

nbn submission to the
ACCC – Superfast
Broadband Access Service
and Local Bitstream Access
Service declaration inquiry–
Discussion paper

11 September 2020



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1 Introduction

1 **nbn** welcomes the opportunity to respond to the Australian Competition and Consumer Commission (**ACCC**) Discussion Paper in relation to the declaration of the Superfast Broadband Access Service (**SBAS**) and the Local Bitstream Access Service (**LBAS**).

nbn supports the continued declaration of superfast broadband networks via a single declaration

2 It is timely for the declaration of the SBAS and LBAS to be combined under a single declaration instrument. With the passage of the recent *Telecommunications Legislation Amendment (Competition and Consumer) Act 2020*, it is difficult to justify two separately declared services in which the primary difference is an arbitrary date of when the superfast broadband networks were built. The basis for declaration of a service should not be when the network was built but whether declaration of the service, agnostic of the particular infrastructure which it is provided over, is in the long-term interests of end-users (**LTIE**) and otherwise meets the objectives for declaration of a service.

3 There is strong justification for a single declaration of telecommunications networks in locations that are not served by the **nbn**TM network. A single declaration for these services, will ensure greater regulatory symmetry is achieved and competition in downstream retail markets for superfast broadband services is promoted. Smaller or regional RSPs can benefit from full access to these networks and offer services over those networks to complement their wider **nbn** based offering of superfast broadband services. In this respect, a single declaration will lower barriers to entry whilst also lowering barriers to expansion, especially in new development areas.

Regulation of nbn and non-nbn superfast broadband networks should be symmetrical

4 Economic regulation under Part XIC of the *Competition and Consumer Act 2010* (CCA) has the objective of promoting the LTIE. The LTIE will be promoted by regulatory settings which are applied symmetrically and in a technologically agnostic manner across all access providers that offer the relevant service that is subject to regulation.

5 To the extent that superfast broadband services are being provided over both **nbn** and non-**nbn** infrastructure, then it is necessary to ensure that **nbn** and non-**nbn** services are subject to a comparable level of regulation.

6 It will not be possible for **nbn** and non-**nbn** services to be subject to a similar level of regulation in the absence of declaration of non-**nbn** superfast broadband networks. In fact, as no alternative option is available to secure the declaration of non-**nbn** services (unlike the multiple approaches available to declare **nbn** services under Part XIC of the CCA, including the publication of an SFAA

and the use of a Special Access Undertaking), declaration of non-**nbn** networks is a necessary precondition for ensuring regulatory symmetry between **nbn** and non-**nbn** networks in relation to comparable services.

7 Where only **nbn** services are subject to declaration and economic regulation, this is likely to place the **nbn**TM network at a competitive disadvantage relative to other superfast broadband networks but will also have the effect of limiting supply side substitution possibilities in relation to superfast broadband services. This is likely to undermine the prospect of competition in relation to listed services at both the infrastructure and retail level, as well as potentially undermining incentives for both **nbn** and other superfast broadband providers to invest in superfast broadband networks and services.

8 In particular:

- regulated access to the non-**nbn** superfast broadband networks should increase the number of retail service providers that are able to supply a particular end user premises; thereby increasing the level of retail competition and allowing for improved demand-side substitution at that premises;
- regulated access to the non-**nbn** superfast broadband networks will also encourage supply side substitution, as access seekers will then have a choice of which infrastructure provider to use for superfast broadband access, resulting in higher levels of competition, service differentiation and potential investment between **nbn** and non-**nbn** entities as they compete for the wholesale business of access seekers; and
- declaration will, even in the absence of an access determination, create incentives for alternative providers of superfast broadband services to act reasonably and to price wholesale services at competitive levels to avoid more onerous regulation through the ACCC's access determination power.

Declaration is necessary to promote a level playing field between nbn and non-nbn superfast broadband networks

9 **nbn** considers that declaration of non-**nbn** superfast broadband networks is necessary to promote a level playing field between **nbn** and non-**nbn** networks and is consistent with the Government's response to the Vertigan review on this matter.¹

10 The declaration of non-**nbn** superfast broadband networks should apply, regardless of whether **nbn** has overbuilt, or been overbuilt by, the alternative provider of superfast broadband access services.

¹ Dr Michael Vertigan AC, Ms Alison Deans, Professor Henry Ergas and Mr Tony Shaw PSM, 'Statutory review under section 152EOA of the Competition and Consumer Act' (June 2014), p.29.

11 Part 7 of the *Telecommunications Act 1997* has been repealed, following the passage of the *Telecommunications Legislation Amendment (Competition and Consumer) Act 2020*. The intention of the legislative change was that any required access to Layer 2 bitstream services would be regulated under Part XIC of the CCA.² Without the continued declaration of non-**nbn** superfast broadband networks, this is likely to undermine the concept of a level playing field by giving alternative superfast broadband network operators a significant competitive advantage at both the retail and infrastructure level. This is notwithstanding the requirement for structural or functional separation, as structural or functional separation will still need to be accompanied by sufficient regulation at the wholesale level to have the effect of promoting competition in downstream markets and to encourage economically efficient investment in infrastructure.

Declaration is necessary to prevent bottlenecks for the supply of superfast broadband services to end-users

12 There is the potential for alternative superfast broadband networks, other than the **nbn**TM network, to represent a bottleneck for providing superfast broadband services to end users. The declaration of superfast broadband networks would have a strong bearing on whether such alternative networks become bottleneck facilities in practice.

13 **nbn** is subject to extensive regulation through its Special Access Undertaking (**SAU**) and a range of other measures, which together ensure that there is no plausible risk that **nbn** could potentially become a bottleneck for providing services in downstream wholesale and retail markets. The regulatory framework that applies to **nbn**, including the declaration of **nbn** services through the SAU and publication of a standard form of access agreement and associated regulation, provides the basis for a level playing field and effective competition in downstream markets.

14 However, without comparable measures applying to other non-**nbn** superfast broadband networks, there is a greater risk that these alternative networks may be used to limit the competitive supply of broadband services to end users. This is notwithstanding the changes to the *Telecommunications Act 1997*, as the effectiveness of these measures is ultimately contingent on an effective regime being put in place under Part XIC of the CCA to facilitate access to these wholesale only, structurally or functionally separated networks.

There is little competitive restraint against non-nbn superfast broadband networks if nbn does not rollout to those locations

15 While the rollout of the **nbn**TM network has had pro-competitive impacts in residential and business segments in those areas served by the network, there remain areas where **nbn** has been prohibited

² Explanatory Memorandum to the 'Telecommunications Legislation Amendment (Competition and Consumer) Bill 2019', p.77

or discouraged from rolling out. In these areas the **nbn**TM network has not had the ability to make any impact on competition or on the customer experience for end users. In particular, we note that in a number of areas served by non-**nbn** networks, businesses in those areas are unable to obtain a high-speed fit for purpose symmetric business grade connection which is comparable to those offered on the **nbn**.

16 **nbn**'s current position is that where a geographic region is served by a non-**nbn** network, but end users of that network have a choice of RSPs offering affordable access to superfast broadband services, there is likely to be little commercial justification for **nbn** to overbuild. However, if **nbn** was to experience pressure from RSPs and end users to overbuild other networks on the basis that there was inadequate competition in those areas or there were barriers to RSPs serving those markets then there could be a stronger case for **nbn** to overbuild. Such an outcome may not further the efficient investment in, and use of, network infrastructure whereas the declaration currently under consideration by the ACCC will reduce the commercial incentives for competitive network overbuild and promote the efficient use of existing network infrastructure by requiring full access to a wholesale layer 2 bitstream service.

The declaration should be technology neutral and should extend to wireless broadband services

17 **nbn** supports a technologically agnostic approach to the regulation of non-**nbn** superfast broadband network. The service description should define a Layer 2 bitstream service in a way that is largely agnostic to the underlying access technology so as to capture all services to residential and small business customers that are capable of delivering superfast broadband services, including vectored VDSL, G.fast based services and any future technology variants.

18 In addition to a single declaration for superfast broadband networks, **nbn** also recommends that this declaration should be extended to cover wireless broadband services such as Fixed Wireless and mobile (5G).

19 **nbn** considers that mobile technology, including 5G technology, are effective technical substitutes for fixed line broadband services. Given the emerging nature of 5G technology we consider that it is not yet clear whether 5G technology is an economic substitute for fixed line broadband services, but that the technological aspect is clearer and **nbn** does consider that mobile technology is an effective technical substitute for fixed line broadband services.

20 **nbn** notes that Rod Sims (ACCC Chair) made the following observations about the substitutability of 5G and fixed services at the 2018 ACMA RadComms Conference:³

With 5G we will see the first generation of mobile technology capable of delivering broadband services that are comparable to fixed services in terms of speed and capacity...

As 5G networks will be able to transport significantly more data traffic than previous mobile networks, it is anticipated that mobile broadband services may become more of a viable substitute for fixed broadband... (emphasis added)

21 Telstra, as part of its 2020 Full Year Results, flagged that they will launch 5G Fixed Wireless products targeted at **nbn** FTTN and Fixed Wireless area. Andy Penn recently stated:

"...fixed wireless is not necessarily the right solution for every customer. It's definitely a very viable and particularly attractive option for customers whose experience may not be the best, either because they're in a, perhaps a fibre to the node area, where they've got a long lead line on their service and therefore they're not receiving the best experience, or where they're getting a fixed wireless service, but over an NBN network, whereas in fact a 5G fixed wireless solution could be more interesting. So we're launching on a targeted basis..."⁴

22 We also note Optus is currently advertising its in-market 5G modems as an alternative to the **nbn**.

23 Given that Australia's three mobile networks are operated on a vertically integrated basis and there is limited wholesale access to these networks, **nbn** does not consider that the further rollout of 5G and Fixed Wireless technologies is likely to lower the barriers to entry and the barriers to expansion in those areas not served by the **nbn** network (even though the mobile networks are technical substitutes to fixed line networks). As such, expanding the declaration of superfast broadband networks to cover these mobile and fixed wireless networks would be in the LTIE as it would enable a truly agnostic regulation to future proof the declaration and allow for enhanced regulatory symmetry.

Telstra's fibre networks in South Brisbane and Velocity estates should be required to provide a layer 2 bitstream service

24 Telstra's fibre networks in South Brisbane and Velocity estates should not be exempt from the requirement to provide a layer 2 bitstream service on the primary basis that this is an example of regulatory asymmetry justified on the basis of minimising the cost of regulation for a single market participant as opposed to being justified on the basis of it being in the LTIE.

³ Mr Rod Sims, ACMA RadComms Conference 2018, 'Competition & the 5G spectrum,' <https://www.accc.gov.au/speech/competition-the-5g-spectrum>.

⁴ Telstra, Telstra Full Year Results Presentation, 13 August 2020 – Transcript, <https://www.telstra.com.au/content/dam/tcom/about-us/investors/pdf%20F/140820-FY20-Transcript.pdf> p.18.

Geographic scope of regulation

- 25 **nbn** supports the declaration of superfast networks on a nationwide basis. If geographic restrictions are included in the service description, **nbn** considers that there may be significant risk of bypass if an alternative provider moves to build out infrastructure in an area which is not otherwise covered by the geographic scope of the declaration. This would effectively limit the prospect of retail competition in these uncovered areas and expose the declaration to the prospect of regulatory arbitrage by the alternative operator of the superfast broadband network.
- 26 While it is likely that alternative superfast broadband providers will seek to limit their rollouts to metropolitan areas where the costs of deployment are lower, the imposition of a geographic restriction within the scope of the declaration will likely result in the ACCC having to make a largely arbitrary decision as to which geographic areas would be covered by the declaration and those areas which would not. This would create a situation of potential regulatory arbitrage, as this could result in the creation of geographic areas outside of the scope of the declaration where an alternative superfast broadband network service provider could economically deploy their own infrastructure without being regulated under declaration.
- 27 **nbn** notes that its own standard access obligations under Part XIC of the CCA apply on an Australia-wide basis. Thus, if the ACCC opted to include geographic limitations in the declaration instrument, it would serve to undermine the symmetric regulation in those areas that were outside the scope of the declaration.

Exemptions to the declarations

- 28 **nbn** submits that the declaration should be as broad as possible, and to that extent, the ACCC should limit the exemptions set out by the service description or a Final Access Determination:
- Business customers are exempted from the scope of the SBAS declaration. **nbn** submits that the long-term interests of business end-users will be promoted if the declaration includes all superfast broadband capable networks, regardless of whether they serve residential or business end-users. This will contribute to a symmetrical approach to the regulation of superfast broadband services under Part XIC of the CCA. If the ACCC was to take the view that the provision of business services is competitive then **nbn** would welcome a review of the wider regulatory framework so that competitive services are not subject to inefficient regulation.
 - The current SBAS and LBAS service descriptions do not capture download data transfer rates below 25Mbps (e.g. 12Mbps). **nbn** is of the view that the service description should cover potential entry level offerings at lower speed tiers (e.g. below 25Mbps on the downlink), as

well as higher speed tier services. This would ensure there is no gap in the regulatory approach between **nbn** and non-**nbn** services and that access seekers on non-**nbn** superfast broadband networks are capable of offering competitive choice in relation to entry level services to subscribers with basic broadband requirements. **nbn** notes that all of **nbn**'s data transfer rates are regulated, including 12Mbps services.

- The SBAS Final Access Determination exempts SBAS providers from providing regulated wholesale access to their networks if they have less than 12,000 end users. **nbn** argues that it is not be appropriate to exempt operators of small networks, on the basis that these networks will effectively constitute an economic bottleneck for all users of such networks, notwithstanding their smaller size.

nbn supports a declaration period of five years

29 Under section 152ALA(2) of the CCA, the ACCC must apply an expiry date for a declaration that is between 3 to 5 years after the declaration is made, unless the ACCC is of the view that there are circumstances that warrant a longer or shorter duration for the declaration. **nbn** broadly supports the declaration non-**nbn** superfast broadband networks for a period of five years. **nbn** considers that a five-year declaration period would be appropriate in promoting regulatory certainty.