

Access determination for the local bitstream access service (LBAS)

Telstra's response to the ACCC Discussion Paper

Contents

Executive Summary	3
01 Introduction	4
02 Services that may be covered by an LBAS access determination	4
2.1. Telstra is not aware of any services currently being offered over designated superfast networks	5
2.2. Telstra does not currently supply a layer 2 bitstream service	5
03 Legislative requirements for an LBAS access determination	6
3.1. An access determination for LBAS need not specify a price	6
3.2. Establishing guiding principles would be consistent with previous ACCC practice	7
3.3. It would not be appropriate to specify a price, as there are currently no LBAS services being offered	7
04 Method of ascertaining an LBAS price	7
4.1. The fixed pricing principles applying to other declared services could be adapted	7
4.2. If the ACCC is minded to establish a price ceiling, this could be linked to initial NBN prices	8
05 Other matters	9
5.1. Term of an LBAS FAD	9
5.2. Non-price terms	9

Executive Summary

Telstra welcomes the opportunity to respond to the Australian Competition and Consumer Commission (**ACCC**) discussion paper into making an access determination for the local bitstream access service (**LBAS**).

Telstra submits that it would be premature at this time to definitively determine price and non-price terms for the LBAS through an access determination. Telstra is not aware of any services currently available that meet the threshold requirement for the LBAS: that it be supplied using a designated superfast telecommunications network. Moreover, none of the services currently being offered by Telstra meet the definition of a layer 2 bitstream service. Given the absence of any LBAS or similar services currently being offered and the lack of information regarding costs of supply, there would be no basis to definitively determine price and non-price terms of supply that could be considered reasonable or in the long-term interests of end-users (**LTIE**).

Telstra notes that the ACCC is not required to definitively determine price and/or non-price terms and conditions in an access determination. Rather, the ACCC may simply determine ‘a method of ascertaining price’. Establishing a set of principles for ascertaining a price for the LBAS would be consistent with previous ACCC practice in relation to regulation of services supplied over non-dominant networks.

The method of ascertaining price for the LBAS could draw on principles of cost-based pricing that are applied to other declared services. These principles may need to be sufficiently flexible so as to take into account differences between networks that may be used to supply the LBAS in future.

Alternatively, if the ACCC is minded to establish a price for the LBAS, it may wish to consider NBN Co’s proposed pricing for its bitstream access services (as set out in its special access undertaking) as a starting point. Adjustments may need to be made to NBN Co’s proposed pricing for bitstream services to account for likely differences between the circumstances of NBN Co and operators of non-dominant networks, particularly given NBN Co’s Government ownership and requirements for nationally uniform pricing.

01 Introduction

On 23 February 2012, the Australian Competition and Consumer Commission (**ACCC**) commenced a public inquiry into making a final access determination (**FAD**) for the local bitstream access service (**LBAS**) under section 152BC of the Competition and Consumer Act 2010 (**CCA**).¹

The ACCC notes that the LBAS is a newly declared service and that the ACCC does not currently have detailed information regarding the services being offered. The Discussion Paper issued by the ACCC is therefore preliminary in nature, focusing on the issues to be covered in the FAD and seeking information from industry regarding the types of services currently being offered and the terms on which they are supplied.

The ACCC discussion paper seeks information on the following issues in particular:²

- the nature of the current services that may be captured by the LBAS declaration, particularly the location and extent of these services and the commercial terms and conditions under which they are supplied;
- the appropriate methodology for pricing the LBAS or suggested pricing for the LBAS;
- the appropriate regulatory period for the LBAS FAD; and
- the non-price terms and conditions that should be included in the LBAS FAD.

This submission briefly addresses each of these issues.

02 Services that may be covered by an LBAS access determination

The LBAS is defined as follows:

The local bitstream access service is a point to point service for the carriage of communications in digital form between a network-network interface and a user-network interface supplied using a designated superfast telecommunications network that is:

- (a) a Layer 2 bitstream service; and
- (b) a superfast carriage service.

This declaration does not apply to services supplied, or capable of being supplied:

- (a) using a specified network; or
- (b) using a specified local access line; or
- (c) by a specified owner of a local access line;

where that network, local access line or owner is the subject of a Ministerial exemption under section 141A or statutory exemption under subsection 141B(3) or 141B(4) of the Telecommunications Act and any conditions that apply to the exemption are satisfied.

An important element of this definition is its linkage of the service to specific types of networks. A service will only fall within the LBAS definition if it is supplied using a “designated superfast telecommunications network”. Moreover, a service will not fall within the LBAS definition where it is supplied using network or local access line that is subject to a Ministerial exemption.

¹ ACCC, *Public inquiry to make an access determination for the local bitstream access service: Discussion paper*, February 2012 (**Discussion Paper**).

² Discussion Paper, p 1.

In its Discussion Paper, the ACCC seeks information from industry regarding designated superfast networks currently in operation, including:

- Which currently operational networks are designated superfast telecommunications networks under section 152AGA of the CCA?
- What types of access technologies are used in these networks?
- How many customers do these designated superfast telecommunications networks (potentially) serve?
- What geographic area do these designated superfast telecommunications networks serve?
- Do these networks currently (as at February 2012) offer wholesale access?

The ACCC also seeks information on current terms of supply for LBAS or “like services”.

2.1. Telstra is not aware of any services currently being offered over designated superfast networks

Telstra is not aware of any services that meet the threshold requirement for the LBAS, that it be supplied using a designated superfast telecommunications network.

As the ACCC would be aware, Telstra has recently obtained exemptions from the super-fast network obligations in respect of certain recently deployed (or in-train) fibre-to-the-premises networks.³ Since exemptions have been granted in respect of these networks, they are not designated superfast telecommunications networks.⁴

Telstra is not aware of any other networks (other than the NBN) that have been built or upgraded since 1 January 2011 and which will be used to supply superfast carriage services.

2.2. Telstra does not currently supply a layer 2 bitstream service

Telstra considers that none of the services supplied on any of its networks would meet the definition of a ‘layer 2 bitstream service’.

The term ‘layer 2 bitstream service’, which is a critical element of the LBAS service definition, is not clearly defined – in particular, the term “bitstream” is not defined anywhere in the ACCC service definition or the legislation. Telstra understands the term ‘layer 2 bitstream’ to mean a native 802.3 Ethernet technology, which it considers to be a reasonable benchmark or proxy.

Potentially the closest product currently offered by Telstra to a layer 2 bitstream service is the Fibre Access Broadband (**FAB**) product. However the architecture of the FAB product is different from what NBN Co is deploying as a bitstream service and the functionality provided by FAB does not match what customers would expect of a ‘bitstream’ service.

Although FAB is referred to in Telstra advertising as a ‘layer 2’ product, it relies on both layer 2 and layer 3 transport protocols. FAB encapsulates a customer’s Layer-3 protocol (**IP**) messages using Layer-2 Point to Point Protocol (**PPP**) via Layer-2 Tunnelling Protocols (**L2TP**) to allow it to be transported over Telstra’s IP network (a Layer-3 protocol).

The key features of the FAB service are:

- broadband at speeds of up to 8M/384k, 30M/1M and 100M/5M

³ *Telecommunications (Network Exemption – Telstra South Brisbane Network) Instrument 2012*; *Telecommunications (Network Exemption – Telstra Specified Velocity Networks) Instrument 2012*.

⁴ CCA, s 152AGA(2).

-
- multiple domain names
 - 99.2% monthly availability (targeted)
 - connectivity via L2TP tunnels and Virtual Local Area Networks (**VLANs**)
 - direct access to end user sessions
 - connectivity without tying up the phone line
 - aggregation of Internet Grade data traffic on a state basis

However, FAB does not support some features which might be expected on a ‘layer 2 bitstream service’, such as:

- Quality of Service (**QoS**);
- standalone broadband; or
- multicast.

For all of the above reasons, Telstra considers that the FAB service is not a layer 2 bitstream service.

03 Legislative requirements for an LBAS access determination

Section 152BC1 of the CCA requires the ACCC to commence a public inquiry into making a FAD within 30 days after the decision to declare a service. Once a public inquiry has commenced, the ACCC must make a FAD within six months, although this timeframe may be extended for a further six months.⁵

3.1. An access determination for LBAS need not specify a price

Under section 152BC of the CCA, a FAD need not specify a price for the LBAS, and may instead simply specify a method of ascertaining price.

Sub-section 152BC(3) contains permissive language, allowing the ACCC to make a FAD which does any or all of the things listed in that subsection. One of the things that a FAD may do is specify “any or all” terms and conditions relating to compliance with the standard access obligations or “any” other terms and conditions. Sub-section 152BC(8) clarifies that any terms and conditions specified in a FAD must include terms and conditions relating to price *or a method of ascertaining price*. Therefore the ACCC is not required to comprehensively specify price terms in a FAD, and may instead specify a method of ascertaining price.

This is supported by the Explanatory Memorandum, which states:⁶

It is intended that an access determination may deal only with terms and conditions about certain matters relating to compliance with the standard access obligations. **It is not intended that an access determination must deal with the terms and conditions about all matters relating to compliance with the standard access obligations.** To ensure the intended operation of this provision is clear (that an access determination is not required to deal with all terms and conditions), subsection (3)(a) expressly provides that an access determination may specify any or all of the terms and conditions on which a carrier or carriage service provider is to comply with any or all of the standard access obligations applicable to the carrier or CSP [emphasis added].

⁵ CCA, s 152BCK.

⁶ Explanatory Memorandum to the Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2010, p 174.

Telstra considers that the intent of the legislation is clear: that a FAD may establish a price for declared service, but need not do so in all circumstances.

3.2. Establishing guiding principles would be consistent with previous ACCC practice

Telstra notes that the ACCC has previously refrained from establishing a price in respect of declared services supplied over non-dominant networks, albeit under different legislative provisions.

In its pricing principles paper for access prices of PSTN originating and terminating access services provided by non-dominant networks, the ACCC established guidelines for pricing on non-dominant networks rather than establishing definitive terms of access. The ACCC recognised that evidence regarding market power of these non-dominant networks was ‘sketchy’ and that there was little information on actual pricing practices. Accordingly, the ACCC established a broad set of guidelines consistent with principles of economic efficiency. The ACCC stated:⁷

In the light of this sketchy evidence, the Commission does not consider it appropriate to regulate the terminating service access prices of smaller networks directly or in some heavy-handed way. However, there is an alternative approach which attempts to ensure that end outcomes are consistent with economic efficiency principles and therefore in the long-term interests of end users and would be expected to prevail if market power was not evident.

The Commission’s view is that the most sensible approach to termination charges is to discourage smaller networks from pricing their termination services above those of an efficient larger network. It would be expected that in most cases smaller networks are likely in practice to price consistently with this approach, however, should an issue arise, this rule is intended to assist the parties negotiate acceptable outcomes.

In Telstra’s view it would be appropriate for the ACCC to take a similar approach to regulation of LBAS, at least until the market matures and services become available.

3.3. It would not be appropriate to specify a price, as there are currently no LBAS services being offered

Telstra submits that it would be premature for the ACCC to definitively specify price terms for the LBAS, given the limited information on costs and market pricing.

As noted above (section 2), Telstra is not aware of any services currently being offered that would meet the LBAS service definition, or that would satisfy the definition of a ‘layer 2 bitstream service’. Therefore there is insufficient information to enable the ACCC to be satisfied that any FAD which definitively specifies price terms would be in the LTIE.

04 Method of ascertaining an LBAS price

For the reasons set out in section 3, Telstra considers that a FAD for the LBAS need not specify a price, and should only specify a method of ascertaining price at this stage. This section sets out two alternative pricing methods that the ACCC could consider for the LBAS.

4.1. The fixed pricing principles applying to other declared services could be adapted

A FAD for the LBAS could be limited to establishing a cost-based method of ascertaining price.

In the case of the LBAS, alternative pricing methods such as retail-minus retail cost (RMRC) are unlikely to be appropriate given the particular characteristics of networks that will be used to supply these services. Networks used to supply the LBAS are likely to be newly built (making it easier to apply a cost-

⁷ ACCC, *Pricing guidelines for access prices of PSTN terminating and originating access services provided by non-dominant or smaller fixed networks: Pricing Principles Paper*, March 2001, pp 24-25.

based method) and will be under obligations to supply on a wholesale-only basis⁸ (making the application of a RMRC method more difficult). Therefore the most appropriate method of ascertaining price for the LBAS is likely to be a cost-based method.

The cost-based method could potentially be established as a set of fixed principles in the FAD. Subsequent access determinations would need to contain the same cost-based method⁹ (subject to expiry of the fixed principle) and could also include a price based on this method.

The cost-based method could be based on the building block methodology that is embodied in the fixed principles provisions of the ACCC’s access determinations for the declared fixed line services.¹⁰ Broadly, this method involves:

- establishing a regulatory asset base comprising the assets used to supply the relevant service(s);
- roll-forward of the asset base each year based on new capital expenditure, depreciation, disposals and asset inflation; and
- prices set to recover (for each year) a return on the asset base, return of the asset base (regulatory depreciation), operating expenditure and taxation expenses.

The cost-based method would need to set out a basis for determining each of the inputs into these calculations, although some flexibility in the determination of inputs is likely to be needed to account for differences between networks used to supply the LBAS.

4.2. If the ACCC is minded to establish a price ceiling, this could be linked to initial NBN prices

Alternatively, or in addition to establishing a cost-based method of ascertaining price, the ACCC could also establish a price ceiling for the LBAS in its FAD.

Given the current lack of cost and pricing information on the LBAS, it would appear that at present the only reasonable starting point for determining this price ceiling is NBN Co’s proposed pricing for comparable bitstream services (as set out in the special access undertaking that it has submitted to the ACCC).¹¹

Telstra notes that adjustments may need to be made to NBN Co’s proposed pricing for bitstream services to account for likely differences between the circumstances of NBN Co and operators of non-dominant networks. In particular, adjustments may need to be made for:

- a commercial rate of return to be earned by operators of non-dominant networks (to the extent that NBN pricing reflects government rates of return); and/or
- different geographic coverage of non-dominant networks (noting that NBN Co’s prices are nationally averaged).

⁸ Under s 143 of the *Telecommunications Legislation Amendment (National Broadband Network Measures – Access Arrangements) Act 2011* (Cth), an owner of a designated superfast network may only supply services to carriers or service providers, and cannot supply directly to end users.

⁹ CCA, s 152BCD(3).

¹⁰ For example: ACCC, Final Access Determination No. 1 of 2011 (LSS), dated 20 July 2011, clause 6.

¹¹ NBN Co, *Special Access Undertaking in respect of the NBN Access Service given to the ACCC in accordance with Part XIC of the Competition and Consumer Act 2010* (Cth), December 2011. Telstra notes that this undertaking is the subject of an ongoing consultation and has not yet been accepted by the ACCC. In its current form, this undertaking provides for an initial price for NBN Co’s ‘Fibre Basis Access Offer’ of \$24 per SIO, per month (Schedule 5, clause 2.1). The Fibre Basis Access Offer comprises a Fibre Access Virtual Circuit with data transfer rates of 12Mbps downlink / 1Mbps uplink (Schedule 4, clause 2.2).

Benchmarking LBAS pricing against NBN pricing is likely to promote competitive neutrality as between NBN Co and non-dominant networks. This potentially avoids the risk of distorting investment incentives based on pricing differentials as between the NBN and non-dominant fibre networks.

This approach would be consistent with the ACCC’s approach in 2001 to pricing originating and terminating access on non-dominant networks (referred to above), which established a price cap based on the pricing of an efficient larger network.

Benchmarking prices against the NBN price could potentially be used as a short-term remedy, while cost and pricing information for the LBAS remains sparse. As more information becomes available, the ACCC could move towards pricing that is more closely aligned to the cost of delivering LBAS over non-dominant fibre networks.

05 Other matters

5.1. Term of an LBAS FAD

An access determination must specify an expiry date for that determination.¹² In specifying the expiry date, the ACCC must have regard to the principle that the expiry date should be the same as the expiry date for the service declaration, unless there are circumstances that warrant the specification of a different date.

In the case of the LBAS, the general principle that the expiry date should be the same as that for the service declaration is of limited relevance, since the LBAS declaration does not expire.¹³ Therefore it is open to the ACCC to determine an expiry date for the FAD, having regard to whatever matters it considers relevant.

In these circumstances, Telstra considers that the most relevant consideration for the ACCC in determining the term of the FAD is the lack of detailed information regarding the services being offered and the costs of supply. Given this current paucity of information, Telstra considers that it would be appropriate for the ACCC to make a shorter term FAD (for example two to three years), since this would allow for a reassessment of available cost and pricing information within a relatively short period of time.

5.2. Non-price terms

Just as there is insufficient information available to the ACCC to establish definitive price terms for the LBAS, there is similarly not enough information to allow the ACCC to set appropriate non-price terms at this time. Therefore Telstra considers that the ACCC should wait for services to be developed before establishing definitive non-price terms of access to the LBAS.

However if the ACCC is minded to establish non-price terms and conditions notwithstanding the absence of any LBAS or similar services currently being offered, it could potentially use the terms and conditions being established by NBN Co for its bitstream access services as a starting point. If the ACCC is to do this, it would need to consider the NBN terms and conditions in the context of the ongoing consultation on the NBN Co special access undertaking and the submissions made to this consultation on the proposed non-price terms.

¹² CCA, s 152BCF(5).

¹³ Pursuant to s 152ALA(5A) of the CCA, the mandatory declaration for the layer 2 bitstream service remains in force indefinitely.