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Superfast Broadband Access Service and Local Bitstream Access Service Final Access Determination Joint Inquiry

Discussion Paper

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List of abbreviations and acronyms

ACCC	Australian Competition and Consumer Commission
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
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
IAD	interim access determination
LBAS	local bitstream access service
LTIE	long-term interests of end-users
Mbps	megabits per second
NBN	National Broadband Network
POI	point of interconnection
PSTN	Public switched telephone network
RSP	retail service provider
SAOs	standard access obligations
SBAS	superfast broadband access service
SAU	Special Access Undertaking
SIO	services in operation
VDSL	very-high-bit-rate digital subscriber line

1. Introduction

This discussion paper begins our consultation for making final access determinations (FAD) under section 152BC of the *Competition and Consumer Act 2010* (CCA) for the following declared services:

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

The SBAS and LBAS are wholesale services that can be used by access seekers to supply fixed line superfast broadband services to end-users.

The LBAS was declared on 24 February 2012, following changes to the telecommunications access regime in Part XIC of the CCA and the *Telecommunications Act 1997* (the Telecommunications Act) to implement the National Broadband Network (NBN). These changes required the ACCC to declare the LBAS on an on-going basis to ensure that providers of superfast carriage services built or substantially extended after 1 January 2011 were subject to the same conditions as NBN Co – that is that they offered a wholesale Layer 2 bitstream access service and operated on a wholesale only basis. In October 2012, we made a FAD for the LBAS. This FAD has been extended and will not expire until a new FAD is made as part of this inquiry.

Pre-existing superfast networks that were not substantially extended after 1 January 2011 were exempt from such conditions (which are set out in the 'level playing field' provisions in Parts 7 and 8 of the Telecommunications Act), as were those exempted by the Minister for Communications under section 141A of the Telecommunications Act.¹

Following the Vertigan Committee's concerns about the potential for small technical non-NBN monopolies to appear and the conclusion of our investigation into TPG's compliance with the level playing field provisions in its supply of superfast broadband services on its fibre-to-the-basement (FTTB) network, we commenced the SBAS declaration inquiry.

This inquiry resulted in the declaration of SBAS on 29 July 2016. We subsequently commenced an SBAS FAD inquiry and made an SBAS Interim Access Determination (IAD), as allowed under the CCA.² Following the commencement of the SBAS FAD inquiry we announced that we would combine the SBAS FAD public inquiry with the LBAS FAD public inquiry process. We considered that this approach would be appropriate given the scope of common issues between the two services. Combining these inquiries would also provide us the opportunity to consider consistency of regulation across these similar services.

This discussion paper represents the first step in the making of our FADs for the SBAS and the LBAS. Some of the key issues we seek views from interested parties on include:

What pricing methodology should be used for determining prices?

To date, both the LBAS and the SBAS have been subject to price regulation in the form of prices benchmarked to NBN pricing for similar services. However, the NBN prices were set on a geographically averaged basis and for a network with national scale – in contrast to the smaller scale, geographically discrete networks typically covered by the LBAS and SBAS declarations. Given these factors, we will assess what is the most appropriate pricing approach for the LBAS and/or SBAS.

¹ These include Telstra's South Brisbane exchange and Velocity estate networks and the iiNet/TransACT VDSL and HFC networks in the Australian Capital Territory and regional Victoria

² Section 152BCG

We also seek views on whether we should maintain an anchor pricing approach where the FAD price terms are set only for the entry-level product tier on superfast networks, or whether other product tiers should also be included. For the LBAS and non-Telstra SBAS services, this has involved setting prices for only the 25/5 Mbps product tier, while the equivalent Telstra product tier is the 30/1 Mbps offering.

We will also look more closely at the price for the aggregation component of the SBAS and LBAS. An aggregation component price was not included in the current LBAS FAD while it was included in our SBAS IAD. In this inquiry we seek views on what factors need to be considered in setting aggregation charges for either or both the LBAS and SBAS, as well as whether prices for other service components should also be included in the LBAS/SBAS FADs.

These issues are discussed in section 3 and 4 of this discussion paper.

What are the compliance costs for smaller networks and likelihood of competitive entry?

In our SBAS declaration inquiry final decision, we concluded that the declaration of the SBAS was likely to promote the long term interests of end-users (LTIE). However, we acknowledged that there are costs of complying with the declaration and that these costs may be disproportionately burdensome for some small providers.³ Conversely, access seekers' willingness to enter the retail market may be restricted due to factors such as the small addressable markets on these networks, increased costs associated with multiple interconnections (with access providers) and inconsistent product constructs between access providers.⁴ We seek the views of interested parties and further information on these issues as part of this inquiry process.

Should we apply differential treatment to the Telstra FAB service?

Telstra's supplies its Fibre Access Broadband (FAB) service on its South Brisbane and Velocity networks. The FAB service was developed to function within Telstra's copper-based public switched telephone network (PSTN) network architecture and ordering and business systems. Because of this, pricing of the FAB in the SBAS IAD is benchmarked to regulated wholesale ADSL prices and differs significantly from the NBN-benchmarked non FAB service in the SBAS IAD. The FAB has also only been supplied where an active voice service is supplied to the end-user.

In pricing the FAB service, we note that there are likely to be further opportunities for price reduction, particular in respect of the wholesale ADSL aggregation component price (the AGVC). There also remains a question as to the need for Telstra to supply an active voice service on a fibre line in order to supply the FAB service to the end-user.⁵

We seek the views of interested parties and further information on these issues as part of this inquiry process.

The issues of compliance costs for smaller networks and the treatment of Telstra FAB service are discussed in section 4 of this discussion paper.

Section 4 of this discussion paper also explores whether transitional arrangements are necessary in dealing with either of these issues in the SBAS and/or LBAS FAD.

³ ACCC, Superfast Broadband Access Service Declaration Inquiry – Final Decision, July 2016, p13

⁴ Optus, Public submission to the ACCC draft decision, 4 December 2015, p. 1.

⁵ ACCC. Superfast Broadband Access Service declaration inquiry – Final decision, July 2016, pp.44-46.

Other issues canvassed in this discussion paper include:

- the appropriate non-price terms and conditions for the LBAS and SBAS (see section 5 of this discussion paper) and
- whether we should exempt any access provider or class of access provider from the FADs – such as small scale providers –as well as whether any access obligations should apply differently with respect to any access seeker or class of access seeker (see section 6 of this discussion paper).

1.1. Consultation process for a FAD

We must hold a public inquiry before making a FAD.⁶ Submissions are sought as part of our inquiry about the proposed FADs for the SBAS and the LBAS. Following this consultation, once submissions have been received and considered, we propose to issue draft FADs for these services, for further public comment before publishing a Final Report. We may also issue further discussion papers or undertake targeted consultation on discrete issues if that is considered appropriate to inform a final decision.

We encourage industry participants, other stakeholders and the public to consider the issues set out in this discussion paper and make a submission. A full list of questions posed in this discussion paper is at **Appendix A**.

We seek written submissions on the issues raised in this discussion paper by **no later than close of business on Friday 21 October 2016**.

We prefer to receive electronic copies of submissions, either in PDF or Microsoft Word format allowing for the submission text to be searched.

Please forward submissions and enquiries by email to:
superfastbroadbandinquiry@acc.gov.au

cc to: Nicole.Ross@acc.gov.au

Please contact Nicole Ross on (03) 9290 1957 regarding any questions you have with respect to this consultation.

We expect to release our draft decision on the LBAS and SBAS FADs in late 2016 or early 2017, followed by a final decision and FADs in the first half of 2017.

1.2. Confidentiality

To foster an informed and consultative process, all submissions will be considered as public submissions and will be posted on our 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'.

We have published a Confidentiality Guideline which sets out the process parties should follow when submitting confidential information to communications inquiries commenced by us. The Guideline describes our legal obligations with respect to confidential information, the process for submitting confidential information and how we will treat confidential information provided in submissions. A copy of the Guideline can be downloaded from our [website](#).

⁶ Subsection 152BCH(1) of the CCA

The ACCC-AER information policy: the collection, use and disclosure of information is also a useful reference and can be downloaded from our [website](#).

1.3. Structure of the discussion paper

Section 2 provides background on superfast broadband services, the current SBAS and LBAS declarations, the LBAS FAD and the SBAS IAD and also the access determination assessment framework.

Section 3 outlines pricing approaches that could be taken with respect to the SBAS and LBAS, consistent with the subsection 152BCA(1) criteria of the CCA.

Section 4 considers the compliance costs and the likelihood of retail entry on smaller scale networks and the treatment of Telstra's FAB service.

Section 5 discusses appropriate non-price terms and conditions for the SBAS and LBAS

Section 6 sets out issues related to possible exemptions from the SAOs in the FADs

Section 7 sets out the possible commencement and expiry of these FADs

Appendix A provides a consolidated list of all questions

Appendix B provides the legislative framework for final access determinations.

2. Background and regulatory framework

This section provides background information including an overview of regulatory framework applying relevant to making FADs for the SBAS and LBAS.

2.1. Overview of the services

SBAS and LBAS are declared broadband wholesale services able to be used by access seekers to supply downstream superfast broadband retail markets. Both services are Layer 2 bitstream fixed line services capable of a transmission rate of 25 Mbps or more. The SBAS and LBAS declarations do not apply to the NBN, HFC networks to be transferred to the NBN or in other specific cases which are noted in section 2.3 below.

Other technologies capable of supplying superfast broadband services (defined as services capable of download speeds of at least 25 Mbps) that are not covered by the SBAS and LBAS declarations are fixed wireless, satellite and mobile.

A distinguishing feature between LBAS and SBAS is that the LBAS encapsulates fixed line networks built, upgraded or altered by more than one kilometre after 1 January 2011,⁷ whereas the SBAS covers eligible networks built before this date. This distinction means that LBAS networks are subject to legislative structural separation requirements, but SBAS networks are not necessarily. In practical terms, the networks covered by the SBAS declaration often require relatively more aggregation or carriage of data back further into the network than LBAS networks do.

2.2. Access determination framework

Part XIC of the CCA establishes a telecommunications access regime under which service providers can access declared telecommunications services in order to supply end-users.

Declaration of a service means that an access provider is subject to Standard Access Obligations (SAOs). These require the access provider to provide access to the declared service, on request, to an access seeker. In doing so the access provider must take all reasonable steps to ensure that the technical and operational quality of the service is equivalent to that which the access provider provides to itself.

Where an access provider is subject to the SAOs, they must be complied with on terms and conditions either commercially negotiated or set out in an access agreement, or as determined via the regulatory hierarchy in the CCA.

An access determination, including a FAD, can provide a 'fall back' set of terms and conditions that access seekers can rely on if they are unable to reach agreement with an access provider on the terms and conditions of access to a declared service. Access determinations by the ACCC can shape the negotiation of an access agreement and the formulation of an SAU. This means that the FAD, and the structure and level of prices (and other terms) it establishes, serves a fundamental role in facilitating the private negotiation of terms and conditions of access that are broadly consistent with efficient outcomes and promoting the LTIE.

The requirements and criteria we must have regard to in making an access determination are detailed in Appendix B of this discussion paper.

⁷ See section 152AGA(6) including the '1km' rule at subsection (6).

Further details of the coverage of the declarations and the current pricing determinations for the LBAS and the SBAS are detailed below.

2.3. Current declarations

2.3.1. LBAS declaration

The LBAS declaration requires operators of fixed superfast broadband networks built, upgraded, altered or extended by more than 1 km after 1 January 2011 to provide access to a Layer 2, 25 Mbps service upon request. This declaration commenced on 13 April 2012. It does not expire and cannot be varied or revoked under current legislation.

The LBAS applies to all networks, local access lines and carriers that supply a Layer 2 services unless they have received a Ministerial exemption under the Telecommunications Act or are otherwise exempt under the provisions of Part 7 of the *Telecommunications Act*.⁸

The LBAS currently applies to services supplied on the following networks:

- Opticomm
- OPENetworks
- The Local Broadband Network company (LBN Co), and
- Other networks that supply superfast carriage services that were built, altered or extended after 1 January 2011.

For further information please see our LBAS declaration final decision available [here](#).

2.3.2. SBAS declaration

The SBAS was declared by the ACCC on 29 July 2016 and is due to expire on 28 July 2021. The SBAS is a point to point service that is either

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

The SBAS does not include:

- services supplied where there appears to be effective competition – that is, services supplied exclusively to business customers, public bodies or charity customers in CBD areas of Australian capital cities
- services supplied by the NBN
- services supplied using a HFC network that will be transferred to the NBN
- the LBAS or
- the Domestic Transmission Capacity Service (DTCS).

⁸ 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 SBAS applies to services supplied on the following networks:

- Telstra's FTTP networks in South Brisbane and Velocity Estates
- iiNet's (now TPG's) VDSL network in the ACT and HFC networks in regional Victoria
- TPG's FTTB networks
- Other networks that supply superfast carriage services, including superfast broadband networks that existed before 1 January 2011 (which are not subject to Part 7 of the Telecommunications Act).

For further information please see our SBAS declaration final decision available [here](#).

2.4. The current access determinations

2.4.1. LBAS – final access determination

We made a FAD for the LBAS on 3 October 2012, which although was due to expire on 5 October 2015, has been extended until the day before a new FAD comes into force.

The FAD specifies terms and conditions of access, including price and non-price terms for a LBAS with the following characteristics:

- a downstream data transfer rate of 25 Mbps (peak information rate)
- an upstream data transfer rate of 5 Mbps (peak information rate)
- residential-grade service characteristics
- use of a data port (user-network interface – e.g. Ethernet connector) on the data termination device at the end-user's premises
- if requested by the access seeker, a prioritised, symmetric bitstream of sufficient capacity to provide a voice service
- if available and requested by the access seeker, use of an analogue voice port on the network termination unit at the end-user's premises.⁹

An LBAS access provider is also not restricted from supplying the declared service with additional wholesale products. LBAS access providers can also offer other LBAS products not specified in the FAD at commercially negotiated prices.

The price terms and conditions are detailed in section 4 of this paper.

The LBAS non-price terms cover issues including: billing and notifications; creditworthiness and security; general dispute resolution procedures; confidentiality provisions, and suspension and termination.

For further information please see our 2012 LBAS FAD available [here](#).

⁹ For the avoidance of doubt, the declared service, and therefore the wholesale product/s defined here, does not include backhaul between a network-network interface and a service provider's point-of-presence.

2.4.2. SBAS – interim access determination

We made an interim access determination (IAD) for the SBAS on 29 July 2016..This IAD was made as we considered it unlikely that a final access determination would be made within six months after the commencement of the public inquiry.¹⁰

The SBAS IAD sets some different terms and conditions (including prices) for the Fibre Access Broadband (FAB) services supplied in Telstra's South Brisbane and Velocity estate networks compared to other SBAS services.

The SBAS IAD terms and conditions are applied to specific entry-level products including:

- a 25/5 Mbps data rate tier product for all non- FAB services and
- a 30/1 Mbps data rate tier product for all FAB services. (This is the FAB service product tier closest to the entry-level 25/5Mbps product tier, which is already supplied on Telstra's South Brisbane and Velocity estate networks).

The SBAS IAD also includes the following service characteristics (for the entry level) non-FAB product:

- residential-grade service characteristics
- if requested by the access seeker, a prioritised, symmetric bitstream of sufficient capacity to provide a voice service.

The price terms and conditions are detailed in section 4 of this paper. In contrast to the LBAS FAD, the SBAS FAD includes an aggregation charge as the SBAS, as supplied by a number of providers, may provide relatively more aggregation services back further into the network to a Point of Interconnection.

The SBAS access provider is not restricted from supplying the declared service with additional wholesale products. SBAS operators can also offer other SBAS products not specified in the IAD at commercially negotiated prices.

Consistent with our approach in the wholesale ADSL FAD inquiry¹¹ the IAD does not prevent Telstra from only supplying a FAB service where there is an active voice service supplied to the end user. We note that this does not prevent Telstra from supplying a FAB service without an active voice service should it decide to do so

In the SBAS IAD we set non-price terms and conditions consistent with those included in the recent Domestic Transmission Capacity Service (DTCS) FAD.¹²

For further information please see our SBAS IAD available [here](#).

¹⁰ Section 152BCG)(1)(d) of the CCA.]

¹¹ ACCC, *Public inquiry to make a final access determination for the Wholesale ADSL service*, Final Report, May 2013, Public version, pp. 74-78.

¹² Final Access Determination No. 1 of 2016 for the Domestic Transmission Capacity Service

3. Pricing approaches for the SBAS and LBAS

This section outlines issues relating to the pricing of the SBAS and LBAS. The CCA requires that an access determination contain terms and conditions relating to price or a method of ascertaining price. A possible price or a pricing methodology for the SBAS and LBAS will need to be assessed against the criteria in subsection 152BCA(1) of the CCA as outlined in Appendix B of this paper.

We seek views from interested parties on what may be an appropriate pricing methodology for the SBAS and the LBAS.

3.1. Current regulated prices for SBAS and LBAS

Currently, different charges apply for the various SBAS and LBAS products.

The SBAS IAD access charges comprise:

- the current regulated NBN access (port) and aggregation charges for non-Telstra operators
- the wholesale ADSL charges set in the ACCC's 2015 fixed line services FAD for Telstra

The LBAS FAD sets the access charge equal to the current regulated NBN port charge only.

For SBAS, price regulation applies to the 30/1 Mbps product tier for Telstra FAB services and for other (non-FAB) services to the 25/5 Mbps product tier.

For LBAS, price regulation applies to the 25/5 Mbps product tier.

The charges and the benchmarks on which they are based are shown in Table 4.1 below.

Table 3.1: Current SBAS and LBAS regulated prices

Services	Port (end-user access) charge (Per port per month)	Aggregation charge (Per Mbps per month)	Benchmark charges
SBAS			
Telstra FAB services – Zone 1	\$22.14	\$29.27	Port: Telstra wholesale ADSL Zone 1 Aggregation: Telstra wholesale ADSL AGVC/VLAN charge ¹³
Telstra FAB services – Zones 2/3	\$26.87	\$29.27	Port: Telstra wholesale ADSL Zone 2/3 Aggregation: Telstra wholesale ADSL AGVC/VLAN charge ¹⁴

¹³ ACCC, *Public inquiry into final access determinations for fixed line services*, Final Decision, October 2015.

¹⁴ *Ibid.*

Other (non-FAB) SBAS services	\$27.00	\$17.50	Port: NBN AVC charge 25/5 Mbps Aggregation: NBN CVC charge ¹⁵
<u>LBAS</u>			
All services	\$27.00	-	NBN AVC charge ¹⁶

The non-Telstra product prices were adopted on the basis of there being significant similarity between the entry level 25/5 Mbps LBAS and SBAS products and the 25/5 Mbps NBN product.

Similarly, we decided to benchmark Telstra's FAB service to the current regulated prices for wholesale ADSL (and its component charges) on the basis that Telstra's commercial supply of the FAB service is on a similar basis to the wholesale ADSL service plus wholesale line rental.

3.2. Possible pricing methodologies for SBAS and LBAS

Any pricing methodology for the SBAS and LBAS should aim to, consistent with the subsection 152BCA(1) criteria, ensure that:

- the service provider is adequately compensated (neither over- nor undercompensated)
- the service is provided in an economically efficient manner, and
- the structure and level of the regulated price is efficient.

A key consideration in choosing a pricing methodology is whether it will create incentives for efficient investment in, and use of, infrastructure and at the same time promote competition. Historically this has involved choosing a pricing methodology that is cost based on the basis it best meets these criteria. However a number of alternative methodologies have been considered appropriate in meeting the subsection 152BCA(1) criteria, based on the particular circumstances.

3.2.1. Previous ACCC pricing methodologies

A variety of pricing methodologies have been adopted under recent FADs and other regulatory decisions issued by the ACCC. These approaches and some of the key reasons they were adopted are summarised in Table 3.1 below.

Table 3.1: Recent ACCC pricing methodologies

Service	Date	Pricing methodology and rationale
Wholesale ADSL and other fixed services	Oct 2015	Building block model (BBM) to determine an overall revenue requirement and enable calculation of uniform price change of 9.4% on earlier BBM decision that set service prices according to costs allocated to each service. The uniform price change was adopted in order to maintain the previous price relativities of

¹⁵ NBN, *Wholesale Broadband Agreement Price List* (as varied from time to time) and NBN, *NBN Co Special Access Undertaking*, 18 December 2012 varied on 18 December 2012.

¹⁶ *Ibid.*

		access services, to aid price stability and minimise industry disruption in the transition to the NBN. ¹⁷
DTCS	April 2016	Use of competitive route benchmarking to establish price benchmarks for non-competitively supplied services subject to the service declaration. ¹⁸ This reflected the method adopted for the previous FAD and the formerly acknowledged complexities of applying Total Service Long Run Incremental Cost plus common costs (TSLRIC+) pricing for transmission services and timeliness considerations. ¹⁹
MTAS	Aug 2015	Benchmarking of regulated mobile terminating rates in other countries that were determined using TSLRIC+ modelling and adjusted these to more closely reflect local conditions. This reflected, among other considerations, that the approach could be implemented relatively quickly compared to the use of a major costing exercise for the three local mobile operators. ²⁰
NBN broadband service	Dec 2013	Initial prices benchmarked to enable services to be supplied to end-customers equivalent to those on existing copper and HFC services, CPI-1.5% for all service prices, long term revenue constraint to costs set using a BBM. ²¹ This pricing methodology was not specified by the ACCC, but rather accepted by us in determining that particular features of the methodology and the price terms and conditions of NBN's SAU were reasonable.

The recent pricing methodologies we have adopted indicate that there are a range of methodologies that can be consistent with the criteria under the CCA. An appropriate methodology that might be applied can depend on a number of factors including the features of the products and their providers, the level of competition in the relevant markets, the availability of cost information, the regulatory costs and the need for timeliness.

3.2.2. Anchor pricing and product tiers

A threshold issue for pricing the SBAS and LBAS is whether only the base product pricing tier for each service should be regulated, or a range of product tiers.

The current IAD and FAD prices apply to the base product tiers for the relevant superfast broadband services covered by the service declarations. These products are the most widely purchased superfast broadband products in the in markets in which NBN and Telstra's

¹⁷ ACCC, *Public inquiry into final access determinations for fixed line services*, Final Decision, October 2015.

¹⁸ ACCC, *Public Inquiry to make a Final Access Determination for the Domestic Transmission Capacity Service*, Final Report, April 2016.

¹⁹ ACCC, *Domestic Transmission Capacity Service*, Position Paper, November 2010.

²⁰ ACCC, *Mobile Terminating Access Service Final Access Determination*, Final Decision, August 2016.

²¹ ACCC, *NBN Co Special Access Undertaking*, Final Decision, December 2013.

products are supplied. In relation to the NBN, products within the 25 Mbps download speed product tier currently account for 77 per cent of the NBN's superfast services.²²

There is theoretical and practical support for limiting price regulation to a single tier or limited number of tiers. To the extent the products have some substitution possibility, regulatory constraint on a lower tier product can constrain the price of higher tier products. This constraint is likely to diminish the further away a given broadband product tier is away from the anchor broadband product tier in terms of download and upload speed and other service functionality.

Regulating a base product can lower the costs of regulation and provide some constraint on other products while still allowing for some pricing flexibility on these other product tiers and service elements. This can be desirable for an emerging service in order to achieve LTIE outcomes, including the promotion of dynamic efficiency. On the other hand, to the extent that these other products are not reasonably substitutable with the base tier, the anchor price regulation might not constrain other product tiers and lead to monopoly wholesale pricing and foreclosure of rivals in downstream markets.

In a number of European countries, wholesale price regulation of legacy copper based services or a base tier high speed broadband service have been accompanied by regulatory forbearance for higher speed product tiers. The reasons for regulating only an anchor product in these cases seem to be driven by a desire to allow pricing flexibility for the higher speed products so as not to undermine next generation network (NGN) investment, and also to reduce regulatory costs including avoiding potential regulatory failure.²³

Questions:

1. *Should price regulation apply to all SBAS and LBAS wholesale product tiers currently offered or only to the base tier SBAS and LBAS offerings as anchor products? Do you consider a different product tier should be used as the anchor product? Please outline your reasons for this view.*
2. *What are the implications for investment and competition (and therefore the LTIE) if only the base tier SBAS and LBAS offerings are subject to price regulation? How do these relate to the statutory criteria in sub-section 152BCA(1) of the CCA?*

3.2.3. Proposed pricing methodologies for SBAS and LBAS

We consider that in the case of the SBAS and LBAS, a strict cost-based pricing methodology using TSLRIC+ or a BBM is not likely to be suitable.

We note that that the LBAS and SBAS products are provided by a number of different access providers using a range of network types, all of which are likely to have differing input costs. In these circumstances, application of a robust cost-based pricing approach would necessarily involve obtaining detailed cost and technical information from a number of different suppliers and constructing a number of different cost models to reflect the diversity of network operators.

Further, the regulatory costs to us and network operators to determine the costs of SBAS and LBAS on these various networks using TRLRIC+ or a BBM are expected to be excessively high relative to the likely benefits that will be derived for end-users. This reflects

²² ACCC NBN Wholesale Market Indicators Report 30 June 2016 <http://www.accc.gov.au/regulated-infrastructure/communications/national-broadband-network-nbn/nbn-wholesale-market-indicators-report/reports>

²³ B. Williamson, Anchor product regulation – retrospective and prospective, Plum Consulting, October 2013.

both the relatively small number of end-users supplied via these networks and the existence of other timelier and lower-cost pricing options available to us.

In regard to the competitive service and international benchmarking approaches, we consider that these are unlikely to be suitable for SBAS and LBAS on the basis that:

- It is not evident that there is a broad-based market for competitively supplied wholesale SBAS and LBAS in the same way as there is for many transmission services in Australia. This reflects that the areas of competitive supply of SBAS and LBAS are confined largely to CBD areas that exclusively service business customers.²⁴
- Our review of regulated wholesale superfast broadband products and pricing offered overseas indicates that there would be substantial difficulty in establishing suitable overseas benchmarks for the locally supplied services. This is due to the differences in provider and service characteristics among overseas networks and also between the various local networks in Australia.

In light of these identified difficulties with the cost-modelling, competitive service and international benchmarking approaches, we consider that there are two possible alternative approaches to determining SBAS and LBAS prices in the FAD.

The first approach would involve making adjustments to the current regulated price benchmarks to more accurately reflect the specific characteristics of SBAS and LBAS providers (the 'adjusted regulated benchmarks' approach).

The second is a retail minus approach, which would involve determining wholesale SBAS and LBAS prices by subtracting estimates of the per unit retail costs for providers from the prices of retail services being supplied with the use of SBAS and LBAS services (the 'retail minus' approach). These are discussed further in turn below.

Adjusted regulated benchmarks

The NBN and Telstra's wholesale ADSL services have been identified as having similarities with the SBAS/LBAS and Telstra FAB services respectively, and were accordingly used for the purpose of determining the SBAS (and Telstra FAB) IAD and LBAS FAD prices.²⁵ Nevertheless, we consider that there may be factors that could drive differences in the unit costs of the SBAS and LBAS compared to the costs of NBN and Telstra wholesale ADSL services. For example, one key difference is the more narrow geographic concentration of SBAS and LBAS networks within particular metropolitan and CBD locations that are expected to have lower costs per customer than networks that also supply services outside these areas.

Under an adjusted regulated benchmarks approach, the current SBAS IAD and LBAS FAD prices could be adjusted to account for cost differences due to factors such as:

- narrower geographic coverage,
- higher traffic levels since the price benchmarks were initially determined (for the aggregation component only) and
- any scale diseconomies that apply to SBAS and LBAS providers compared to the providers of the benchmark services.

²⁴ ACCC, *Superfast Broadband Access Service Declaration Inquiry*, July 2016, p. 40.

²⁵ It is noted that the Telstra FAB has been treated differently in the declaration and IAD but the ACCC is to give further consideration to how appropriate this is as part of this FAD inquiry (see Section 5).

The advantage of this approach is that the starting point benchmark prices are already known and can serve as reference points. Notwithstanding this, the initial benchmarks can introduce some inaccuracies in that the particular services for which prices were developed may have different characteristics to the services that will be the subject of the benchmarking. They may also not be fully cost reflective. However, the proposed adjustments would attempt to narrow the extent of the existing deficiencies and provide for improved investment signals for access providers and seekers while also providing the conditions for increased retail competition.

We note that the current NBN price benchmarks, used in the SBAS IAD (for non-FAB service only) and the LBAS FAD, are geographically averaged across all areas in which the NBN is supplied. However, the SBAS and LBAS are confined largely to city areas or discrete geographic areas that are likely to involve lower costs to serve. To better reflect the costs of serving smaller discrete geographic and/or city areas, one solution could be to apply an adjustment factor to the NBN price benchmarks to reflect an estimate of the relative cost differential between national and discrete geographic area supply. For example, we note that TPG is to offer wholesale FTTB services in capital city areas with a CVC charge of \$4 per Mbps per month²⁶ which could in part reflect this cost differential. In the absence of better information, the adjustment factor for the existing NBN-derived access (port) charge could be based on the relativities of the wholesale ADSL port charges which differ according to two geographic zones (Zone 1 and Zone 2/3). We note that these form the basis of the currently geographically differentiated Telstra FAB charges under the SBAS IAD)..

In regard to the wholesale ADSL charges currently used as the Telstra FAB benchmarks, the aggregation charge component might also be adjusted to reflect any shorter distance over which the aggregation component to the POI is provided for the FAB service.

There could also be scope to adjust the aggregation charge for both the current NBN and wholesale ADSL benchmarks to reflect any fall in unit costs (per Mbps) due to higher traffic volumes since the time the NBN CVC charge was imposed in the NBN Wholesale Broadband Agreement (WBA), if that better reflects the traffic volumes of SBAS and LBAS providers. We note, for example, that:

- NBN has recently introduced a trial of dimensioning based-discounting of the CVC charge, which sees the charge per Mbps fall as overall dimensioning requirements per user increase. NBN indicates this could produce a reduction in the CVC to as low as \$11.50 per Mbps per month depending on the average CVC bandwidth that industry provisions to all end users.²⁷ It is reported in the media that this has so far led to a reduction in the average CVC charge from \$17.50 to \$15.50 per Mbps per month.²⁸
- In the context of the fixed services FAD, we determined that treating the AGVC component of the wholesale ADSL service as a stand-alone service and implementing a cost-reflective price that more closely aligned with demand trends would have seen an AGVC price of approximately \$17.90 per Mbps per month. This compares with the charge we ultimately adopted under our uniform price change method of \$29.27 per Mbps per month (although this would have meant that other fixed line services, including the wholesale ADSL port charge were reduced by a lesser amount than adopted for the FAD).²⁹

²⁶ *Communications Day*, 17 August 2016, p. 1.

²⁷ NBN, *New discount-based pricing to encourage enhanced broadband experience*, Media Release, 5 April 2016.

²⁸ *AFR Weekend*, 13-14 August 2016.

²⁹ ACCC, *Public inquiry into final access determinations for fixed line services*, Final Decision, October 2015, p. 184.

We understand that the aggregation component of SBAS, and potentially LBAS, has some features that are similar to the domestic transmission capacity service (DTCS). Accordingly, one potential means of making the distance and traffic adjustments for the aggregation charges would be to use the ACCC's DTCS FAD pricing calculator³⁰ to derive DTCS prices for hypothetical transmission services that reflect the service capacities in Mbps purchased by access seekers from SBAS and LBAS providers as well as from the NBN and Telstra consistent with the route category and aggregation network distances of these providers' aggregation services. The resulting price relativities between the prices of the hypothetical SBAS and LBAS supplied transmission services and those supplied by the NBN and Telstra would then be used to adjust the relevant current NBN and Telstra CVC/AVGC price benchmarks used for the SBAS IAD and LBAS FAD. We are interested to hear from interested parties as to whether such an approach would be both feasible and sufficiently robust.

Another potential element for the geographic adjustment of the NBN-based charges concerns the cross-subsidy that is embedded in those charges for loss-making wireless and satellite services. Draft analysis undertaken by the Bureau of Communications Research has quantified this cross-subsidy at around \$350 million in FY2018 and rising to \$810 million in FY2022. Dividing these numbers by the forecast number of NBN fixed line SIOs in each of these years (4 million for FY2018 and 8 million in FY2022) points to a subsidy per line of around \$7 to \$8 per month.³¹ On the basis that non-NBN suppliers of LBAS and SBAS do not have to incur the costs of supplying wireless and satellite services to their customer bases, this per line cost of the subsidy could be removed from the combined NBN-derived benchmark monthly charges. The ACCC seeks views on the appropriateness of such an adjustment.

To the extent that there are scale diseconomies on the supply of services on SBAS and LBAS networks, some further offsetting adjustments to the price benchmarks may also be necessary. We will consider this further based on responses, including any detailed cost information that we receive in response to the discussion paper or subsequent information requests.

Questions:

3. *Is it appropriate to benchmark regulated prices for the SBAS and LBAS against the regulated NBN and Telstra's wholesale ADSL charges?*
4. *How do the current regulated wholesale prices (specified by the SBAS IAD and LBAS FAD) compare to the wholesale costs of providing these services? Please provide as much detail as possible.*
5. *What, if any, adjustments should the ACCC make to the SBAS and LBAS IAD prices for these to more accurately reflect the costs of providing the SBAS and LBAS services (for example to reflect different POI locations, higher expected traffic per end-user or diseconomies of scale of smaller networks)?*
6. *Do particular adjustments need to be made across all price components, or only some of the components (e.g. the aggregation charge)?*
7. *Do you have suggestions for how appropriate adjustments might be determined? Please explain how these relate to the statutory criteria.*

³⁰ The calculator is available at <http://accg.gov.au/regulated-infrastructure/communications/transmission-services-facilities-access/domestic-transmission-capacity-service-final-access-determination-inquiry-2014/final-decision>

³¹ Bureau of Communications Research, *NBN non-commercial services funding options*, Final consultation paper, October 2015, p. 63, Table 14.

Retail minus approach

A retail minus approach to wholesale pricing would involve estimating the per unit retail costs for each LBAS and SBAS provider (or a representative or common estimate) to subtract from each provider's retail superfast broadband offers (or market offers for wholesale-only providers). For example, if a LBAS or SBAS access provider offers its own retail broadband services at a price of \$50 per month and has an average retailing cost of \$15 per service per month, the wholesale price to be charged to access seekers would be \$35 (= \$50 retail price - \$15 retail costs).³²

Retail minus has the main virtue of introducing competition and improved investment incentives in retailing functions. It does not necessarily address these objectives at the wholesale level as effectively as cost-based methods for setting wholesale charges can. However, retail minus can still deliver substantial competition and efficiency objectives, and in a lower cost and more timely manner than bottom-up costing methods.³³

Another key attraction of retail minus is that it can allow an access provider to maintain a high level of pricing flexibility for its retail offers, which can be desirable for helping to encourage investment in and take up of a new service such as superfast broadband, and to promote dynamic efficiency. Further, by permitting an access provider to hold on to its profit margin from sales captured by access seekers at the retail level it should make the access provider fairly indifferent between offering wholesale access or retail services, while providing for competition on the merits at the retail level.

The downside of retail minus, however, is that it can preserve monopoly profits of an access provider if there are not complementary measures to address this monopoly power.³⁴ The efficiency losses these monopoly profits cause the economy will clearly be larger the more extensive is the network in question, notwithstanding that those end-users tied to any given monopoly network will be adversely affected.

Retail minus regulation for wholesale broadband services has some precedent under the terms of a 2013 European Commission recommendation to National Regulatory Authorities (NRAs)³⁵ and under a recent Ofcom decision for the pricing of BT's Virtual Unbundled Local Access (VULA) service.³⁶ We also used this approach for the wholesale ADSL IAD made in 2012 (which was replaced by the use of a BBM methodology for the FAD).³⁷

To apply the retail minus approach, estimates of the retail costs for the supply of the SBAS and LBAS will need to be obtained. These might be obtained from each provider or a sub-set of providers. Questions of the allocation of shared costs between wholesale and retail services and between different SBAS and LBAS and other services can make this a difficult and imperfect exercise. Alternatively, in absence of such information being readily obtainable we may need to estimate or extrapolate these costs based on the use of proxy data such as

³² In practice the application of the retail minus methodology to the LBAS and SBAS may be more complicated than in this example. Some of these potential complexities are flagged below.

³³ This reflects that retail minus avoids a detailed assessment of network cost differences and therefore can be much easier to apply than bottom-up costing approaches.

³⁴ W. J. Baumol and J. G. Sidak, *Toward Competition in Local Telephony*, The MIT Press 1994, Ch. 7.

³⁵ Commission Recommendation 2013/466/EU of 11 September 2013 on consistent non-discrimination obligations and costing methodologies to promote competition and enhance the broadband investment environment (*Official Journal* L251/13 21.9.2013). This recommendation canvases the use of the Equivalence of Input (EoI) and Equivalence of Output (EoO) pricing methodologies as alternatives to LRIC+ price regulation, which have very strong parallels with retail minus price regulation.

³⁶ Ofcom, *Fixed Access Market Reviews: Approach to the VULA margin*, Statement, 19 March 2015, p. 55.

³⁷ ACCC, *Interim access determination for the wholesale ADSL service*, Statement of Reasons, February 2012.

the retailing costs for providers of other similar communications services (for example Telstra's ADSL services).

Another question to resolve is what is the appropriate retail price or prices of the provider from which to subtract the retail margin or margins from. These might be a single standard offer, multiple standard offers or a weighted average of these offers. In the case where only a single service tier is to be regulated, this is likely to be more straightforward. Retail broadband offers sold as part of a bundle with other communications services are not likely to be appropriate as the broadband service may be priced below costs, with the shortfall recovered from the prices of other services in the bundle.

In cases where an access provider does not have any related retail operation, the approach would require the use of market retail offers and estimates of retail costs for similar wholesale and retail or retail-only providers of the services to derive a wholesale price.

A further issue is whether the wholesale price should be specified as a single charge or separated into port and aggregation components (and if so, the appropriate means of deriving these separate component charges given that superfast broadband retail prices are usually expressed as a single monthly charge).

In applying a retail minus approach, we may need to impose ongoing complementary regulatory measures, such as a transparency or equivalence framework for LBAS and SBAS providers' internal costs to ensure they do not engage in behaviour designed to foreclose retail rivals from the market. For example, once a regulated wholesale price has been set for an access provider's base offer it could lower the wholesale costs for its affiliated retail arm by shifting more of these costs to higher speed services that are not price regulated in order to allow the affiliated retail arm to lower the retail price of its base offer with the intention of keeping rival retailers from entering the market.

Questions:

8. *Do you support the application of a retail-minus pricing methodology for the setting of wholesale prices for the SBAS and LBAS? Please provide reasons, linking them to the statutory criteria in subsection 152BCA(1) of the CCA.*
9. *What, if any, ongoing transparency or equivalence measures should the ACCC impose on access providers if it were to adopt a retail minus pricing approach for SBAS and LBAS?*
10. *Please advise if you would be able to provide the ACCC (on a confidential basis if required) with the total annualised retail costs of supplying SBAS and LBAS access and aggregation services as well as the costs expressed per customer line and/or Mbps of traffic?*
11. *Should wholesale prices or retail costs be determined for each individual SBAS and LBAS network or should overall or sample averages be applied for each of these networks? Why?*
12. *What retail broadband prices should be used for implementing the retail minus pricing approach? Please provide reasons, having regard to the statutory criteria in subsection 152BCA(1) of the CCA.*
13. *Please outline any practical implementation issues you think could arise in the application of a retail minus pricing approach for SBAS and LBAS?*
14. *Are there other suitable pricing approaches, including any used overseas, that might be adopted for pricing the SBAS and LBAS? Please outline your reasons for favouring these approaches.*

15. What impacts would your preferred or non-preferred pricing approaches for the SBAS and LBAS have on the provision of retail broadband services?

16. What impacts would your preferred or non-preferred pricing approaches for the SBAS and LBAS have on the deployment of SBAS and LBAS networks?

Interaction with the NBN

The NBN's SAU maximum regulated prices are geographically uniform, reflecting government policy. This means that there is an implicit cross-subsidy from lower cost to serve areas to higher cost to serve areas. To the extent that SBAS and LBAS networks are concentrated in lower cost to serve areas, the SBAS and LBAS networks will have a cost advantage over the NBN given they do not have to fund a similar cross-subsidy. In this context, regulating these networks to cost could give them an advantage in gaining wholesale customers to the extent they overlap with the NBN. If however, they are price regulated in line with (the higher) unadjusted NBN wholesale prices, they have an added incentive to extend their network reach which would be economically inefficient.

There is however the prospect that smaller SBAS and LBAS networks will lack the economies of scale of the NBN, which will mean that they will face at least a partial offsetting cost disadvantage to that held by the NBN as a result of the cross-subsidy.

We note that the overlap between SBAS and LBAS networks and the NBN is currently fairly limited, and will therefore limit the extent to which price regulation of the former networks closer to their actual costs will influence use of the NBN.

SBAS and LBAS components that should be priced

Access providers may recover the costs of providing the SBAS and LBAS from charges other than for access (port) and usage (aggregation). The NBN, for example, also has recurring Network-Network Interface (NNI) charges and a charge for an additional User Network Interface (UNI) as part of its wholesale broadband service.³⁸

Regulating charges equivalent to only the NBN's AVC and CVC charges may provide incentives for SBAS and LBAS providers to raise other charges to excessive levels. We invite views from parties on whether any other charges for accessing the SBAS and LBAS should be subject to regulation.

We also note that there will likely be differences in aggregation requirements between SBAS and LBAS networks, and between the networks of different SBAS and LBAS providers. These differences may be based on the location of POIs or Points of Presences (POPs), access network density and traffic volumes. We are interested in views from parties on how we should take these differences into account in determining access charges for these aggregation components.

We understand that there are wholesale bitstream products supplied where separate port and aggregation charges are not applied. Instead the port charge is supplied on a 'fully-loaded' basis so that the costs of aggregation are included in the port charge. We are interested to know to what extent SBAS and LBAS are primarily priced with separate port and aggregation components and whether this decision is influenced by the geographic location of end users relative to the POI.

³⁸ NBN, Product Description NBN Co Ethernet Bitstream Service, Wholesale Broadband Agreement.
http://www.nbnco.com.au/content/dam/nbnco2/documents/sfaa-wba2-product-catalogue-nebs-prod-desc_20160630.pdf

Questions:

17. Are there any other price components for the SBAS and LBAS services that should be price regulated in addition to port and aggregation charges currently regulated?
18. Do you charge (or are you charged) for port and aggregation services separately and what factors determine whether this charge is imposed separately?
19. What aggregation elements do you require as an access seeker of the SBAS or LBAS?
20. What aggregation elements do you supply as an access provider of the SBAS or LBAS?
21. What factors need to be taken into account in determining regulated aggregation charges for the SBAS and LBAS? Should they differ between LBAS and SBAS or particular providers or classes of providers?
22. Do any of your answers to questions 17 to 21 above change on whether an adjusted benchmarking or a retail minus pricing approach is adopted for the LBAS or SBAS? If so, please outline how.

4. Other economic and technical issues

This section discusses other economic and technical issues which may affect the legitimate business interests of access providers supplying SBAS and LBAS services, as well as efficiency and market entry considerations for access seekers.

In undertaking the SBAS declaration inquiry two major issues for further investigation arose. These relate to:

- *Compliance costs for smaller providers and the likelihood of retail entry on these providers' networks* – the SBAS declaration inquiry final decision stated that while it was in the LTIE to declare an SBAS, it recognised that there were costs of complying with the declaration and that these costs may be disproportionately burdensome for some small providers.³⁹ On the flipside, RSPs willingness to enter markets may be restricted due to small addressable markets on smaller scale networks, increased costs associated with multiple interconnections (with access providers) and inconsistent product constructs between access providers.⁴⁰
- *Differential treatment of the Telstra FAB service* – Telstra's supplies FAB service on its South Brisbane and Velocity networks, which was developed to function within its' copper-based public switched telephone network (PSTN) network architecture and ordering and business systems. Because of this, pricing of the FAB in the SBAS IAD is benchmarked to regulated wholesale ADSL prices and differs significantly from the NBN-benchmarked non FAB service in the SBAS IAS. The FAB has also only been supplied where an active voice service is also supplied to the end-user.

We consider that these matters should be more fully considered in this FAD inquiry and are outlined in detail below.

4.1. Compliance costs and the likelihood of retail entry

During the SBAS declaration inquiry, we acknowledged that the costs of compliance for some SBAS providers may potentially be higher than any competition gains that would result from regulating SBAS on their networks. In particular the extent to which the wholesale

³⁹ ACCC, Superfast Broadband Access Service Declaration Inquiry – Final Decision, July 2016, p13

⁴⁰ Optus, Public submission to the ACCC draft decision, 4 December 2015, p. 1.

SBAS product would be taken up by RSPs is unclear. Given this factor, we noted the matter would be further considered in the subsequent SBAS FAD inquiry and any IAD.

The IAD, conservatively, exempted all providers who supplied the SBAS and/or LBAS to 20,000 end-users or less. Having adopted this approach, we now seek to further understand

- the likely compliance costs access providers are likely to face in providing access,
- the likelihood of new RSPs entering retail markets to supply superfast broadband services to end-users connected to smaller scale networks, particularly if they face different operability standards, conditions and arrangements between providers.

For some providers, and particularly small providers only offering retail services, declaration and the setting of regulated benchmark prices in an access determination will mean that they must provide wholesale access for the first time. This will have associated set up costs for those network providers to implement wholesale provision, as well as recurrent costs associated with the provision of services to wholesale customers.

Submissions in response to the SBAS declaration draft decision acknowledged the issue of the costs for small vertically integrated providers who currently only operate at the retail level, and noted that these may outweigh the benefits of declaration. A number of small access providers provided submissions on the costs to supply an SBAS non-FAB service and on possible exemptions from the SAO requirements for small providers.⁴¹ All noted their small customer base and sought exemptions either relating to their size or until current investment projects were finalised.

However, we had some concerns with the reliability of the information provided. Specifically:

- the cost information provided in submissions was largely headline figures without disaggregation
- a number of these submitters overstated compliance costs by basing their estimates upon separation obligations (which are outside the scope of the proposed declaration), and/or an assumed requirement that they could only supply a wholesale SBAS product and would need to vacate the retail market(s).

Further, and as noted in the SBAS declaration final decision, a number of other relatively small scale providers (such as Opticomm and OPENetworks) appear to provide wholesale access only and recover their costs via the regulated LBAS price, suggesting that low cost operational arrangements to provide wholesale access are sustainable over the longer term.⁴²

During the SBAS declaration inquiry Optus noted that even if superfast broadband services were declared, interoperability issues between access providers and seekers could limit the participation of RSPs in relevant markets. Optus argued high costs associated with connecting to multiple networks can act as a barrier to entry and delay the supply of superfast broadband products to the national market. Examples of barriers to entry that Optus referred to included:

- Multiple points of interconnection for each access provider
- Different provisioning and assurance arrangements for each provider, and

⁴¹ Pivit, Confidential submission to the ACCC draft decision, 9 December 2015, Clublinks, Confidential submission to the ACCC draft decision, 8 December 2015, Frontier Networks, Public submission to the ACCC draft decision, 4 December 2015, Spirit Telecom, Public submission to the ACCC draft decision, 4 December 2015.

⁴² ACCC, *Superfast broadband access service declaration inquiry – draft decision*, 2015, p. 27.

- Different wholesale product constructs between providers.⁴³

Optus also noted that even if the costs of multiple interconnection arrangements and interfaces were not prohibitive, the presence of 'niche' wholesale product constructs and price points that differ from NBN Co's product constructs and prices act as a barrier to entry.⁴⁴

Optus therefore recommended that the ACCC set price and non-price terms of access consistent with the product suite developed by NBN Co, including common provisioning and assurance systems.⁴⁵ In this regard, Optus argues that any costs associated with adopting these common arrangements should be borne by the access provider, consistent with other regulation of bottleneck infrastructure under Part XIC.

However, we note that small access providers may face substantial costs in adopting the same product constructs, provisioning and assurance systems as the NBN and other large access providers, relative to the size of their operations. While Optus's view is that these different product constructs and systems are manifestation of the monopoly power of such operators,⁴⁶ we note it is possible that such different arrangements have arisen out of the legitimate business interests of the smaller access providers and the efficient operation of their networks and systems based on the scale of their operations and the technology originally implemented.

We therefore seek submissions from parties on the compliance costs they will, or do, face in supplying the SBAS and/or LBAS. In particular, we seek information on the one-off implementation costs, such as the development of operating and ordering and provisioning systems for the SBAS and/or LBAS, as well as estimates of the likely ongoing costs for access providers. We also invite submissions as to how these costs may differ between small scale and large scale providers (for example, a smaller scale operator may be able to run its wholesale operations through the use of basic record keeping and billing methods and a single or partial staff member).

We are interested to know if there any thresholds that must be met (for example, size of addressable market (or submarket) before an RSP would consider obtaining the SBAS or LBAS from a given network? We also seek views on the extent to which operating standards, assurance systems and business interfaces can differ between providers, the reasons for adopting different standards, how these may act as a barrier to entry into retail markets by access seekers and the costs to SBAS and LBAS providers of implementing product constructs and systems/interfaces consistent with the NBN.

Questions:

23. *What are the compliance costs to access providers of supplying an LBAS?*
24. *What are the likely compliance costs to access providers of supplying an SBAS? Do they differ from those faced by LBAS suppliers?*
25. *Do the compliance costs for supplying a SBAS/LBAS vary according to the size and or location of the telecommunications network on which they are supplied? Please outline how and why these costs vary.*
26. *Of the costs discussed above which of them are one-off costs and which are recurrent? (Please itemise costs against systems/software changes, equipment purchases, staffing*

⁴³ Optus, public submission to the ACCC draft decision, 4 December 2015, pp. 3-4

⁴⁴ Optus, Public submission to the ACCC draft decision, 4 December, p.4.

⁴⁵ Optus, Public submission to the ACCC draft decision, 4 December 2015, p.5.

⁴⁶ Optus, Public submission to the ACCC draft decision, 4 December 2015, p.5.

costs etc. Parties should also specify the type of ordering and other business systems they would implement/use in order to provide a wholesale service)

- 27. Is it appropriate to put in place transitional arrangements for new SBAS/LBAS pricing? Why, and how does this relate to the statutory criteria in subsection 152BCA(1) of the CCA? What transitional arrangements (if any) should be implemented?*
- 28. Are there any barriers to entry into relevant retail markets and what are they?*
- 29. Are there thresholds that must be met in order to justify entry into retail markets or submarkets supplied particular superfast networks? What are these thresholds and how do they affect entry decisions?*
- 30. To what extent do you consider the location of POIs, provision and assurance arrangements and wholesale product constructs differ between different superfast networks and to what extent do they act as barriers to entry into associated retail markets or submarkets? Please outline any additional costs each of the factors impose on access seekers seeking to acquire the SBAS/LBAS on these networks?*
- 31. Are there any other barriers to entry on non-NBN superfast networks and what are they? Please outline the extent to which they differ from arrangements or standards used by NBN Co and the extent to which they act as a barrier to entry.*
- 32. Do you consider it appropriate for any SBAS/LBAS FAD terms to mandate consistent arrangements or standards with the NBN? Why? How do these relate to the subsection 152BCA(1) statutory criteria?*
- 33. What would be the costs faced by access providers in adopting consistent arrangements or standards with the NBN. Please itemise these costs. What would be their effect on the legitimate business interests of the access provider and other efficiency and competition considerations?*

4.2. Differential treatment of Telstra's FAB product

As discussed above, the SBAS declaration specifically includes a Telstra's FAB service, which is a separate limb to the more general SBAS service description. Telstra supplies the FAB service over its South Brisbane and Velocity Estate networks, and this service uses a Layer 2 tunnelling protocol that functions within Telstra's copper-based (PSTN) architecture, ordering and business systems. Telstra also requires an active voice product to be supplied on the line (to the end-user) in order to supply the FAB service.

In its final SBAS declaration decision, we incorporated the FAB service (as currently supplied using the Layer 2 tunnelling protocol) into the SBAS service description. This was to ensure that end users would receive some benefit from increased competition while also acknowledging that it would not promote the LTIE to declare the SBAS in a way that required Telstra to undertake significant network investments to modify the supply of the FAB service when ultimately the South Brisbane and Velocity estate networks would be transferred to NBN Co.

We also accepted that the commercial supply of the FAB SBAS service is on a similar basis to the wholesale ADSL service and the wholesale line rental (WLR) service. This reflects that Telstra's FAB service has been developed to function within Telstra's PSTN network architecture and ordering and business systems. On this basis, we assessed that the regulated wholesale ADSL prices in the 2015 FAD were the best available prices on which to benchmark the SBAS FAB service in the SBAS IAD.

As part of making our FAD, we are seeking parties' views on the ongoing suitability of benchmarking SBAS FAB prices to the wholesale ADSL FAD prices – particularly since the

wholesale ADSL prices (in total) are considerably higher than the NBN prices against which other SBAS prices are benchmarked. In the SBAS declaration inquiry Telstra noted that the Layer 2 FAB service it offers network areas is different to the Layer 2 bitstream service incorporated within the more general SBAS service description. Telstra stated that if it were required to develop a Layer 2 bitstream service consistent with the general service description, it would cost Telstra at least [c-i-c starts] [REDACTED] [c-i-c ends] to transform its FAB product to an Ethernet Layer 2 product (like that supplied by NBN Co), and to remove the requirement for an active voice service to be supplied. However, in providing this estimate, Telstra did not separate out or itemise the costs for transforming to a Layer 2 Ethernet protocol as opposed to supplying a FAB service without an active voice service.⁴⁷

We note that the provision of an active voice service was considered necessary by Telstra to supply a wholesale ADSL service, in order to allow for testing of the copper line for suitability/availability of a line. However, it is not clear that this is necessary where the broadband service in question is supplied over a fibre line rather than a copper one. Particularly since such a requirement does not operate with respect to broadband services on other fibre networks. In this regard, we seek submissions on whether it would be possible to supply a 'naked' FAB service without requiring the supply of a voice product on the line and what the likely costs of doing this would be.

That said, we are mindful that Telstra built the FAB service onto its existing operating support and business support systems, which are likely linked to voice provision given their legacy nature. We therefore seek views on whether an 'allowance' or additional charge should be applied to the FAB service prices in the FAD, to allow Telstra to recover the reasonable costs of providing the FAB while at the same requiring it to supply the FAB on an unbundled or 'naked' basis.

Questions:

34. *Is it possible for Telstra supply a superfast broadband service in its South Brisbane and Velocity estate networks where no active voice service is present?*
35. *What costs would Telstra face in supplying a superfast broadband service on these networks where no active voice capacity was present?*
36. *What costs would Telstra be likely to face in transforming the current FAB service to a Layer 2 Ethernet protocol service?*
37. *If a 'naked' FAB service could be provided, should the ACCC put in place some type of charging to allow Telstra to recover the reasonable costs of operating its legacy copper-based systems to supply a FAB? Please specify what these costs would be – including the extent to which they are common costs.*
38. *Would RSPs with customers in Telstra's South Brisbane and Velocity Estate Networks or that are considering supplying customers in these areas supply services to customers on these networks if Telstra could supply an SBAS without an active voice capacity present?*

4.3. Other issues

A further option we are considering, given the current difference between the regulated SBAS FAB prices and those for non-FAB services (noting the current much higher aggregation charge relative to the unadjusted NBN aggregation charge in particular), is whether there is a need to use transitional arrangements, for example, a price 'glide path'.

⁴⁷ Telstra, *Response to the Commission's Superfast Broadband Access Service Declaration Inquiry – Draft Decision Confidential version*, 4 December 2015, pp.16-19.

We seek submissions on the appropriateness of such an approach taking into account the costs likely to be faced by Telstra in supplying the declared services and other statutory criteria.

There may also be circumstances in which the use of similar arrangements could be considered for other network operators – for example, small scale operators not currently subject to wholesale price regulation.

We note that for a mobile services (MTAS) pricing principles decision in 2004, we adopted a 'glide-path' methodology to help ease the transition costs of mobile operators from their existing regulated prices to the new regulated prices by allowing a step down in access prices over a number of years to reach a specified target price.⁴⁸

Questions:

39. *Should the ACCC consider transitional arrangements, such as the use of a glide path, for the pricing Telstra FAB services once it has determined the final regulated charges that should apply to these networks under the SBAS FAD?*
40. *Are there any costs relating to the Telstra FAB service prior to its transfer to the NBN that the ACCC should be aware of in setting transitional arrangements?*
41. *What costs will be incurred by non-Telstra network providers that would warrant transitional arrangements for these providers in applying the final regulated charges under the SBAS FAD?*

⁴⁸ ACCC, *Mobile Services Review – Mobile Terminating Access Service*, June 2004,

5. Non-price terms and conditions

This section discusses the non-price terms and conditions (NPTCs) that can be considered for the SBAS and LBAS FADs.

There are various types of non-price terms and conditions that could be included in an FAD. These can include:

- standard commercial terms, such as billing, creditworthiness and dispute resolution
- limitations or restrictions on the supply of the service, including limitations
- restrictions on use of the Service for resale or other specified purposes, or
- operational or technical aspects of the service, such as the points of interconnection.

Our general approach to making an FAD has been to address the key commercial terms of access that would facilitate the commercial supply of the service to occur, and to base these upon a set of model terms. In 2014-2015, we reviewed the NPTCs which were to be applied to declared services.

Specifically, in 2015, we set non-price terms and condition in FADs for the following services⁴⁹:

- fixed line services (including the wholesale ADSL service)
- the mobile terminating access service (MTAS) and
- domestic transmission capacity service (DTCS).

A final report now provides a list of general commercial and service specific conditions that can be utilised in subsequent FADs.⁵⁰

We propose to include non-price terms both in a new FAD for LBAS and the SBAS FAD, which will largely be consistent with the non-price terms already specified in the current LBAS FAD and SBAS IAD determinations.

5.1. LBAS FAD non-price terms and conditions

The current non-price terms and condition for the LBAS FAD are set out in Schedules 2 to 6 of the *Final Access Determination No. 2 of 2012 (LBAS)*, and include:

- (a) billing and notifications
- (b) creditworthiness and security
- (c) general dispute resolution procedures
- (d) confidentiality provisions
- (e) suspension and termination

⁴⁹ ACCC, Telecommunications Final Access Determination Inquiries - Non-price terms and conditions - Final decision for MTAS and views for fixed line services and DTCS, Final Report, August 2015

⁵⁰ ACCC, Telecommunications Final Access Determination Inquiries - Non-price terms and conditions – Appendix to the Final decision for MTAS and views for fixed line services and DTCS, Final Report, August 2015

5.2. SBAS IAD non-price terms and conditions

We set non-price terms in this IAD consistent with those in the recent Domestic Transmission Capacity Service FAD. The non-price terms and conditions in the current SBAS IAD are set out in Schedules 2-10 of the *Interim Access Determination No.1 of 2016 (SBAS)* and include:

- (a) billing and notifications
- (b) creditworthiness and security
- (c) general dispute resolution procedures
- (d) confidentiality provisions
- (e) suspension and termination
- (f) liability and indemnity
- (g) communication with end-users
- (h) network modernisation and upgrade notice periods
- (i) changes to operating manuals
- (j) recourse to regulated terms.

We invite views on whether the current NPTCs for the LBAS FAD and the SBAS IAD should continue.

Questions:

42. *Should all the non-price terms for the LBAS FAD and SBAS IAD be continued? If not, which terms be removed and on what basis?*

43. *Do you support non-price terms and conditions applying uniformly to LBAS and SBAS? If not, which terms should differ, and what are your reasons for recommending this?*

5.3. Other non-price terms and conditions

The LBAS FAD included service specifications with respect to the use of data and voice ports on a network termination device at the end-user premises. This was not included in the SBAS IAD because of the range of different network configurations that can be used to supply the SBAS (e.g. FTTB, FTTN) and the potential for end-users to self-supply their own network termination devices. We seek parties' views on whether specifications for the use of these ports should continue to be included in any FAD for the LBAS and/or whether they should also be specified in a FAD for the SBAS. If parties consider they should be specified for the SBAS, we invite the submission of specific drafting for their inclusion, along with reasons why such specifications are necessary.

Questions:

44. *Should the ACCC include in LBAS and/or SBAS service specifications the use of data and voice ports on a network termination device at the end-user premises? Please provide reasons.*

45. *What, if any, other service specifications should be included in the LBAS and/or SBAS FAD? Please provide reasons.*

6. Exemptions

This section sets out the issues that we must consider in a FAD for exempting an access provider or providers from the SAOs.

Under paragraph 152BC(3)(h) of the CCA we can include terms and conditions in an access determination which provide that any or all of the SAOs do not apply to a carrier or carriage service provider either unconditionally or subject to such conditions and limitations as are specified in the FAD.⁵¹ The access determination can make provisions for these conditions to apply to different carriers or access seekers or classes of carriers or access seekers.⁵² We cannot exempt LBAS access providers from the SAOs for delivery of a Layer 2 bitstream service.⁵³

In making the SBAS IAD, we exempted from the SAOs:

- Small scale access providers who supply the SBAS and/LBAS to 20,000 end-users or less, (prior to fully considering the issue in this inquiry)
- Supply of the SBAS on TransACT's FTTN (VDSL) network in the ACT and its HFC networks in parts of regional Victoria (now owned by TPG). This was to provide a suitable transition period to allow TPG/TransACT to transform its wholesale service from a Layer 3 product to a Layer 2 product.

6.1. Small scale access providers

In the SBAS declaration inquiry final decision, we concluded that superfast broadband services supplied on all networks display characteristics of natural monopolies, irrespective of their geographic footprint or subscriber base. Consequently we declared the SBAS with respect to all providers – subject to exclusions for networks already subject to regulation (or which soon will be)⁵⁴ and those services supplied where competition appears to be effectively competitive.⁵⁵

In the SBAS IAD, we exempted from the SAOs, for the period of the IAD, those SBAS suppliers who supply a SBAS or LBAS to 20,000 or less end-users.⁵⁶ As discussed in Section 5.1, we took a conservative approach in this regard, mindful of the potential risk that compliance for an individual small scale provider could be disproportional to any competition and efficiency benefits that could follow from declaration and price regulation of the SBAS. However, additional information on the likely compliance costs for small scale operators is now sought from interested parties (as outlined in section 5.1). And, based on this information and relevant considerations, we seek views on whether an exemption from the SAOs should be maintained in the longer term in the SBAS and/or LBAS FAD for smaller scale operators – and what form any such exemption should take.

We seek views on whether any other exemptions that should be provided for in the FAD, noting that we can exempt from the SAOs:

- Different carriers or CSPs, or
- Different classes of carriers and CSPs, or

⁵¹ Section 152BC(3)(h)(ii) of the CCA

⁵² Section 152BC(5) of the CCA

⁵³ Section 152(4AA) of the CCA

⁵⁴ Specifically, the NBN, HFC networks to be transferred to NBN Co, the LBAS and the DTCS.

⁵⁵ ACCC, *Superfast broadband access service declaration inquiry – final decision*, 2016, p.v.

⁵⁶ Interim Access Determination No.1 2016 (SBAS), clause 5

- Different access seekers, or
- Different access providers.

Questions:

46. Is an exemption of small providers from the application of the SAOs, as set out in the SBAS IAD, appropriate? Please provide reasons.

47. If yes, how should such an exemption operate? Please explain how this exemption relates to the statutory criteria in subsection 152BCA(1).

48. Are there any other exemptions that the ACCC should consider?

7. Commencement and expiry

This section sets out the requirements for when a FAD can commence and expire.

In general a FAD commences on the day specified in the determination as the day on which the determination comes into force, and ceases on the expiry date identified in the determination.⁵⁷ A FAD can be retrospective⁵⁸, can be expressed to commence at a time following the expiry of an existing FAD⁵⁹ or to not commence prior to the commencement of a declaration.⁶⁰

We propose that when FADs for the SBAS and for the LBAS have been developed, they would commence upon publication. A FAD must have an expiry date, which should align with the expiry of the declaration for that service unless there are circumstances that warrant a different expiry date. Because the LBAS declaration does not expire, it is not possible to align the expiry date of the access determination with the expiry of the declaration as envisaged by subsection 152BCF(6) of the CCA.

In specifying an expiry date for the SBAS FAD, we will seek to appropriately balance the need for sufficient stability and certainty to support industry investment and planning, and the potential for the FAD to fall out of step with industry changes.

The declaration for the SBAS expires on 28 July 2021. We consider that the FAD for the SBAS should expire when the SBAS declaration expires. This would result in a regulatory period for the SBAS FAD of around four to four and a half years.

We consider that this period would be long enough to provide sufficient stability and certainty to support industry investment planning. If significant concerns about the appropriateness of pricing (or other terms) in the FADs arose during their operation, we could conduct a variation inquiry if necessary.⁶¹

We invite submissions on the appropriate duration for any SBAS or LBAS FAD.

Questions:

49. What is an appropriate duration for each of these FADs?
50. Are there any circumstances that warrant a difference in the expiry dates of the SBAS FAD and the SBAS declaration?
51. Is it appropriate to link the expiry dates for the LBAS FAD and the SBAS FADs? If not why?

⁵⁷ Section 152BCE(1) of the CCA.

⁵⁸ Section 152BCE(2) of the CCA.

⁵⁹ Section 152BCE(1) of the CCA.

⁶⁰ Section 152BCE(4A) of the CCA.

⁶¹ Section 152BCN (2) of the CCA

Appendix A - Consolidated list of questions

Questions:

1. *Should price regulation apply to all SBAS and LBAS wholesale product tiers currently offered or only to the base tier SBAS and LBAS offerings as anchor products? Do you consider a different product tier should be used as the anchor product? Please outline your reasons for this view.*
2. *What are the implications for investment and competition (and therefore the LTIE) if only the base tier SBAS and LBAS offerings are subject to price regulation? How do these relate to the statutory criteria in sub-section 152BCA(1) of the CCA?*
3. *Is it appropriate to benchmark regulated prices for the SBAS and LBAS against the regulated NBN and Telstra's wholesale ADSL charges?*
4. *How do the current regulated wholesale prices (specified by the SBAS IAD and LBAS FAD) compare to the wholesale costs of providing these services? Please provide as much detail as possible.*
5. *What, if any, adjustments should the ACCC make to the SBAS and LBAS IAD prices for these to more accurately reflect the costs of providing the SBAS and LBAS services (for example to reflect different POI locations, higher expected traffic per end-user or diseconomies of scale of smaller networks)?*
6. *Do particular adjustments need to be made across all price components, or only some of the components (e.g. the aggregation charge)?*
7. *Do you have suggestions for how appropriate adjustments might be determined? Please explain how these relate to the statutory criteria.*
8. *Do you support the application of a retail-minus pricing methodology for the setting of wholesale prices for the SBAS and LBAS? Please provide reasons, linking them to the statutory criteria in subsection 152BCA(1) of the CCA.*
9. *What, if any, ongoing transparency or equivalence measures should the ACCC impose on access providers if it were to adopt a retail minus pricing approach for SBAS and LBAS?*
10. *Please advise if you would be able to provide the ACCC (on a confidential basis if required) with the total annualised retail costs of supplying SBAS and LBAS access and aggregation services as well as the costs expressed per customer line and/or Mbps of traffic?*
11. *Should wholesale prices or retail costs be determined for each individual SBAS and LBAS network or should overall or sample averages be applied for each of these networks? Why?*
12. *What retail broadband prices should be used for implementing the retail minus pricing approach? Please provide reasons, having regard to the statutory criteria in subsection 152BCA(1) of the CCA.*
13. *Please outline any practical implementation issues you think could arise in the application of a retail minus pricing approach for SBAS and LBAS?*
14. *Are there other suitable pricing approaches, including any used overseas, that might be adopted for pricing the SBAS and LBAS? Please outline your reasons for favouring these approaches.*
15. *What impacts would your preferred or non-preferred pricing approaches for the SBAS and LBAS have on the provision of retail broadband services?*

16. *What impacts would your preferred or non-preferred pricing approaches for the SBAS and LBAS have on the deployment of SBAS and LBAS networks?*
17. *Are there any other price components for the SBAS and LBAS services that should be price regulated in addition to port and aggregation charges currently regulated?*
18. *Do you charge (or are you charged) for port and aggregation services separately and what factors determine whether this charge is imposed separately?*
19. *What aggregation elements do you require as an access seeker of the SBAS or LBAS?*
20. *What aggregation elements do you supply as an access provider of the SBAS or LBAS?*
21. *What factors need to be taken into account in determining regulated aggregation charges for the SBAS and LBAS? Should they differ between LBAS and SBAS or particular providers or classes of providers?*
22. *Do any of your answers to questions 17 to 21 above change on whether an adjusted benchmarking or a retail minus pricing approach is adopted for the LBAS or SBAS? If so, please outline how.*
23. *What are the compliance costs to access providers of supplying an LBAS?*
24. *What are the likely compliance costs to access providers of supplying an SBAS? Do they differ from those faced by LBAS suppliers?*
25. *Do the compliance costs for supplying a SBAS/LBAS vary according to the size and or location of the telecommunications network on which they are supplied? Please outline how and why these costs vary.*
26. *Of the costs discussed above which of them are one-off costs and which are recurrent? (Please itemise costs against systems/software changes, equipment purchases, staffing costs etc. Parties should also specify the type of ordering and other business systems they would implement/use in order to provide a wholesale service)*
27. *Is it appropriate to put in place transitional arrangements for new SBAS/LBAS pricing? Why, and how does this relate to the statutory criteria in subsection 152BCA(1) of the CCA? What transitional arrangements (if any) should be implemented?*
28. *Are there any barriers to entry into relevant retail markets and what are they?*
29. *Are there thresholds that must be met in order to justify entry into retail markets or submarkets supplied particular superfast networks? What are these thresholds and how do they affect entry decisions?*
30. *To what extent do you consider the location of POIs, provision and assurance arrangements and wholesale product constructs differ between different superfast networks and to what extent do they act as barriers to entry into associated retail markets or submarkets? Please outline any additional costs each of the factors impose on access seekers seeking to acquire the SBAS/LBAS on these networks?*
31. *Are there any other barriers to entry on non-NBN superfast networks and what are they? Please outline the extent to which they differ from arrangements or standards used by NBN Co and the extent to which they act as a barrier to entry.*
32. *Do you consider it appropriate for any SBAS/LBAS FAD terms to mandate consistent arrangements or standards with the NBN? Why? How do these relate to the subsection 152BCA(1) statutory criteria?*
33. *What would be the costs faced by access providers in adopting consistent arrangements or standards with the NBN. Please itemise these costs. What would be their effect on the*

legitimate business interests of the access provider and other efficiency and competition considerations?

- 34. Is it possible for Telstra supply a superfast broadband service in its South Brisbane and Velocity estate networks where no active voice service is present?*
- 35. What costs would Telstra face in supplying a superfast broadband service on these networks where no active voice capacity was present?*
- 36. What costs would Telstra be likely to face in transforming the current FAB service to a Layer 2 Ethernet protocol service?*
- 37. If a 'naked' FAB service could be provided, should the ACCC put in place some type of charging to allow Telstra to recover the reasonable costs of operating its legacy copper-based systems to supply a FAB? Please specify what these costs would be – including the extent to which they are common costs.*
- 38. Would RSPs with customers in Telstra's South Brisbane and Velocity Estate Networks or that are considering supplying customers in these areas supply services to customers on these networks if Telstra could supply an SBAS without an active voice capacity present?*
- 39. Should the ACCC consider transitional arrangements, such as the use of a glide path, for the pricing Telstra FAB services once it has determined the final regulated charges that should apply to these networks under the SBAS FAD?*
- 40. Are there any costs relating to the Telstra FAB service prior to its transfer to the NBN that the ACCC should be aware of in setting transitional arrangements?*
- 41. What costs will be incurred by non-Telstra network providers that would warrant transitional arrangements for these providers in applying the final regulated charges under the SBAS FAD?*
- 42. Should all the non-price terms for the LBAS FAD and SBAS IAD be continued? If not, which terms be removed and on what basis?*
- 43. Do you support non-price terms and conditions applying uniformly to LBAS and SBAS? If not, which terms should differ, and what are your reasons for recommending this?*
- 44. Should the ACCC include in LBAS and/or SBAS service specifications the use of data and voice ports on a network termination device at the end-user premises? Please provide reasons.*
- 45. What, if any, other service specifications should be included in the LBAS and/or SBAS FAD? Please provide reasons.*
- 46. Is an exemption of small providers from the application of the SAOs, as set out in the SBAS IAD, appropriate? Please provide reasons.*
- 47. If yes, how should such an exemption operate? Please explain how this exemption relates to the statutory criteria in subsection 152BCA(1).*
- 48. Are there any other exemptions that the ACCC should consider?*
- 49. What is an appropriate duration for each of these FADs?*
- 50. Are there any circumstances that warrant a difference in the expiry dates of the SBAS FAD and the SBAS declaration?*
- 51. Is it appropriate to link the expiry dates for the LBAS FAD and the SBAS FADs? If not why?*

Appendix B – Detail reference of the FAD assessment requirements

This appendix sets out the relevant legislative framework in relation to access determinations (ADs).

B.1 Content of final access determinations

Section 152BC of the *Competition and Consumer Act 2010* (CCA) specifies what an AD may contain. It includes, among other things, terms and conditions which a carrier or carriage service provider (CSP) is to comply with, the standard access obligations and terms and conditions of access to a declared service.

An AD may make different provisions with respect to different access providers or access seekers.

B.2 Fixed principles provisions

A FAD may contain a fixed principles provision, which allows a provision in an AD to have an expiry date after the expiry date of the FAD.⁶² Such a provision allows the ACCC to ‘lock-in’ a term so that it would be consistent across consecutive ADs.

B.3 Varying final access determinations

Section 152BCN allows the ACCC to vary or revoke an AD, provided that certain procedures are followed.

A fixed principles provision cannot be varied or removed unless the AD sets out the circumstances in which the provision can be varied or removed, and those circumstances are present.⁶³

B.4 Commencement and expiry provisions

Section 152BCF of the CCA sets out the commencement and expiry rules for ADs.

An AD must have an expiry date, which should align with the expiry of the declaration for that service unless there are circumstances that warrant a different expiry date.⁶⁴

B.5 Matters to consider when making FADs

The ACCC must have regard to the matters specified in subsection 152BCA(1) of the CCA when making an AD. These matters are:

- (a) whether the determination will promote the LTIE of carriage services or services supplied by means of carriage services

⁶² Section 152BCD of the CCA.

⁶³ Subsection 152BCN(4) of the CCA.

⁶⁴ Subsection 152BCF(6) of the CCA.

- (b) the legitimate business interests of a carrier or CSP who supplies, or is capable of supplying, the declared service, and the carrier's or provider's investment in facilities used to supply the declared service
- (c) the interests of all persons who have rights to use the declared service
- (d) the direct costs of providing access to the declared service
- (e) the value to a person of extensions, or enhancement of capability, whose cost is borne by someone else
- (f) the operational and technical requirements necessary for the safe and reliable operation of a carriage service, a telecommunications network or a facility, and
- (g) the economically efficient operation of a carriage service, a telecommunications network or a facility.

The subsection 152BCA(1) matters reflect the repealed subsection 152CR(1) matters that the ACCC was required to take into account in making a final determination (FD) in an access dispute. The ACCC interprets the subsection 152BCA(1) matters in a similar manner to the approach taken in access disputes.

Subsection 152BCA(2) sets out other matters that the ACCC may take into account in making FADs in certain circumstances.

Subsection 152BCA(3) allows the ACCC to take into account any other matters that it thinks are relevant.

The ACCC's views on how the matters in section 152BCA should be interpreted for the AD process are set out below.

B.6 Paragraph 152BCA(1)(a)

The first matter for the ACCC to consider when making an AD is 'whether the determination will promote the long-term interests of end-users of carriage services or of services supplied by means of carriage services'.

The ACCC has published a guideline explaining what it understands by the phrase 'long-term interests of end-users' in the context of its declaration responsibilities.⁶⁵ This approach to the LTIE was also used by the ACCC in making determinations in access disputes. The ACCC considers that the same interpretation is appropriate for making the AD for the SBAS and LBAS.

In the ACCC's view, particular terms and conditions promote the interests of end users if they are likely to contribute towards the provision of:

- goods and services at lower prices
- goods and services of a high quality, and/or

⁶⁵ ACCC, *A guideline to the declaration provisions for telecommunications services under Part XIC of the Competition and Consumer Act 2010*, 2016, in particular pp. 28-31.

- a greater diversity of goods and services.⁶⁶

The ACCC also notes that the Australian Competition Tribunal (Tribunal) has offered guidance in its interpretation of the phrase ‘long-term interests of end-users’ (in the context of access to subscription television services):

Having regard to the legislation, as well as the guidance provided by the Explanatory Memorandum, it is necessary to take the following matters into account when applying the touchstone – the long-term interests of end-users:

** End-users: “end-users” include actual and potential [users of the service]...*

** Interests: the interests of the end-users lie in obtaining lower prices (than would otherwise be the case), increased quality of service and increased diversity and scope in product offerings. ...[T]his would include access to innovations ... in a quicker timeframe than would otherwise be the case ...*

** Long-term: the long-term will be the period over which the full effects of the ... decision will be felt. This means some years, being sufficient time for all players (being existing and potential competitors at the various functional stages of the ... industry) to adjust to the outcome, make investment decisions and implement growth – as well as entry and/or exit – strategies.⁶⁷*

To consider the likely impact of particular terms and conditions on the LTIE, the CCA requires the ACCC to have regard to whether the terms and conditions are likely to result in:

- promoting competition in markets for carriage services and services supplied by means of carriage services
- achieving any-to-any connectivity, and
- encouraging the economically efficient use of, and economically efficient investment in:
 - the infrastructure by which listed carriage services are supplied, and
 - any other infrastructure by which listed services are, or are likely to become, capable of being supplied.⁶⁸

Promoting competition

In assessing whether particular terms and conditions will promote competition, the ACCC analyses the relevant markets in which the declared services are supplied (retail and wholesale) and considers whether the terms set in those markets remove obstacles to end-users gaining access to telephony and broadband services.⁶⁹

Obstacles to accessing these services include the price, quality and availability of the services and the ability of competing providers to provide telephony and broadband services.

⁶⁶ *ibid.*, p. 33.

⁶⁷ *Seven Network Limited (No 4)* [2004] ACompT 11 at [120].

⁶⁸ Subsection 152AB(2) of the CCA.

⁶⁹ Subsection 152AB(4) of the CCA. This approach is consistent with the approach adopted by the Tribunal in *Telstra Corporations Limited (No 3)* [2007] A CompT 3 at [92]; *Telstra Corporation Limited* [2006] A CompT at [97], [149].

The ACCC is not required to precisely define the scope of the relevant markets in which the declared services are supplied. The ACCC considers that it is sufficient to broadly identify the scope of the relevant markets likely to be affected by the ACCC's regulatory decisions.

The ACCC's view is that the relevant markets for the purpose of making the AD for the SBAS the relevant markets are the retail and wholesale markets for superfast broadband services – that is fixed line broadband services providing data download rates normally more than 25 Mbps with monthly download limits of 50Gb per month or more.⁷⁰ In terms of the LBAS, the ACCC considers the relevant markets to be the wholesale and retail markets for the supply of fixed line telecommunications services (including broadband and voice services) in geographic areas serviced by network operators subject to the LBAS declaration.⁷¹

Any-to-any connectivity

The CCA gives guidance on how the objective of any-to-any connectivity is achieved. It is achieved only if each end-user who is supplied with a carriage service that involves communication between end-users is able to communicate, by means of that service, with each other end-user who is supplied with the same service or a similar service. This must be the case whether or not the end-users are connected to the same telecommunications network.⁷²

The ACCC considers that this matter is relevant to ensuring that the terms and conditions contained in an AD do not create obstacles for the achievement of any-to-any connectivity.

Efficient use of and investment in infrastructure

In determining the extent to which terms and conditions are likely to encourage the economically efficient use of and investment in infrastructure, the ACCC must have regard to:

- whether it is, or is likely to become, technically feasible for the services to be supplied and charged for, having regard to:
 - the technology that is in use, available or likely to become available
 - whether the costs involved in supplying and charging for, the services are reasonable or likely to become reasonable, and
 - the effects or likely effects that supplying and charging for the services would have on the operation or performance of telecommunications networks.
- the legitimate commercial interests of the supplier or suppliers of the services, including the ability of the supplier or suppliers to exploit economies of scale and scope

⁷⁰ ACCC, *Superfast Broadband Access Service Declaration Inquiry final decision*, 29 July 2016, p.20.

⁷¹ ACCC, *Local bitstream access service - Final access determination - Explanatory statement*, October 2012, p20

⁷² Subsection 152AB(8) of the CCA.

- incentives for investment in the infrastructure by which services are supplied; and any other infrastructure (for example, the NBN) by which services are, or are likely to become, capable of being supplied, and
- the risks involved in making the investment.⁷³

The objective of encouraging the ‘economically efficient use of and economically efficient investment in ... infrastructure’ requires an understanding of the concept of economic efficiency. Economic efficiency consists of three components:

- productive efficiency – this is achieved where individual firms produce the goods and services that they offer at least cost
- allocative efficiency – this is achieved where the prices of resources reflect their underlying costs so that resources are then allocated to their highest valued uses (i.e., those that provide the greatest benefit relative to costs), and
- dynamic efficiency – this reflects the need for industries to make timely changes to technology and products in response to changes in consumer tastes and in productive opportunities.

On the issue of efficient investment, the Tribunal has stated that:

*An access charge should be one that just allows an access provider to recover the costs of efficient investment in the infrastructure necessary to provide the declared service.*⁷⁴

*...efficient investment by both access providers and access seekers would be expected to be encouraged in circumstances where access charges were set to ensure recovery of the efficient costs of investment (inclusive of a normal return on investment) by the access provider in the infrastructure necessary to provide the declared service.*⁷⁵

*...access charges can create an incentive for access providers to seek productive and dynamic efficiencies if access charges are set having regard to the efficient costs of providing access to a declared service.*⁷⁶

B.7 Paragraph 152BCA(1)(b)

The second matter requires the ACCC to consider ‘the legitimate business interests’ of the carrier or CSP when making an AD.

In the context of access disputes, the ACCC considered that it was in the access provider’s legitimate business interests to earn a normal commercial return on its investment.⁷⁷ The ACCC is of the view that the concept of ‘legitimate business interests’ in relation to ADs should be interpreted in a similar manner, consistent with the phrase ‘legitimate commercial interests’ used elsewhere in Part XIC of the CCA.

⁷³ Subsections 152AB(6) and (7A) of the CCA.

⁷⁴ Telstra Corporation Ltd (No. 3) [2007] ACompT 3 at [159].

⁷⁵ *ibid.* at [164].

⁷⁶ *ibid.*

⁷⁷ ACCC, *Resolution of telecommunications access disputes – a guide*, March 2004 (revised) (Access Dispute Guidelines), p. 56.

For completeness, the ACCC notes that it would be in the access provider's legitimate business interests to seek to recover its costs as well as a normal commercial return on investment having regard to the relevant risk involved. However, an access price should not be inflated to recover any profits the access provider (or any other party) may lose in a dependent market as a result of the provision of access.⁷⁸

The Tribunal has taken a similar view of the expression 'legitimate business interests'.⁷⁹

B.8 Paragraph 152BCA(1)(c)

The third matter requires the ACCC to consider 'the interests of all persons who have the right to use the service' when making an AD.

The ACCC considers that this matter requires it to have regard to the interests of access seekers. The Tribunal has also taken this approach.⁸⁰ The access seekers' interests would not be served by higher access prices to declared services, as it would inhibit their ability to compete with the access provider in the provision of retail services.⁸¹

People who have rights to currently use a declared service will generally use that service as an input to supply carriage services, or a service supplied by means of carriage service, to end-users.

The ACCC considers that this class of persons has an interest in being able to compete for the custom of end-users on the basis of their relative merits. This could be prevented from occurring if terms and conditions of access favour one or more service providers over others, thereby distorting the competitive process.⁸²

However, the ACCC does not consider that this matter calls for consideration to be given to the interests of the users of these 'downstream' services. The interests of end-users will already be considered under other matters.

B.9 Paragraph 152BCA(1)(d)

The fourth matter requires the ACCC to consider 'the direct costs of providing access to the declared service' when making an AD.

The ACCC considers that the direct costs of providing access to a declared service are those incurred (or caused) by the provision of access.

The ACCC interprets this matter, and the use of the term 'direct costs', as allowing consideration to be given to a contribution to indirect costs. This is consistent with the Tribunal's approach in an undertaking decision.⁸³ A contribution to indirect costs can also be supported by other matters.

⁷⁸ ACCC, *Access pricing principles—telecommunications*, July 1997 (1997 Access Pricing Principles), p. 9.

⁷⁹ Telstra Corporation Limited [2006] ACompT 4 at [89].

⁸⁰ Telstra Corporation Limited [2006] ACompT 4 at [91].

⁸¹ *ibid.*

⁸² *ibid.*

⁸³ Application by Optus Mobile Pty Limited and Optus Networks Pty Limited [2006] ACompT 8 at [137].

However, the matter does not extend to compensation for loss of any ‘monopoly profit’ that occurs as a result of increased competition.⁸⁴

The ACCC also notes that the Tribunal (in another undertaking decision) considered that the direct costs matter ‘is concerned with ensuring that the costs of providing the service are recovered.’⁸⁵ The Tribunal has also noted that the direct costs could conceivably be allocated (and hence recovered) in a number of ways and that adopting any of those approaches would be consistent with this matter.⁸⁶

B.10 Paragraph 152BCA(1)(e)

The fifth matter requires that the ACCC consider ‘the value to a party of extensions, or enhancements of capability, whose cost is borne by someone else’ when making an AD.

In the 1997 Access Pricing Principles, the ACCC stated that this matter:

*...requires that if an access seeker enhances the facility to provide the required services, the access provider should not attempt to recover for themselves any costs related to this enhancement. Equally, if the access provider must enhance the facility to provide the service, it is legitimate for the access provider to incorporate some proportion of the cost of doing so in the access price.*⁸⁷

The ACCC considers that this application of paragraph 152BCA(1)(e) is relevant to making ADs.

B.11 Paragraph 152BCA(1)(f)

The sixth matter requires the ACCC to consider ‘the operational and technical requirements necessary for the safe and reliable operation of a carriage service, a telecommunications network or a facility’ when making an AD.

The ACCC considers that this matter requires that terms of access should not compromise the safety or reliability of carriage services and associated networks or facilities, and that this has direct relevance when specifying technical requirements or standards to be followed.

The ACCC has previously stated in the context of model non-price terms and conditions, it is of the view that:

*...this consideration supports the view that model terms and conditions should reflect the safe and reliable operation of a carriage service, telecommunications network or facility. For instance, the model non-price terms and conditions should not require work practices that would be likely to compromise safety or reliability.*⁸⁸

The ACCC considers that these views will apply in relation to paragraph 152BCA(1)(f) for the making of ADs.

⁸⁴ See Explanatory Memorandum for the *Trade Practices Amendment (Telecommunications) Bill 1996*, p. 44: [T]he ‘direct’ costs of providing access are intended to preclude arguments that the provider should be reimbursed by the third party seeking access for consequential costs which the provider may incur as a result of increased competition in an upstream or downstream market.

⁸⁵ Telstra Corporation Limited [2006] ACompT 4 at [92].

⁸⁶ *ibid.* at [139].

⁸⁷ ACCC, 1997 Access Pricing Principles, p. 11.

⁸⁸ ACCC, Final Determination – Model Non-price Terms and Conditions, November 2008, p. 8.

B.12 Paragraph 152BCA(1)(g)

The final matter of subsection 152BCA(1) requires the ACCC to consider ‘the economically efficient operation of a carriage service, a telecommunications network facility or a facility’ when making an AD.

The ACCC noted in the Access Dispute Guidelines (in the context of arbitrations) that the phrase ‘economically efficient operation’ embodies the concept of economic efficiency as discussed earlier under the LTIE. That is, it calls for a consideration of productive, allocative and dynamic efficiency. The Access Dispute Guidelines also note that in the context of a determination, the ACCC may consider whether particular terms and conditions enable a carriage service, telecommunications network or facility to be operated efficiently.⁸⁹

Consistent with the approach adopted by the Tribunal, the ACCC considers that in applying this matter, it is relevant to consider the economically efficient operation of:

- retail services provided by access seekers using the access provider’s services or by the access provider in competition with those access seekers, and
- the telecommunications networks and infrastructure used to supply these services.⁹⁰

B.13 Subsection 152BCA(2)

Subsection 152BCA(2) provides that, in making an AD that applies to a carrier or CSP who supplies, or is capable of supplying, the declared services, the ACCC may, if the carrier or provider supplies one or more eligible services,⁹¹ take into account:

- the characteristics of those other eligible services
- the costs associated with those other eligible services
- the revenues associated with those other eligible services, and
- the demand for those other eligible services.

The Explanatory Memorandum states that this provision is intended to ensure that the ACCC, in making an AD, does not consider the declared service in isolation, but also considers other relevant services.⁹² As an example, the Explanatory Memorandum states:

...when specifying the access price for a declared service which is supplied by an access provider over a particular network or facility, the ACCC can take into account not only the access provider’s costs and revenues associated with the declared service, but also the costs and revenues associated with other services supplied over that network or facility.⁹³

⁸⁹ ACCC, Access Dispute Guidelines, p. 57.

⁹⁰ *Telstra Corporation Limited* [2006] ACompT at [94]–[95].

⁹¹ ‘Eligible service’ has the same meaning as in section 152AL of the CCA.

⁹² Explanatory Memorandum, Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2010, p. 178.

⁹³ *ibid.*

B.14 Subsection 152BCA(3)

This subsection states the ACCC may take into account any other matters that it thinks are relevant when making an AD.

The ACCC is of the view that considerations of regulatory certainty and consistency will be important when setting the terms and conditions of the SBAS and LBAS AD.

The ACCC also considers that it should have regard to:

- its previous decisions in relation to the LBAS
- consultation documents and submissions in response to those documents, and
- information provided to the ACCC by stakeholders.

These considerations and documents do not limit the matters that the ACCC may have regard to when making the AD for the SBAS and LBAS.