

Superfast Broadband Access Service

Declaration Inquiry

Discussion Paper

May 2015

Response by iiNet

Public Version

1. Introduction

Under Part XIC of the Competition and Consumer Act 2010 (**CCA**) the ACCC can declare a service if the ACCC is satisfied that doing so would promote the long-term interests of end-users (**LTIE**).

On 11 September 2014 the ACCC commenced a public inquiry into the declaration of the Superfast Broadband Access Service (**SBAS**). This declaration inquiry was commenced in response to specific competition concerns that arise from the technical limitations of vectored VDSL 2 technology.¹ The ACCC put the SBAS declaration inquiry on hold due to regulatory developments that culminated in the making of the *Carrier Licence Conditions (Networks supplying Superfast Carriage Services to Residential Customers) Declaration 2014 (the Carrier Licence Conditions)*.

Having considered the implications of the Carrier Licence Conditions and a range of other relevant processes and information, the ACCC has now decided to issue a discussion paper entitled: *Superfast Broadband Access Service declaration inquiry Discussion paper (the Discussion Paper)*. The Discussion Paper seeks comment on whether the SBAS should be declared.

iiNet welcomes the opportunity to respond to the Discussion Paper.

Please note this submission contains confidential information which has been marked as [c-i-c] and highlighted in yellow.

2. Overview of this submission

The Discussion Paper has identified eight specific questions that the ACCC is seeking a response to. iiNet's response to these specific questions is set out in section 3 below. iiNet's core message in response to the Discussion Paper is that:

- Due to the existence of the NBN, the declared Local Bitstream Access Service (**LBAS**) and the Carrier Licence Conditions, the utility of a declared superfast broadband access service is likely to be limited. iiNet believes that the potential utility of the SBAS declaration lies in enhancing the Carrier Licence Conditions and providing certainty that regulated access to networks that are subject to the Carrier Licence Conditions will continue after the Carrier Licence Conditions have expired.
- There appears to be no justification for applying the SBAS declaration to non dominant networks that are not subject to the Carrier Licence Conditions.

3. Answers to specific questions

1. What are the relevant markets for the purpose of this Discussion Paper and the application of the LTIE test?

iiNet agrees that Part XIC of the CCA does not require the ACCC to precisely define the scope of the relevant market(s) in a declaration inquiry and that it is sufficient to broadly identify

¹ Discussion Paper, at p.1.

the scope of the relevant market(s) likely to be affected by the declaration.² In iiNet's opinion the relevant markets for the SBAS declaration inquiry are the markets that the ACCC has considered for fixed line services more broadly.³ These are the national markets for:

- the retail and wholesale provision of fixed voice services;
- the retail and wholesale provision of fixed broadband services, and
- the retail and wholesale provision of bundled fixed voice and fixed broadband services.

2. *Would declaring a superfast broadband access service promote the long-term interests of end users? Please give reasons, referring to the implications for competition, any-to-any connectivity (where relevant) and the efficient use of and investment in infrastructure.*

The analysis below concludes that when an LTIE analysis is applied, there is no justification for applying the SBAS declaration to non dominant networks that are not subject to the Carrier Licence Conditions. However, declaring the SBAS will have utility by:

- providing certainty that networks that are currently subject to the Carrier Licence Conditions will continue to be regulated after the Carrier Licence Conditions expire; and
- allowing the ACCC to make more expansive regulated terms as regards access to networks that are subject to the Carrier Licence Conditions.

iiNet notes that the ACCC states the following:⁴

The ACCC considers that declaration is likely to promote the LTIE where infrastructure facilities are enduring bottlenecks. Facilitating third party access to these infrastructure facilities will promote competition, any-to-any connectivity and efficiency in the use of and investment in telecommunications infrastructure. In the telecommunications industry, an enduring bottleneck is an element of the network that is essential to the supply of services to end-users in downstream (retail) markets, and exhibits natural monopoly characteristics.

iiNet agrees with this as a statement of general principle. When this statement of general principle is applied in the context of the following facts:

- a dominant NBN that is open access and wholesale only ; and
- a declared LBAS that applies to new networks that seek to compete with the NBN,

there would seem to be little work for the SBAS declaration to do as far as promoting the LTIE is concerned because any facilities for providing superfast broadband services that exist

² Discussion Paper, at p.8.

³ See for example, ACCC, Fixed services review declaration inquiry for the ULLS, LSS, PSTN OA, PSTN TA, LCS and WLR, Final Decision, July 2009.

⁴ Discussion Paper, at p.6.

alongside the NBN would be subject to competition from the NBN, accordingly, they would not be enduring bottleneck facilities.

As regards the LBAS, it is important to acknowledge that its reason for being is as part of the measures that allow NBN Co to achieve a level playing field rather than in ensuring that the LTIE is promoted. This is reflected by the fact that the LBAS operates in tandem with Part 7 of the Telecommunications Act 1997 and the declaration of the LBAS was mandatory.⁵ If the ACCC had done an LTIE analysis for declaration of the LBAS, it was possible that the ACCC could have concluded, applying orthodox principles, that the LBAS should not be declared because the networks it applies to are not enduring bottlenecks and making such networks subject to regulation may deter market entry by competitors to NBN Co and thereby fail to promote competition, investment in infrastructure and the LTIE.

However, notwithstanding the analysis above, there may be a need to declare access to some non dominant networks because as stated by the ACCC:⁶

Natural monopoly characteristics may also be present where the features of a technology are such that the presence of multiple operators degrades the quality of the service. If a technology cannot support multiple operators using their own equipment to self-supply services of sufficient minimum quality, it may be more efficient for a single operator to supply wholesale services, rather than competitors duplicating the infrastructure to supply services that meet the quality of service standards.

iiNet is aware of only one technology where this would apply. This is vectored VDSL2 technology. The issue is neatly summarised in the explanatory statement to the Carrier Licence Conditions as follows:⁷

While there is scope for multiple VDSL services to operate on a copper bundle without vectoring, technical and financial issues will mean that only one fixed-line vectored VDSL2 network is likely to be connected to multi-dwelling units and business centres.

[...]

A carrier that has connected a vectored VDSL2 network to premises does not have a statutory monopoly on access to those premises. However, the technical issues outlined above, and the resulting extra costs, mean that other service providers will be unlikely to duplicate the carrier's network.

It should be noted that as is evident from the above statement, the problem only relates to vectored VDSL 2. Infrastructure based competition is possible if non vectored VDSL 2 technology is used.

The issues relating to vectored VDSL 2 technology discussed above led the Vertigan Committee to recommend that the ACCC start a public inquiry with a view to declaring

⁵ See section 152AL(3C) of the CCA.

⁶ Discussion Paper, at p.6.

⁷ Carrier Licence Conditions (Networks supplying Superfast Carriage Services to Residential Customers) Declaration 2014 – Explanatory Statement, at p.11 and p.12.

vectored VDSL services.⁸ iiNet supports this recommendation. It was this recommendation that led the ACCC to commence the SBAS declaration inquiry.

In addition to the problems with vectored VDSL referred to above, the explanatory statement to the Carrier Licence Conditions identified another issue that needed to be dealt with which was articulated as follows:⁹

The decision by the Minister to consult on a new licence condition declaration reflected concerns that carriers could use the exemptions under the Act to extend networks previously servicing business customers to service residential customers, contrary to the intention of the Act. This could allow them to operate FTTB networks on a vertically integrated basis, meaning they would have the ability and incentive to favour their own retail operations. This would re-introduce the competition issues that the rollout of the NBN and the structural separation of Telstra were meant to address.

Therefore, on the basis of the explanatory statement to the Carrier Licence Conditions, it appears that the intention behind the Carrier Licence Conditions was to address:

- the problems with vectored VDSL technology described above; and
- the problems that arise from the exploitation of a 'loophole' in Parts 7 and 8 of the Telecommunications Act 1997.

In the case of TPG's FTTB rollout, it appears that both of those problems were combined as the following extracts from the explanatory statement to the Carrier Licence Conditions confirm:¹⁰

On 17 September 2013 TPG Telecom announced plans to deploy a fibre-to-the-basement (FTTB) broadband network to an initial tranche of 500,000 residential and small business premises in five mainland capital cities (Brisbane, Sydney, Melbourne, Adelaide and Perth). It plans to do so by using a fixed-line fibre network which it acquired in November 2009. The network will offer very high-speed digital subscriber line (VDSL) services that can support download transmission speeds of more than 25 mbps. In this case the network will offer a newer version of VDSL, known as vectored VDSL2.

[...]

In this case, TPG is rolling out a network through a loophole that the Government did not anticipate in 2011. TPG's network prior to 2011 did not target residential customers. It is now extending a business network to target such customers. This is a regulatory failure as the legislation has not ensured that a superfast local access

⁸ Independent cost-benefit analysis of broadband and review of regulation - Statutory review under section 152EOA of the Competition and Consumer Act 2010 – recommendation 6.

⁹ Carrier Licence Conditions (Networks supplying Superfast Carriage Services to Residential Customers) Declaration 2014 – Explanatory Statement, at p.2.

¹⁰ *ibid* at, p.6 and p.7

network targeting residential customers will operate on a wholesale-only and non-discriminatory basis.

iiNet believes that it is important to acknowledge that the Vertigan Committee and the Minister have fully considered the issues relating to the provision of superfast broadband services in Australia, and at no point have the Vertigan Committee or the Minister seen fit to respectively make recommendations or take any action directed at any non dominant networks other than those that are:

- vectored VDSL 2 networks; and/or
- networks that are seeking to exploit a loophole in Parts 7 and 8 of the Telecommunications Act 1997,

(for ease of expression referred to as **Relevant Networks**).

This fact, together with the fact that (leaving aside the vectored VDSL 2 issue) non dominant networks are unlikely to be enduring bottlenecks, supports the conclusion that there is currently no justification for applying the SBAS declaration to any non dominant networks that are not Relevant Networks. Non dominant networks that are not Relevant Networks include the following types of networks that are used to supply superfast broadband services:

- networks that service only business customers;
- networks that were in existence prior to 1 January 2011 and were used to provide superfast broadband services to residential and small business customers before that date; and
- networks that are subject to a Ministerial exemption from Parts 7 and 8 of the Telecommunications Act 1997,

(for ease of expression referred to as the **Excluded Networks**).

Given that:

- there is no justification for applying the SBAS declaration to the Excluded Networks; and
- the Carrier Licence Conditions address the problems related to the Relevant Networks,

it would appear that the SBAS declaration has little work to do. However, as it is uncertain whether the Carrier Licence Conditions will continue beyond 31 December 2016,¹¹ declaration of the SBAS may have utility in providing certainty that Relevant Networks will continue to be subject to regulated access after the expiry of the Carrier Licence Conditions. Furthermore, declaration of the SBAS would allow the ACCC to make more expansive

¹¹ This is the expiry date of the Carrier Licence Conditions.

regulated terms for services that are subject to the Carrier Licence Conditions. For example, the ACCC could set general default non price terms and conditions of access.¹²

- 3. Do any superfast broadband networks represent, or are they likely to represent in the future, a bottleneck for providing broadband services to end-users? Please give reasons referring to the state of competition in broadband (and other relevant) markets, any-to-any connectivity and the efficient use and investment in infrastructure.**

Due to the existence of the NBN, other superfast broadband networks are not likely to represent enduring bottlenecks in the classical sense. However, as discussed above, there is a specific problem as regards vectored VDSL 2 networks in circumstances where the 'first in best dressed' operator is not NBN Co or another wholesale only open access provider.

- 4. Do you consider that any existing wholesale commercial terms and conditions of access to superfast broadband networks inhibit competition? If so, what have been the effects on the ability of access seekers to compete? In the future, what are the likely effects on the ability of access seekers to compete?**

iiNet currently does not have any specific information to provide in response to this question.

- 5. If the ACCC were to declare a superfast broadband access service:**
- (a) What would be an appropriate service description?**
 - (b) Should the service description be technology neutral?**
 - (c) What specifications, if any, should the service description include? For example, should the service description include specifications as to quality of service (such as speed)?**
 - (d) Which types of services should be captured and/or excluded by the service description? Please give reasons, referring to the implications for competition, any-to-any connectivity (where relevant) and the efficient use of and investment in infrastructure.**
 - (e) Do you consider that the LBAS service description is an appropriate starting point for a SBAS service description which may apply to a broader range of services or network providers?**

As discussed above in response to question 2, iiNet believes that the utility of the SBAS declaration lies in enhancing the Carrier Licence Conditions. Therefore, relevant definitions used in the Carrier Licence Conditions, such as 'Layer 2 Wholesale Service' and 'designated telecommunications network', would be relevant to formulating a service description for the SBAS. The definition of 'designated telecommunications network' could be used to ensure that Excluded Networks are not captured by the SBAS service description. The definitions used in the carrier licence conditions are technologically neutral definitions. The LBAS service description (insofar as it may be extended to Relevant Networks) is also, clearly, a relevant service description to consider as a potential starting point.

¹² As part of its inquiry into the final access determinations, the ACCC has developed standard non price terms that will apply to a range of declared services – see <http://www.accc.gov.au/regulated-infrastructure/communications/fixed-line-services/fad-inquiries-non-price-terms-conditions-supplementary-prices>. Some of these non price terms have also been included in the LBAS final access determination and the ACCC is currently consulting on the terms for a new LBAS final access determination.

6. If the ACCC were to declare a superfast broadband access service:

- (a) Should the service description cover the SBAS nationally, or be limited in geographic scope? Please give reasons why/why not.**
- (b) Will carrier-specific exemptions promote the LTIE? Please give reasons why/why not.**

As discussed above in response to question 2, iiNet believes that due to the existence of the NBN, the utility of the SBAS declaration lies in enhancing the Carrier Licence Conditions. In light of this, the scope of the networks that the SBAS declaration applies to should be the same as the scope of the networks that the Carrier Licence Conditions apply to. iiNet believes that there is no justification for applying the SBAS declaration to any Excluded Networks.

7. What is an appropriate duration for the declaration? Please give reasons.

Given that the one of the principal utilities of the SBAS declaration appears to lie in providing long term regulatory certainty after the Carrier Licence Conditions have expired, it would make sense for the declaration to have a term of at least five years.

8. Having regard to the potential sources of regulatory burden listed above, would declaration of an SBAS lead to a substantial increase in regulatory burden on your business? If so, please provide details and where possible evidence of the likely increase in regulatory burden.

In iiNet's view, if the scope of the networks that the SBAS declaration applies to is limited to Relevant Networks, then the cost of this additional regulation is likely to be fairly low because the Carrier Licence Conditions already require an open access layer 2 wholesale service. Any such modest additional costs of regulation are likely to be outweighed by the benefits of providing:

- regulatory certainty as regards having continued regulated access following the expiry of the Carrier Licence Conditions; and
- enhanced access terms for services supplied pursuant to the Carrier Licence Conditions.

The iiNet Group currently has networks that are used to provide superfast broadband services. These include:

- a VDSL 2 network in Canberra; and
- HFC networks in regional Victoria,

(for ease of expression referred to collectively as the **iiNet Networks**).

Neither of the iiNet Networks are Relevant Networks. Therefore, if the SBAS only applies to Relevant Networks, declaration of the SBAS will not impose any additional regulatory burden on iiNet. However, if the scope of the SBAS declaration is broader so that it captures one or both of the iiNet Networks, this would impose a significant regulatory burden on iiNet.

Each of the iiNet Networks is considered in turn.

The VDSL 2 network

It is clear that the TransACT VDSL 2 network is not a bottleneck. [c-i-c starts] [c-i-c ends].

The VDSL 2 network is subject to a Ministerial exemption from Parts 7 and 8 of the Telecommunications Act 1997.¹³ In accordance with the terms of the Ministerial exemption, TransACT¹⁴ provides access to a layer 3 wholesale service.

As regards issues relating to vectored VDSL [c-i-c starts] [c-i-c ends].

The HFC networks

As regards the HFC networks, these are also operated by TransACT. These networks have not been the subject of any significant competition concerns. They are non dominant networks and cannot be regarded as enduring bottlenecks. TransACT's HFC networks were used to provide superfast broadband services to residential and small business customers prior to 1 January 2011. They are not, therefore, Relevant Networks. [c-i-c starts] [c-i-c ends].

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¹³ Telecommunications (Network Exemption—TransACT Upgraded VDSL Networks) Instrument 2012 – available at:

[http://www.communications.gov.au/policy_and_legislation/Telecommunications Act Parts 7 and 8 requirements and exemptions/ministerial exemptions from parts 7 and 8 of the telecommunications act 1997](http://www.communications.gov.au/policy_and_legislation/Telecommunications_Act_Parts_7_and_8_requirements_and_exemptions/ministerial_exemptions_from_parts_7_and_8_of_the_telecommunications_act_1997)

¹⁴ TransACT is the owner of the VDSL 2 network. TransACT is part of the iiNet Group.