



TELSTRA CORPORATION LIMITED

SUBMISSION TO THE AUSTRALIAN COMPETITION AND CONSUMER COMMISSION
IN RESPONSE TO LAYER 2 BITSTREAM SERVICE DESCRIPTION DISCUSSION
PAPER

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1. THE NEED FOR CAUTION

- 1 Telstra welcomes this opportunity to respond to the Australian Competition and Consumer Commission's (**ACCC**) Discussion Paper on the declaration of a Layer 2 bitstream service to be provided over superfast broadband networks (other than the NBN).
- 2 In Telstra's view, the current inquiry is occurring in an extremely uncertain commercial and regulatory environment. The service(s) to be provided by NBN Co are not yet finalised, and remain subject to the ACCC's approval in the Special Access Undertaking (**SAU**). As the ACCC cannot change the superfast Layer 2 service description once set, Telstra does not consider that making the declaration in this environment of uncertainty is necessary or prudent.
- 3 The ACCC has suggested that these limitations might be addressed by the declaration of a service that mirrors the language of the statute. While this is not an unreasonable attempt to deal with a highly inflexible statutory provision, Telstra is concerned that:
 - (a) Such a service description will not give access providers sufficient certainty on the service that they need to make available; and
 - (b) An uncertain service description runs the risk of being held legally invalid.
- 4 The ACCC should undertake its statutory responsibilities with the best possible information available. Given there is no legal or commercial imperative for the declaration to be made in the short-term, Telstra suggests the ACCC delay its inquiry and declaration at least until NBN Co's Layer 2 bitstream service description has been finalised.
- 5 NBN Co's Wholesale Broadband Access (**WBA**) agreements are expected to be finalised in the coming weeks. While this will be an important industry milestone, the exact specifications of the NBN Co Layer 2 bitstream service will not become clear until the ACCC approves NBN Co's SAU. The SAU will set the industry standard, and will be a key input to any discussion of a Layer 2 service being provided by other superfast networks.

2. THERE IS NO IMPERATIVE FOR THE DECLARATION TO BE MADE NOW

- 6 Telstra recognises the legislation puts the ACCC in a challenging position. Section 152AL(3C) requires the ACCC to describe – for all time, without possibility of variation (absent legislative amendment) – a service that does not yet exist; is provided by networks that are not built or that require upgrading prior to supplying the service; and which is to form a key input to a range of uncertain retail products in a highly dynamic and innovative market.
- 7 In Telstra's view, to proceed with a declaration in the face of these restrictions and uncertainties carries an extremely high risk.
- 8 It is therefore opportune that there is no legal or practical reason for the ACCC to declare a superfast Layer 2 bitstream service in the short-term:
 - (a) There is no legislative deadline requiring the ACCC to make an immediate decision. Its statutory obligation is to make the declaration of superfast Layer 2 bitstream "as soon as practicable" after the commencement of the relevant provisions, which has not yet occurred. Telstra's view is that this clearly permits the ACCC to hold off making its decision until the uncertainties discussed below are resolved.
 - (b) There is no compelling competition or consumer imperative to make a decision. The Layer 2 bitstream declaration will become meaningful when NBN Co has advanced its

rollout, finalised its service offering and begun full commercial operations. In that environment, retail services that use NBN Co's Layer 2 service as an input will start to become more widely available, at which point the declared Layer 2 service will become more relevant. However, at the current time, given that NBN Co's Layer 2 service is at an early stage of commercialisation, the superfast declaration would have little effect on either competition or the availability of high-speed services.

3. THE NON-NBN SUPERFAST DECLARATION SHOULD NOT BE MADE BEFORE THE SPECIFICATIONS OF NBN CO'S LAYER 2 BITSTREAM SERVICE ARE FINALISED

9 A substantive policy rationale behind the requirement to declare a Layer 2 bitstream service is ensuring that Layer 2 inputs are available on a consistent basis nationally, regardless of which superfast network is providing the service. It is important that retail service providers do not face a "Swiss cheese" scenario in terms of speed, quality of service, or other service attributes. This is not only commercially important, but has implications for the Universal Service Obligation (**USO**), which may require consistency in wholesale inputs and systems in order to be fulfilled.

10 In this respect, the Explanatory Memorandum to the Access Act says, in relation to the superfast provisions:¹

Together these amendments should ensure that end-users have access to the same high-quality superfast broadband services, regardless of the network provider, and assist the NBN in meeting its objectives nationally by ensuring it operates on a more level regulatory playing field.

11 NBN Co is currently in the process of determining the service description of the Layer 2 bitstream service which it is to supply under its WBA agreements and SAU. That service will be the wholesale input to the high-speed retail services supplied to over 90% of the Australian population and will overwhelmingly set the industry standard. It is the NBN Co service, not any superfast service, which will determine the systems, processes and standards that retail service providers will eventually adopt.

12 In Telstra's view, given that the WBA/SAU processes are still ongoing, it is not currently possible for the ACCC to provide access seekers with any confidence as to how the proposed "local bitstream access service" will be aligned with NBN Co's services.

13 In particular:

- (a) Industry technical standards, interconnection arrangements, wholesale billing and management platforms, and retail service offerings will all be largely determined by the technical standards adopted by NBN Co. It is unlikely to be cost-effective for superfast providers to be required by regulation to offer a service that differs in a material respect from an NBN Co standard, though this is a question that will require further consideration;
- (b) NBN Co and superfast services will be substitutes and/or complements within those geographic areas in which they overlap, and, more broadly, as inputs to a national retail market. Competitive neutrality thus requires that they be regulated in an equivalent way, absent reasons to the contrary, i.e. different technologies, or the satisfaction of the exemption criteria; and

¹ Explanatory Memorandum, *Telecommunications Legislation Amendment (National Broadband Network Measures – Access Arrangements Bill 2010*, p.4

- (c) The extent to which the Government's key objective of consistent, uniform high-speed broadband for all Australians will be affected by differing service definitions between NBN Co regions and superfast regions requires assessment. The Government's Statement of Expectations indicates that NBN Co will not be required to "inefficiently duplicate infrastructure ... that can already support the provision of high speed broadband".² This leaves open the possibility that there will be areas of the country where third-party fibre is the only provider of wholesale Layer 2 bitstream.
- 14 Some differentiation may be necessary between NBN Co and superfast providers. For example, the NBN Co service descriptions are not technology neutral, whereas the superfast declaration may apply to different technologies. Ideally, the ACCC would know, before making the superfast declaration:
- (a) What the service is that NBN Co will provide (see also paragraphs 16 to 18 below); and
 - (b) To what networks the superfast declaration will apply (see also paragraph 22 below).
- 15 Both will inform what differentiation might be feasible and appropriate from a practical and competition perspective. In Telstra's view, this is a compelling reason for the ACCC to delay its making of the declaration.

4. THE ACCC SHOULD WAIT UNTIL THE SAU HAS BEEN FINALISED

- 16 NBN Co's service description, technical standards, and wholesale systems are currently the subject of parallel processes – most notably, the WBA process and the preparation of the SAU. Telstra expects that the WBA will be in a form broadly acceptable to access seekers within coming weeks. However, while the WBA is an important milestone, and will do much to bring clarity to the industry, it remains subject to the SAU that NBN Co has indicated it is preparing for lodgement with the ACCC.
- 17 The SAU will contain a number of provisions that go to the description of NBN Co's Layer 2 bitstream product. On the currently anticipated structure of the SAU, as described by NBN Co:³
- (a) Schedule 2 will contain a service description, and a high level overview of NBN Co's proposed product components;
 - (b) Schedule 3 will describe all 4 product components (UNI, AVC, CVC, NNI), the terms of supply, and NBN Co's proposed POI locations; and
 - (c) Schedule 9 will address the development of new products, or the enhancement of existing products, and will contain a product roadmap.
- 18 All of these provisions will require the ACCC's approval. While some of these matters are also the subject of the WBA process, the WBA agreements specifically provide that an access seeker is unable to enforce their terms to the extent they are inconsistent with the SAU. This is further reason why the current inquiry should be postponed at least until such a time as the SAU process has been finalised by the ACCC.

² DBCDE, *Statement of Expectations*, 17 December 2010, p.4

³ See also, NBN Co, *SAU Discussion Paper*, July 2011, pp.20-21

5. AVOIDING BUILT-IN OBSOLESCENCE IN THE SERVICE DESCRIPTION

- 19 From an access provider's point of view, and from a competition policy perspective, network providers other than NBN Co should not be required to provide services that are out of date or otherwise not in demand at any viable level. This will impose costs without delivering a commensurate level of benefit. It would also mean that, in the event there are regions where superfast providers are the only providers of high-speed broadband, consumers will be left with an inferior service, in clear contradiction to the Government's policy.
- 20 Given that the superfast service description – once set – cannot be changed or varied by the ACCC in any circumstances, the challenge for the ACCC in the present inquiry is to develop a service description which is:
- (a) Sufficiently certain as to ensure access providers can comply with their legal obligation to provide a Layer 2 bitstream service; and
 - (b) Sufficiently flexible as to avoid locking in a legacy product that is inconsistent with NBN's product development pathway.
- 21 There is a real risk that the ACCC, by proceeding at the present time, may adopt a service description that will not meet the industry's requirements in the future. In Telstra's view, some degree of assurance that this will not occur will come when the ACCC approves NBN Co's product description and product development roadmap in its SAU.

6. UNCERTAINTY OVER THE MINISTER'S APPROACH TO EXEMPTION APPLICATIONS

- 22 It is open for service providers to seek exemptions under s 141A. It is not yet clear the terms on which the Minister will be prepared to grant those exemptions, or the sort of networks that will be exempted. Telstra expects this will become clearer over coming months, giving the ACCC a better understanding of the sort of networks to which the declaration will apply (at least in the medium-term). This in turn will usefully inform its declaration decision, and represents another reason why the superfast declaration should be delayed.

7. THE LEGAL RISK ASSOCIATED WITH A GENERAL DESCRIPTION

- 23 The ACCC is clearly aware of the difficulties involved in this particular consultation. The approach it has taken in its draft paper, that is, to define the service in "general, technology neutral terms to ensure it is relevant in the future" is a not unreasonable response to such an inflexible set of statutory requirements.
- 24 Telstra considers however, that there may be risks in this approach, particularly as it is being attempted in an environment of uncertainty.
- 25 Under the 1997 transitional legislation, a number of services were 'deemed declared'. As is the case under the current legislation, the ACCC's role was limited to setting the relevant service descriptions. The ACCC's service description for the subscription television service was ultimately invalidated by the Federal Court for failing to meet the statutory

requirements. For the judge below, the key issue was the variability inherent in the description that the ACCC had reached:⁴

Section 39(5) of the Telco Act requires ACCC to "specify in the statement an eligible service" that meets certain criteria. That function cannot be discharged by specifying, as a single eligible service, a service of variable content. It must be remembered that, while the request for the adjunct services is optional, from the access seeker's point of view, from the viewpoint of the access provider, supply is compulsory.

- 26 In its reasonable attempt to develop an adaptable and flexible definition in the face of clear uncertainties, the risk in the present inquiry is that the ACCC may fail to define a service that is capable of a precise definition. This is not to say that the ACCC cannot define a service of more general application, only that the description needs to be sufficiently certain as to enable access providers to comply with their legal obligation to make the service available.
- 27 While the inflexible terms of the statute lock in some of this uncertainty, it is Telstra's view that this legal risk can be materially reduced by the ACCC delaying its inquiry. Once the NBN Co service is set, the industry has had time to develop a workable set of technical standards, and the extent of any exemptions has become clear, the ACCC will be able to make its decision in a more certain environment than presently exists.

⁴ *Foxtel Management Pty Ltd v ACCC* [2000] FCA 589; (2000) 173 ALR 362 at [101] (Wilcox J); see also, on appeal [2000] FCA 1160; (2000) 178 ALR 707 at [108]