand contain restrictions on NBN offering a wireless solution in a fixed-line footprint. As with Telstra's refusal to supply DTCS, these anticompetitive arrangements can be assessed by the ACCC under the CCA at any time.

5.1 NBN pricing

The biggest challenge currently facing NBN's business case and the take up of services is NBN's wholesale pricing arrangements. NBN's wholesale pricing arrangements discourage RSPs from offering their customers the faster speeds NBN is capable of delivering. We agree with the ACCC's observation that the CVC has a direct impact on speed and service quality of downstream broadband services on the NBN. In our view, the amount of CVC a RSP purchases is one of the most significant influences on the quality of

the service experienced by NBN users. As a mobile-only provider until recently, VHA does not have an existing fixed line services margin to protect and we are dimensioning sufficient CVC to ensure our customers get the service they need and expect. However, RSPs who wish to deliver high quality services by providing adequate levels of network dimensioning are impacted by the risks of ever increasing CVC costs per end user. The current structure of CVC penalises RSPs for provisioning higher guaranteed capacity and, therefore, more consistent guaranteed performance for their customers.

The issue is not just the well-publicised CVC however, as the fixed monthly AVC increases steeply for higher speed tier plans. This, combined with higher CVCs to guarantee the higher throughput customers would expect on higher speed plans, means that the pricing model discourages RSPs from offering higher speed tier plans. There is little incentive for RSPs to market them to customers as its margins are thinner and the price at which RSPs must sell the plans to customers are so high as to raise questions as to how attractive they will actually be. The market is therefore currently migrating services from historic DSL copper and HFC cable services (which could already offer up to 20 Mbps and 100 Mbps respectively) to the lower speed NBN 12/1 Mbps and 25/5 Mbps services rather than migrating to faster NBN 50/20 Mbps and 100/40 Mbps services. This means that the full potential of the NBN is not currently being delivered.

VHA recognises that NBN must be able to achieve an appropriate level of ARPU to make a return on its significant investment. It is therefore important to stress that we are not advocating an overall price reduction for NBN services. Rather, VHA believes NBN must shift its dependence on revenue growth from increased demand for CVC capacity and focus on incentives for the industry to sell NBN's faster speed tiers. We are proposing a rebalance in the AVC and CVC that results in a substantial reduction in the CVC, ideally by more than half. The reduction in ARPU associated with the fall in the CVC can be compensated with an increase in the AVC. The AVC increase should be proportionately the highest in the 12/1 Mbps product level and customers should be encouraged to migrate from 12/1 Mbps plans to 25/5 and 50/20 Mbps plans.

VHA has been actively participating in NBN's pricing consultations. We are encouraged that NBN has made some recent positive changes to its wholesale pricing, however it is critical that a permanent, long-term solution is implemented so that consumers can utilise the NBN to its full capacity. While the industry should continue to seek to negotiate an outcome with NBN, it is appropriate the ACCC pays close attention to this issue and intervenes if there is not a transparent and reasonable process in place.

We are confident that a proper solution to the current NBN wholesale pricing model will address many of the issues customers are currently experiencing in relation to the speed and service quality of services on the NBN. Having said that, there will always be a minority of customers who experience installation and performance issues with their NBN service. Given some of these issues could be within the control of NBN which is a key part of the supply chain, we agree with the ACCC that it is critical NBN is included in the TIO's dispute resolution process and we support the recent amendments to the TIO's terms of reference to this effect. We support the ACCC's proposal for the TIO collect and report on a clear data set of NBN-related

complaints and collect NBN complaint data according to technology type (proposed recommendation 18).

5.2 Wholesale aggregation, transmission and dark fibre

While NBN's wholesale access network is available to all RSPs at the same price, each RSP is responsible for operating or leasing backhaul transmission capacity from one of NBN's 121 POIs to the RSP's own core network. The NBN distributed POI model favours providers with an extensive backhaul network, which is subject to economies of scale. Telstra's high market share in regional Australia and extensive regional backhaul network could allow it to provide a higher-quality super-fast service to regional customers at a lower cost without fundamentally being any more efficient or innovative than other RSPs.

For these reasons, VHA is supportive in principle of the introduction of an ACCC Record Keeping Rule to monitor the supply of wholesale aggregation services as per proposed action 7. VHA also supports NBN considering the provision of transitional products or pricing measures to facilitate the entry of smaller or niche service providers as per proposed recommendation 8. Even though the ACCC's latest wholesale report indicates access seekers are connecting at more NBN POIs, there is a limited choice of transmission suppliers and services and VHA believes that this situation will continue. We note the ACCC's assessment that there is a relatively concentrated supply of wholesale aggregation services and note the estimated HHI of between 2900 and 3400. In VHA's experience, at some POIs, there is only one supplier of services. Given the prices of NBN Layer 2/Layer 3 wholesale aggregation services are not regulated, this is of particular concern.

It is important to note that it is not just the limited number of suppliers which is of concern, but also the quality of the services being supplied. While we support the examination of the supply of transmission services to NBN POIs as part of the upcoming review of the declaration for the DTCS, the emerging question is whether DTCS will be sufficient for the next generation of fixed and mobile services with exponentially increasing data demands. Managed transmission services require escalating volume-based transmission payments to the access provider as the volume of traffic carried across the transmission line increases. Fixed and mobile networks are however experiencing exponential increases in data traffic driven by increasing demand for streaming video and TV services. Against this context, the managed services model has a limited lifespan before it becomes a fundamental constraint to the competitive development of the industry.

The complementary product which is available either commercially and/or under regulated access obligations in many other advanced markets is dark fibre. Dark fibre provides access seekers with significant flexibility in how they configure their end products to consumers and businesses. This can result in greater product differentiation and innovation, as well as provide a constraint on the pricing of 'active' transmission services. Since flexibility and cost certainty will be critical pre-conditions to continuing expansion of data growth across fixed and mobile networks, the availability of dark fibre,

especially in regional areas, is likely to be of substantial importance to the long-term competitiveness of the Australian communications market.

Dark fibre provides access seekers with control and certainty over the technology used, and the cost of managing exponentially increasing capacity rather than being reliant on the access provider to make those choices for the access seeker. Indeed, access providers are likely to have incentives to restrict the supply of alternative products such as dark fibre since they are likely to generate lower margins for the access provider and allow access seekers many advantages in terms of technology choice and cost control and certainty. These incentives appear to be playing out in the Australian communications market with neither Telstra nor Optus supplying dark fibre services, as noted by the ACCC. VHA supports the ACCC's proposed action 10 and the regulation of dark fibre given its importance in promoting competition. Dark fibre is increasingly available in international markets and, as noted by the ACCC, is already regulated in comparable markets including the Netherlands and Sweden.

6. Other regulatory issues

6.1 Internet interconnection

VHA supports the ACCC undertaking a detailed investigation of the internet interconnection market as part of the Market Study, as per proposed action 12. As we noted in our submission to the ACCC's Issues Paper, the current internet peering arrangements were put in place many years ago (which may be at odds with a dynamic market) and appear to be anti-competitive. The ACCC should determine a path or process by which a better peering solution could be achieved. Australia's arrangements are unusual in that while peering is commonplace among smaller service providers, the so-called "gang of four" arrangements require other providers to purchase connectivity to and from their networks at commercial (transit) IP carriage rates. In many instances, domestic traffic costs more than traffic sourced from international providers/destinations due to this arrangement. For so long as the current arrangements remain, the "gang of four" should at least be required to publish transparent criteria which allow other networks to understand the factors which are taken into account in assessing proposals to enter into peering relationships.

6.2 SMS termination services regulation

VHA supports the ACCC examining the need for ongoing regulation of SMS termination services in its next regulatory review of the MTAS as per proposed action 2. As outlined in our previous MTAS submissions we do not believe there is a case for the ongoing regulation of SMS termination services. With the evolution of mobile plan inclusions, virtually all plans include unlimited international and domestic SMS services including plans priced at the lowest entry level price point of \$10 a month. The basis for the ACCC's intervention appears to have fundamentally changed.

6.3 ACCC competition and price monitoring and reporting

VHA believes a review of the ACCC's competition and price monitoring activities is long overdue given the significant structural and technological change occurring in the market for voice and messaging services, as per proposed action 1.

As the ACCC notes, the market remains highly concentrated with large vertically and horizontally integrated service providers continuing to capture most of the voice services market across both fixed line and mobile networks. The ACCC's current price monitoring and reporting activities are no longer fit for purpose. A new statistically sound model for pricing should be developed in consultation with the Australian Bureau of Statistics which takes account of the multiple dimensions of fixed and mobile plans such as voice, text, data, international calling, roaming, content, frequent flyer points and other inclusions. Particular attention should be paid to reporting mechanisms which allow for the prevalence and implications of bundling and tying to be understood. This will be even more important following the ACCC's decision to allow the merger of Fox Sports and Foxtel.