



Submission in response to ACCC
Draft Decision

**Superfast Broadband Access Service
Declaration Inquiry**

PUBLIC VERSION

December 2015

INTRODUCTION

1. Optus welcomes the Draft Decision to declare a superfast broadband access service (SBAS) as a Layer 2 fixed-line broadband service. This applies to services with a download rate that is normally greater than 25Mbps.
2. While it has been acknowledged that the proposed SBAS is very similar to other superfast carriage services supplied on a declared basis through a number of regulatory mechanisms, Optus agrees with the observation in the Draft Decision that *“declaring the SBAS will also close a number of gaps and promote consistency of regulation across all networks supplying superfast broadband services.”*¹
3. Optus submits that the starting position should be that all providers of SBAS are declared as every SBAS provider will be a local monopoly with end-users facing no or limited wholesale fixed network choice or retail competition.
4. There are obvious exceptions to this;
 - (a) Superfast networks that are over-built by NBN Co networks;
 - (b) Superfast networks used to provide business services (i.e. non NBN services);
 - (c) Networks to be transferred to NBN.
5. The last two have been acknowledged in the Draft Decision. Optus recommends that the Declaration make clear that the access obligations only apply in so far as non-NBN Co SBAS networks have not been overbuilt by a network provided by NBN Co.
6. The willingness of retail providers to connect to multiple wholesale SBAS networks may also be restricted by several factors, including limited revenue potential due to restricted addressable markets and increased costs associated with multiple network interconnections. In addition, there is often inconsistent wholesale product constructs which are a problem for offering national retail products.
7. Together, these factors limit the commercial benefits for RSPs to provide services over small-scale SBAS networks. Should the ACCC wish to ensure that declaration of the SBAS results in real benefits to end-users, it should ensure the terms of access in the resulting Access Determination addresses inconsistencies between NBN Co and small-scale SBAS networks.

SBAS NETWORKS ARE LOCAL MONOPOLIES

8. The economics of superfast fixed-line broadband networks results in first-movers acquiring monopolies for premises connected to the superfast broadband network. Overlapping superfast broadband networks will be the exception rather than the norm.
9. Optus supports the competition assessment that the *“potential technological and economic barriers to entry mean it is unlikely to be economically efficient for multiple infrastructure providers to deploy superfast broadband networks in the same serving area.”*² Further, Optus agrees with the observation that these local monopolies have the incentive and opportunity to

¹ ACCC, 2015, Superfast Broadband Access Service declaration inquiry, Draft Decision, November, p.v

² ACCC, 2015, Superfast Broadband Access Service declaration inquiry, Draft Decision, November, p.v

impose monopoly rents and, where they are vertically integrated, discriminate in favour of themselves in downstream retail markets.³

10. As such, all providers of SBAS – irrespective of size – should be subject to access regulation. This will ensure that end-users connected to non-NBN Co superfast broadband networks will not be disadvantaged compared to end-users connected to networks provided by NBN Co.
11. Optus, therefore, does not support adopting exemptions for small providers of SBAS. End-users of these small providers will still be subject to the potential for monopoly rents and discrimination in related markets due to the presence of local monopoly power. Even small providers who have deployed SBAS networks will benefit from the economic reality that network competition is not viable.
12. The ACCC should focus on maximising benefits to end-users of these local SBAS networks. Small SBAS providers should not be allowed to extract monopoly rents from end-users that are ‘forced’ to acquire services merely due to a geographical lottery. Optus further notes that should these small SBAS providers operate in a manner consistent with an effective competitive market, the small providers should be offering wholesale products, interfaces and prices that are consistent with NBN Co in order to minimise costs for RSPs. In so far as this does not occur, it can be reasonably inferred that the SBAS providers are acting consistent with their local monopoly market power.
13. Finally, Optus agrees with the Draft Decision that declaration will not promote the LTIE where there are a number of different networks supplying premium superfast broadband services in an area.⁴ Further, Optus supports the removal of regulation on SBAS networks that have been over-built by NBN Co. SBAS networks facing competition with NBN Co supplied networks would have an incentive to operate in an effectively competitive manner.

MULTIPLE NETWORKS LIMITS COMPETITION

14. Optus notes the observation in the Draft Decision that a limited number of RSPs are connected to multiple small SBAS networks.⁵ Optus is concerned that end-users connected to non-NBN Co will face limited retail competition due to the high costs faced by RSPs to interconnect and provision multiple wholesale providers. This is due to:
 - (a) Limited commercial benefits due to small addressable market;
 - (b) High costs associated with;
 - (i) Multiple interconnection arrangements;
 - (ii) Inconsistent provisioning and assurance systems; and
 - (iii) Different wholesale product constructs.
15. First, and foremost, there is little commercial benefit available from SBAS networks that cover limited geographic regions. The ACCC has correctly adopted a national market definition for retail and wholesale markets in the Draft Decision.⁶ This of course also means that the retail products supplied by RSPs (like Optus) are a uniform national retail product. The benefits

³ ACCC, 2015, Superfast Broadband Access Service declaration inquiry, Draft Decision, November, p.vi

⁴ ACCC, 2015, Superfast Broadband Access Service declaration inquiry, Draft Decision, November, p.35

⁵ ACCC, 2015, Superfast Broadband Access Service declaration inquiry, Draft Decision, November, s.4.2.4

⁶ ACCC, 2015, Superfast Broadband Access Service declaration inquiry, Draft Decision, November, p.24

accruing to national RSPs from small networks are generally not sufficient to justify the extra costs involved in accessing those networks.

16. These benefits are extinguished by the extra costs involved in interconnecting with many small wholesale SBAS networks. First, RSPs are required to set-up different points-of-interconnection to connect to each SBAS provider. Second, RSPs incur substantial product development costs due to inconsistent wholesale provisioning and assurance systems of the different SBAS providers. And third, the wholesale product constructs often differ across the different wholesale SBAS providers. Optus agrees with the observation that RSPs face difficulties in offering services on small networks, which:

... may be due to the costs and logistical difficulties associated with on-boarding on these networks, such as integration and interoperability of systems. It may also be due to the relatively small addressable customer bases on these networks and the prospects of low revenue yields.⁷

17. In the current market, small SBAS providers are not making it attractive for RSPs to provide services. Non-NBN Co SBAS networks would, if subject to effective competition, develop wholesale product constructs and business interfaces consistent with minimising the costs faced by RSPs; most likely to be consistent with the approach by NBN Co. This is because such an approach would maximise the number of RSPs that would commercially choose to connect to the SBAS wholesale network – and hence maximise revenue. However, in the presence of local monopoly power, it may be optimal for SBAS providers to limit the number of RSPs connected in order to profit maximise.
18. Incentives to operate in a manner inconsistent with competitive markets are highest for vertically-integrated SBAS providers – that is, Telstra, iiNet and TPG. In Optus' experience even where SBAS providers comply with all existing regulations (including separation), it may still not be viable for third parties to access those networks due to issues surrounding non-price terms and conditions.
19. In saying that, however, even if the costs associated with multiple interconnection arrangements and multiple interfaces were not a barrier to entry, the presence of niche wholesale product constructs and price points different from that offered by NBN Co is problematic.
20. Further, the ad hoc enforcement of the Australian Consumer Law provisions for retail products based on NBN Co networks presents another challenge when trying to integrate multiple wholesale inputs into one national retail product. The integration of multiple networks under NBN Co combined with the ACCC's current approach to enforcement has made it difficult to prepare retail constructs based on NBN Co supplied wholesale inputs. Adoption of wholesale inputs that are different to NBN Co inputs would make it more challenging to comply with the ACCC's demands in relation to the ACL. In effect, connecting to non-NBN Co SBAS providers presents a high legal and reputational risk preventing many RSPs from doing so. Optus would welcome further efforts to better align the ACCC's ex post enforcement of the ACL for retail products using regulated wholesale inputs and the ACCC's ex ante regulation of the same wholesale inputs under Part XIC. A consistent approach to ex ante regulation and ex post enforcement should be a consequence of having a combined competition and telecommunications regulator.
21. Finally, the ACCC should also be cognisant that SBAS providers may face incentives to shift costs associated with a common interface to NBN Co. For instance, non-NBN Co providers may argue that the costs associated with developing interfaces, products, and price points, consistent with

⁷ ACCC, 2015, Superfast Broadband Access Service declaration inquiry, Draft Decision, November, p.41

NBN Co's offering – which makes the outcome consistent with effectively competitive outcomes – should be borne by NBN Co or Government. Such a claim would be inconsistent with the regulation of bottleneck infrastructure under Part XIC. As noted above, it is the exploitation of local monopoly power that enables non-NBN Co SBAS providers to offer inconsistent and costly interfaces and solutions. Access regulation should be designed to remove this exploitation. The only cost incurred by the SBAS provider is foregone monopoly rents – it is not a cost that should be borne by other providers or end-users.

POSSIBLE WAY FORWARD

22. Optus supports the view that *“the extent to which the benefits of competition will flow through to end-users depends on access seekers adopting the declared service and using it to supply retail superfast broadband services.”*⁸
23. To do this, Optus recommends that the ACCC:
 - (a) Set price and non-price terms of access consistent with the product suite developed by NBN Co, including common provisioning and assurance systems; and
 - (b) Adopt a consistent approach to ex ante regulation of wholesale product inputs and ex ante enforcement of retail products that rely on declared wholesale inputs.
24. But the ACCC needs to also be aware of:
 - (a) Avoiding imposing unnecessary costs on NBN Co which should be borne by SBAS providers; and
 - (b) Ensuring integrated SBAS providers do not discriminate in favour of their own downstream retail products.

⁸ ACCC, 2015, Superfast Broadband Access Service declaration inquiry, Draft Decision, November, p.35