

4 December 2015

Ms Nicole Ross  
Director  
Communications Group  
Australian Competition and Consumer Commission  
GPO Box 520  
Melbourne VIC 2001

By email: [Nicole.Ross@acc.gov.au](mailto:Nicole.Ross@acc.gov.au)

Dear Nicole,

## Superfast Broadband Access Service declaration inquiry - nbn submission in response to the ACCC draft decision

**nbn** welcomes the opportunity to make a submission in response to the Australian Competition and Consumer Commission's (ACCC's) draft decision to declare a superfast broadband access service (SBAS).

As detailed in **nbn's** public submission to the ACCC dated June 2015, we strongly support the declaration of an SBAS on the basis that it:

- will promote the long term interests of end-users (LTIE);
- is a necessary pre-condition to give effect to the level playing field objectives that underpin the provisions of the *Telecommunications Act 1997* (the Telco Act) in relation to telecommunications networks that are capable of supplying superfast carriage services; and
- is consistent with the Government's policy response to the Vertigan review on this matter.

We therefore support the ACCC's draft decision to declare an SBAS with a technology neutral service description for a period of five years. We also support a service description that makes specific reference to a layer-2 bitstream service and that covers all networks capable of supplying superfast carriage services regardless of the different technological specifications of those networks.

**nbn** requests that if the ACCC is considering any substantial changes to the service description for SBAS, that these changes be subject to further consultation with industry stakeholders.

**nbn** supports the ACCC's draft decision. However, we are concerned that the proposed exemptions to the declaration will not promote the LTIE or the efficient investment in, and use of, broadband infrastructure. In particular, we do not support the following aspects of the ACCC's draft decision:



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- **Exemptions to the declaration:**
  - **Carrier specific exemptions for small network providers** – the declaration should apply to all superfast broadband capable networks that serve residential and business customers, other than the **nbn**<sup>TM</sup> network and existing HFC networks, as this will contribute to a symmetrical approach to regulation of superfast broadband services under Part XIC of the Competition and Consumer Act 2010 (CCA) **[C-I-C]**.
  - **Exemption for superfast broadband networks servicing business customers** – **nbn** submits that the potential technological and economic barriers to entry that the ACCC has identified in respect of residential customers in multi-dwelling complexes also exist in respect of business customers, particularly in business precincts, such as business parks, shopping centres, professional centres and other multi-tenanted business premises. **nbn** submits that the long-term interest of business end-users will be promoted if the declared SBAS includes all superfast broadband capable networks regardless of whether they serve residential or business end-users. **[C-I-C]**
  - **Exclusion of services delivered over superfast broadband networks with speeds of less than 25Mbps** – **nbn** considers that the service description should capture download data transfer rates at Layer 2 of 12 Mbps or more provided over non-**nbn**<sup>TM</sup> superfast broadband networks.

## 1. Proposed exemption for small network providers and superfast broadband networks servicing business customers

The ACCC has invited submissions on the most appropriate exclusions to adopt in the declaration (if any) so as to avoid over-regulating in areas where competition appears to be effective. In this regard, **nbn** submits that the declaration of an SBAS is unlikely to result in a material increase in the regulatory burden faced by providers of superfast broadband services. Indeed, noting the proposed changes to the legislative environment, the declaration of the SBAS (which is designed to complement the requirement for structural separation) is unlikely to materially increase the regulatory burden that will be faced by non-**nbn** operators of superfast broadband networks.

Accordingly:

- It would not be appropriate to exempt operators of small networks from the declaration, on the basis that these networks will effectively constitute an economic bottleneck notwithstanding their smaller size. As noted above, **nbn** does not accept the ACCC's reasoning that declaration may impose a regulatory burden that is "disproportionately heavy on smaller providers" in light of the broader structural changes that these providers are aware they will be required to implement and the fact that some of these smaller networks are operated by well-established players with significant resources. This is particularly the case in relation to new developments and other locations that are served by a single small network. **[C-I-C]**.





- Superfast broadband networks that serve exclusively business customers should also be subject to the declaration. **nbn** is not convinced that business services in metropolitan, regional and rural areas are effectively competitive. While enterprise and government customers and larger businesses in CBD areas are well served by multiple fibre providers, this is not necessarily the case outside of CBD areas. This is because the potential technological and economic barriers to entry that the ACCC has identified in respect of residential customers in multi-dwelling units also exist in respect of business customers located in business parks, shopping centres, professional centres and other multi-tenanted business premises. **[C-I-C]**

In summary, **nbn** submits that the LTIE will be best served by all superfast broadband capable networks being subject to declaration irrespective of size or whether they serve residential or business end-users. To this end, on the question of whether there is also a need for a geographic delineation in the business service exemption in the SBAS declaration, **nbn** reiterates that it supports the SBAS being declared on a nationwide basis to ensure that all non-**nbn**<sup>™</sup> superfast broadband services are subject to competitive supply at the retail level. This would:

- minimise the possibility of regulatory arbitrage and circumvention if the alternative provider of superfast broadband access services were to be allowed to deliver services outside of a pre-defined geographic footprint; and
- **[C-I-C]**.

If the ACCC is going to proceed with its stated preference of exempting business customers from the scope of the SBAS declaration notwithstanding **nbn**'s submission, then **nbn** submits that the scope of this exemption will need to be extremely narrow. **[C-I-C]**. An exemption that only excluded CBD areas from the scope of the declaration would be an example of a sufficiently narrow exemption.

## 2. Proposed Service Description for the SBAS

**nbn** supports the use of a technologically neutral approach to the service description for the SBAS to capture all services to residential and business customers that are capable of delivering superfast broadband services, including vectored VDSL, G.fast based services and any future technology variants. However, this should include lower speed tiers (i.e. below 25 Mbps on the downlink), to ensure that there is no gap in the regulatory approach between **nbn** and non-**nbn** services and that access seekers on non-**nbn** superfast broadband networks are capable of offering competitive choice in relation to entry level services to marginal subscribers or subscribers with basic broadband requirements.

**nbn** submits that constraining the service description in a way that would limit the statutory obligation to supply under section 152AR of the CCA to services above a particular speed (or speed combination) would be counterproductive and would potentially allow the access provider to circumvent the scope of the declaration. An appropriate way forward would be to ensure that the service description operates to cover potential entry level offerings at lower speed tiers (e.g. below 25 Mbps on the downlink), as well as the higher speed tier services available over superfast broadband networks and which are currently seen today in the retail market.

**[C-I-C]**



## ACCC FAD should have regard to nbn's access price, terms and conditions

Further to the above, the principle of regulatory symmetry suggests that when making a Final Access Determination for the declared SBAS the ACCC should have regard to **nbn's** access price terms and conditions. That is, to the greatest extent possible, the access price terms and conditions that will apply to the declared SBAS should be comparable to those of **nbn**.

If you have any queries regarding this submission please do not hesitate to contact James Endres at [jamesendres@nbnco.com.au](mailto:jamesendres@nbnco.com.au).

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Caroline Lovell', is positioned above the typed name.

Caroline Lovell  
Chief Regulatory Officer