

**LOCAL BITSTREAM ACCESS SERVICE**  
**INTERIM ACCESS DETERMINATION AND PROPOSAL FOR THE**  
**FINAL ACCESS DETERMINATION**

**JULY 2012**

**RESPONSE FROM iiNET, INTERNODE AND TRANSACT**

## INTRODUCTION

iiNet, Internode and TransACT (**the Access Seekers**) welcome the opportunity to respond to the Australian Competition and Consumer Commission's (**ACCC**) consultation paper entitled: *Local bitstream access service, Interim access determination and proposal for the final access determination, July 2012 (the Consultation Paper)*.

Section 152AL(3C) of the *Competition and Consumer Act 2010 (CCA)* requires the declaration of a Layer 2 bitstream service. On 24 February 2012, pursuant to its obligation under section 152AL(3C) of the CCA, the ACCC declared the LBAS and also commenced a public inquiry into making an access determination in respect of the LBAS.

Once a public inquiry into making an access determination for a newly declared service has commenced, the ACCC must make a decision on making a Final Access Determination (**FAD**) for that service within six months (subject to a power to extend the time period). Section 152BCG of the CCA requires that if, after the commencement of the public inquiry, the ACCC considers it unlikely that a FAD will be made within six months, it must make an interim access determination (**IAD**). The ACCC has formed the view that it will be unable to make a FAD for the LBAS within the six month time limit. It has therefore decided to extend the time limit and it has also made an IAD in respect of the LBAS.

The Consultation Paper sets out the ACCC's reasons for making the IAD, and seeks comments on the proposed content of the FAD for the LBAS.

In this submission the Access Seekers:

- seek to identify the high level principles that should be applied to determine the content of the LBAS FAD; and
- respond to the specific questions raised by the ACCC in the Consultation Paper.

## HIGH LEVEL PRINCIPLES

The regulation of the LBAS is part of what is commonly referred to as the 'level playing field' arrangements. The level playing field arrangements were introduced by the *Telecommunications Legislation Amendment (National Broadband Network Measures – Access Arrangements) Act 2011 (the Amendment Act)*. The explanatory memorandum that relates to the Amendment Act (**the EM**) describes the intended policy outcomes of the level playing field arrangements as follows (emphasis added):<sup>1</sup>

*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.***

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<sup>1</sup> Explanatory Statement to the Telecommunications Legislation Amendment (National Broadband Network Measures – Access Arrangements) Bill 2010 at p.14.

It is submitted that the highlighted policy objective in the quote above leads to the following high level principle:

**High Level Principle 1: Where it is practicable to do so, the LBAS FAD should seek to deliver a wholesale service that is capable of delivering similar and comparable outcomes for end users as NBN Co's Fibre Access Service.**

The Access Seekers acknowledge that regulation of the LBAS is particularly challenging due to the fact that the LBAS description applies to, or potentially applies to, a broad range of networks, products and network operators. That is why the 'where it is practicable to do so' qualification is included in High Level Principle 1.

As regards regulating LBAS price terms, the Access Seekers note that the ACCC proposes a benchmarking approach described as follows:<sup>2</sup>

*The benchmarking approach proposed by the ACCC would establish a price ceiling for specified LBAS products based on regulated NBN Co prices. The ACCC proposes that this approach only establish regulated prices for LBAS products where there has been a regulated price determined for a corresponding NBN Co product. This approach will require LBAS operators to offer specified LBAS products at a price no greater than the nominated price ceiling, but allow the freedom to offer other LBAS products not specified in a LBAS access determination.*

Given the particular challenges relating to regulating LBAS referred to above, the Access Seekers believe that the ACCC's approach is sensible and pragmatic and it is also consistent with High Level Principle 1. Therefore, the Access Seekers support the proposed benchmarking approach at this time. However, the ACCC should review this approach if information about the costs of providing the LBAS becomes available, so as to allow a cost based approach to be adopted. Furthermore, care needs to be taken when establishing what an 'NBN Co regulated charge' is. Given that NBN Co intends to be wholly or partly regulated by a special access undertaking (SAU), depending on what is included in the SAU and/or whether the SAU is accepted by the ACCC, NBN Co's price terms could be regulated in one, a combination of, or by all three, of the following ways:

1. The actual price term is included in NBN Co's SAU that has been accepted by the ACCC.
2. The price term is established by means of NBN Co using a method of ascertaining price that is contained in the SAU that has been accepted by the ACCC.
3. The ACCC makes a binding rule of conduct or access determination that specifies the price term.

In light of the above, a reference in this submission to a 'regulated NBN Co price term' is a reference to NBN Co pricing that is established in one of the three ways referred to above.

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<sup>2</sup> Consultation Paper at p.15.

The ACCC's benchmarking proposal quoted above leads to the following high level principle:

**High Level Principle 2: The regulated pricing for the LBAS should be benchmarked to regulated NBN Co price terms, with regulated NBN Co price terms setting a ceiling on what an LBAS provider can charge for the LBAS.**

As regards the scope of regulated pricing for LBAS, the Access Seekers believe that the LBAS should replicate each regulated price term for the NBN Co Fibre Access Service. This leads to the following high level principle:

**High Level Principle 3: The LBAS FAD should include benchmark prices that correspond to each regulated NBN Co price term for the Fibre Access Service.**

The Access Seekers note that the LBAS includes the carriage of communications between the user-network interface and the network-network interface, and that there are different models that can be used to provide the LBAS<sup>3</sup>. The Access Seekers note that the ACCC states the following in the Consultation Paper (emphasis added):<sup>4</sup>

*The ACCC notes that the LBAS is a local access service involving comparatively little aggregation or transmission as part of the service. The ACCC considers that the LBAS can be compared with NBN Co's AVC product component (part of NBN Co's Fibre Access Service (FAS)). LBAS differs from NBN Co's network in that LBAS specifies a local Point of Interconnection and as such involves comparatively little aggregation. **LBAS does not involve an equivalent component to NBN Co's Connectivity Virtual Circuit (CVC).***

The Access Seekers respectfully submit that the ACCC needs to give further consideration to how the 'carriage component' of the LBAS should be regulated. The Access Seekers submit that given the definitions of 'point of interconnection' and 'network-network interface' in the LBAS description, the LBAS description is broad enough to include a component that is equivalent to a CVC. For example, if Telstra had not been granted a Ministerial exemption in relation to its South Brisbane fibre network, that network would have been subject to the level playing field arrangements. As a condition of the Ministerial exemption, Telstra is required to provide access to its Fibre Access Broadband Service (**FABS**)<sup>5</sup>. The FABS therefore stands in the place of the LBAS. The FABS includes a mandatory 'Broadband VLAN' component which is used to aggregate traffic<sup>6</sup>.

In light of the above, the Access Seekers submit that the LBAS FAD should implement the following high level principle:

**High Level Principle 4: The LBAS FAD should set price ceilings for LBAS charges relating to the aggregation of traffic. These price ceilings should be based on regulated NBN Co CVC charges.**

<sup>3</sup> See for example the Opticomm submission of 23 March 2012 in response to the ACCC's discussion paper of February 2012 entitled: *Public inquiry to make an access determination for the local bitstream access service* available at: <http://www.accc.gov.au/content/index.phtml/itemId/1034770>

<sup>4</sup> Consultation Paper, at p. 16.

<sup>5</sup> See *Telecommunications (Network Exemption—Telstra South Brisbane Network) Instrument 2012*.

<sup>6</sup> The service description of the FABS is available on Telstra's website at: <http://www.telstrawholesale.com.au/products/fibre-access/fibre-access-broadband/index.htm#tab-3>

However, given that there will be situations where it is not practicable to provide a CVC as part of an LBAS, the CVC component of the LBAS should be unbundled and it should not be mandatory for an access seeker to obtain a CVC (or equivalent). This leads to the following high level principle:

**High Level Principle 5: A CVC (or equivalent) should not be a mandatory requirement of the LBAS but the FAD should set a price ceiling so that where a CVC (or equivalent) is provided, it will be subject to regulated pricing consistent with High Level Principle 3.**

The Access Seekers note that difficulty with the benchmarking approach for setting regulated LBAS pricing arises where the LBAS access provider:

- does not provide a service component that aggregates traffic; but
- imposes specific charges for the carriage of traffic between the user-network interface and the network-network interface.

This is because, given that it is a mandatory requirement of NBN Co's Fibre Access Service that a CVC be obtained, there will be no equivalent regulated NBN Co price term to set a benchmark price for the charging of the 'carriage component'. The Access Seekers note that the ACCC is of the view that in circumstances where there is little or no aggregation of traffic, the LBAS is equivalent to the AVC component of NBN Co's Fibre Access Service<sup>7</sup>. The Access Seekers support this view. If this view is followed to its logical conclusion, it leads to the following high level principle:

**High Level Principle 6: Where the LBAS is provided in a way that involves little or no aggregation of traffic, the LBAS provider should not be permitted to impose any additional charges for the 'carriage component' of the LBAS.**

As regards non price terms, the Access Seekers believe that High Level Principle 1 above requires that non price terms for the LBAS should be consistent with any regulated non price terms that apply to the NBN Co Fibre Access Service. This leads to the following high level principle:

**High Level Principle 7: Any relevant regulated non price terms that apply to NBN Co's Fibre Access Service should apply, mutatis mutandis, to the LBAS.**

## RESPONSE TO SPECIFIC ACCC QUESTIONS

***1) Do parties consider that the proposed benchmarking approach is likely to be appropriate for establishing LBAS prices for the FAD for the initial regulatory period (of 3 years, discussed below in Section 5.2? Are there any other pricing approaches that would likely be more appropriate for setting LBAS prices in the circumstances?***

Subject to the application of High Level Principles 3 to 6, the Access Seekers agree that the benchmarking approach is appropriate. The Access Seekers do not believe that there is a more appropriate approach at this time.

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<sup>7</sup> Consultation Paper, at p.16.

**2) If the proposed pricing approach is adopted, which specified 'port' or 'access line' LBAS products should be included in the FAD for LBAS? What characteristics should these products include?**

In accordance with High Level Principle 3, the LBAS FAD should include benchmark prices that correspond to each regulated NBN Co price term for NBN Co's Fibre Access Service.

**3) If the proposed pricing approach is adopted, which, if any, ancillary products (e.g. connection charges) should be included in the FAD for LBAS?**

In accordance with High Level Principle 3, the LBAS FAD should include benchmark prices that correspond to each regulated NBN Co price term for NBN Co's Fibre Access Service.

**4) Should the ACCC include a requirement to provide voice capability for the specified LBAS products? Would the voice capability characteristics proposed above likely be appropriate to include in the FAD for specified LBAS products?**

In accordance with High Level Principle 1, the ACCC should include such a requirement. However, in order to avoid any doubt, it should not be mandatory for an access seeker to acquire voice capability - i.e. there should be no forced bundling.

**5) If the proposed pricing approach is adopted, how often should prices be realigned to the prices of benchmarked products (e.g. annually, at the commencement of the following FAD etc.)?**

Any change to NBN Co regulated price terms should be replicated in the LBAS FAD as soon as the change occurs. Rather than specifying actual price terms, a FAD may include a 'method of ascertaining price'<sup>8</sup>. Therefore, the ACCC is able to set LBAS prices in the LBAS FAD by reference to the relevant NBN Co regulated price terms that are applicable from time to time, thereby creating a mechanism that allows any changes in NBN Co regulated price terms to flow through to the LBAS FAD automatically.

**6) With regard to the matters that the commission must take into account in making a final access determinations as prescribed in sections 152AB and 152BCA of the CCA (attached in Appendix B and discussed), how does the proposed pricing approach address these matters?**

The Access Seekers are in broad agreement with the approach set out in Appendix B of the Consultation Paper. The Access Seekers submit that an application of the High Level Principles discussed above is the most appropriate way to balance the competing objectives that the ACCC must consider. In particular, application of the High Level Principles will:

- achieve the relevant end user policy outcome of the level playing field arrangements (see High Level Principle 1); and
- avoid a disproportionate regulatory burden being placed on LBAS providers.

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<sup>8</sup> See section 152BC(8) of the CCA.

**7) Do parties have views on the ACCC's preliminary views of the assessment of the proposed pricing approach against the criteria, as set out above?**

See response to questions 1 and 6 above.

**8) Are the NPTCs set out in the IAD appropriate for inclusion in the LBAS FAD?**

The Access Seekers acknowledge that it was appropriate for the ACCC to include the NPTCs in the IAD. However, consistent with High Level Principle 7, when setting non price terms in the LBAS FAD, the ACCC should have regard to the regulated non price terms that apply to NBN Co's Fibre Access Service.

**9) For any NPTCs in the IAD that are considered not appropriate for inclusion in the LBAS FAD, please provide details of any modifications that can be made to the NPTCs to make them appropriate.**

See response to question 8.

**10) Are there any other NPTCs that should be included in the LBAS FAD? If so, please include details.**

See response to question 8. Details cannot be included until the regulated NBN Co terms have been established.

**11) Are there any matters that should be considered when determining the NPTCs for the LBAS FAD?**

Yes, High Level Principles 1 and 7 above.

**12) Is the proposed duration of the FAD appropriate? If not, what is the appropriate duration?**

It may be appropriate to align the term of the FAD with the term of NBN Co regulated terms. However, the Access Seekers have no strong views on this issue.

**13) Do you agree with the ACCC's application of the legislative criteria in subsection 152BCA(1) of the CCA? Please provide reasons.**

The Access Seekers believe that the ACCC has adopted a sensible and pragmatic approach that is consistent with the applicable statutory test. The Access Seekers believe that the ACCC's reasoning process that supports the adoption of a benchmarking approach also supports the implementation of the High Level Principles - i.e. the High Level Principles are merely a refinement of the ACCC's broader approach.

**iiNet  
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