



Superfast Broadband Access Service and Local Bitstream Access Service declaration inquiry

Discussion paper

July 2020



Australian Competition and Consumer Commission

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List of abbreviations and acronyms

| | |
|-------|---|
| ACCC | Australian Competition and Consumer Commission |
| ACMA | Australian Communications and Media Authority |
| ADSL | Asymmetric Digital Subscriber Line |
| CBD | Central Business District |
| CCA | <i>Competition and Consumer Act 2010</i> |
| C-I-C | Commercial in Confidence |
| CLC | Carrier Licence Conditions |
| DSL | Digital Subscriber Line |
| DSLAM | Digital Subscriber Line Access Multiplexer |
| FAB | Fibre Access Broadband |
| FAD | Final Access Determination |
| FTTB | Fibre to the Basement |
| FTTN | Fibre to the Node |
| FTTP | Fibre to the Premises |
| HFC | Hybrid Fibre-Coaxial |
| LBAS | Local Bitstream Access Service |
| LTIE | Long-term Interests of End-users |
| Mbps | Megabits Per Second |
| NBN | National Broadband Network |
| POI | Point of Interconnection |
| RSP | Retail Service Provider |
| SAO | Standard Access Obligation |
| SBAS | Superfast Broadband Access Service |
| SAU | Special Access Undertaking |
| SIO | Services in Operation |
| TC-4 | A standard, best effort traffic class used for delivering residential and non-critical business broadband services. |
| VDSL | Very-high-bit-rate Digital Subscriber Line |
| WLR | Wholesale Line Rental |

1. Introduction

This discussion paper begins the Australian Competition and Consumer Commission's (ACCC) public inquiry into the following declared services:

- the superfast broadband access service (SBAS)
- the local bitstream access service (LBAS).

These are wholesale fixed line broadband services capable of download data rates of normally 25 Mbps or more, able to be used by access seekers to supply downstream superfast broadband retail services to end-users. They are supplied on non-NBN networks and provide similar services to the NBN.

This inquiry will examine whether the current LBAS and SBAS declarations should be extended, varied, revoked, allowed to expire or whether a new declaration should be made. The current SBAS declaration expires on 28 July 2021 and the ACCC is required to hold a public inquiry in the 18 month period before expiry, pursuant to subsection 152ALA(7) of the *Competition and Consumer Act 2010* (Cth) (CCA). The current LBAS declaration does not expire, however it is open to the ACCC to decide whether to vary, revoke, make a new declaration or allow the current declaration to remain in-force.

The LBAS and SBAS declaration inquiry commences in the context of new legislation (the *Telecommunications Legislation Amendment (Competition and Consumer) Act 2020*) which received Royal assent on 25 May 2020 and that enables the ACCC to review the current LBAS declaration. Therefore, this inquiry will consider the declaration of superfast broadband networks built *before* 1 January 2011 (i.e. SBAS) and *after* 1 January 2011 (i.e. LBAS).

1.1. Purpose and consultation process

The ACCC has commenced this public inquiry under Part 25 of the *Telecommunications Act 1997* (the Telecommunications Act). This paper raises issues the ACCC considers relevant to the LBAS and SBAS declarations and invites submissions on these issues as well as any other issues that stakeholders consider relevant.

A consolidated list of questions raised in this paper is provided at **Appendix A**. You may wish to address any or all of these questions and any other matter relevant to superfast broadband access services.

Submissions are due on Friday, 4 September 2020.

The ACCC prefers to receive submissions in electronic form, either in PDF or Microsoft Word format, which allows the submission to be text searched.

Submissions should be sent to: superfastbroadbandinquiry@acc.gov.au

To foster an informed and consultative process, all submissions will be considered as public submissions and will be posted on the ACCC's website. Interested parties wishing to submit commercial-in-confidence material to the ACCC should submit both a public and a commercial-in-confidence version of their submission. The public version of the submission should clearly identify the commercial-in-confidence material by replacing the confidential material with an appropriate symbol or 'c-i-c'.

The ACCC has published a [guideline](#) setting out the process parties should follow when submitting confidential information to the ACCC. The *ACCC/AER Information Policy June 2014* sets out the general policy of the ACCC and the Australian Energy Regulator (AER) on

the collection, use and disclosure of information. A copy of the guideline and policy are available on the [ACCC website](#).

After considering submissions, the ACCC expects to release a draft decision for public consultation in November 2020.

2. Legislative framework

The following sets out the legislative framework applicable to the declaration of telecommunications services and the ACCC's approach to assessing whether a service should be declared.

2.1. Declaration framework

There is no general right of access to telecommunications services in Australia and access is usually unregulated unless the services are declared. Once declared, an access seeker can seek access to that service and the access provider (the owner of the network or facility) must provide access in accordance with the access obligations set out in the CCA. The regulatory arrangements do not preclude access seekers and providers agreeing to terms of access through negotiation.

The ACCC may only declare a service, or vary a declaration, after holding a public inquiry under Part 25 of the Telecommunications Act, if it is satisfied that declaration would promote the long term interests of end-users (LTIE).¹

Once declared, the ACCC must hold a public inquiry about a proposal to make an access determination for that service. An access determination may include a broad range of matters, but if it includes terms and conditions relating to access to the service it must specify price or a method of ascertaining price.² An access determination usually serves as a fall back that parties can rely on if they are unable to reach agreement on the terms and conditions or price of access.

In deciding whether declaration will promote the LTIE, the ACCC must consider the extent to which declaration is likely to result in the achievement of the following three objectives:

- promoting competition in markets for telecommunications services
- achieving any-to-any connectivity
- encouraging the economically efficient use of, and economically efficient investment in, telecommunications infrastructure.

We are required to consider only these objectives when determining whether declaration would be in the LTIE.

2.1.1. Promoting competition

To determine the extent to which declaration will promote competition, we:

- identify and define the relevant markets
- assess the current state of competition in those markets and
- assess how declaration may affect competition in those markets.

In identifying the relevant markets, we consider the market(s) that are relevant to the supply of the service and any downstream markets that may rely upon this service. We generally give most attention to the markets for downstream (or retail) services, as these (rather than the upstream or wholesale markets) are usually the markets in which declaration may promote competition. When defining a relevant market, we also consider whether there are effective substitutes for the relevant service.

¹ CCA, section 152AL.

² CCA, subsections 152BC(3) and 152BC(8).

The ACCC does not need to take a definitive position on market definition, and market analysis under Part XIC of the CCA should be seen in the context of showing whether declaration would promote competition.

When assessing the current state of competition in a relevant market, we will consider a number of factors including market share and concentration levels, whether there are any barriers to entry, and any dynamic market characteristics such as growth, product differentiation and the potential for competition to emerge.

In considering the effect that declaration will have on competition in a relevant market, we consider the likely future state of competition in the relevant market, with and without declaration of the service. Among other things, this requires consideration of whether declaration will establish conditions under which competition will improve and whether these conditions would develop without declaration.

2.1.2. Achievement of any-to-any connectivity

Declaration of a service will promote any-to-any connectivity if it allows end-users of a telecommunications service to communicate with other end-users, whether or not they are directly connected to the same network. This is particularly relevant when considering services that require interconnection between different networks. When considering other types of services (such as carriage services which are inputs to an end-to-end service), the ACCC will generally give this factor less weight.

The ACCC does not consider that declaration of the LBAS or the SBAS have any bearing on any-to-any connectivity. This is because the LBAS and SBAS are both inputs to an end-to-end service and with no switching capability do not in and of themselves involve communications between end-users.

2.1.3. Economically efficient use of, and economically efficient investment in, infrastructure

We must have regard to a number of matters when assessing whether declaration will promote the economically efficient use of, and economically efficient investment in, telecommunications infrastructure. We consider:

- whether it is technically feasible to supply the service
- the legitimate commercial interests of suppliers of the service
- the incentives for investment in the infrastructure used to supply the service under consideration, and other telecommunications services.

The economic concept of efficiency consists of three components:

- Productive efficiency refers to the efficient use of resources within each firm to produce goods and services using the least cost combination of inputs.
- Allocative efficiency refers to the allocation of goods and services across the economy in a way that is most valued by consumers. It can also refer to the allocation of production across firms within an industry in a way that minimises industry-wide costs.
- Dynamic efficiency refers to the efficiencies flowing from innovation leading to the development of new services or improvements in production techniques. It also refers to the efficient deployment of resources between present and future uses so that the welfare of society is maximised over time.

When considering incentives for investment in infrastructure, we will consider how declaration may impact incentives for investing in existing infrastructure as well as how it

may impact decisions about maintenance, improvement and extension of existing infrastructure, and investment in new infrastructure.

2.1.4. Further information

The ACCC's [Guideline](#) to the declaration provisions for telecommunications services under Part XIC of the CCA provides further guidance about the declaration process and the ACCC's general approach to declaration decisions.

3. Regulation of superfast broadband services

Three types of regulation currently apply to superfast (non-NBN) broadband services under the Telecommunications Act and the CCA:

- the level playing field rules (Parts 7 and 8) in the Telecommunications Act
- the Local Bitstream Access Service (LBAS) and Superfast Broadband Access Service (SBAS) declarations under the CCA
- *Carrier Licence Conditions (Networks supplying Superfast Carriage Services to Residential Customers) Declaration 2014 (CLCs)*.

3.1. Level playing field rules

The level playing field rules prohibit:

- the use of a network to supply a fixed carriage service if the network is used to supply superfast carriage services wholly or principally to residential or small business customers, unless a Layer 2 bitstream service is supplied (Part 7)³
- the use of such networks unless they are operated on a wholesale-only basis (Part 8).

Unless an exemption applies, the level playing field rules apply to networks that were built after 1 January 2011, or to networks that have been extended by more than one kilometre, or upgraded to make the network capable of supplying superfast carriage services, since 1 January 2011. For example, the networks operated by Opticomm and Uniti.

These rules do not apply where a ministerial exemption or statutory exemption applies. To date, six ministerial exemptions have been granted including for Telstra's South Brisbane and Velocity networks, TPG's VDSL and HFC networks, and SmartFarmNet's rural networks.

The Government has recently amended the level playing field rules under the *Telecommunications Legislation Amendment (Competition and Consumer) Act 2020*, which received royal assent on 25 May 2020. Under the new provisions, the Part 7 requirement to supply Layer 2 bitstream service has been repealed. The wholesale-only rules have also been amended, allowing network providers to run separate wholesale and retail businesses on a 'functionally separated' basis subject to ACCC approval, with effect from 26 August 2020. These amendments are discussed in further detail in Section 6.2.3.

3.2. LBAS declaration

The ACCC was required to declare an LBAS under amendments to the CCA in 2011 associated with the introduction of the NBN and the level playing field rules.⁴ The ACCC declared the LBAS in February 2012. The current LBAS declaration does not have an expiry date.⁵

Broadly, the LBAS declaration requires operators of fixed line superfast broadband networks built, upgraded, altered or extended by more than 1 km after 1 January 2011 to provide wholesale access to a Layer 2 bitstream service with a downstream data rate that is normally 25 Mbps or higher upon request, unless the network is subject to a Ministerial Exemption from Parts 7 and 8 of the Telecommunications Act. The LBAS declaration does not apply to the NBN.

³ The repeal of Part 7 of the Telco Act was enacted by item 24 of Schedule 1 to the [Telecommunications Legislation Amendment \(Competition and Consumer\) Act 2020](#) which commenced on 26 May 2020.

⁴ Subsection 152AL(3C) of the CCA (subsequently repealed).

⁵ The ACCC was required to declare the LBAS under the now-repealed subsection 152AL(3C) of the CCA. The current LBAS declaration does not have an expiry date (subsection 152ALA(5A), CCA).

The LBAS service description is set out in Appendix B. Further information is available in our LBAS declaration final decision available [here](#) and the LBAS declaration instrument available on the ACCC's [public registers](#).

3.3. SBAS declaration

In 2016, the ACCC declared the SBAS. Broadly, the SBAS declaration applies to fixed line networks capable of a downstream data rate that is normally 25 Mbps or more (a description of the SBAS is provided in Section 4 of this paper). The SBAS declaration does not apply to services:

- supplied on the NBN, HFC networks that will be transferred to NBN Co, and networks already subject to the LBAS or Domestic Transmission Capacity (DTCS) declarations. These services are subject to other access regulation under Part XIC of the CCA
- that exclusively supply business, charity and public body end-users in central business district (CBD) areas of capital cities on the basis that competition in the supply of these services is considered to be effective.

The SBAS and the LBAS generally have the same service characteristics and can be considered as counterpart services provided over networks built *before* 1 January 2011 (i.e. SBAS) and *after* 1 January 2011 (i.e. LBAS). The SBAS also applies to networks built after 1 January 2011 covered by ministerial exemptions to Parts 7 and 8 of the Telecommunications Act. LBAS networks are subject to legislative structural or (subject to ACCC approval) functional separation requirements; however SBAS networks for the most part are not subject to separation requirements.⁶

The ACCC declared the SBAS so that wholesale access regulation is in place for fixed line superfast broadband networks not covered by the LBAS declaration.

The SBAS service description is set out in Appendix C. Further information is available in our SBAS declaration final decision available [here](#) and the SBAS declaration instrument available on the ACCC's [public registers](#).

3.4. Superfast carrier licence conditions

The superfast carrier licence conditions require relevant carriers to comply with functional separation requirements and, in the absence of the SBAS declaration, to supply a 25/5Mbps Layer 2 access service at \$27 per port per month on a non-discriminatory basis. These licence conditions:

- apply to superfast broadband networks in existence before 1 January 2011 that have been altered to provide services to residential customers after this date⁷
- do not apply to networks covered by the level playing field provisions or subject to a ministerial exemption
- do not apply to the NBN or specified HFC networks.

Notably, the CLCs apply to TPG's FTTB networks in capital cities, which are also covered by the current SBAS declaration.

The CLCs do not have an expiry date and will remain in-force indefinitely.

⁶ Except for networks which are captured by the superfast carrier license conditions (discussed in Section 2.4), which are required to operate on a functionally-separated basis.

⁷ The intention of the CLCs declaration was to close off an exemption to the level playing field rules which allowed network operators with superfast networks built before January 2011 to extend them by up to 1 kilometre.

The regulatory arrangements under the Telecommunications Act and CCA applicable to superfast broadband services are outlined below.

Table 1.1 Regulation of superfast broadband services

| Network | Regulation | Key wholesale access obligations |
|---|--|--|
| National Broadband Network | Part XIC of the Competition and Consumer Act 2010 and the NBN Companies Act 2011 | Services supplied on a wholesale-only basis as a declared service under NBN's Special Access Undertaking (SAU) and its published Wholesale Broadband Agreement (WBA). |
| Superfast broadband networks built, upgraded or altered after 1 January 2011 | Part 8 of the Telecommunications Act and the LBAS declaration and FAD | Services supplied on a structurally or (subject to ACCC approval) functionally separated basis at the price of the NBN Co product TC-4 25/5 Mbps with aggregation capacity (including discounts). |
| Telstra's FTTP networks in South Brisbane and Velocity estates | SBAS declaration and FAD | Requirement to supply a declared FAB 30/1 Mbps service at \$13.01 per month (Zone 1) and \$18.15 per month (Zone 2) and \$29.27 per Mbps per month for aggregation. An RSP seeking an access service would also have to purchase Telstra's wholesale line rental service, which is an additional \$20.69 per month. |
| TPG's VDSL network in the ACT and extensions to its HFC network in regional Victoria | SBAS declaration and FAD | Requirement to supply a declared Layer 2 25/5 Mbps service at the price of the NBN Co product TC-4 25/5 Mbps with aggregation capacity (including discounts). |
| Superfast broadband networks in existence before 1 January 2011 | SBAS declaration and FAD | Requirement to supply a declared Layer 2 25/5 Mbps service at the price of the NBN Co product TC-4 25/5 Mbps with aggregation capacity (including discounts). |
| Superfast broadband networks in existence before 1 January 2011 and altered to provide services to residential customers ⁸ | Carrier Licence Conditions (Networks supplying Superfast Carriage Services to Residential Customers) Declaration 2014 and the SBAS declaration and FAD | Functional Separation and the requirement to supply a declared Layer 2 25/5 Mbps service at the price of the NBN Co product TC-4 25/5 Mbps with aggregation capacity (including discounts). |

⁸ Provided the lines have not been altered, upgraded or extended after the amended Part 8 rules take effect on 26 August 2020.

Table 1.2 outlines the regulatory arrangements that would apply to superfast broadband services if the LBAS and SBAS declarations were revoked or allowed to expire. Networks are subject to different obligations depending on the network’s operator or when the network was built.

Table 1.2 Regulation of superfast broadband services in absence of LBAS and SBAS declarations

| Network | Regulation | Key wholesale access obligations |
|--|---|---|
| National Broadband Network | Part XIC of the Competition and Consumer Act 2010 and the NBN Companies Act 2011 | Services supplied on a wholesale-only basis as a declared service under NBN’s SAU and its published WBA. |
| Superfast broadband networks built, upgraded or altered after 1 January 2011 | Part 8 of the Telecommunications Act | Services supplied on a structurally or (subject to ACCC approval) functionally separated basis. No price regulation. |
| Telstra’s FTTP networks in South Brisbane and Velocity estates | Ministerial exemptions from Part 8 of the Telecommunications Act | A service must be offered at a wholesale level as set out in Ministerial Exemption from Part 8 of the Telecommunications Act ⁹ No price regulation. |
| TPG’s VDSL network in the ACT and extensions to its HFC network in regional Victoria | Ministerial exemptions from Part 8 of the Telecommunications Act | A service must be offered at a wholesale level as set out in Ministerial Exemptions from Part 8 of the Telecommunications Act ¹⁰ No price regulation. |
| Superfast broadband networks in existence before 1 January 2011 | No regulation of access to superfast broadband services | No wholesale access obligations or price regulation. |
| Superfast broadband networks in existence before 1 January 2011 and altered to provide services to residential customers | Carrier Licence Conditions (Networks supplying Superfast Carriage Services to Residential Customers) Declaration 2014 | Functional separation and a wholesale access obligation for supply of a Layer 2 25/5 Mbps service at \$27 per port per month. |

⁹ *Telecommunications (Network Exemption—Telstra South Brisbane Network) Instrument 2012 ; Telecommunications (Network Exemption—Specified Velocity Networks) Instrument 2012.*

¹⁰ *Telecommunications (Network Exemption—TransACT Upgraded VDSL networks) Instrument 2012; Telecommunications (Network Exemption—TransACT Very Small Scale Networks) Instrument 2012.*

4. Service description

4.1. LBAS declaration

The LBAS declaration requires operators of fixed line superfast broadband networks used, or proposed to be used, to supply residential or small business customers to provide access to a Layer 2 bitstream service with a download data rate of normally 25 Mbps or more upon request.

The LBAS applies to all networks, local access lines and carriers that supply a Layer 2 service unless they have received a Ministerial exemption under the Telecommunications Act.¹¹

The LBAS currently applies to services supplied on networks that supply superfast carriage services that were built, altered or extended after 1 January 2011 which currently include networks operated by Opticomm and Uniti. The LBAS declaration does not apply to the NBN, HFC networks that have or will be transferred to the NBN or to wireless, mobile or satellite networks.

Question 1

Do you consider that the LBAS service description as declared in 2012 remains current and appropriate? Please explain the reasons for your view.

4.2. SBAS declaration

The SBAS is a declared fixed line broadband wholesale service provided on a network built before 1 January 2011, able to be used by access seekers to supply downstream superfast broadband retail services to end-users. It is a point-to-point service that is either:

- a Layer 2 bitstream service and a superfast carriage service (that is, with a download data rate of normally 25 Mbps or more), or
- Telstra's Fibre Access Broadband (FAB) service.

The SBAS declaration currently applies to services supplied on the following networks:

- Telstra's FTTP networks in South Brisbane and Velocity Estates
- TPG's VDSL network in the ACT and HFC networks in regional Victoria
- TPG's FTTB networks in capital cities
- Other networks that supply superfast carriage services, including superfast broadband networks that existed before 1 January 2011 (which are not subject to the level playing field rules).

The SBAS does not include:

- services supplied where there is likely to be effective competition – that is, services supplied exclusively to business customers, public bodies or charity customers from a multiplexer or node in CBD areas of Australian capital cities
- services supplied by the NBN
- services supplied using a HFC network that has or will be transferred to the NBN

¹¹ Ministerial exemptions are granted under section 141A of the Telecommunications Act. Statutory exemptions operate pursuant to subsections 141B(3) and 141B(4) of the Telecommunications Act.

- the LBAS or
- the DTCS.

There is an exemption to the standard access obligations (SAOs) for SBAS providers supplying up to 12,000 end users made under the 2017 SBAS final access determination (FAD). This means SBAS providers supplying up to 12,000 end users are not required to offer regulated wholesale access to their networks.

Question 2

Do you consider that the SBAS service description as declared in 2016 remains current and appropriate? Please explain the reasons for your view.

Question 3

Should the LBAS and SBAS be combined under a single declaration instrument?

4.2.1. Telstra's South Brisbane and Velocity estates

In its 2016 SBAS declaration inquiry, the ACCC decided that while Telstra must provide access to services on its fibre networks in the South Brisbane and Velocity estates, it need not undertake any systems changes to provide a Layer 2 service equivalent to that of the NBN. The SBAS service description included a second limb of the definition stating that Telstra's FAB service, as defined in the *Telecommunications (Network Exemption—Telstra South Brisbane Network) Instrument 2012* and the *Telecommunications (Network Exemption—Telstra Specified Velocity Networks) Instrument 2012*, is an SBAS. This is because these networks were built to work with Telstra's legacy copper-based network business systems and require an active voice line service.

The ACCC considered at the time that this distinction in the service description would avoid the potential for Telstra to undertake inefficient investment to supply a Layer 2 bitstream service on its networks, without an active voice line service, in light of the expectation that the networks would be transferred to the NBN.¹²

Telstra's FAB networks are subject to different terms and conditions (including prices) compared to other SBAS services under the SBAS FAD. Terms specific to Telstra's FAB services include:

- a wholesale access obligation to supply a 30/1 Mbps data rate product for all FAB services¹³
- prices benchmarked to the service-specific costs of the wholesale ADSL service because like the FAB service, the wholesale ADSL service also requires operation with Telstra's legacy copper-based systems.¹⁴ To provide a retail service through Telstra's FAB service, an RSP also needs to purchase Telstra's wholesale line rental service,¹⁵ which is \$20.69 per month.¹⁶

¹² ACCC, SBAS declaration inquiry final decision, p. 54.

¹³ This is the FAB service product already supplied on Telstra's South Brisbane and Velocity estate networks closest to the general entry-level 25/5Mbps product.

¹⁴ In response to the 2017 SBAS Draft FAD, Telstra submitted that Telstra's FAB and wholesale ADSL traffic are aggregated on the same aggregation virtual circuit (AGVC) and its current network, systems and process are not able to accommodate different aggregation charges between the two services. Source: Telstra, Telstra's response to the ACCC's draft decision report, February 2017, pp. 7-8.

¹⁵ The wholesale line rental provides access to a fixed line voice service over Telstra's legacy copper-based network and is currently a declared service under the ACCC's 2018 fixed line services declaration.

¹⁶ Telstra retail prices for customers using its fibre networks in South Brisbane and Velocity estates are higher than similar services offered on the NBN and other regulated networks. Telstra Velocity customers pay an additional \$15-\$20 per month, which equates to a \$180-\$240 additional price premium over a year. Source: ACCAN, Department of Communication and Arts Designated date submission, November 2018.

The ACCC noted in its 2017 SBAS FAD that it was unlikely to allow the exemption from the requirement to provide a Layer 2 bitstream service and the other special arrangements applicable to the South Brisbane and Velocity estates to continue beyond the term of the FAD.¹⁷

The networks in the South Brisbane and Velocity estates are currently still owned by Telstra. On 2 July 2020, the Government granted Telstra a further extension to the exemption for its South Brisbane and Velocity networks from rules governing non-NBN superfast broadband networks until July 2022.¹⁸

Question 4

Do you consider that Telstra's fibre networks in South Brisbane and Velocity estates should continue to be exempt from the requirement to provide a Layer 2 bitstream service?

¹⁷ ACCC, ACCC finalises regulation of non-NBN high-speed internet services. Viewed on 27 May at: <https://www.accc.gov.au/media-release/accc-finalises-regulation-of-non-nbn-high-speed-internet-services>.

¹⁸ Department of Transport, Infrastructure, Regional Development and Communications (DTIRDC), Consultation on Telstra request for extensions to Ministerial exemptions for its South Brisbane and Velocity networks, May 2020.

5. The LBAS and SBAS declarations

LBAS declaration

The *Telecommunications Legislation Amendment (National Broadband Network Measures – Access Arrangements) Act 2011* (NBN Access Arrangements Act) introduced amendments to both the Telecommunications Act and the CCA regarding Layer 2 bitstream services. These amendments set out a regime to regulate the provision of Layer 2 bitstream services to ensure that these services are offered on an open and equivalent access basis.¹⁹

Under subsection 152AL(3C) of the CCA (since repealed), the ACCC was required to declare a Layer 2 bitstream service as soon as practicable after the commencement of the subsection. The ACCC declared the LBAS on 24 February 2012 following a public inquiry under Part 25 of the Telecommunications Act. The current LBAS declaration does not expire, however it is open to the ACCC to decide whether to vary, revoke, make a new declaration or allow the current declaration to remain in-force.

SBAS declaration

The ACCC declared the SBAS in July 2016 following a public inquiry under Part 25 of the Telecommunications Act, commencing in September 2014.

This inquiry was initiated in response to competition concerns raised by the panel conducting the Vertigan Review. These concerns related to the potential for some broadband services to exclude competitive entry and result in monopoly provision within particular service areas. To address these concerns, the panel recommended that the ACCC investigate declaring a new broadband access service.

In deciding whether to declare the SBAS, the ACCC considered whether declaration would promote the LTIE of telecommunications services, with regard to the extent to which declaration is likely to result in:

- promoting competition in markets for the listed services
- achieving any-to-any connectivity in relation to carriage services that involve communication between end-users
- encouraging the economically efficient use of, and the economically efficient investment in, infrastructure.

Having regard to these objectives, the ACCC's final decision concluded that declaring an SBAS would promote the LTIE. The decision noted that:

- superfast broadband services, irrespective of their geographic footprint and subscriber base, display characteristics of natural monopolies, due to both technical and economic barriers to entry
- in most areas where these services are supplied, there is limited, if any, infrastructure competition.

The ACCC considered that superfast broadband services were likely to be highly valued and sought after by end-users in the future, and declaration of the SBAS would promote:

- competition in retail markets for the supply of superfast broadband services, and

¹⁹ The amendments requiring provision of a Layer 2 service have since been repealed. See Section 6.2.2 for further discussion on the Government's legislative changes to the regulation of superfast broadband.

- to a lesser extent, competition in wholesale markets for the supply of wholesale superfast broadband services.

The ACCC also considered that declaration of the SBAS would promote efficient investment in, and use of, the infrastructure used to supply telecommunications services. The ACCC's decision concluded that productive efficiency would be improved as services would be supplied at the lowest possible cost, and allocative efficiency improved as price signals would enable decisions to be based on underlying cost. The ACCC did not consider network investment incentives would be inefficiently affected by the decision to declare the SBAS.

Any-to-any connectivity is not of substantial relevance to considering declaration for SBAS and was not discussed in detail in the ACCC's final view in the 2016 Final Declaration Decision.

The ACCC did not consider declaration would promote the LTIE where there are a number of different networks supplying superfast broadband to business customers, public bodies and charity customers in the CBD areas of capital cities. In these cases, the ACCC considered that competition appeared generally effective and decided to exempt these superfast broadband services from the declaration. Specifically, the declaration did not apply to superfast broadband services supplied in CBD areas of capital cities from a single DSLAM or other access multiplexer device that exclusively supplies business customers, public bodies or charity customers.

Following declaration of the SBAS, the ACCC released a final decision in May 2017 on its inquiry to make a combined FAD for the LBAS and SBAS, incorporating price and non-price terms and conditions of access until July 2021 (i.e. in the absence of commercial agreement between access providers and access seekers).

Under the 2017 FAD, SBAS (but not LBAS) providers supplying up to 12,000 end-users are not required to offer regulated wholesale access to their networks. This is because the compliance costs for these operators are expected to be high relative to the expected wholesale revenues and the aggregate benefits to end-users from retail competition on these smaller networks.

6. Developments impacting the regulation and supply of superfast broadband services

The following sets out developments impacting the superfast broadband market since the ACCC's 2016 SBAS declaration inquiry.

6.1. Industry and technology developments

6.1.1. National Broadband Network rollout

The NBN rollout has advanced significantly since the ACCC's 2016 SBAS declaration inquiry. As at 18 June 2020, over 11 million premises are able to connect to the NBN, with over 7 million already connected.²⁰ The NBN access network is now available to over 80 per cent of Australia,²¹ with further towns and suburbs being added as the rollout nears completion.²²

A number of locations in Australia have pre-existing fibre networks providing high-speed broadband services. The Australian Government's current policy is that NBN Co should not overbuild alternative networks offering NBN-comparable services unless it is commercial for NBN Co to do so and Shareholder Ministers agree.²³ This means that certain locations around Australia that have access to high-speed fibre on non-NBN networks are unlikely to have access to the NBN in the future. The Government's Telecommunications in New Developments (TIND) policy is currently under review. Changes proposed include removing the requirement for NBN Co to obtain Shareholder Ministers' approval before overbuilding existing networks providing NBN-comparable services.²⁴

As part of its declaration inquiry the ACCC is seeking information from stakeholders on the extent to which the NBN provides effective network competition to non-NBN wholesale networks that are currently covered by the LBAS and SBAS declarations.

Question 5

How has the NBN affected network competition in high-speed broadband services markets?

6.1.2. Non-NBN fixed line network competition

The ACCC previously considered that there was sufficient competition in the supply of wholesale superfast broadband services to high revenue business customers as well as public bodies and charity customers operating within the CBDs of capital cities. The ACCC found that in these areas there appeared to be infrastructure competition. This reflected the high customer density of these areas and the high-revenue products or data volumes being supported by business customers, as well as public bodies or charity customers, operating in the same areas.²⁵ However, competition was not considered effective in medium-low density areas serving both residential and business customers, reflecting the limited presence of competing networks.

²⁰ NBN Co, Weekly progress report, 18 June 2020. <https://www.nbnco.com.au/corporate-information/about-nbn-co/corporate-plan/weekly-progress-report>.

²¹ iiNet, Check the NBN coverage for your address. Viewed on 22 May 2020 at: <https://www.iinet.net.au/internet-product/broadband/nbn/coverage>.

²² 1 July 2020 has been determined as the 'designated day' of the NBN rollout completion for the purposes of section 577A of the *Telecommunications Act*.

²³ DTIRDC, Review of the 2015 TIND policy: Request for Comments, November 2019, p.4.

²⁴ DTIRDC, Consultation on a proposed update of the TIND policy, April 2020.

²⁵ ACCC, SBAS declaration inquiry final decision, July 2016, pp. 26-27.

The ACCC understands that there has been continued investment by non-NBN network operators since the 2016 SBAS declaration inquiry. A number of carriers have entered the market to service greenfield residential and industrial areas, and some carriers servicing these new developments have grown in terms of the areas they cover and the number of premises they service.²⁶ Total premises serviced by non-NBN carriers in new developments are currently estimated to number around 400,000.²⁷ The ACCC expects that most of these new developments will continue to be served by a single fixed line network given the cost of rolling out a duplicate network and the small number of end-users in greenfield areas.

While private network operators appear to be actively competing for, and investing in new developments, the ACCC understands that the market for brownfield areas is predominately controlled by NBN Co.²⁸ Competition from non-NBN network operators appears to be limited to point-to-point fibre networks in business districts, and existing multi-point networks of limited reach covered by the SBAS declaration.

Several state governments are also intending to roll out alternative high-speed networks using fixed line and fixed wireless technologies, primarily to serve low density rural and remote areas. These include the QNC Fibre and Gig State projects being developed to compete with the NBN by the Queensland and New South Wales governments, respectively.

6.1.3. Retail competition

The ACCC notes that where wholesale network access is mandated for NBN and non-NBN networks, end-users potentially have access to a range of RSPs, although this has not applied universally. RSPs may choose not to enter markets in certain geographic areas due to logistics, interconnection and transmission costs, limitations on revenue due to the size and density of the market, and the presence of other RSPs already servicing the market, among other things.

Even where declaration and a FAD applies to markets serviced by non-NBN networks, those markets have generally had less RSP entry and retail product offerings compared to markets serviced by the NBN. There are over 200 RSPs supplying services to end-users over the NBN. By contrast, there is a small number of RSPs currently supplying services to end-users over non-NBN networks. For example, as of March 2020 there are 24 retailers of Opticomm's LBAS, most of which are small or local RSPs and not all are available in all areas of Opticomm's rollout. Larger retailers like Telstra, Optus, TPG, Vocus and VHA generally do not supply fixed line services to residential customers on non-NBN networks.

The ACCC seeks submissions on the extent to which the LBAS and SBAS declarations have stimulated the take-up of wholesale access to non-NBN networks and whether the potential benefits from regulated wholesale access and retail competition on non-NBN networks have been realised.

Question 6

What is the extent of competition at the wholesale level of the superfast broadband services market, and what is the risk of competition not developing in the future?

Question 7

Have the LBAS and SBAS declarations affected competition in the retail market for superfast broadband services?

²⁶ For example, Uniti has been pursuing a growth strategy in the new developments market and has acquired the business of Pivit, Clublinks, LBN Co and OPENetworks.

²⁷ DTIRDC, Review of the 2015 TIND policy: Request for Comments, p. 6.

²⁸ NBN Co is estimated to have approximately 9.9 million brownfield lots passed as of FY19. Source: NBN Co Corporate Plan 2020-2023, Table 3, p. 49, excluding wireless and satellite.

Question 8

Are there geographic areas where competition at the wholesale or retail levels is considered to be effective, if so where are these areas and why is competition considered effective?

Question 9

Are there any particular barriers to entry impacting competition in the wholesale or retail markets for non-NBN superfast broadband services?

6.1.4. Potential substitutes to fixed line superfast broadband services – Fixed wireless, mobile and satellite network services

In its 2016 SBAS declaration inquiry the ACCC considered other technologies including mobile broadband, ADSL, satellite and fixed wireless networks to be weak substitutes (if at all) for fixed line superfast broadband services.²⁹ While the ADSL network has declined significantly in relevance over the last five years due to the NBN rollout; mobile broadband, satellite and fixed wireless network services have offered increased value to customers driven in particular by greater data inclusions.

For example, fixed wireless broadband plans offering 25Mbps data rates currently start at around \$50 per month and have download allowances of at least 200GB.³⁰ Increasingly, fixed wireless services will be considered by some retail customers with access to these services as comparable to fixed line services. The roll-out of 5G will enable higher data rates, greater data allowances and further market penetration by fixed wireless services over coming years. Fixed wireless services have the potential to be a substitute for fixed line networks for many end-users although currently the technology is not regarded as a direct substitute for the majority of users.

The ACCC previously considered that mobile broadband was not an effective substitute to fixed line broadband services, as mobile broadband plans typically provide a lower data allowance at a higher price.³¹ There have been significant developments in mobile data allowances and per gigabyte pricing. For example, Optus currently offers 200Gb home wireless broadband plans on its 4G network at \$65 per month.³² Optus also offers \$70 5G mobile broadband plans with unlimited data allowance and guaranteed download rates of at least 50Mbps; however these plans are currently only available on a limited geographic basis.

The ACCC notes that while a number of resellers also provide high-data 'home wireless' plans over the Optus network, most of these competitors are limited to a maximum data rate of 12/1Mbps.³³ This suggests that although 4G enabled mobile wireless is capable of providing data rates and data allowances comparable to a fixed line service, it potentially cannot cater for large numbers of end-users due to capacity limits. 5G could see mobile broadband services as a more complete substitute for fixed broadband, but is currently only available to a limited number of areas.

Telstra and Vodafone also provide mobile broadband plans over their respective networks. These plans typically provide lower data offerings and currently serve as a complement

²⁹ ACCC, SBAS declaration inquiry Final report, 2016, p.14.

³⁰ Whistleout, Best fixed wireless NBN plans May 2020. Viewed on 28 May 2020. <https://www.whistleout.com.au/Broadband/Guides/Best-Fixed-Wireless-NBN-Plans>

³¹ ACCC, SBAS declaration inquiry Final report, 2016, pp.18-19.

³² Plan information sourced from Optus website.

³³ Whistleout, Best home wireless broadband plans June 2020. Viewed on 3 June 2020. <https://www.whistleout.com.au/Broadband/Guides/Best-Home-Wireless-Broadband-Plans>

rather than a replacement for a fixed line broadband connection. The ACCC observes that mobile broadband plans supplied over these networks in the \$50-\$60 range provide an average data allowance of approximately 60Gb per month,³⁴ while a comparably priced fixed line broadband plan provides an average of 700Gb per month.³⁵

Trends in data usage suggest that end-users are not substituting their fixed line service in favour of a mobile broadband connection.³⁶ The ACCC has observed that fixed broadband services continue to account for the majority (89 per cent) of data downloaded, with mobile services (including mobile broadband) accounting for 11 per cent of all download volumes in Australia for the quarter ending 31 December 2019.³⁷ The Australian Communications and Media Authority (ACMA) has found that the proportion of Australians who were 'mobile only' for internet declined from 23 per cent in 2014 to 16 per cent in 2019.³⁸

Question 10

Are there any capacity or availability constraints which might limit the ability of fixed and mobile wireless technologies to provide large numbers of end-users with a high-speed broadband service comparable to a fixed line service?

Satellite is available on a limited geographic basis and generally does not compete directly with superfast fixed broadband.³⁹ The ACCC notes that satellite plans are primarily available in remote areas where it is infeasible or uneconomical to roll out a fixed line network. Potentially challenging this assumption is the development of Low Earth Orbit Satellite Broadband (LEOSB) networks, for example OneWeb and SpaceX's Starlink, both of which are currently being deployed.⁴⁰ Amazon has made substantial investments in developing its own LEOSB network and Facebook is also reportedly developing a network.⁴¹

Question 11

Are wireless broadband services (offered over mobile broadband, fixed wireless or satellite) substitutes for fixed line broadband services and if so, to what extent?

6.2. Legislative and regulatory changes

Since the ACCC's 2016 SBAS inquiry there have been a number of legislative and regulatory changes impacting superfast broadband services, including:

- the Government's extension of interim access regulation such as the Carrier Licence Conditions (CLCs)
- technical regulation of next-generation digital subscriber line (DSL) technology to promote greater competition between carriers in multi dwelling buildings (MDBs)
- legislation to facilitate further network investment by non-NBN carriers.

³⁴ ACCC, Telecommunications Market Report 2018-19, p. 39.

³⁵ ACCC, Telecommunications Market Report 2018-19, p. 27.

³⁶ It is noted that more recently some consumers with low data requirements appear to be using mobile broadband as a substitute for fixed line broadband services. However, for consumers with higher data requirements, e.g. to allow content streaming of multiple programs, this does not appear to be the case. For example, the average monthly data usage of a consumer on a mobile broadband plan is approximately 10Gb, compared to approximately 280Gb for a fixed line plan (source: ACCC, Internet Activity Report, December 2019).

³⁷ ACCC, Internet Activity Report, December 2019.

³⁸ ACMA, Mobile-only Australia: living without a fixed line at home, viewed 27 May 2020 at <https://www.acma.gov.au/publications/2019-10/report/mobile-only-australia-living-without-fixed-line-home>.

³⁹ As at 31 December 2018, there were only around 117,000 Satellite services-in-operation (SIOs) in Australia. ACCC, Internet Activity Report December 2018, May 2019.

⁴⁰ LEOSB networks such as Starlink are reportedly designed to provide download data rates of up to 1Gbps, see L Grush, 'FCC approves SpaceX's plans to fly internet-beaming satellites in a lower orbit', The Verge, 27 April 2019.

⁴¹ L Matsakis, 'Facebook confirms it's working on a new internet satellite', *Wired*, 20 July 2018.

6.2.1. Carrier Licence Conditions

As discussed in section 2.4, affected carriers supplying services to residential customers are subject to regulation of their wholesale services under the carrier licence conditions.⁴²

The ACCC has previously considered that declaration of the SBAS is unlikely to promote significantly greater efficiency in the use of, and investment in, infrastructure in the case of networks subject to CLCs. Notwithstanding this, the ACCC concluded that declaration (and price regulation through a FAD) would ensure efficient outcomes should regulation under the CLCs cease.⁴³ The SBAS declaration currently captures networks subject to the CLCs.⁴⁴

The ACCC notes that the Government has recently legislated so that the CLCs do not have an expiry date and will remain in-force indefinitely.⁴⁵ This could negate the need for declaration of networks subject to the CLCs. However, there may still be benefits from uniform regulation of networks built before 1 January 2011 under an SBAS declaration, irrespective of whether some of these networks remain subject to the CLCs.⁴⁶

6.2.2. Regulation of in-building cabling

Very high-speed digital subscriber line technology (VDSL) is a recent generation of DSL technology. VDSL2, the second generation of VDSL, is capable of delivering download data rates of up to 100 Mbps and is typically provided in fibre-to-the-node (FTTN) and fibre-to-the-basement (FTTB) networks.

The maximum data rate which can be achieved over a line supplying a VDSL2 service depends on, among other things, the level of interference between copper lines in a cable sheath where there are competing DSL systems. There is the potential for loss of end-user service performance (i.e. data rates and dropout frequency) where there are competing VDSL2 carriers in MDBs.

The SBAS declaration inquiry originated in concerns that the rollout of next-generation DSL systems could result in small localised monopolies in MDBs such as apartments, shopping centres and education campuses, as these next-generation technologies require a single provider in order to achieve maximum data rates and service quality.⁴⁷

In response, the Communications Alliance developed the Next-generation Broadband Systems Deployment in Customer Cabling Industry Code (the Industry Code). The purpose of the Code is to optimise data rates experienced by end-users and allow competing VDSL2 networks to operate.⁴⁸

Although technical regulation under the Industry Code allows multiple operators of VDSL2 networks, economic factors may limit infrastructure competition. For example, a second provider may decide there is no economic case for installing VDSL2 equipment where there is an existing VDSL network servicing a building.

⁴² The CLCs do not apply to services to business customers, or in circumstances where a ministerial exemption applies.

⁴³ The CLCs declaration was originally due to expire on 1 January 2017, and was envisaged as an interim measure while the ACCC conducted its 2016 SBAS declaration inquiry.

⁴⁴ Most notably, the CLCs capture TPG's metro FTTB network.

⁴⁵ Item 1 of Schedule 2 to the *Telecommunications Legislation Amendment (Competition and Consumer) Act 2020*.

⁴⁶ The ACCC notes that CLC obligations do not apply to carriers where they are supplying a declared service under Part XIC, meaning that there will not be duplication of regulation in relation to these networks if they are covered by the SBAS declaration.

⁴⁷ Communications Alliance Ltd, Industry paper on FTTN and VDSL2 regulation, March 2014, p.2.

⁴⁸ Currently the industry code applies to VDSL2, however the ACCC understands that the Communications Alliance is currently working on extending the code to include G.Fast, which is capable of download rates of more than 200Mbps.

Of particular relevance to this declaration inquiry is the Industry Code's treatment of scenarios where entry of a competing carrier would result in download rates falling below the required data rate thresholds.⁴⁹ In this event the Industry Code allows the incumbent carrier to operate exclusively in the building, provided the carrier is supplying services at or above the required thresholds.⁵⁰ Also, where the entry of a competing carrier would result in the incumbent bearing an unacceptable cost impost to enable the second carrier to operate, the incumbent could continue to operate exclusively in the building. However, an incumbent carrier would be subject to either the LBAS or SBAS declarations and required to provide wholesale access to RSPs servicing end-users in the building.

If there is a sole infrastructure carrier servicing a MDB, the obligation to provide regulated wholesale access to RSPs means end-users can have a choice of RSP to the extent that these access services are utilised.

Question 12

Has the Industry Code alleviated competition concerns in the supply of VDSL services to buildings and should these services continue to be subject to the LBAS / SBAS declarations?

6.2.3. Changes to regulation and supply of superfast broadband services

In 2014, the panel conducting the Vertigan review raised concerns that the existing regulatory arrangements under the level playing field rules stifled private investment and infrastructure-competition with NBN Co. The panel recommended that Part 7 of the *Telecommunications Act*, which contains the obligation on providers of superfast services to supply a Layer 2 bitstream service, be repealed.

The panel recognised that there could be benefits to maintaining a requirement on providers to operate on a wholesale-only basis, but these may be outweighed by the costs of structurally separating, particularly for smaller providers. It therefore recommended that Part 8 of the *Telecommunications Act* (which contains wholesale-only obligations) be amended to maintain structural separation as the default, but allow vertically integrated providers to make undertakings to the ACCC setting conditions that would replace the default (which the ACCC would accept if in the LTIE).⁵¹ The panel also recommended removing the statutory exemption allowing network extensions of no greater than one kilometre.

In response, the Government has passed legislation (the *Telecommunications Legislation Amendment (Competition and Consumer) Act 2020*) that repeals Part 7, with effect from 26 May 2020. Following repeal, access to specific wholesale services on superfast broadband networks will only be mandated if the services are declared by the ACCC under Part XIC of the CCA. The existing LBAS declaration remains in effect following the repeal of Part 7, however the change in legislation provides an opportunity to consider whether the declaration should continue.

The Government has also amended the wholesale-only rules under Part 8 to require operators of new networks targeting residential consumers to be structurally separated as a default and offer non-discriminatory access, but also to allow the ACCC to authorise functional separation subject to carriers entering into undertakings setting out arrangements for access and equivalence to minimise anti-competitive effects. The legislated changes also remove the 1 km exemption. The ACCC will also be able to exempt very small operators

⁴⁹ The required download data rate thresholds are at least 25Mbps (for FTTN and FTTC) or 50Mbps (for FTTB).

⁵⁰ The Industry Code allows the second carrier to operate in competition with the incumbent carrier if the second carrier used a non-deployment class technology such as G.Fast, but does not guarantee that interference will not affect its performance.

⁵¹ NBN Panel of Experts, Independent cost-benefit analysis of broadband and review of regulation Volume 1 – National Broadband Network, August 2014, p. 81.

from the rules,⁵² which is intended to encourage new entrants into the market. The new separation rules will apply to all fixed line superfast broadband networks targeting residential customers that are built, altered or extended after 26 August 2020.⁵³

The Government has also enacted its Statutory Infrastructure Provider (SIP) legislation to ensure that all Australian premises are able to access superfast broadband services. The primary purpose of this legislation is to obligate NBN Co to:

- connect premises to a fixed line network, and
- provide wholesale services of normally 25/5 Mbps or more to RSPs on request.

The Minister for Communications will be able to designate non-NBN networks as the SIP where appropriate - for example, where a network has already been built in a development. In these circumstances, the provider must connect all premises and supply wholesale services to retail providers.⁵⁴ The SIP obligations came into effect from 1 July 2020.

Question 13

Do the legislative changes regarding regulation and supply of superfast broadband services enhance or diminish the need for declaration of the LBAS and/or SBAS?

⁵² Very small operators are defined in the legislation as a 'person or an associated group of persons that supplies fixed line carriage services to no more than 12,000 residential customers'.

⁵³ To create regulatory certainty, all networks existing prior to 26 August 2020 will be grandfathered under their current arrangements. For example, networks built or extended between 1 January 2011 and the date the new rules take effect will be required to operate on a wholesale-only basis; those built or extended before 1 January 2011 will not be subject to any separation requirements.

⁵⁴ These networks will operate on an open access and non-discriminatory basis, which prohibits their ability to reasonably deny access.

7. Other issues for this declaration inquiry

There are a number of other issues for consideration in the ACCC's LBAS and SBAS declaration inquiry, including:

- relevant markets
- coverage
- duration of the declaration.

7.1. Relevant markets

As noted in section 3.1.1, in determining whether declaration will promote competition in telecommunications markets, the ACCC first defines the relevant markets. In the 2016 SBAS declaration inquiry, the ACCC considered the relevant markets for the purpose of the declaration were the wholesale and retail markets for superfast broadband services of normally 25 Mbps or more with monthly download limits of at least 50Gb.⁵⁵

In the period since the ACCC's 2016 SBAS declaration, superfast broadband services have become more highly valued and sought after by end-users. Consumer demand for data has increased exponentially as a result of increased usage of content streaming services such as Netflix, social media such as Facebook and other data-intensive applications.⁵⁶ There are forecasts of continuing high growth in data consumption. Applications such as virtual and augmented reality, gaming and video content are expected to drive a three-fold increase in traffic over the next five years.⁵⁷ As data downloads increase, consumer demand for higher data rates accompanied by high download limits and choice in service offering will also increase.⁵⁸

The ACCC considers that superfast broadband services supplied on networks that display characteristics of natural monopolies, including localised fixed line monopolies that supply end-users in particular geographic areas, are enduring bottlenecks in most cases.⁵⁹ Many of these networks exist across residential and industrial estates, and in buildings such as apartments, shopping centres and education campuses, where it is generally uneconomical for new carriers to deploy duplicate fixed line networks and compete for customers in these discrete locations. Removing barriers to RSPs having access to wholesale superfast broadband services on reasonable terms, to facilitate competition or the threat of competition, and to provide end-users with a choice of service provider and service offering, will continue to be important for promoting competition in markets for superfast broadband services.

The NBN operates on a wholesale-only basis and supplies its services at regulated prices, enabling downstream competition between RSPs. However, the extent to which the NBN offers a network alternative to pre-existing non-NBN fixed line superfast broadband networks is generally limited. The ACCC recognises that in some areas NBN Co has rolled out its network in competition with non-NBN broadband networks. As the Government transitions to

⁵⁵ The ACCC considered that a fixed line 25Mbps broadband service is the basic entry-level superfast broadband service as it was the most used speed tier on the NBN at the time of the 2016 decision, comprising 56 percent of total services.

⁵⁶ The average end-user on a 25/5Mbps fixed line NBN plan currently uses around 125Gb of data per month. Source: ACCC, Internet Activity Report, December 2019.

⁵⁷ Cisco Virtual Networking Index: Forecast and Trends, 2017–2022 White Paper. Viewed 18 May 2020 at <https://www.cisco.com/c/en/us/solutions/collateral/service-provider/visual-networking-index-vni/white-paper-c11-741490.html>.

⁵⁸ For example, take-up of the NBN Co 50/20Mbps data rate tier has increased from 17 per cent of total services in 2017 to 55 per cent in 2019. Source: ACCC, Telecommunications Report 2018-19, p. 18.

⁵⁹ As noted in Section 5, the current declaration excludes business services in CBDs on the basis that these markets were considered to be sufficiently competitive.

measures giving more freedom for other providers to operate in place of NBN Co, including taking on SIP obligations, the ACCC considers that the potential for competitive overlap between NBN and non-NBN fixed line networks is greater but is likely to remain limited, particularly in residential areas.⁶⁰ This suggests that wholesale access to fixed line networks will continue to be necessary for competition to develop at the retail level.

Considering developments in consumer demand, technology and expectations about the extent of competition between NBN and non-NBN networks, the ACCC is interested in stakeholder views on whether the relevant markets for the purpose of the LBAS and SBAS declarations should continue to be the wholesale and retail markets for superfast broadband services of normally 25 Mbps or more with monthly download limits of at least 50Gb.

Question 14

Do you consider that continued declaration of the:

- a) LBAS
- b) SBAS

will promote competition and the economically efficient use of infrastructure? Please explain the reasons for your view.

Question 15

Are the markets identified in the 2016 declaration decision still relevant for the SBAS? Are the identified markets also relevant for the LBAS?

7.2. Coverage

In its previous declaration inquiries, the ACCC has adopted a national market definition for the retail and wholesale supply of superfast broadband services due to the cost structures and national pricing policies of retail and wholesale providers.⁶¹

When it makes a decision to declare a service, the ACCC has the discretion to confine the service description to specific geographic areas (geographic exemptions). The ACCC may also exempt certain service providers or classes of service providers from the application of the SAOs (carrier-specific exemptions).⁶²

When determining whether to include geographic or carrier-specific exemptions, the ACCC will consider whether the exemptions promote the LTIE.

Question 16

If the ACCC were to continue the LBAS and/or SBAS declarations:

- a) Should the service description cover the services nationally, or be limited in geographic scope?
- b) Will carrier-specific exemptions promote the LTIE?

⁶⁰ The ACCC understands that in many, if not most, instances it is likely that private operators and NBN Co will be competing 'for the market', but not necessarily 'in the market' (i.e. they will compete to be the initial and only provider, not to compete as a subsequent provider). As discussed above, the ACCC is aware that the government is consulting on draft policy that will remove existing restrictions on overbuilding by NBN Co and that, if enacted, this may impact on the degree of competitive overlap of high-speed broadband networks into the future.

⁶¹ ACCC, SBAS declaration inquiry – final decision, July 2016, p. 29. The LBAS was similarly declared on a national basis in 2012.

⁶² Sections 152ASA and 152ATA of the CCA.

7.3. Duration of declaration

Subsection 152ALA(1) of the CCA requires the ACCC to specify an expiry date for a declaration.

In specifying an expiry date, the ACCC must have regard to the principle that an expiry date for declarations should occur sometime between three and five years after making the declaration.⁶³ The ACCC can specify an expiry date shorter than three years, or longer than five years, if it considers the circumstances warrant it.⁶⁴ The current SBAS declaration has a term of five years and expires on 28 July 2021. The current LBAS declaration does not have an expiry date.

The ACCC recognises that a five year term provides significant regulatory certainty which facilitates business planning and investment decisions. The ACCC also recognises the rapid pace of change in the telecommunications sector and that a shorter duration for an LBAS and/or SBAS declaration may be appropriate.⁶⁵

Question 17

What is an appropriate duration for potential LBAS and SBAS declarations? Please explain the reasons for your view.

⁶³ Paragraph 152ALA(2)(a) of the CCA.

⁶⁴ Subsection 152ALA(2) of the CCA.

⁶⁵ The ACCC is mindful that the industry is undergoing significant commercial and regulatory changes such as the impending completion of the NBN, deployment of 5G mobile technology and new government policy to facilitate network investments by competing superfast broadband providers.

Appendix A Consolidated list of questions

1. Do you consider that the LBAS service description as declared in 2012 remains current and appropriate? Please explain the reasons for your view.
2. Do you consider that the SBAS service description as declared in 2016 remains current and appropriate? Please explain the reasons for your view.
3. Should the LBAS and SBAS service descriptions be combined under a single declaration instrument?
4. Do you consider that Telstra's fibre networks in South Brisbane and Velocity estates should continue to be exempt from the requirement to provide a Layer 2 bitstream service?
5. How has the NBN affected network competition in high-speed broadband services markets?
6. What is the extent of competition at the wholesale level of the superfast broadband services market, and what is the risk of competition not developing in the future?
7. Have the LBAS and SBAS declarations affected competition in the retail market for non-NBN superfast broadband services?
8. Are there geographic areas where competition at the wholesale or retail levels is considered to be effective, if so where are these areas and why is competition considered effective?
9. Are there any particular barriers to entry impacting competition in the wholesale or retail markets for superfast broadband services?
10. Are there any capacity or availability constraints which might limit the ability of fixed and mobile wireless technologies to provide large numbers of end-users with a high-speed broadband service comparable to a fixed line service?
11. Are wireless broadband services (offered over mobile broadband, fixed wireless or satellite) substitutes for fixed line broadband services and if so, to what extent?
12. Has the Industry Code alleviated competition concerns in the supply of VDSL services to buildings and should these services continue to be subject to the LBAS / SBAS declarations?
13. Do proposed legislative changes regarding the regulation and supply of superfast broadband services enhance or diminish the need for declaration of the LBAS and/or SBAS?
14. Do you consider that continued declaration of the:
 - a) LBAS
 - b) SBASwill promote competition and the economically efficient use of infrastructure? Please explain the reasons for your view.
15. Are the markets identified in the 2016 declaration decision still relevant for the SBAS? Are the identified markets also relevant for the LBAS?
16. If the ACCC were to continue the LBAS and/or SBAS declarations:
 - a) Should the service description cover the services nationally, or be limited in geographic scope?
 - b) Will carrier-specific exemptions promote the LTIE?
17. What is an appropriate duration for potential LBAS and SBAS declarations? Please explain the reasons for your view.

Appendix B Current LBAS service description

The local bitstream access service is a point to point service for the carriage of communications in digital form between a **network-network interface** and a **user-network interface** that is:

- (a) a **Layer 2 bitstream service**; and
- (b) a **superfast carriage service**.

This declaration does not apply to services supplied, or capable of being supplied:

- (a) using a specified network; or
- (b) using a specified local access line; or
- (c) by a specified owner of a local access line;

where that network, local access line or owner is the subject of a Ministerial exemption under section 141A or statutory exemption under subsection 141B(3) or 141B(4) of the *Telecommunications Act* and any conditions that apply to the exemption are satisfied.

Definitions

Where words or phrases used in this declaration are defined in the *Competition and Consumer Act 2010* or the *Telecommunications Act 1997*, they have the meaning given in the relevant Act.

Layer 2 bitstream service has the meaning given in section 152AC of the *Competition and Consumer Act 2010*

designated superfast telecommunications network has the meaning given in subsection 152AGA of the *Competition and Consumer Act 2010*

a **network-network interface** means an interface provided by an access provider at a **point of interconnection** where the access seeker's telecommunications network can interface to the access provider's **designated superfast telecommunications network**

a **point of interconnection** is a physical point of interconnection which allows the interconnection of facilities in accordance with subsection 152AR(5) of the *Competition and Consumer Act 2010*

superfast carriage service has the meaning given in section 152AC of the *Competition and Consumer Act 2010*

a **user-network interface** means an interface located at a physically defined end-user's premises where the access provider's **designated superfast telecommunications network** is present to an end-user

Appendix C Current SBAS service description

The superfast broadband access service is a point to point service for the carriage of communications in digital form between a **network-network interface** and an **end-user interface** that is:

- (a) a **Layer 2 bitstream service** and is a **superfast carriage service**; or
- (b) a **Fibre Access Broadband service**.

This service does not include:

- i. a service supplied through an **access multiplexer** located in a **multi-dwelling complex** in a **central business district area** or in a **node** in a **central business district area** where all end-users of the services supplied or proposed to be supplied through that access multiplexer and any other access multiplexers owned or controlled by the same access provider located in the same **multi-dwelling complex** or **node** are **business customers, public bodies** or **charity customers**;
- ii. a service supplied other than through an **access multiplexer** located in a **multi-dwelling complex** or in a **node** where the premises of the end-users of the service is in a **central business district area** and all end-users of the service are **business customers, public bodies** or **charity customers**;
- iii. services supplied, or capable of being supplied, by an **NBN corporation**;
- iv. services supplied, or capable of being supplied, using a hybrid-fibre coaxial cable network that was in existence on 29 July 2016 and in respect of which there are agreements for the network to be transferred to NBN corporation;
- v. the local bitstream access service defined in the Local Bitstream Access Service Declaration 2012, while that declaration is in operation; or
- vi. the domestic transmission capacity service defined in the Domestic Transmission Capacity Service Declaration 2014, as that declaration may be varied, extended or replaced from time to time.

Definitions

Unless otherwise defined in this declaration, words or phrases defined in the *Competition and Consumer Act 2010* or the *Telecommunications Act 1997* have the same meaning in this declaration.

access line means the line used to connect the access multiplexer to the end-user interface.

access multiplexer means a device that separates communications carried by means of guided electromagnetic energy to enable an end-user to make use of high data rate services.

business customer means a customer that:

- (a) carries on a business or enterprise from a premises, regardless of whether there is any incidental use of the premises for occupation (from time to time) as a place of residence; and
- (b) has an ABN for the business or enterprise.

central business district area means a geographic area with one of the following postcodes:

- (a) Canberra CBD: 2600-2601
- (b) Sydney CBD: 1000-1299; 2000-2009
- (c) Melbourne CBD: 3000-3010; 8000-8010
- (d) Brisbane CBD: 4000-4004
- (e) Adelaide CBD: 5000-5005; 5800-5879
- (f) Hobart CBD: 7000-7003; or
- (g) Perth CBD: 6000-6005; 6800-6899.

charity customer means a charity registered with the Australian Charities and Not-for-profits Commission.

end-user interface means an interface located at either:

- (a) a physically defined end-user's premises where the access provider's network is directly or indirectly present to an end-user; or
- (b) the jumper cable termination on the customer side of the Main Distribution Frame located in the multi-dwelling complex.

Fibre Access Broadband service means a carriage service that:

- (a) is supplied or offered to be supplied by means of an optical fibre line; and
- (b) is offered as a **superfast carriage service** or with the following maximum transmission speeds;
 - (i) download transmission speed of 30Mbps and upload transmission speed of 1Mbps; and
 - (ii) download transmission speed of 100Mbps and upload transmission speed of 5Mbps; and.
- (c) has the following configurations:
 - (i) a 'best effort' or non-prioritised service, as characterised by the Differentiated Services Code Point Default Forwarding per-hop behaviour; and
 - (ii) connectivity made with static Layer 2 Tunnelling Protocol (L2TP) tunnels and Broadband Virtual Local Area Networks giving direct access to end user sessions; and
 - (iii) end-user sessions are aggregated together via static L2TP tunnels supplied over Ethernet.

Layer 2 bitstream service has the meaning given in the *Telecommunications Act 1997*.

line means a wire, cable, optical fibre, tube, conduit, waveguide or other physical medium used, or for use, as a continuous artificial guide for or in connection with carrying communications by means of guided electromagnetic energy.

multi-dwelling complex means a building that consists of multiple separate units for occupation (from time to time) which are used as a place of residence or business.

NBN corporation has the meaning given in the *National Broadband Network Companies Act 2011*.

network-network interface means an interface provided by an access provider at a **point of interconnection** where the access seeker's telecommunications network can interface to the access provider's network.

node means a roadside cabinet, pillar, pit or distribution point, but does not include an exchange, that:

- (a) houses the equipment for the supply of services, including access multiplexers, and
- (b) enables the physical connection to the end-user premises using access lines.

point of interconnection is a physical point of interconnection which allows the interconnection of facilities in accordance with subsection 152AR(5) of the *Competition and Consumer Act 2010*.

public body means:

- (a) the Commonwealth, a State or a Territory; or
- (b) a municipal authority or other local governing body; or
- (c) a public authority that is constituted by or under a law of the Commonwealth, a State or a Territory.

superfast carriage service means a carriage service, where:

- (a) the carriage service enables end-users to download communications; and
- (b) the download transmission speed of the carriage service is normally 25 megabits per second or more; and
- (c) the carriage service is supplied using a line to premises occupied or used by an end-user.

telecommunications network has the meaning given in the *Telecommunications Act*.

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