



Superfast Broadband Access Service declaration inquiry

nbn's response to the ACCC Discussion Paper

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Executive summary

nbn welcomes the opportunity to respond to the Australian Competition and Consumer Commission (**ACCC**) discussion paper in relation to the declaration of the superfast broadband access service (**SBAS**).

In summary:

- **nbn** broadly supports the declaration of the SBAS for a period of five years.
- **nbn** considers that declaration of the SBAS is likely to promote the long term interests of end users (**LTIE**), including by supporting the promotion of competition in downstream retail markets for superfast broadband services and other related markets, and also encouraging efficient use of and investment in broadband and communications infrastructure.
- **nbn** considers that declaration of the SBAS is a necessary pre-condition to give effect to the level playing field objectives that underpin the provisions of the *Telecommunications Act 1997* (**Telco Act**) in relation to telecommunications networks that are capable of supplying superfast carriage services and is consistent with the Government's response to the Vertigan review on this matter.
- The declaration of the SBAS will contribute to a symmetrical approach to regulation of superfast broadband services under Part XIC of the *Competition and Consumer Act 2010* (**CCA**) between **nbn**TM and non-**nbn**TM services of a similar nature. Economic regulation that applies symmetrically across network infrastructure is the intention of Part XIC.
- **nbn** supports the SBAS being declared on a nationwide basis to ensure that all non-**nbn**TM superfast broadband services are subject to competitive supply at the retail level and to minimise the prospect of regulatory arbitrage by allowing the alternative provider of superfast broadband access services to deliver services outside the geographic footprint of any narrowly constructed declaration.
- **nbn** supports the use of a technologically neutral approach to the service description for the SBAS. The service description should define a Layer 2 bitstream service in a way that is largely agnostic to the underlying access technology so as to capture all services to residential and small business customers that are capable of delivering superfast broadband services, including vectored VDSL, G.fast based services and any future technology variants.
- The service description should capture all non-**nbn**TM superfast broadband networks that can deliver a download data transfer rate at Layer 2 of at least 25 Mbps.
- The declaration of the SBAS should apply, regardless of whether **nbn** has overbuilt, or been overbuilt by, the alternative provider of superfast broadband access services.
- **[C-I-C]**.



1. Introduction

On 6 May 2015, the ACCC released a discussion paper regarding the declaration of the SBAS. The discussion paper sought industry views on whether a SBAS should be declared and the scope of any associated service description.

The ACCC can declare a service if it is satisfied that doing so would promote the LTIE of carriage services, or services supplied by means of carriage services. In deciding whether declaration will promote the LTIE, the ACCC must have regard to three core objectives:

- the promotion of competition in relevant markets;
- the achievement of any-to-any connectivity; and
- encouraging the economically efficient use of, and the economically efficient investment in, infrastructure by which the relevant services are supplied.¹

The ACCC's decision to initiate an SBAS declaration inquiry is closely aligned with other relevant regulatory and industry developments, including:

- the Vertigan Committee's final report into Part XIC of the CCA, which included a recommendation that the ACCC commence a public inquiry into declaring vectored VDSL services and making non-**nbn**TM wholesale bitstream access services available to access seekers;²
- the Government's response to the Vertigan Committee's recommendations, in which the Government outlined new regulatory arrangements to apply both in the short term (e.g. an interim carrier licence condition) and the longer term (e.g. legislative reform and possible SBAS declaration by the ACCC);³
- the possible competition concerns that were raised in relation to the technical limitations of vectored VDSL2 technology and the ability of competing superfast broadband providers to use vectored technologies to serve a particular premises;
- **[C-I-C]**; and
- the Government inquiry on, and subsequent introduction of, a carrier licence condition that applies to designated networks supplying a superfast carriage service to residential customers.⁴

nbn broadly supports the declaration of the SBAS and considers that declaration will promote the LTIE, as well as complementing the broader legislative changes that are expected to occur over the next two years to ensure a level playing field between **nbn**TM and non-**nbn**TM services.

This submission comprises two parts:

- section 2 sets out the key considerations that the ACCC should take into account when deciding whether to declare the SBAS; and
- section 3 responds to the ACCC's specific questions in Appendix A of its discussion paper.

¹ Section 152AB, CCA.

² Dr Michael Vertigan AC, Ms Alison Deans, Professor Henry Ergas and Mr Tony Shaw PSM, 'Statutory review under section 152EOA of the Competition and Consumer Act' (June 2014) at 29.

³ Australian Government, 'Telecommunications Regulatory and Structural Reform' (December 2014).

⁴ Carrier Licence Conditions (Networks supplying Superfast Carriage Services to Residential Customers) Declaration 2014.



2. Key considerations for declaring the Superfast Broadband Access Service

2.1 Level playing field

The legislative environment for telecommunications services in Australia seeks to provide a level playing field in relation to the delivery of superfast broadband services over the **nbn**[™] and non-**nbn**[™] networks. This is reflected in the current carrier licence condition that applies in relation to superfast broadband networks and the Australian Government's proposed legislative changes to the Telco Act.

In particular, the Australian Government's response to the Vertigan review provides for the following:

- as part of the transition to a more competitively neutral structure, the implementation of a two-year carrier licence condition requiring functional separation of non-**nbn**[™] superfast broadband networks and the supply of superfast broadband wholesale services to access seekers over these networks on a non-discriminatory basis;
- the repeal of Part 7 of the Telco Act, with intended effect from 1 January 2017, with access to superfast broadband services to be dealt with under Part XIC of the CCA (i.e. through declaration of the SBAS);
- the introduction of legislation to require new networks targeting residential customers and offering high-speed broadband to be structurally separated as a default and to offer non-discriminatory access;
- the removal of the current 1km statutory exemption; and
- the introduction of legislative changes to allow the ACCC to authorise functional separation arrangements (subject to undertakings from carriers detailing satisfactory arrangements for access and equivalence to minimise anti-competitive effects).

As the above makes clear, it is the Australian Government's intention that superfast broadband networks that seek to pre-empt or subsequently overbuild the **nbn**[™] network will be subject to a range of provisions that seek to ensure a level playing field between **nbn** and the alternative network builder.

The ACCC's declaration inquiry into the SBAS needs to be viewed within the broader context of the current legislative environment and proposed changes to this environment over the next couple of years. The objective of promoting competition in markets for listed services and incentives for investment that declaration is likely to have on other infrastructure used to provide superfast broadband services are of particular relevance to, and provide the basis for, the ACCC's consideration of this broader context.

In particular, as the proposed removal of Part 7 of the Telco Act (and presumably the consequential removal of section 152AL(3C) of the CCA) is expected to occur on the basis that it will effectively be replaced with the declaration of the SBAS, the realisation of a level playing field and the Australian Government's broader objectives for the telecoms sector will potentially be jeopardised if declaration of the SBAS does not occur.

nbn considers that a failure to declare the SBAS is likely to undermine the concept of a level playing field by giving alternative superfast broadband network operators a significant competitive advantage at both the retail and infrastructure level. This is notwithstanding the requirement for structural separation (or functional separation as an alternative) at a later point, as structural (or functional separation) will still need to be accompanied by sufficient regulation at the wholesale level to have the effect of promoting competition in downstream markets and to encourage economically efficient investment in infrastructure.



2.2 Symmetrical regulation under Part XIC

Economic regulation under Part XIC of the CCA is designed to promote the LTIE by applying symmetrically to all access providers that offer the relevant service that is subject to regulation.

The fact that Part XIC now distinguishes between **nbn**TM and non-**nbn**TM services for declaration purposes does not change this fundamental underpinning assumption. Therefore, to the extent that superfast broadband services are being provided over both **nbn**TM and non-**nbn**TM infrastructure, then it is necessary to ensure that **nbn**TM and non-**nbn**TM services are subject to a comparable level of regulation.

It will not be possible for **nbn**TM and non-**nbn**TM services to be subject to a similar level of regulation in the absence of declaration of the SBAS. In fact, as no alternative option is available to secure the declaration of non-**nbn**TM services (unlike the multiple approaches available to declare **nbn**TM services under Part XIC, including the publication of an SFAA and the use of a special access undertaking), declaration of the SBAS is a necessary pre-condition for ensuring regulatory symmetry between **nbn**TM and non-**nbn**TM networks in relation to comparable services.

It is also clear that declaration of the SBAS will be necessary to ensure that the current wholesale access regime for alternative superfast broadband networks, which is implemented through the existing carrier licence condition, can continue when the carrier licence condition expires at the end of 2016. The recent announcement by TPG that it has started to offer wholesale services through a functionally separate business unit demonstrates that the carrier licence condition is having the intended policy impact. As this carrier licence condition was only intended to be a short term measure while the Government considers longer term regulatory arrangements,⁵ it follows that declaration of the SBAS will be a critical element to giving effect to the longer term framework for regulating superfast broadband networks other than the **nbn**TM network.

2.3 Promotion of the LTIE

The ACCC can only declare a service if it is satisfied that doing so would promote the LTIE of carriage services, or services supplied by means of carriage services. In deciding whether declaration will promote the LTIE, the ACCC must have regard to the extent to which declaration is likely to result in the achievement of the following three objectives:

- promoting competition in markets for carriage services and services supplied by means of carriage services (together, the **listed services**);
- achieving any-to-any connectivity in relation to carriage services that involve communication between end users; and
- encouraging the economically efficient use of, and the economically efficient investment in:
 - the infrastructure by which listed carriage services are supplied; and
 - any other infrastructure by which listed carriage services are, or are likely to become, capable of being supplied.⁶

In addition to facilitating a level playing field in line with the Australian Government's policy objectives and the underlying objectives of Part XIC, **nbn** also considers that the declaration of a SBAS would ultimately promote the LTIE.

In particular, **nbn** considers that:

⁵ Explanatory statement: Carrier Licence Conditions (Networks supplying Superfast Carriage Services to Residential Customers) Declaration 2014 at 7.

⁶ Section 152AB, CCA.



- if the SBAS is not subject to declaration upon the expiry of a carrier licence condition requiring wholesale access to be made available, it will undermine any short term competitive spur to retail markets that is achieved through the provision of wholesale access in accordance with the current carrier licence condition and limit the prospect of competition over the medium to longer term in downstream retail markets – this is particularly the case for geographic areas where an alternative superfast broadband network has been deployed but where overbuild by **nbn** is pending; and
- the absence of declaration of the SBAS will skew the playing field at the retail level in favour of a single vertically integrated provider. While this competitive advantage at the retail level could potentially be alleviated by **nbn**'s rollout in the affected area and the fact that alternative superfast broadband networks will need to be subject to structural separation (or functional separation) under proposed legislative changes, the better approach is to ensure that any competition in retail markets achieved over the short term through the operation of the carrier licence condition can continue unaffected. This need to pre-empt any foreclosure of competition at the retail level through targeted regulation of the SBAS also needs to be considered in light of the increasing consolidation of service providers at the retail level with the potential for fewer vertically integrated operators, particularly if the proposed merger of iiNet and TPG is allowed to proceed.⁷

Most significantly, in considering whether declaration will promote the LTIE, it is necessary for the ACCC to consider the objective of promoting competition in markets for listed services and investment in alternative infrastructure through which listed services can also be supplied in a multi-faceted way. The ACCC's analysis should also focus on how declaration of the SBAS will promote **nbn** itself contributing to the LTIE. For example, in a situation where only **nbn**TM services are subject to declaration and economic regulation, this is likely to place the **nbn**TM network at a competitive disadvantage relative to other superfast broadband networks but will also have the effect of limiting supply side substitution possibilities in relation to superfast broadband services. This is likely to undermine the prospect of competition in relation to listed services at both the infrastructure and retail level, as well as potentially undermining incentives for both **nbn** and other superfast broadband providers to invest in superfast broadband networks and services.

In particular:

- regulated access to the SBAS should increase the number of retail services providers that are able to supply a particular end user premises [**C-I-C**]; thereby increasing the level of retail competition and allowing for improved demand-side substitution at that premises;
- regulated access to the SBAS will also encourage supply side substitution, as access seekers will then have a choice of which infrastructure provider to use for superfast broadband access, resulting in higher levels of competition, service differentiation and potential investment between **nbn** and non-**nbn** entities as they compete for the wholesale business of access seekers; and
- declaration of the SBAS will, even in the absence of an access determination, create incentives for alternative providers of superfast broadband services to act reasonably and to price wholesale services at competitive levels to avoid more onerous regulation through the ACCC's access determination power.

2.4 Impacted markets

The declaration inquiry process under Part XIC of the CCA does not technically require the ACCC to define the scope of relevant markets as part of its LTIE analysis.

Nevertheless, **nbn** considers that the following markets are likely to be most relevant to the ACCC's consideration of whether to declare the SBAS:

⁷ ACCC, 'Statement of issues – TPG Telecom Limited – proposed acquisition of iiNet Limited' (11 June 2015) at 69 – 72.



- **a wholesale market for bitstream access to superfast broadband services**, comprising the market in which the SBAS will be provided by the alternative superfast broadband network operator and in which alternative wholesale offerings from **nbn** will become available and co-exist over time;
- **retail fixed markets for superfast broadband services**, comprising all fixed line broadband services provided over superfast broadband networks, including lower speed tiers (e.g. below 25 Mbps on the downlink) that serve as a migration product from ADSL services and which potentially serve as a pricing anchor for higher speed tier services available over superfast broadband networks;
- **retail fixed markets for telephony services**, comprising telephony services provided from a fixed location; and
- **retail fixed markets for audio-video services** – this is likely to be a broad market that includes the provision of content services by Foxtel, on-demand TV services provided by 'over the top' providers and potentially a number of alternative providers – some services provided in this market will rely on the provision of superfast broadband services (on a unicast or multicast basis) as an input.

nbn considers that declaration of the SBAS is likely to promote the LTIE in each of these markets relative to the counter-factual where declaration of the SBAS does not exist, regardless of whether **nbn** has overbuilt the alternative superfast broadband service provider.

2.5 Geographic restrictions

In keeping with the objective of having a level playing field between **nbn** and alternative superfast broadband network operators, **nbn** supports the declaration of SBAS on a nationwide basis. Otherwise, if geographic restrictions are included in the service description, **nbn** considers that there may be significant risk of bypass if an alternative provider moves to build out infrastructure in an area which is not otherwise covered by the geographic scope of the SBAS declaration. This would effectively limit the prospect of retail competition in these uncovered areas and expose the SBAS declaration to the prospect of regulatory arbitrage by the alternative operator of the superfast broadband network.

nbn does not consider that declaring the SBAS in a way that limits its geographic scope would be in the LTIE.

While it is likely that alternative superfast broadband providers will seek to limit their rollouts to metropolitan areas where the costs of deployment are lower, the imposition of a geographic restriction within the scope of the SBAS declaration will likely result in the ACCC having to make a largely arbitrary decision as to which geographic areas would be covered by the declaration and those areas which would not.

This would create a situation of potential regulatory arbitrage, as this could result in the creation of geographic areas outside of the scope of the SBAS declaration where an alternative superfast broadband network service provider could economically deploy their own infrastructure without having to provide wholesale access.

The decision to use a national geographic market for declaring the SBAS would be consistent with the positions set out in the final report on the public inquiry into the fixed line services declarations that was recently completed. Many of the reasons provided by the ACCC in response to that inquiry are equally applicable to the current SBAS declaration inquiry. For example, retail service providers generally compete nationally for end users and tend to adopt a national approach to setting prices.⁸

Lastly, **nbn** notes that its own standard access obligations under Part XIC of the CCA apply on an Australia-wide basis. Thus, if the ACCC opted to include geographic limitations in a SBAS declaration, it would serve to undermine the symmetric regulation in those areas that were outside the scope of the SBAS declaration.

⁸ ACCC, 'Public inquiry into the fixed line services declarations – Final report' (April 2014) at 17.



2.6 Impact of interference

The potential impact on competition in relation to the supply of superfast broadband services caused by interference associated with the shared use of lines in a single cable sheath are well known.

In its submission to the 'Vertigan Panel Review: Regulatory Issues Framing Paper',⁹ Communications Alliance stated:

"To reap the maximum performance benefits of vectoring and prevent service instability (e.g. dropouts) no more than one provider can offer vectored services within each cable sheath. This effectively means that there can only be one provider of VDSL2 network services in a node serving area or within a multiple dwelling unit or business centre development."¹⁰

Various work streams have been established to better understand the technical impacts of this interference and identify possible solutions for addressing the resultant impacts on competition. For example, Communications Alliance's VDSL2 and Vectoring Working Committee (WC58) is revising the ULLS deployment industry code and related standards and guidelines to align with international developments in VDSL2 technology (e.g. ITU-T Recommendations G993.2 and G993.5).¹¹ WC58 is also considering the nature and extent of potential effects of emerging successor technologies such as G.Fast.

nbn strongly supports the development of appropriate arrangements to facilitate co-existence of competing infrastructure providers using the same individual cable sheaths to provide superfast broadband services. **nbn** considers that the issue of co-existence needs to be addressed separately outside of the declaration process. In particular, the process for identifying possible solutions for addressing the resultant impacts on competition on cable sheath interference should be addressed primarily through the current Communications Alliance process.

Accordingly, **nbn** considers that the issue of interference in cable sheaths is not directly relevant to the decision to declare the SBAS, or the terms of the SBAS declaration itself. The declaration of the SBAS will not, in itself, solve all competition issues in respect of cable bundle bottlenecks. These bottlenecks can only be sufficiently addressed if competing services from superfast broadband networks operators are permitted to co-exist as part of the broader industry efforts currently underway on this issue.

With that said, it is also important for the ACCC to avoid adopting a service description for the SBAS that will have the effect of potentially facilitating (inadvertently or otherwise) adverse competition outcomes that could eventuate from cable sheath interference.

Accordingly, while **nbn** broadly supports declaration of the SBAS, **nbn** does not consider that the issue of interference caused by vectoring needs to be addressed directly within the SBAS service declaration.

nbn has provided an overview of what it considers to be the key requirements of the SBAS service description in section 3.

⁹ Communications Alliance, 'Regulatory Issues Framing Paper: Communications Alliance submission to the Vertigan Panel Review' (March 2014).

¹⁰ Ibid at 3.

¹¹ Under review are *C559:2012 Unconditioned Local Loop Service (ULLS) Network Deployment Industry Code*, *AS/ACIF S043 Requirements for Customer Equipment for connection to a metallic local loop interface of a Telecommunications Network Australian Standard*, and *AS/ACIF S041:2009 Requirements for DSL Customer Equipment for connection to the Public Switched Telephone Network Australian Standard* (see: <http://www.commsalliance.com.au/Activities/committees-and-groups/wc58>).

3. Response to ACCC questions

3.1 Relevant markets

ACCC question:

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

Please see **nbn**'s response to this issue in sections 2.4 and 2.5 above.

3.2 Declaration of the SBAS to promote the LTIE

ACCC question:

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.*

Yes, **nbn** considers that declaration of the SBAS is likely to promote the LTIE for the reasons set out in section 2.3 above.

In particular, declaration of the SBAS is likely to achieve the objective of promoting competition at both the infrastructure level between **nbn** and the alternative superfast broadband network operator, while also encouraging competition in downstream retail markets over the medium to long term.

In addition, declaration is also likely to encourage the efficient use of, and investment in, infrastructure as the competitive provision of wholesale access services at Layer 2 will provide increased opportunities for supply side substitution.

3.3 Superfast broadband networks as a bottleneck

ACCC question:

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.*

Yes, **nbn** considers that there is the potential for alternative superfast broadband networks, other than the **nbn**TM network, to represent a bottleneck for providing superfast broadband services to end users. While the carrier licence condition and proposed legislative changes to the Telco Act are intended to ensure that this does not become the case in respect of alternative superfast broadband networks, the declaration of the SBAS would have a strong bearing on whether such alternative networks become bottleneck facilities in practice.

nbn is subject to extensive regulation through its SAU and a range of other measures, which together ensure that there is no plausible risk that **nbn** could potentially become a bottleneck for providing services in downstream wholesale and retail markets. The regulatory framework that applies to **nbn**, including the declaration of **nbn**TM services through the SAU and publication of a standard form of access agreement and



associated regulation, provides the basis for a level playing field and effective competition in downstream markets.

However, without comparable measures applying to other non-**nbn**TM superfast broadband networks, there is a greater risk that these alternative networks may be used to limit the competitive supply of broadband services to end users. This is notwithstanding proposed changes to the Telco Act to encourage structural separation and wholesale only access of alternative superfast broadband networks, as the effectiveness of these measures is ultimately contingent on an effective regime being put in place under Part XIC to facilitate access to these wholesale only, structurally separated networks.

Indeed, the carrier licence condition attempts to address this issue by requiring the alternative operators of superfast broadband networks to functionally separate and offer wholesale access to competing providers on the same terms that are provided to its own retail operations. However, the carrier licence conditions are only a temporary measure that are set to expire in December 2016. Thus, the ACCC should declare the SBAS to ensure that competitive wholesale access to the facilities of alternative superfast broadband networks is maintained after the carrier licence condition expires. This would avoid a scenario where a lack of regulation (or the risk of regulatory intervention by the ACCC through its access determination power) could result in alternative superfast broadband networks being competition free zones until the arrival of **nbn**. Such outcome would be contrary to the LTIE and would also have adverse impacts on the potential levels of infrastructure based competition in the last mile.

3.4 Access seekers' ability to compete

ACCC question:

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?*

As a structurally separated wholesale only provider of superfast broadband services, **nbn** considers that the terms on which it offers wholesale access to the **nbn**TM network has the positive effect of promoting competition in downstream wholesale and retail markets. **nbn**'s offering includes wholesale access at the lowest practical level of the value stack and the use of a product construct that allows for reasonably high levels of competitive differentiation at the retail level (e.g. through an extensive and expanding wholesale service portfolio and flexible provisioning options around contention, value added services, etc.).

The specific terms and conditions of access to the **nbn**TM network are based on extensive commitments made by **nbn** under its SAU and the wholesale broadband agreement, which have both been developed through extensive industry consultation. When taken together, these regulatory arrangements provide significant protections to access seekers, while also giving **nbn** the opportunity to recover its costs and to achieve a reasonable rate of return over the life of the SAU.

[C-I-C]

3.5 Service description of a declared SBAS

ACCC 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?*

nbn recommends that the ACCC adopt a service description that is as technologically neutral as possible. The inclusion of a service description that specifically refers to certain technologies (e.g. use of vectored VDSL2 technology, etc.) could unintentionally limit the scope of the declaration or create incentives for carriers to adopt other technologies to avoid the reach of the regulation.

For these reasons, **nbn** considers that the ACCC should seek to apply a technology-neutral service description which broadly covers all superfast broadband networks that are capable of supporting superfast broadband services, including those provided over VDSL2, with or without vectoring, G.fast technologies and any future successor technologies capable of delivering superfast broadband to end users.

Lastly, as noted in the ACCC's discussion paper, applying a technology-neutral approach would also be consistent with other ACCC service descriptions which are typically not limited to services with particular performance characteristics.¹²

Specifically, **nbn** considers that the following key characteristics should be incorporated in the service description of a declared SBAS:

- the service should be defined as a Layer 2 wholesale bitstream service;
- the service should apply expansively to all superfast broadband capable networks that serve residential or small business customers, other than the **nbn**[™] network [**C-I-C**];
- the superfast broadband service should be defined as the ability to deliver a download data transfer rate of at least 25 Mbps at Layer 2 under normal operating conditions. Such an approach to defining the data transfer rate would be broadly consistent with the existing legislative definitions for a superfast carriage service which provides that "the download transmission speed of the carriage service is normally more than 25 megabits per second";¹³ and
- there should be nothing in the service description that limits the ability of the ACCC to regulate speed tiers that are either above or below 25 Mbps which are capable of being supplied over the relevant superfast broadband network – limiting the service description in a way that would limit the statutory obligation to supply under section 152AR to services of a particular speed (or speed combination) would be counterproductive and would potentially allow the access provider to circumvent the scope of the declaration. The better approach would be to ensure that the service description operates expansively to cover potential entry level offerings at lower speed tiers (e.g. below 25 Mbps on the downlink), as well as the higher speed tier services available over superfast broadband networks and which are currently seen today in the retail market.

¹² ACCC, 'Superfast Broadband Access Service declaration inquiry: Discussion paper' (May 2015) at 20.

¹³ Section 142A, Telecommunications Act.



3.6 Geographic considerations and carrier-specific exemptions

ACCC question:

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.**

For the reasons given in section 2.5, **nbn** considers that the SBAS declaration should apply on a nationwide basis.

nbn does not consider that carrier specific exemptions will promote the LTIE and believes that the service description should apply expansively to all networks that are capable of delivering superfast broadband services to residential and small business customers, other than the **nbn**TM network.

3.7 Duration of the declaration

ACCC question:

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

Under section 152ALA(2), the ACCC must apply an expiry date for a declaration that is between 3 to 5 years after the declaration is made, unless the ACCC is of the view that there are circumstances that warrant a longer or shorter duration for the declaration.¹⁴

nbn supports a 5 year period for the SBAS declaration. **nbn** considers that a five year declaration represents an appropriate period of time, having regard to the expected timelines for the rollout of the **nbn**TM network and alternative superfast broadband networks and the need for as much regulatory certainty as possible over this transitional period.

3.8 Regulatory burden

ACCC question:

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.*

The declaration of an SBAS is unlikely to result in a material increase in the regulatory burden faced by alternative providers of superfast broadband services.

It is necessary to consider the potential regulatory burdens associated with the declaration of the SBAS as part of the broader legislative framework that seeks to support a level playing field between **nbn**TM and non-**nbn**TM services.

¹⁴ Section 152ALA(2), CCA.



As noted above, proposed changes to the legislative environment in connection with the promotion of a level playing field include the introduction of legislation to require new networks targeting residential customers and offering high-speed broadband to be structurally separated as a default and to offer non-discriminatory access.

Given that the proposed legislative framework requires structural separation (or functional separation as an alternative) and the existing carrier licence provisions require functional separation and the supply of wholesale superfast broadband services on an open access basis, it follows that a significant proportion of the regulatory burden that exists today (or which will exist in the future) will exist regardless of whether the SBAS is declared.

Therefore, the declaration of the SBAS, which is intended to complement the requirement for structural separation, is unlikely to materially increase regulatory burdens that would be faced by alternative operators of superfast broadband networks as a matter of course.

It is also necessary to consider any regulatory burdens (or costs) associated with structural separation and the associated declaration of the SBAS in the context of the benefits that structural separation and declaration is likely to produce. These benefits are likely to outweigh such costs and are likely to include an enhanced prospect of competition in downstream markets and the minimisation of incentives for the alternative provider of a superfast broadband network to engage in unreasonable commercial pricing (e.g. by exposing them to the risk of ACCC intervention through an access determination).