



Submission by TPG Telecom Limited (TPG)

to

Australian Competition and Consumer Commission (ACCC)

Superfast Broadband Access Service - Declaration inquiry  
Draft Decision

PUBLIC VERSION

1. TPG does not support the ACCC's position, as set out in its draft decision (**Draft Decision**) to declare a superfast broadband access service (SBAS) as a wholesale Layer 2 fixed-line broadband service with a download data rate that is normally greater than 25 megabits per second.
2. TPG disagrees with the following conclusions reached by the ACCC in the Draft Decision that:
  - (a) the long term interests of end users (**LTIE**) will be promoted by the declaration of SBAS;
  - (b) competition in the downstream markets for retail superfast broadband services on reasonable terms requires the declaration of SBAS;
  - (c) promotion of the economically efficient use of telecommunications infrastructure requires the declaration of SBAS;
  - (d) all superfast broadband services are likely to display natural monopoly characteristics; and
  - (e) the technical and economic barriers to entry mean that it is unlikely to be economically efficient for multiple infrastructure providers to deploy superfast broadband networks in the same area.
3. TPG does not consider a SBAS declaration to be in the LTIE for the reasons set out below.

#### *Discouraging Investment*

4. The LTIE of telecommunications services are best promoted by infrastructure based competitors bringing technologically and commercially innovative products to the market. This is a widely held view that the ACCC has accepted on many occasions.
5. The threat of regulatory burdens on the builders of such infrastructure, particularly those without significant market power, acts as a serious detriment to investors who would consider investing capital to supply such products. TPG poses the question of whether investors into Optus, Hutchison or Vodafone would have invested billions of dollars building out mobile networks had there been expectations that the value of those investments would be subjected to (a) regulated pricing (b) the costs of establishing regulated B2B interfaces and (c) additional corporate overhead in managing regulatory requirements. TPG believes that they would have been severely discouraged from doing so and the competitive mobile environment in Australia would be substantially diminished.
6. Indeed, Telstra has from time to time signalled its concerns about regulatory burdens before committing capital to new infrastructure, including most recently in connection with its 4G network.<sup>1</sup> This is not new:

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<sup>1</sup> See Telstra, Offering Circular (i.e. Debt Prospectus), 2013, at p.14: "...**mandated access to Telstra networks**: a key part of our strategy involves deploying next-generation networks and services, including our Telstra Next G<sup>®</sup>™ network which incorporates 4G LTE technology. Regulatory change may require us to allow competitor access to our next-generation networks and services which could materially adversely affect our investment returns, earnings and financial performance. See also, John McDuling, "Telstra expresses doubts over 4G regulation, Australian Financial Review, 9 Oct 2012, available at: <http://www.afr.com/news/politics/national/telstra-expresses-doubts-over-4g-regulation-20121008-j1n55> .

- (a) In 2006, Telstra sought assurances from the ACCC about 3G regulation:

*"In a report in today's Australian Financial Review, the Communications Minister, Helen Coonan, said there may be regulation of Telstra's new 3GSM 850 network (such as third-party access or license conditions). The 3G network is currently under construction. ...*

*These kinds of regulations consistently undervalue Telstra's network investments, forcing Telstra's shareholders to subsidise the operations of the company's foreign and domestic competitors.*

*To protect its shareholders and their investments, Telstra is seeking urgent clarification from the Government that its new 3G network will not be regulated."*<sup>2</sup>

- (b) Also in 2006, Telstra delayed its deployment of ADSL infrastructure for a long time and limited its ADSL broadband speed offerings because of the threat of regulation. At the same time, the ACCC was pressured to give strong statements that it preferred Telstra's competitors to invest in competitive infrastructure rather than resell Telstra's broadband services.<sup>3</sup>
7. It is of some note that infrastructure based competition flourished in the Australian market without regulatory intervention on parties that did not have substantial market power. Optus installed a HFC network. Hutchison installed a 3G network. Optus and Vodafone installed 2G and 3G networks. Neighbourhood Cable and TransAct installed HFC and fibre networks. PIPE Networks and Amcom installed fibre optic networks. There are many other examples.
8. TPG submits that many investments would have been considered more risky and therefore may not have proceeded if the promoters of the investments felt that they were seriously under threat of regulatory impost. The LTIE would have been severely affected had those investments not been made.
9. It is interesting to observe that the spark for this SBAS enquiry has only arisen since TPG announced its intention to roll out a VDSL2 network to buildings in CBD areas under an expressly created exemption to rules that would otherwise have been considered anti-competitive (the so called anti-cherry picking rules). VDSL and other high speed infrastructure competition existed for many years, including HFC cables (which have been capable of running up to 30Mbps for some years), other VDSL deployments such as that of TransAct and Telstra's FTTP networks in South Brisbane. Prior to the NBN and TPG's roll out, there had been, to TPG's knowledge, no call for declaration of those networks, much less actual declaration.
10. However, for reasons that are not clear to TPG (but which could include strong submissions from NBN, or perhaps the exercise of commercial power of parties negotiating contracts for the national broadband network), regulation on TPG and other legitimate infrastructure based competitors has been written up as being critical for the LTIE.
11. TPG submits the countervailing view. If declaration of SBAS is made, it will create considerable uncertainty for the investors of capital looking at bringing new technologies to Australian consumers. When investment is reduced, infrastructure based competitive effort will be reduced, and the LTIE will be reduced.

#### *Competition in retail markets does not require declaration*

12. The ACCC has formed the view that competition in retail markets requires the declaration of SBAS. TPG disagrees.

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<sup>2</sup> Telstra, Media Release: "Telstra seeks Government clarification on 3G regulation", 27 April 2006, 077/2006.

<sup>3</sup> See Telstra, CEO letter to shareholders, half-year review and BACK Telstra brochure, dated 15 February 2007, at p. 2 of the 2006 Half year review: "because of regulatory constraints, the up to 20 Mbps service is limited to exchanges where competitors are also offering those higher speeds...".

See also: Stephen Bartholomeusz, "Sol and Samuel point fingers while broadband falls behind", Sydney Morning Herald, 1 December 2006, at: <http://www.smh.com.au/news/business/sol-and-samuel-point-fingers-while-broadband-falls-behind/2006/11/30/116477720863.html>.

13. Whilst it is accepted that vectoring may cause some interference impacts, VDSL (in particular TPG's FTTB network) does not necessarily mean the end of the infrastructure based competition in a building or area.
  - (a) Notwithstanding Government statements about NBN overbuild, NBN is overbuilding TPG's FTTB network and TPG expects will overbuild other Superfast Broadband (**SB**) networks. There are locations where TPG and NBN have competing VDSL equipment servicing the one building. In other buildings, NBN has installed FTTP. TPG expects that in many buildings NBN will or could use the existing HFC networks in the buildings. Once NBN is installed, retail customers in the area will be able to be serviced by all RSPs who supply over the NBN.
  - (b) Between now and the rollout of NBN, there are many technologies that create competition in retail markets. ADSL2+ remains a viable option for most people, particularly in the metropolitan locales of SB networks. HFC is available in most buildings and speeds in excess of 30Mbps are available on such services. Spirit Telecom is installing Fibre and Ethernet to premises. Wireless networks provided by the likes of Big Air are available and of course 3G and 4G networks are a competitive threat.
  - (c) Into the future, it is highly likely that a range of new technological developments will create new competition for SB networks. 4G circuits with carrier aggregation already provide competition. 5G is not far off.
14. The threat of wireless technologies seems to be significantly downplayed by the ACCC on the basis that they are either not able to support SB services or are not suitable for applications requiring large data downloads. It notes that there is a substantial disparity in data allowances and per gigabyte pricing between mobile and fixed-line broadband services.<sup>4</sup>
15. TPG submits that such a position is too simplistic. The current levels of mobile broadband consumption are a product of:
  - (a) The fact that wireless data is relatively new as an access technology compared to fixed line;
  - (b) The nature of the technology currently available; and
  - (c) The dynamics of the market place that is producing above fixed line profits for two of the three mobile providers such that neither is motivated to offer higher data download inclusions.
16. Following a period of constricting data inclusions and the resurrection of Vodafone as a serious competitive threat in that industry, both Telstra and Optus have recently reduced the effective price of mobile data downloads. There is no reason to believe that the mobile network operators will not be able to increase their effectiveness as a substitute for fixed line broadband, particularly with technological developments.
17. Indeed, TPG notes that Optus now offers a 50GB home wireless broadband plan for \$70 per month.<sup>5</sup> This is in contrast to the position stated in the Draft Decision that "the highest allowance that Optus offers on mobile wireless is 12GB for \$60 per month"<sup>6</sup>. Wireless competition is already moving quickly. The booming tablet market, which now sees Apple suggesting that no one needs a home computer anymore, can easily feed into a wireless connectivity solution replacing fixed line altogether.
18. It is difficult to understand how the ACCC could form the view that wireless is not a threat to fixed line when as recently as 2011 and 2012:
  - (a) NBN was demanding that Telstra agree to a term that Telstra not market Telstra's wireless internet services as a substitute for NBN services<sup>7</sup>; and

<sup>4</sup> Draft Decision, p. 18.

<sup>5</sup> Refer to <http://www.optus.com.au/shop/broadband/home-wireless-broadband/plans#Plans> last accessed on 1 December 2015. See also: C Simpson, Optus is selling 50GB of Mobile Data for \$70 a month, 2 Nov 2015, available at <http://www.gizmodo.com.au/2015/11/optus-is-selling-50gb-of-mobile-data-for-70-a-month-taking-on-home-adsl-cable-and-nbn-plans/>.

<sup>6</sup> Draft Decision, p. 19.

<sup>7</sup> This was an original condition in the Definitive Agreements between NBN and Telstra.

(b) The ACCC was concerned that such provisions would be “*detrimental to competition in the markets for the supply of wireless voice and broadband services*”.<sup>8</sup>

19. For these reasons, TPG thinks that it is plain that mobile broadband should be considered as a possible substitute for fixed broadband services. To continue to treat mobile broadband as merely a complement is to ignore the enormous developments in that market (even in just the past month). Further regulation will significantly constrain the ability of SB providers to fully compete with increasingly competitive wireless offerings, to the detriment of the LTIE.

#### *The promotion of efficient economic use of infrastructure demands regulation*

20. Given TPG’s views about the existence of potential alternative infrastructure based competition and, in particular, the likelihood of NBN overbuild, TPG does not agree with the ACCC’s conclusion that a declaration of the SBAS will promote efficient economic use of infrastructure.
21. The examples cited by the ACCC in the Draft Decision, for the most part, show that regulation of SB networks has not resulted in there being a significant use by access seekers of the declared service. Where access seekers have sought access in any meaningful way, it is for business case reasons rather than as an outcome of regulation. For example:
- (a) The requirements in South Brisbane saw very few CSPs use wholesale FAB services to try to acquire new End Users in South Brisbane. TPG, for example, has not offered services in South Brisbane for new customers at all.
  - (b) TPG has offered Wholesale FTTB services as required by the carrier licence condition, but very little takeup has occurred.
  - (c) Opticomm and OPENnetworks have a reasonable number of providers as wholesale customers but this is more likely attributable to business decisions by those parties rather than the regulated outcome. Neither provider, to TPG’s knowledge, has specific expertise in supplying retail voice or data services. Both have always sought to address the wholesale market via retail telcos, even before regulation was in place.
  - (d) The TransAct VDSL and HFC networks have operated with wholesale operations since as early as 2001. Regulation had nothing to do with TransAct having wholesale customers.
22. As such, TPG considers it likely that the ACCC and SB Network operators will invest considerable resources in declaring SBAS and managing that declaration for very little benefit. The ACCC has acknowledged that this is a risk.

#### *How Should “Technical Monopolies” be Resolved*

23. As stated above, TPG considers that a range of competitive infrastructure will be available to consumers, even those who are resident in buildings service by TPG’s FTTB network and that no monopoly position will occur.
24. The ACCC has apparently formed the view that potential VDSL interference will inevitably lead to a monopoly because of technical reasons.
25. TPG submits that solving a technical problem with regulations, particularly at this early stage, is wrong.
26. First, it is not clear that a technical problem has arisen or will arise. There is no evidence that TPG is aware of that there have been any real world examples of interference issues.

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<sup>8</sup> ACCC, [Assessment of Telstra’s Structural Separation Undertaking and draft Migration Plan - Discussion Paper](#), 30 August 2011, p. 65.

27. Secondly, even if technical issues do arise, it is the task of the carriers to resolve any such issues. Work is already being done by the industry to develop solution processes.
28. Regulations should only be imposed where there is clear evidence that technical issues do create a monopoly and no technical solution is possible. TPG submits that this position has not been reached.

#### *Regulation of Supply to business*

29. TPG submits that any move to declare SBAS to promote competition of supply of services to businesses would be retrograde. It would surely stifle any impetus to build out new infrastructure to service businesses. The business market is a critical driver for telecommunications competition and it is essential that this market not be reduced artificially by regulation.

#### *The Cost of Regulation and Smaller Player Exemptions*

30. TPG submits that the cost of declaration is not minor. Initial costs of establishing business arrangements for wholesale customers which is then followed by ongoing costs associated with the FAD pricing processes and otherwise managing the bureaucracy associated with supplying a declared cost are unlikely to be small. TPG agrees that the burden on small companies is likely to be disproportionate.
31. However, TPG does not consider that it makes any sense to exempt any provider if the whole purpose of the regulation is to open up what the ACCC believes are or will be monopolies. If there are monopolies (which TPG does not accept will be the case) then all monopolies must be managed in the same way. Exemptions do not make sense.
32. Contrary to the ACCC's views about TransAct and AAPT, the costs to implement a revised arrangement for the TransAct VDSL network will be very significant. The AAPT system relies on being able to directly manage the network. The TransAct network has been in place for many years and the systems are quite different to those which AAPT would use. TPG is unable at this stage to make an assessment of the likely cost but TPG considers that it would be the range of [c-i-c start] [c-i-c end]. Noting that there has been little new interest from wholesale customers seeking to access the TransAct network and the fact that regulation is unlikely to produce a sudden raft of demands for services on the TransAct network, it is plain that the costs of declaration will outweigh the benefits.

#### *Service Description and Term*

33. If the ACCC is still minded to declare the SBAS, TPG considers that:
  - the proposed SBAS service description should be limited to the operation of the SBAS to services that are between 25mbps and 100mbps. In the medium term, services that are in excess of 100mbps should be considered contestable;
  - declaration should be extended to cover wireless services for the substitution reasons stated above; and
  - five years is far in excess of the period of declaration that is needed. The ACCC should limit the period to 2 years at most, particularly given the fast pace of developments in the relevant markets.

#### *An Alternative Path*

34. The carrier licence condition was pushed onto TPG (and similar carriers) for the FTTB network. A similar condition applied for the TransAct network. Instead of declaration, the ACCC should simply recommend the extension of the carrier licence conditions.