



# Superfast broadband access service – access determination inquiry

Discussion paper

November 2021

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## List of abbreviations and acronyms

ACCC	Australian Competition and Consumer Commission
ACMA	Australian Communications and Media Authority
ADSL	Asymmetric Digital Subscriber Line
AVC	Access Virtual Circuit is the bandwidth allocated to the end-user premises. It is charged on a per-connection basis.
CBD	Central Business District
CCA	<i>Competition and Consumer Act 2010</i>
C-I-C	Commercial-in-Confidence
CVC	Connectivity Virtual Circuit is the bandwidth capacity required to serve a collection of end-user premises on an aggregate basis.
FAB	Fibre Access Broadband
FAD	Final Access Determination
IAD	Interim Access Determination
Layer 2 service	Layer 2 has the same meaning as in the Open System Interconnection (OSI) Reference Model. In general terms, it provides a point-to-point dedicated connection between two fixed points in a network.
Layer 3 service	Layer 3 has the same meaning as in the OSI Reference Model. In general terms, layer 3 provides a switched connection that enables an end-user to reach a desired application service.
LBAS	Local Bitstream Access Service
Mbps	Megabits Per Second
NBN	National Broadband Network
Overage	A charge that applies when the CVC bandwidth ordered by an access seeker is greater than the CVC Inclusions of all bundled services ordered in aggregate.
RSP	Retail Service Provider
SBAS	Superfast Broadband Access Service
TC-4	A standard, best effort traffic class used for delivering residential and non-critical business broadband services.
VDSL	Very-high-bit-rate Digital Subscriber Line

# 1. Introduction

This discussion paper begins the Australian Competition and Consumer Commission's (ACCC) public consultation for making a final access determination (FAD) under section 152BC of the *Competition and Consumer Act 2010* (CCA) for the superfast broadband access service (SBAS). The SBAS is a declared wholesale access service that access seekers can use to supply fixed line superfast broadband services to end-users.

In July 2021 the ACCC decided to vary and extend the SBAS declaration to regulate non-NBN fixed line superfast broadband services until 28 July 2026.<sup>1</sup> This declaration provides a retailer of broadband services with a right of access to the SBAS.<sup>2</sup>

Once a telecommunications service is declared, the ACCC must hold a public inquiry about a proposal to make an access determination for that service. An access determination may include a broad range of matters, but if it includes terms and conditions relating to access to the service, it must specify price or a method of ascertaining price. Parties can rely on the terms and conditions set out in an access determination, or they can negotiate commercial terms and conditions. An access determination usually serves as a fall back that parties can rely on if they are unable to otherwise reach agreement about the terms of access.

The ACCC has made an interim access determination (IAD) to maintain the current price and non-price terms until we make a new SBAS FAD.<sup>3</sup> It applies from 27 July 2021 to either 31 Dec 2022 or the day on which a new SBAS FAD comes into force, whichever is earlier. The current regulated prices for the SBAS are set out in Schedule 2 of the IAD and shown in Appendix A of this paper.

## 1.1. Key consultation issues

We seek the views of interested parties on a range of specific issues regarding the new SBAS FAD. These issues are outlined below and discussed in more detail in this paper. We also seek stakeholder views on other issues relevant to the access determination, including the required statutory considerations set out in Appendix C.

### **What pricing methodology should determine SBAS prices?**

To date, the SBAS has been subject to price regulation in the form of anchor prices benchmarked to NBN pricing for similar wholesale access services (with an exception for Telstra's Fibre Access Broadband service as outlined below).

After considering alternative models in the previous 2017 inquiry, such as a building block model and a 'retail minus' approach, we implemented an anchor pricing model for the SBAS benchmarked to NBN services (and benchmarked to ADSL for the Fibre Access Broadband (FAB) service). This was more straightforward to implement and helped to ensure SBAS retailers were not paying more than for equivalent NBN services, benefiting consumers. We are interested in whether regulated SBAS prices should continue to be set in line with NBN prices (for the FAB service, ADSL) and, if not, what alternative approaches should be considered.

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<sup>1</sup> ACCC, [SBAS and LBAS declaration inquiry – Final Decision](#), 19 July 2021

<sup>2</sup> The July 2021 SBAS declaration varied the previous SBAS declaration and combined it with the Local Bitstream Access Service (LBAS) declaration under a single declaration instrument. The ACCC also revoked the LBAS declaration concurrently to the varied and extended SBAS declaration taking effect. The SBAS and LBAS generally have the same service characteristics and can be considered as counterpart services provided over networks built before 1 January 2011 (i.e., SBAS) and after 1 January 2011 (i.e., LBAS).

<sup>3</sup> ACCC, [Interim Access Determination and Explanatory Note](#), 29 July 2016

## **If we were to continue to adopt an anchor pricing approach, what product(s) should we use as anchors?**

The main regulated prices for the SBAS are currently specified at download/upload speeds of 25/5 Mbps. This is the entry level product tier for superfast broadband services. The access price set for this speed tier (plus a charge for shared network capacity) is the 'anchor' price point for regulated access to the SBAS. Telstra's Fibre Access Broadband (FAB) service is currently treated differently (see below).

Focusing access regulation on only some access products can provide important safeguards for consumers and competition while providing the access provider with additional flexibility to price higher quality access products. However, the price of these higher quality offers can still be restricted to efficient and competitive levels provided the regulated product(s) provide a viable alternative for a significant number of end-users. In this way the regulated access products act to anchor the unregulated access offers.

We seek views on whether the current anchor price point for the SBAS should be reviewed and whether regulated prices should be set for additional speed tiers above or below 25/5 Mbps.

## **Should current access prices for Telstra's Fibre Access Broadband service be maintained?**

Telstra supplies a FAB service on its South Brisbane and Velocity Estates networks, for which access is regulated under the SBAS declaration and access determination. The FAB service is treated differently because these networks were built to work with Telstra's legacy copper-based network systems and require an active voice line service. Telstra has recently sold these networks to Uniti Group Ltd (Uniti).

Following the planned upgrade by Uniti of these networks to a Layer 2<sup>4</sup> service, the current regulated access prices for the FAB service will not apply to these networks. When the South Brisbane and Velocity Estates networks are upgraded, the regulated price and other terms and conditions of access to Layer 2 services under the SBAS declaration and 2022 SBAS FAD will apply. The transfer of end-users to the upgraded networks is expected to commence in July 2022 and take around 12 months to complete.

Noting stakeholder concerns about the quality of the FAB service and limited retail offerings for users, we seek views on the approach to wholesale access pricing for the FAB service for the period while the service is still operating and regulated under the 2022 SBAS FAD. We are also interested in understanding what practicable access measures could address any competition and consumer concerns regarding the FAB service, including the potential for aligning the regulated access price for the FAB service with an SBAS Layer 2 service or other options.

## **Should there be exemptions from the Standard Access Obligations?**

We will consider the circumstances in which there should be exemptions from the Standard Access Obligations<sup>5</sup> under the SBAS access determination. In the absence of the Standard Access Obligations applying, the price and non-price terms of access would be subject to commercial negotiation without fall back to the regulated terms of access where agreement cannot be reached.<sup>6</sup>

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<sup>4</sup> In essence, this refers to an NBN-equivalent broadband access service.

<sup>5</sup> CCA section 152AR.

<sup>6</sup> Access providers that are a designated SIP must offer wholesale access and any exemption we make would not remove that statutory obligation.

### ***Small network exemption***

Small scale operators of superfast access networks built prior to 1 January 2011 are currently exempt from complying with the Standard Access Obligations under the SBAS IAD. A small-scale operator is one with no more than 12,000 end-users supplied by the SBAS services.<sup>7</sup> Under the 2017 SBAS and LBAS access determinations, SBAS (but not LBAS) providers supplying up to 12,000 end-users were exempt from the Standard Access Obligations. The 2021 SBAS IAD maintains the exemption for SBAS (but not LBAS) providers to provide regulatory certainty during this inquiry.

We are considering adopting a uniform approach for SBAS and former LBAS providers in the 2022 SBAS FAD. That is, if the current small network exemption is maintained, varied or removed, changes would apply equally to SBAS and former LBAS providers.

We are interested in stakeholder views on whether the small network exemption should be removed, modified or remain the same.

We note that any exemptions only apply while they are in force in a declaration or FAD and can be varied or removed by the ACCC following an inquiry.

### ***Competition based exemption from the SBAS access obligations***

In the 2021 SBAS declaration final decision<sup>8</sup>, we recognised that there were geographic areas where it may be commercially viable for multiple superfast broadband networks to co-exist and compete, such that an exemption from the Standard Access Obligations may be appropriate. The 2021 SBAS IAD does not apply to services that exclusively supply business, charity and public body end-users in central business district (CBD) areas of major capital cities, on the basis that competition in the supply of these services is considered to be effective, consistent with the previous SBAS FAD.

During the SBAS declaration inquiry, we received support from some stakeholders to develop and implement a broader competition-based exemption framework that could exclude non-NBN networks from regulation in certain circumstances.

We recognise that a competition-based exemption framework may not be straightforward to apply in practice and seek stakeholder views on the form of any exemption framework.

This discussion paper poses questions regarding the need for, form and implementation of a potential competition-based exemption framework.

### ***Service standards for access***

We seek stakeholders' views about whether the provision by SBAS providers of certain key measures of service standards, such as connection times, fault rectification and outages would enhance competition and/or promote better quality of service for SBAS users and end-users. This information could be provided confidentially to RSPs and prospective RSPs to provide greater transparency.

### ***Duration of determination***

We propose to make the 2022 SBAS FAD apply until the expiry of the SBAS declaration (28 July 2026), unless we consider a different timeframe would be more appropriate following consultation.

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<sup>7</sup> ACCC, [Interim Access Determination No. 1 of 2021 for the Superfast Broadband Access Service \(SBAS\)](#), Clause 5.

<sup>8</sup> ACCC, [SBAS and LBAS declaration inquiry – Final Decision](#), 19 July 2021

## 1.2. Consultation process

The ACCC commenced this public inquiry under Part 25 of the *Telecommunications Act 1997* (the Telecommunications Act) on 19 July 2021. This paper raises issues the ACCC considers relevant to an SBAS access determination and invites submissions on these issues as well as any other issues that stakeholders consider relevant.

After considering submissions, the ACCC expects to release a draft decision for public consultation in the second quarter of 2022.

A consolidated list of questions raised in this paper is at Appendix B. You may wish to address any or all of these questions and any other matter relevant to superfast broadband access services.

Submissions are due on **10 December 2021**.

The ACCC prefers to receive submissions in electronic form, either in PDF or Microsoft Word format, which allows the submission to be text searched.

Submissions should be sent to: [superfastbroadbandinquiry@acc.gov.au](mailto:superfastbroadbandinquiry@acc.gov.au)

To foster an informed and consultative process, all submissions will be considered public and will be posted on the ACCC's website. Interested parties wishing to submit commercial-in-confidence material to the ACCC should submit both a public and a commercial-in-confidence version of their submission. The public version of the submission should clearly identify the commercial-in-confidence material by replacing the confidential material with an appropriate symbol or 'c-i-c'.

The ACCC has published a guideline setting out the process parties should follow when submitting confidential information to the ACCC. The ACCC/ Australian Energy Regulator (AER) Information Policy June 2014 sets out the general policy of the ACCC and the AER on the collection, use and disclosure of information. A copy of the guideline and policy are available on the ACCC website.<sup>9</sup>

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<sup>9</sup> ACCC, [Communications inquiries: submitting confidential material](#), 3 April 2014.

## 2. Background and regulatory framework

This section provides background information including an overview of the regulatory framework relevant to making a final access determination.

### 2.1. Access determination framework

Part XIC of the CCA establishes a telecommunications access regime under which service providers can access declared telecommunications services in order to supply end-users.

Declaration of a service means that an access provider is subject to Standard Access Obligations. These require the access provider to provide access to the declared service, on request, to an access seeker. In doing so the access provider must take all reasonable steps to ensure that the technical and operational quality of the service is equivalent to that which the access provider provides to itself.

A FAD provides a ‘fall back’ set of terms and conditions that access seekers can rely on if they are unable to reach agreement with an access provider on the terms and conditions of access to a declared service. Access determinations can shape the negotiation of an access agreement. This means that the FAD, and the structure and level of prices (and other terms) it establishes, serves a fundamental role in facilitating commercial negotiation of terms and conditions of access that are broadly consistent with efficient outcomes and promoting the long-term interests of end-users.

An access determination can also serve other purposes, including specifying circumstances in which the access provider is exempt from complying with the Standard Access Obligations.

Consequently, a FAD plays a key role in refining the bounds of regulation and facilitating commercial negotiation or otherwise establishing terms and conditions of access that promote the long-term interests of end-users.

The requirements and criteria we must have regard to in making an access determination are set out in Appendix C of this discussion paper.

### 2.2. Overview of SBAS regulation

The SBAS is a wholesale access service that access seekers can use to supply broadband and other services to end-users that are connected to a superfast fixed-line network (other than the NBN). A superfast network is one that is normally capable of download data speeds of 25 Mbps or higher.

The ACCC first declared a superfast broadband access service on 24 February 2012. That declaration applied only to superfast fixed-line networks that were built after 1 January 2011 and was called the LBAS. The ACCC declared a further SBAS in July 2016, which applied to superfast fixed-line networks that were built before 1 January 2011.

In July 2021 the ACCC combined these declarations into a new declaration to operate until 28 July 2026.

The SBAS has two variants. The standard SBAS is a wholesale Layer 2 broadband access service that is similar to that provided by the NBN. The second variant is only supplied over the Telstra Velocity and South Brisbane networks, is referred to as the Fibre Access Broadband (FAB) service and was designed to work with Telstra’s legacy voice and cable television services.



The SBAS declaration does not apply to NBN services or fixed wireless, satellite and mobile technologies.

To date we have benchmarked SBAS access arrangements with NBN or Telstra wholesale access offers depending on the SBAS variant. We adopted this approach in previous SBAS and LBAS FADs and when making an IAD in July 2021 to operate until 31 December 2022 or until the ACCC makes a new FAD, whichever is sooner.

### 3. SBAS pricing

Under the CCA, an access determination that sets out terms and conditions of access must contain terms and conditions relating to price or a method to ascertain price.<sup>10</sup> Possible prices and pricing methodologies are assessed against the criteria in subsection 152BCA(1) of the CCA. The criteria are set out in Appendix C of this paper.

In conjunction with the criteria required to be considered in making a FAD, more broadly we consider that any pricing methodology for the SBAS should aim to ensure:

- the service provider is adequately compensated (neither over- nor under-compensated)
- the service is provided in an economically efficient manner
- the structure and level of the regulated price is efficient.

Key considerations in choosing a pricing methodology include whether it will promote competition; create incentives for efficient investment in, and use of, infrastructure; the direct costs of providing the service; and the legitimate business interests of the service providers.

#### 3.1. Current methodology

The 2017 SBAS FAD adopted an anchor price benchmark approach for setting prices for the SBAS and Telstra's FAB service. It specified wholesale access prices based on residential grade products (25/5 Mbps for the SBAS and 30/1 Mbps for the FAB service) of equivalent NBN broadband services and Telstra wholesale ADSL services, respectively.

In making the former SBAS FAD, one of the key objectives was that services to RSPs and end users on non-NBN broadband networks should be broadly consistent with those on NBN networks. Therefore, prices for the SBAS were set in line with the NBN's wholesale access prices and designed to change with these prices over time.

Different regulated access prices were applied to Telstra's FAB service supplied in South Brisbane and the Velocity Estates because these networks were built to work with Telstra's legacy copper network systems. FAB service prices were benchmarked to the costs of Telstra's wholesale ADSL service because it also requires operation with its legacy network systems.

The 2021 SBAS IAD carries over the pricing approach that was in place under the 2017 SBAS access determination. Regulated access prices are specified for the SBAS as the NBN bundled AVC/CVC price (plus CVC overage if applicable) inclusive of discounts at download /upload speeds of 25/5Mbps. For the FAB service, it is specified as access (i.e., port charge per month) and usage (i.e., aggregation) at download / upload speeds 30/1 Mbps. Current wholesale access prices for these services are set out in Schedule 2 of the SBAS IAD and shown in Appendix A of this paper. Appendix D of this paper shows SBAS access prices over the period since the 2017 SBAS determination was made.

#### 3.2. Methodologies adopted in other access determinations

A number of different pricing methodologies have been adopted by the ACCC for access determinations and other regulatory decisions relating to wholesale access prices for telecommunications services in recent years, as set out in the table below.

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<sup>10</sup> CCA, subsection 152BC(8), by reference to paragraphs 152BC(3)(a), (b) and (f).

Price benchmarking has been adopted for transmission and mobile terminating access services, whereas a building block model has been used to set wholesale access prices for Telstra’s legacy copper network. For the NBN, a combination of price controls and a long-term revenue constraint is used. The nature of the regulated services and their providers, the level of competition in the relevant markets, the availability of cost information, the regulatory costs, and the need for timeliness are factors we have considered in adopting an appropriate methodology.

**Table 1 Recent pricing methodologies**

ACCC decision	Year	Pricing methodology
<b>Domestic Transmission Capacity Service – access determination</b>	2020	Benchmarking based on Australian carriers’ competitive transmission route prices
<b>Mobile Terminating Access Service – access determination</b>	2020	International benchmarking using outputs from cost models developed in other jurisdictions
<b>Telstra Wholesale ADSL and other fixed line access services – access determination</b>	2015 & 2019	Building block model
<b>NBN broadband service – special access undertaking</b>	2013	Price controls and long-term revenue constraint (building block model with deferral of cost recovery)

### 3.3. Alternative methodologies

For the 2017 SBAS access determination inquiry, we considered several pricing methodologies. Following public consultation, we settled on a price benchmark approach for setting SBAS (and the Telstra FAB service) prices. We consider that this is still likely to be an appropriate approach; however, we seek views on whether we should reconsider any of the methodologies we consulted on for the 2017 SBAS access determination, or any other methodologies.

The following discusses the methodologies considered for the 2017 SBAS access determination and the rationale for adopting a price benchmark approach.

#### 3.3.1. Competitive market and overseas carrier benchmarking

For the 2017 SBAS access determination inquiry, we considered whether regulated access prices could be set based on prices struck competitively between RSPs and SBAS providers for access to the SBAS. That is, in a similar way to how we set prices for the domestic transmission capacity service.

We also considered setting SBAS prices based on price benchmarks of overseas carriers’ superfast broadband access services, in a similar way to how we set prices for the mobile terminating access service.

However, we concluded that these approaches were unlikely to be suitable for the SBAS on the basis that:

- There is not a broad-based market for competitively supplied wholesale SBAS in the same way as there is for the domestic transmission capacity service in Australia. This reflected that at that time the areas of competitive supply of the SBAS (i.e., areas where

there are alternative superfast broadband networks) were largely the CBD areas of capital cities.

- Overseas markets can provide useful indicators that may identify possible approaches to regulation. A review of wholesale superfast broadband services and access prices offered overseas indicated that there would be substantial difficulty in establishing suitable comparative overseas price benchmarks for similar locally supplied broadband access services. This was due to the differences in provider and service characteristics among overseas superfast broadband networks and between the various local broadband networks in Australia.

### **3.3.2. Building block model**

For the 2017 SBAS access determination inquiry, we also considered whether a building block model would be suitable for setting SBAS prices. A building block model had been used to set wholesale access prices for Telstra's legacy copper network services. We also accepted the NBN Co's 2013 Special Access Undertaking which used a building block model (with a deferral of cost recovery) to establish a long-term revenue allowance for the NBN.

Considering the practicalities of developing and implementing a building block model for the SBAS, we recognised that the SBAS is provided by a number of different access providers using a range of network types, all of which are likely to have differing underlying costs. In these circumstances the application of a building block model would involve obtaining detailed cost and technical information from a number of different network providers and constructing a range of financial models to reflect the diversity of the networks, among other things.

We concluded that the regulatory cost of adopting a building block model for the SBAS was likely to be high relative to the benefits for end-users compared to other potential pricing methodologies. This reflected both the relatively small number of end-users supplied by SBAS networks and the existence of other timelier and lower-cost regulatory approaches.

In light of the identified difficulties with the three methodologies discussed above, we also considered during the 2017 SBAS access determination inquiry whether:

- a retail minus approach, or
- price benchmarking based on comparable Australian broadband services

would be suitable for setting the SBAS and FAB service wholesale access prices.

### **3.3.3. Retail minus approach**

The retail minus approach<sup>11</sup> involves estimating the per unit retail costs and subtracting this cost from each provider's retail offers to arrive at a wholesale price. For example, if an SBAS provider offered its own retail broadband service at a price of \$50 per month and has an average retailing cost of \$15 per service per month, the wholesale price would be \$35 per month.

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<sup>11</sup> Retail minus regulation for wholesale broadband services has previously been adopted overseas under the terms of a 2013 European Commission recommendation to National Regulatory Authorities, and under a 2015 Ofcom decision for the pricing of BT's Virtual Unbundled Local Access service. The ACCC also used the retail minus approach for the wholesale asymmetrical digital subscriber line (wholesale ADSL) service interim access determination in 2012 but adopted a building block model for subsequent wholesale ADSL access determinations.

For the 2017 SBAS access determination inquiry, we considered that the retail minus approach could potentially deliver competition and efficiency objectives, at a lower regulatory cost and in a timelier manner than bottom-up costing methods such as the building block model. Another attraction of the retail minus approach was that it allowed an access provider to maintain a high level of pricing flexibility for its own retail offers, which could encourage investment in new services and promote dynamic efficiency. Also, permitting an access provider to retain some margin from sales captured by access seekers at the retail level could potentially make access providers indifferent between offering wholesale access or retail services, while providing for competition at the retail level.

However, we also recognised that the retail minus approach may not be effective in eliminating the monopoly profits of an access provider or all incentives to foreclose the retail market, and there could be practical issues in establishing the appropriate retail price and retail cost allowance to derive regulated access prices. During the 2017 SBAS access determination inquiry, there was no stakeholder support for this approach to be adopted for those reasons.

We note that additional SBAS providers have more recently commenced supplying retail broadband over their networks, and some have announced plans to sell white label Layer 3 wholesale broadband services<sup>12</sup> in addition to the SBAS. Consequently, there could be more potential for an SBAS provider to offer favourable pricing to its retail affiliate, or to RSPs that are provided access to its white label wholesale service instead of the SBAS.

We are interested in testing whether the prices offered by SBAS providers or their affiliates for higher layer wholesale services or retail services are likely to be set at levels that could impede take up of the SBAS. Further, we are interested in whether having regard to the retail minus methodology when determining SBAS access prices in the 2022 SBAS FAD would help address any such concerns that are held. This could involve using the retail minus methodology to set regulated wholesale access prices directly. The retail minus methodology could otherwise be used to assess whether access prices offered by an SBAS provider to an affiliate or to preferred retailers for higher layer wholesale services are likely to foreclose entry by competing retailers using the SBAS.

### **3.3.4. Price benchmarking against domestic broadband services**

The 2017 SBAS access determination adopted a price benchmark approach for setting prices for the SBAS and Telstra's FAB service. This is because we recognised that NBN broadband and wholesale ADSL services have similarities to the SBAS and Telstra FAB service, respectively and that their regulated access prices could serve as reference points for SBAS and FAB service access prices.

Notwithstanding this, we also recognised that there may be factors driving differences in the unit costs of the SBAS and FAB service compared to the costs of NBN and wholesale ADSL services. We therefore considered whether an *adjusted* benchmarks approach should be adopted to account for these differences (e.g., due to factors such as geographic coverage of networks, traffic levels and economies / diseconomies of scale).

An *adjusted* benchmarks approach would involve modifying regulated price benchmarks for NBN and wholesale ADSL services to reflect the different characteristics of SBAS and FAB service networks compared to the NBN and Telstra's legacy network, as well as changes in the broadband sector since the NBN and wholesale ADSL access prices were set. We raised the possibility of adjustments to account for factors such as the narrower geographic

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<sup>12</sup> White label Layer 3 service: a service implemented by one provider but labelled as provided by another provider. The service allows the supply of retail services without the need for underlying communications infrastructure. The white label service may include customer management and billing capability.

coverage of SBAS networks compared to the NBN (including the absence of a need to fund non-commercial services), the growth in broadband sector traffic levels, and scale diseconomies of SBAS networks relative to the NBN.

Several stakeholders providing submissions to the 2017 SBAS access determination inquiry had concerns with an *adjusted* regulated benchmarks approach.<sup>13</sup> They were concerned that the approach would see the regulated prices for the SBAS adjusted below those of existing NBN benchmark bundle/discounted rates. For example, OptiComm (now owned by Uniti Group Ltd (Uniti)) considered that SBAS providers are likely to operate from a higher cost base than NBN Co, and that it would not be appropriate to set prices for SBAS networks at less than NBN prices, nor to align them with reductions in NBN access prices over time. Telstra did not support an adjusted benchmarking methodology either, on the basis that it would lead to prices inconsistent with the NBN and undermine the level playing field provisions. Telstra also considered that such an approach would increase the risk of errors in adjusting benchmark prices and would add complexity. ACCAN considered that the prices, product design, interfaces and conditions for access to the SBAS should at least be consistent with the NBN to encourage RSPs to operate across all networks with national price plans. NBN Co considered it appropriate that its comparable products serve as price ceilings for the SBAS.

In light of the views of stakeholders and other considerations, we did not adopt an *adjusted* benchmarks approach. Instead, we adopted a price benchmarks approach for the SBAS and Telstra's FAB service based directly on superfast broadband residential grade products (25/5 Mbps for the SBAS and 30/1 Mbps for the FAB service) of equivalent NBN and Telstra wholesale ADSL services. Prices for the SBAS were set directly in line with NBN prices and were designed to change with these prices over time.<sup>14</sup> FAB service prices were benchmarked to Telstra's wholesale ADSL service.

In benchmarking SBAS prices directly to NBN bundled/discounted prices we sought to ensure prices encouraged RSPs to use the wholesale services of SBAS networks, thereby promoting competition in the supply of retail services to end users through improved price and quality of service, as well as providing incentives for RSPs to innovate and provide a wider array of retail products.

Regarding the FAB service, we set the access price in the 2017 SBAS access determination based on the annual service-specific costs of Telstra's wholesale ADSL service. We modelled this previously and considered this to be a better proxy than NBN pricing for the direct costs of the FAB service over time.

We considered that the application of regulated anchor pricing at the 25/5 Mbps speed tier for the SBAS and the 30/1 Mbps speed tier for the FAB service would reduce regulatory costs and provide for flexibility and innovation in retail pricing. This in turn was expected to encourage efficient investment and protect the legitimate business interests of access providers.

We also considered that the overall price terms and conditions under the SBAS access determination achieved other important objectives that were relevant in the circumstances (under subsection 152BCA(3) of the CCA). These included that they:

- provide for reasonable consistency of regulation of all superfast broadband services (on NBN and non-NBN networks and between SBAS services)
- could be implemented quickly and at relatively low regulatory cost for both providers and the ACCC, rather than approaches involving more extensive costing or adjustment

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<sup>13</sup>ACCC, [SBAS and LBAS declaration inquiry - draft decision](#), 18 December 2020

<sup>14</sup> Regulated access prices for the SBAS are now based on the NBN bundled/discounted products.

- considered the views of submitters, which were generally opposed to a more extensive costing exercise for setting prices.

We are interested in views on whether a price benchmark approach like that adopted in the 2017 SBAS access determination should be adopted for the 2022 SBAS FAD.

### ***Regional Broadband Scheme levy***

The Regional Broadband Scheme (RBS) was established by the government in 2020 to fund fixed wireless and satellite broadband services to regional, rural and remote Australians. Under the RBS, a carrier or declared nominated carrier is required to pay \$7.10 per month for each eligible premise on their telecommunication network that has an active fixed line that provides a designated broadband service.

In 2017 we allowed for the then prospective RBS levy on broadband network providers to be added to regulated wholesale access charges for the SBAS. This is because of submissions that we received to the effect that requiring SBAS providers to absorb the RBS levy could push their prices below costs. At the time we considered this would be contrary to the legitimate business interests of SBAS providers. We also believed it would be a disproportionate regulatory imposition given the small overall market share of SBAS providers compared to NBN Co.<sup>15</sup>

However, we are now interested in stakeholders' views about whether SBAS providers should continue to be allowed to pass through the RBS levy in addition to regulated access charges, or whether regulated access charges should be inclusive of the levy. We seek information about how both SBAS providers and RSPs have dealt with the levy to date, noting that it came into effect from 1 January 2021.

Not allowing the levy to be passed through may moderate prices for RSPs and end-users of SBAS networks; however, it could also affect the willingness of SBAS providers to invest in new infrastructure. This could have a disproportionate effect on new fixed line network rollouts in rural and regional areas where there is lower customer density and higher rollout costs, to the extent that such investments are planned or underway.

#### **Questions:**

1. Should regulated SBAS prices be set in line with NBN wholesale access prices and, if not, what alternative price approaches should we consider? For example, should we consider using the retail minus methodology?
2. If SBAS prices continue to be set directly in line with NBN wholesale access prices, should the regulated price continue to be inclusive of NBN Co's intertemporal bundling/discount offers, or based on prices published in NBN Co's Price List excluding such offers?
3. Should the Regional Broadband Scheme (RBS) levy continue to be able to be passed through to RSPs and users or absorbed by SBAS providers?

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<sup>15</sup> NBN Co's wholesale customers contribute to its financial losses from fixed wireless and satellite services through an internal NBN Co cross-subsidy from its fixed line services.

### 3.4. South Brisbane and Velocity Estates networks – FAB service

The July 2021 SBAS IAD maintained substantially the same approach to declaration of Telstra's South Brisbane and Velocity Estates networks as the previous declaration. That is, it provides a separate service description (for the FAB service) and access pricing arrangement. This enables Telstra to comply with the declaration without having a Layer 2 access service in place in the South Brisbane and Velocity Estates networks, which was the case when the SBAS was first declared and still is.

In December 2020 Telstra sold the South Brisbane and Velocity Estates networks to Uniti. Uniti's wholesale subsidiary, OptiComm, will become the network provider for the South Brisbane and the Velocity Estates networks. A network upgrade to a Layer 2 service by Uniti is planned along with other work to move end-users to the upgraded network. This is expected to commence in July 2022 and take around 12 months to complete.

The ACCC's final decision on declaration of the SBAS considered that an extension to the previous treatment of Telstra's South Brisbane and Velocity Estates networks would ensure service continuity for end-users and regulatory certainty while the networks are being transferred to the new owner. The extension of the previous regulatory treatment for the FAB service provides for a transition period while Uniti undertakes the necessary investment to be able to supply a Layer 2 service to wholesale customers seeking access to the South Brisbane and Velocity Estates networks.

The prices that currently apply to Telstra's FAB service under the 2021 SBAS IAD are different to those that apply to the other declared SBAS services because the South Brisbane and Velocity Estates networks were built to work with Telstra's legacy copper network systems. The FAB service prices are benchmarked to the service-specific costs of Telstra's wholesale ADSL service.

Following the upgrade of the South Brisbane and Velocity Estates networks to a Layer 2 service the regulated price and other terms and conditions of access to Layer 2 services under the SBAS declaration will apply to these networks.

As noted in the July 2021 *SBAS and LBAS declaration inquiry – Final Decision*,<sup>16</sup> we received an anonymous submission to the declaration inquiry that identified Telstra's Velocity networks as an example of a market with a lack of retail competition, excessive retail pricing,<sup>17</sup> and networks of limited speed or low services quality. The submission noted that in many Telstra Velocity Estates there is no choice of retail provider. ACCAN's submission similarly observed the absence of retail competition on these networks.

We also acknowledged that Uniti's acquisition of the South Brisbane and Velocity Estates networks may encourage greater retail competition over these networks once Uniti integrates the Telstra infrastructure into its existing networks. We had previously observed that the networks operated by Uniti, including LBN Co and OptiComm, have benefitted from steady increases in the number of RSPs offering services over its networks.

We recognise that the exact period over which the FAB service is still operating and regulated under the 2022 SBAS FAD is currently unclear, as it is subject to the timeframe for Uniti's upgrade of the South Brisbane and Velocity Estates networks and the transition of end-users to the upgraded networks.

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<sup>16</sup> ACCC, [SBAS and LBAS declaration inquiry - Final decision](#), 19 July 2021

<sup>17</sup> Telstra has subsequently confirmed that its retail prices for services in the South Brisbane and Velocity Estates networks are the same as for the Standard Speed and Premium Speed services it offers on the NBN.



However, we consider that a review of current wholesale access pricing for the FAB service may be warranted, given concerns about price and competition on these networks raised through the SBAS/LBAS declaration inquiry and directly with the ACCC. We note also that end-users connected to the South Brisbane and Velocity Estates networks do not have access to the NBN.

Consequently, we are interested in understanding how the timeframes associated with network migration may impact on competitive supply, including practicable wholesale access price measures that would work to address competition and consumer concerns during the migration process. For instance, are there measures that would improve the uptake of other RSPs in addition to Telstra accessing the wholesale FAB service in the lead up to the migration to Uniti's network?

It may be appropriate to set a point in time from which the regulated access price for the FAB service is set at the same level as the equivalent regulated SBAS and NBN services.

For example, if the 25/5 speed tier remains the regulated SBAS anchor price, the FAB service wholesale access price for the 100/5 speed tier could potentially be set at the same level as the SBAS 25/5 speed tier. This may encourage more RSPs to offer services over the South Brisbane and Velocity Estates networks and facilitate competition and improved service and price outcomes for end-users connected to these networks. It would also recognise that under the SIP regime, which applies to Telstra's South Brisbane and Velocity networks, a 5mbps minimum upload speed is required to be available.

Further, if a retail minus methodology were to be adopted to determine regulated access prices for the SBAS and FAB service, as discussed above, another option would be to apply that approach to determine wholesale access prices for the FAB service having regard to Telstra's retail prices for services on the South Brisbane and Velocity networks.

We seek views on the approach(s) that should be considered for regulation of FAB service wholesale access prices in the period while the service is still operating and regulated under the 2022 SBAS FAD.

#### **Questions:**

4. How should we approach regulated wholesale access pricing for the FAB service for the period while the service is still operating and regulated under the 2022 SBAS FAD?

5. Do you support the regulated access price for the FAB service being set at the same level as the equivalent regulated SBAS and NBN services? Please explain why in detail, including the appropriate speed tier at which to set the regulated access price for the FAB service.

### **3.5. Other issues for consideration**

There are several other pricing issues we will be considering for the 2022 SBAS FAD discussed below.

#### **3.5.1. Regulated price components**

The 2017 SBAS access determination initially separated the components of regulated prices into access (i.e., port charge per month) and usage (i.e., aggregation or overage per Mbps/month) charges for the SBAS and FAB service reflecting NBN Co's pricing at the time. When NBN Co adopted a discounted bundled pricing structure, the SBAS regulated access

prices reflected this new structure and that is the pricing approach reflected in the 2021 SBAS IAD.

Prices are referenced directly to the access prices for equivalent residential grade products for NBN and Telstra wholesale ADSL services (i.e., at 25/5 Mbps for the SBAS and 30/1 Mbps for the FAB service).

We recognise that some SBAS providers may want to recover the costs of providing the service from charges other than access and usage, or potentially through other charging structures.

For example, there may be some SBAS providers and RSPs that prefer regulated charges not to be separated by access and usage, instead having greater flexibility to incorporate the costs of network access and usage within a single fixed access charge (or for example, take or pay charges combining an access and usage charge based on steps in pre-defined usage levels). This may be desirable both for SBAS providers and access seekers where it would simplify regulated pricing for wholesale access and provide greater certainty about the cost of (and revenue from) network access and usage at regulated prices.

#### **Question 6:**

Should we take a different approach to the product components that are price regulated and or to the structure of regulated charges in the 2022 SBAS FAD?

### **3.5.2. Regulated access prices**

The July 2021 SBAS access declaration adopted an open-ended service description which encompasses entry level offerings at lower speed tiers (i.e., below 25 Mbps) as well as higher speed tier services. Though the market for lower speed services is declining, there is still an important segment of the broadband market that values lower speed services.

The SBAS service description in the 2021 SBAS declaration expanded the scope of the previous declaration to capture all Layer 2 broadband access services that are supplied over a fixed line non-NBN network capable of supplying a 25Mbps service.<sup>18</sup> This means a relevant fixed network with a 25Mbps capability could also supply a lower speed service such as 12Mbps and these lower speed services are now also subject to the declaration. As a regulated price is not specified for a service below the 25/5 Mbps speed tier, pricing for lower speed services is currently subject to commercial negotiation between access providers and RSPs, without fall back to a regulated price where agreement cannot be reached.

As discussed previously, the 2017 SBAS access determination specified prices for residential grade products for the SBAS and FAB service based on equivalent NBN broadband and Telstra wholesale ADSL services (i.e., 25/5 Mbps for the SBAS and 30/1 Mbps for the FAB service). The prices set out in the access determination for these speed tiers are therefore the price 'anchors' for regulated access to the SBAS and FAB service.

Regulating the price of 25/5 Mbps and 30/1 Mbps services can provide a price constraint on higher speed services (that are not regulated) while allowing for price flexibility in unregulated higher speed services. Allowing price flexibility at higher speeds can also encourage providers to further invest in the networks.

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<sup>18</sup> Where applicable, the Statutory Infrastructure Provider (SIP) regime also requires SIPs to provide baseline broadband service speeds of at least 25 Mbps downstream and 5 Mbps upstream across all network technologies.

Price regulation of a lower speed wholesale access service may constrain the price of a higher speed service that is not price regulated but is subject to a right of access through commercial negotiation. Given there is a clear trend towards higher speed services, this constraint is likely to diminish the further away a given service speed tier is from the regulated price speed tier in terms of speed and service functionality. Anchoring price regulation at a lower speed tier may therefore not be effective in constraining the unregulated prices of higher speed services, which can lead to monopoly pricing.

**Questions:**

7. Should only the current anchor price points be regulated, or should prices be set for a range of additional speed tiers above and / or below (e.g., at 12 Mbps) the current anchor points?

8. If prices continue to be regulated at a single anchor point for the SBAS, is 25/5 Mbps still an appropriate anchor point for (non-FAB) prices?

**3.5.3. Non-recurring charges**

Existing SBAS regulation provides a regulated price for the monthly access and usage charges for the SBAS and FAB service but does not apply to non-recurring charges such as connection and transfer fees.

In its submission to the 2020-21 SBAS declaration inquiry, Launtel proposed that non-recurring charges such as connection and transfer (i.e., churn) fees that are levied by some providers should also be regulated.<sup>19</sup> We are interested in understanding more about what non-recurring charges exist and what the cost or basis for the charges are.

Where non-recurring charges are unreasonably high and do not reflect the costs of the service or function provided, these charges may be an impediment to customers transferring to another network or RSP and potentially detrimental to competition.

Where these sorts of charges are not based on or broadly reflective of the costs, we will consider regulating them under the FAD unless stakeholders can provide reasoning why they should not be.

**Question 9:**

Should any non-recurring charges be regulated under the SBAS FAD? If so, please explain why and how the regulated charges should be set.

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<sup>19</sup> ACCC, [Launtel - submission to the LBAS & SBAS draft decision](#), 26 February 2021

## 4. Non-price terms and conditions

This section discusses the potential non-price terms and conditions for the 2022 SBAS FAD.

The FAD could include various types of non-price terms and conditions, such as:

- standard commercial terms, such as billing, creditworthiness and dispute resolution
- limitations or restrictions on the supply of the service, including limitations
- restrictions on use of the Service for resale or other specified purposes
- operational or technical aspects of the service, such as the points of interconnection.

The ACCC's general approach has been to address the key commercial terms of access that would facilitate the commercial supply of the service to occur, and to base these upon a set of model terms. These then provide the regulated fall-back terms and conditions if the parties cannot agree on their own set of terms and conditions.

In 2014-2015, we reviewed the non-price terms and conditions for declared services. In 2015 we then set non-price terms and condition in FADs for the following services:<sup>20</sup>

- fixed line services (including the wholesale ADSL service)
- the mobile terminating access service and
- domestic transmission capacity service.

The ACCC's 2015 *Telecommunications Final Access Determination Inquiries - Non-price terms and conditions - Final decision for the mobile terminating access service and views for fixed line services and domestic transmission capacity service, Final Report*, provided a list of general commercial and service specific conditions that can be utilised in subsequent FADs.<sup>21</sup>

These included:

- (a) billing and notifications
- (b) creditworthiness and security
- (c) general dispute resolution procedures
- (d) confidentiality provisions
- (e) suspension and termination
- (f) liability and indemnity
- (g) communication with end-users
- (h) network modernisation and upgrade notice periods
- (i) changes to operating manuals
- (j) recourse to regulated terms.

We set non-price terms in the 2021 SBAS IAD for the SBAS consistent with those generally applicable conditions and the previous SBAS and LBAS FADs. Those terms maintain the status quo while the ACCC is conducting this inquiry and until we make a new FAD.

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<sup>20</sup> ACCC, *Telecommunications Final Access Determination Inquiries - Non-price terms and conditions - Final decision for MTAS and views for fixed line services and DTCS, Final Report*, August 2015

<sup>21</sup> ACCC, *Telecommunications Final Access Determination Inquiries - Non-price terms and conditions – Appendix to the Final decision for MTAS and views for fixed line services and DTCS, Final Report*, August 2015

The full non-price terms and conditions are in Schedules 3 to 12 of the IAD.<sup>22</sup>

We invite views on whether to alter the existing non-price terms and conditions for the 2022 SBAS FAD or continue them in the same form.

We note there is a range of other regulatory arrangements and reviews currently in place or underway relating to the standards of service for telecommunications services. These include:

- the ACCC's recent inquiry into NBN wholesale service standards<sup>23</sup> and improved service commitments under NBN Co's most recent wholesale broadband agreement (WBA4), particularly regarding rebates for cases of poor end-user experiences.
- measures applying to, or being developed for, Statutory Infrastructure Providers<sup>24</sup>
- ACMA's work on service standards for superfast broadband services.<sup>25</sup>

This FAD inquiry is not intended to cover the issues being addressed and considered through these other arrangements and reviews.

**Question 10:**

Should all the non-price terms for the SBAS continue in the same form? If not, how should they be changed and why?

#### 4.1. Reporting service quality to access seekers

The quality and reliability of the SBAS (and FAB service) are generally less regulated than the services of NBN Co – particularly if the provider is not a designated SIP provider. It is open to the ACCC to implement additional requirements on SBAS and FAB service network providers to ensure that RSPs are aware of the likely quality of the infrastructure and accompanying services on SBAS and FAB service networks. This could provide a greater incentive for network providers to ensure their network speed, fault rectification and other key service quality and reliability indicators are of an acceptable standard and meet their access agreements with RSPs.

We do not intend to set service standard levels through this SBAS FAD process. However, we are considering whether SBAS and FAB service network providers should be required to disclose certain key data—confidentially—to current or potential RSPs to promote greater transparency of key network service quality and reliability attributes.

We seek views from SBAS and FAB service network providers and RSPs on whether such a requirement would promote competition and improve quality and reliability of service outcomes for RSPs and end-users.

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<sup>22</sup> ACCC, [Interim Access Determination – Instrument](#), 19 July 2021.

<sup>23</sup> ACCC, [NBN Wholesale service standard inquiry](#), 4 November 2020.

<sup>24</sup> ACMA, [Statutory Infrastructure Provider Regime](#), 15 March 2021

<sup>25</sup> ACMA, [Proposed service standards for superfast fixed broadband services consultation](#), 26 February 2021

**Question 11:**

Should SBAS and FAB service network providers be required to disclose key network service quality and reliability indicators to current or potential RSPs? If so, which indicators would promote competition and improve quality and reliability of service outcomes for RSPs and end-users?

## 5. Exemptions from the SBAS access determination

In this inquiry we are considering the circumstances in which there should be exemptions from the Standard Access Obligations under the SBAS access determination.<sup>26</sup>

Specifically, in the 2022 SBAS FAD we are considering whether:

- the current small network exemption (i.e., as set out in the 2017 SBAS access determination) should be continued, changed, or removed, and
- a possible new competition-based exemption should be included

Under paragraph 152BC(3)(h) of the CCA the ACCC can include terms and conditions in an access determination that provide that any or all of the Standard Access Obligations do not apply to a carrier or carriage service provider either unconditionally or subject to such conditions and limitations as are specified in the access determination.<sup>27</sup> The access determination can make provisions for these conditions to apply to different carriers or access seekers or classes of carriers or access seekers.<sup>28</sup>

Under the ACCC's 2021 SBAS declaration, there is an effective exemption from the declaration for services that exclusively supply business, charity and public body end-users in central business district areas of major capital cities. The services are exempt (i.e., not covered by the SBAS declaration) on the basis that competition in the supply of these services is already deemed to be effective. As those services are not declared, exemptions from the Standard Access Obligations for these services under the SBAS access determination do not require consideration in this inquiry.

Where a service is exempt from the Standard Access Obligations applying to an SBAS network, the price and non-price terms of access by an RSP are subject to commercial negotiation with the access provider. In this situation, there is no fall back to the regulated terms of access where the parties cannot reach agreement.

We are interested in the views of stakeholders on these issues, as discussed further below, and any other potential exemptions from the SBAS Standard Access Obligations that would be in the long-term interests of end-users. We note that any exemptions only apply while they are in force in a declaration or FAD and can be varied or removed by the ACCC following an inquiry.

### 5.1. Small network exemption

Small scale operators of superfast access networks built prior to 1 January 2011 (SBAS) are currently exempt from complying with the standard access obligations under the SBAS IAD. A small-scale operator is one with no more than 12,000 end-users supplied by the SBAS services.

The current SBAS IAD maintains the exemption for SBAS (but not LBAS)<sup>29</sup> providers supplying up to 12,000 end-users, to provide regulatory certainty during this access determination inquiry.

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<sup>26</sup> The SBAS access determination may include terms and conditions providing that the standard access obligations are not applicable to specific service providers (or classes of) or geographic areas either unconditionally or subject to conditions and limitations as are specified in the determination. CCA, section 152BC.

<sup>27</sup> Section 152BC(3)(h)(ii) of the CCA

<sup>28</sup> Section 152BC(5) of the CCA

<sup>29</sup> Under the terms of the CCA at the time, the ACCC could not exempt LBAS providers.

In principle, we consider small scale network operators may have a strong incentive to attract a range of quality retail service providers with competitive wholesale offers, and in those cases, applying access regulation too soon could risk bringing forward costs and deterring market entry.

However, should a network operator look to abuse a monopoly position, in the absence of regulation, barriers to investment in a competing network may lead to the continuation of monopoly behaviour and to market failure.

Further, operators that are now a designated SIP are required to incur the costs of developing wholesale offers and comply with non-discrimination obligations to provide services over SIP networks. In those cases, applying price regulation under an access determination may not impose additional significant costs.

We previously considered that the costs of complying with the SBAS access determination for small network providers and requiring them to provide wholesale access would outweigh the benefits to end-users from regulated access and potential retail competition on these smaller networks. The ACCC's decision reflected the statutory criteria we must take into account when making an access determination, which requires consideration of the direct costs for SBAS providers of providing access.<sup>30</sup>

Since the previous SBAS and LBAS FAD inquiry in 2017, and consistent with reducing regulatory burden for small providers, changes to the structural separation requirements under Part 8 of the Telecommunications Act mean that:

- networks servicing predominantly business customers, including small business customers are no longer subject to the structural separation requirements
- lines and networks that would otherwise be subject to structural separation requirements are able to be operated on a functionally separated basis subject to the approval of the ACCC (either by a voluntary undertaking or a 'deemed' undertaking that an eligible corporation can choose to be bound by)
- the ACCC is able to make class exemptions for small providers (up to 2,000 services fixed line residential services, which could be raised by regulation to 12,000 services fixed line residential services). However, it is a condition of the exemption that the provider must offer wholesale access to service as defined by the SBAS on non-discriminatory terms.

In August and October 2020 respectively, the ACCC issued a class exemption for small networks and deemed functional separation undertaking following public consultation.<sup>31</sup> However, SBAS providers still have to provide wholesale access to a service as defined by the SBAS if they are subject to the class exemption.

We are interested in the views of stakeholders on whether the small network exemption should be continued, changed or removed. We would like to understand how many superfast broadband networks built either prior to or after 1 January 2011 are now under the control of small-scale operators, given the consolidation of network ownership in the period since the 2017 SBAS and LBAS FADs.

While the current SBAS IAD maintains the exemption for SBAS but not former LBAS providers, we may adopt a uniform approach for SBAS and former LBAS providers in 2022 SBAS FAD. That is, if the current small network exemption is maintained, varied or removed, changes would apply equally to SBAS and former LBAS providers under the FAD. This

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<sup>30</sup> Subsection 152BCA(1) of the CCA

<sup>31</sup> ACCC, [Superfast broadband network class exemption & deemed functional separation undertaking](#), 25 August 2021



recognises that former LBAS networks are now declared under the ACCC's 2021 SBAS access declaration.<sup>32</sup>

**Questions:**

12. Should the small network exemption remain, be changed or removed and why?

13. Have changes in the costs or number of small network operators changed since 2017 in a way that should impact the future of such an exemption?

## 5.2. Competition-based exemption

In the ACCC's 2021 SBAS access declaration, we recognised that there are geographic areas where it may be commercially viable for multiple superfast broadband fixed networks to co-exist. However, we also noted that to date there appears to be only limited instances of competitive overlap between fixed networks.

Infrastructure based competition can provide the potential for cheaper access prices and or better quality of service, which may make it more attractive for RSPs to enter a service area and compete. In turn, a larger number of RSPs being available to end-users can give greater choice of service provider and the potential for lower prices or other desired product features.

Submissions to the 2020-21 SBAS/LBAS declaration inquiry generally considered that while infrastructure competition was present in some geographic areas, it is currently limited. This FAD inquiry provides an opportunity for the ACCC and stakeholders to consider these issues further.

Subject to stakeholder views and other considerations, we may decide to implement a competition-based exemption framework through the 2022 SBAS FAD or leave the current regulatory settings for exemptions in place for the period of the determination. It also remains open to the ACCC to conduct a variation inquiry after the 2022 SBAS FAD is made should strong competition subsequently emerge. This is discussed further below.

In order to understand the potential need for a competition-based exemption framework we currently seek stakeholders' views on four main issues:

- Whether we should exempt networks where there is fixed line infrastructure competition.
- If so, the appropriate criteria or thresholds to give rise to exemption.
- Practical issues for implementing an exemption framework and ensuring it is efficient for network providers, RSPs and the ACCC.
- Available processes to put an exemption framework in place.

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<sup>32</sup> The decision varied the SBAS declaration and combined the SBAS and LBAS declarations under a single SBAS declaration instrument. The varied SBAS declaration applies to networks built, upgraded or altered both before and after 1 January 2011. The ACCC revoked the LBAS declaration concurrently to the varied SBAS declaration taking effect.

### 5.2.1. Considering infrastructure-based competition exemptions

Where competitive overlap has occurred, it appears confined to more densely populated areas. We considered that for the period of the 2021 SBAS access declaration, the threat of entry by new fixed line networks to areas served by incumbent networks would probably remain low. We did not consider fixed wireless, mobile or satellite services as likely to be effective substitutes for a fixed line superfast broadband service for the period of the 2021 SBAS access declaration.

One of the core requirements of providing an exemption from the Standard Access Obligations would be the absence of monopoly characteristics. Where infrastructure competition between fixed line networks exists, or will in the future, there may be a case for exemption from the SBAS Standard Access Obligations for networks that face an effective level of competition.

Network operators could be eligible for exemption to the extent that effective competition constrains their ability to misuse market power. Technological development and the rollout of alternative technologies may also become a substantive enabler of competition in the future. The NBN's presence will also provide competition in areas where the NBN and SBAS networks coexist. We note that the NBN will remain subject to the Standard Access Obligations and regulated access prices. A likely precondition for an exemption from the Standard Access Obligations for an SBAS network would be the presence of the NBN as an alternative access network for RSPs and end-users. In areas where only SBAS networks compete, the criteria for exemption would include the absence of significant market power by a single operator.

We are also mindful of the need for regulatory certainty. The more often a regulatory framework changes, the less certainty it provides for regulated parties when making their investment decisions, which in fixed line network rollouts can involve high capital costs that are sunk. Therefore, any exemption framework would need to provide long-term certainty about the regulatory approach for exemptions and ensure it does not negatively affect the potential for investment in new network rollouts.

#### Question 14:

Do you support a framework to provide an exemption from the Standard Access Obligations where there is effective competition with or between fixed line networks?

### 5.2.2. Potential thresholds for exemption

We are considering which of the following three ways to implement exemptions from the SBAS Standard Access Obligations is best fit for purpose and in the long-term interests of end-users:

- exempting any area/development where the competition threshold is or will be met
- exempting some geographic areas ex ante (i.e., similar to the SBAS declaration's exemption of CBDs in major capital cities)
- exempting particular providers after considering issues like structural/functional separation, whether open access is provided, and the number of RSPs accessing the network

We do not favour applying an exemption framework to specific providers. If an exemption framework were to apply to a network provider, it may have networks in multiple areas with

competing networks in some areas but not others. Similarly, the competitive dynamics could change through mergers and acquisitions or changes in the number of (or treatment of) RSPs on the network. An exemption framework to a particular provider would need to have provision for scenarios where an exempt provider purchases a non-exempt provider and vice versa.

Alternatively, the basis for exempting an SBAS network could be a threshold for the presence of multiple superfast broadband networks in a defined geographic area (now or in the foreseeable future) such as where:

- there is or will be at least two competing fixed line superfast broadband networks supplying services where one is the NBN, or
- there is or will be a minimum number of separately owned SBAS networks supplying services in areas where the NBN is not present

and all customers in the service area have or will have a readily available choice of network and RSP.

Geographic exemptions currently exist in the SBAS declaration for services that exclusively service business, public body and charity customers in CBD areas of the major capital cities. The services are exempt on the basis that competition in the supply of these services is already deemed to be effective.<sup>33</sup>

A geographic area-based exemption would not require the meeting of a specific competition threshold ex-post; rather we would need to be satisfied that the area already has sufficient competition, or will have in the foreseeable future, such that the need for regulation of SBAS networks in the area is negated.

#### **Questions:**

15. Would a framework that included localised network areas or developments being eligible for exemption once it meets a competition threshold be workable?

16. If a competition threshold is introduced, what number and type (i.e., NBN and non-NBN) of competing networks would be appropriate to give rise to an exemption?

17. Would defined geographic areas (e.g., by postcode, local government area or another type of geographic boundary) be appropriate for an ex ante exemption and, if so, in which areas are you aware of a sufficient degree of competition now or in the foreseeable future?

18. Would you prefer a threshold-based exemption or a geographic area-based ex ante exemption?

### **5.2.3. Implementing exemptions in practice**

We recognise that an exemption framework may not be straightforward to apply in practice and we are seeking stakeholder views on the form of an exemption framework having regard for administrative efficiency and the long-term interests of end-users.

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<sup>33</sup> CBD-based exemptions also previously existed for certain other fixed line services, although these were later removed. In 2011, the ACCC varied the fixed services FADs to remove the exemptions it previously granted (in 2008) to Telstra from having to comply with regulation in CBD areas. In making its decision, the ACCC found that despite the presence of multiple alternative providers in these areas, Telstra was able to misuse its dominant market position as the owner of the ubiquitous customer access network to charge prices, which were substantially higher than its supply costs.

Any exemptions, provided ex ante through the 2022 SBAS FAD or by meeting a competition threshold in the future that is prescribed in the SBAS FAD, would create complexities in the relationships between parties, as discussed below. It would also potentially create differential regulation on different parts of the same network business.

We seek stakeholders' views on what types of issues would arise if certain geographic areas become exempt. For example, in the relationship between the SBAS network owner and existing RSPs using the network; or the relationship between an RSP and an end-user. While there would be existing access agreements between SBAS providers and RSPs, they may have clauses that are enlivened by regulatory change. Similarly, an SBAS network owner that is no longer regulated may seek to terminate access agreements with RSPs (or not accept new connections) to pursue a more integrated wholesale-retail business model (subject to other regulatory requirements).

An exemption framework would need to be in the long-term interests of end-users but should not give rise to significant service disruptions or issues for continuity of service, to the detriment of RSPs and end-users, that cannot be managed in the short to medium term.

For larger providers that are operating networks in a range of locations, a framework that exempts a geographic or network area may also result in different regulatory requirements applying to different parts of its network.

**Questions:**

19. Are there likely to be practical issues from implementing a competition-based exemption that would arise once an area becomes exempt from SBAS? If so, please explain why.

20. Would the application of SBAS to some areas of a providers' network and not others be costly for the infrastructure owner to implement or manage?

#### **5.2.4. Framework for implementing exemptions**

Under the CCA the ACCC has three main ways it can provide exemptions from some or all of the Standard Access Obligations (and thus any FAD) where the changes are not minor in nature:

- in an inquiry prior to expiry of an existing declaration or FAD (such as this inquiry)
- by commencing a declaration or FAD variation inquiry<sup>34</sup>
- with the consent of all parties<sup>35</sup> whose interests are affected.

The ACCC does not have the ability to exempt networks or areas upon application of an infrastructure owner without carrying out one of the above processes.

In the case of exemptions based on a certain level of network competition, this sort of exemption would set the thresholds up-front and automatically disapply the Standard Access Obligations /FAD once a particular level of competition is met. Alternatively, pre-set ex ante exemptions (i.e., similar to the SBAS declaration's exemption of CBDs in major capital cities) would apply as soon as 2022 SBAS FAD commences.

We do not consider the consent of all parties to be a practical way to implement or change exemption arrangements. In particular, a consent arrangement would also potentially affect

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<sup>34</sup> Under Part 25 of the Telecommunications Act, with similar processes to a declaration or FAD inquiry.

<sup>35</sup> CCA, section 152BCN(2).

unknown new entrants' ability to enter a market due to foreclosure by incumbents, whose interests are affected, opposing exemptions.

As noted above, one of the most important considerations in our assessment of the long-term interests of end-users will be the potential impact of any exemption framework on investment decisions. Without sufficient certainty of the regulatory environment, along with other potential issues, some investments in new superfast broadband networks or extensions to existing SBAS networks may not be undertaken. Network investors and owners would need to know whether they are subject to the Standard Access Obligations and price and non-price terms to forecast returns on investment in new networks and network extensions. They may be more inclined to invest on the basis that they will not be subject to the SBAS Standard Access Obligations and the related compliance costs. Similar considerations would exist for mergers and acquisitions in the industry.

Having regard to the issues discussed above and any other relevant issues, we seek stakeholders' views on whether:

- there would be merit in undertaking formal variation inquiries on exemptions from the Standard Access Obligations during the 'standard' FAD periods or whether this would be disruptive, or
- a less formal, consent-based exemption framework would be workable without the formality of a declaration/FAD inquiry process.

**Question 21:**

If we implement a competition-based exemption framework, should we only do it during the more standard inquiries prior to the expiry of a declaration or FAD; or rely on an ad hoc variation inquiry process for exemptions during a FAD period?

## 6. Duration

Declarations and FADs are typically up to five years in duration and are matched to the duration of the underlying declaration. In some cases, a shorter duration may be appropriate and the ACCC retains the right to commence a variation inquiry at any time during the term of a declaration or FAD.

For the 2022 SBAS FAD, we propose aligning the expiry with that of the SBAS declaration (28 July 2026).

If a declaration is revoked or allowed to expire, the corresponding FAD has no effect from that point.

**Question 22:**

Do you support the term for the 2022 SBAS FAD aligning with the expiry of the SBAS declaration (28 July 2026)?

# Appendix A – Current SBAS and FAB service prices

## SBAS prices

Charge component	Initial price	CVC Inclusion (Mbps)	Subsequent prices
Price per month	\$37.00	1.50	The price for the NBN Co AVC TC-4 25/5 Mbps and CVC TC-4 product components, as amended from time to time (including discounts)
CVC Overage per Mbps <sup>a</sup>	\$8.00		

- a) NBN Co's current discounts apply for a 25/5 AVC and CVC bundle, plus CVC overage as applicable.
- b) CVC Overage charge applies when, over a billing period, the CVC bandwidth ordered by an access seeker is greater than the bundled CVC Inclusion across all bundled services ordered.

### Glossary

CVC – Connectivity Virtual Circuit is the bandwidth capacity required to serve a collection of end-user premises on an aggregate basis.

AVC – Access Virtual Circuit is the bandwidth allocated to the end-user premises. It is charged on a per-connection basis.

Overage – A charge that applies when the CVC bandwidth ordered by an access seeker is greater than the CVC Inclusions of all bundled services ordered in aggregate.

AVC TC-4 – The NBN Co product AVC TC-4 which is an Ethernet-based Layer 2 virtual connection on the NBN Co network that carries traffic to and from a user-network interface used to serve a premise, in traffic class 4.

CVC TC-4 – The NBN Co product CVC TC-4 which is Ethernet-based Layer 2 virtual capacity on the NBN Co Network used to carry customer traffic between multiple access virtual circuits in a connectivity serving area on an aggregated basis and the network-network interface at the point of interconnection serving that connectivity serving area, in traffic class 4.

## FAB service prices

Charge component	Price
Port Zone 1 per month	\$13.01
Port Zone 2/3 per month	\$18.15
Aggregation per Mbps/month	\$29.27

### Glossary

Port Zone – Telstra wholesale ADSL Zone AGVC & VLAN (Aggregating Virtual Circuit and Virtual Local Area Network) charge for network capacity purchased by an access seeker. AGVCs & VLANs are used to provide connectivity between one or more Asymmetric Digital Subscriber Line end-users and a centrally located point of interconnect between the Telstra Digital Subscriber Line network and an Internet Service Provider network.

Aggregation – A charge for the transport of customer traffic from multiple end users on an aggregated basis.

## Appendix B – Consolidated list of questions

1. Should regulated SBAS prices be set in line with NBN wholesale access prices and, if not, what alternative price approaches should we consider? For example, should we consider using the retail minus methodology?
2. If SBAS prices continue to be set directly in line with NBN wholesale access prices, should the regulated price continue to be inclusive of NBN Co's intertemporal bundling/discount offers, or based on prices published in NBN Co's Price List excluding such offers?
3. Should the Regional Broadband Scheme (RBS) levy continue to be able to be passed through to RSPs and users or absorbed by SBAS providers?
4. How should we approach regulated wholesale access pricing for the FAB service for the period while the service is still operating and regulated under the 2022 SBAS FAD?
5. Do you support the regulated access price for the FAB service being set at the same level as the equivalent regulated SBAS and NBN services? Please explain why in detail, including the appropriate speed tier at which to set the regulated access price for the FAB service.
6. Should we take a different approach to the product components that are price regulated and or to the structure of regulated charges in the 2022 SBAS FAD?
7. Should only the current anchor price points be regulated, or should prices be set for a range of additional speed tiers above and / or below (e.g., at 12 Mbps) the current anchor points?
8. If prices continue to be regulated at a single anchor point for the SBAS, is 25/5 Mbps still an appropriate anchor point for (non-FAB) prices?
9. Should any non-recurring charges be regulated under the SBAS FAD? If so, please explain why and how the regulated charges should be set.
10. Should all the non-price terms for the SBAS continue in the same form? If not, how should they be changed and why?
11. Should SBAS and FAB service network providers be required to disclose key network service quality and reliability indicators to current or potential RSPs? If so, which indicators would promote competition and improve quality and reliability of service outcomes for RSPs and end-users?
12. Should the small network exemption remain, be changed, or removed and why?
13. Have changes in the costs or number of small network operators changed since 2017 in a way that should impact the future of such an exemption?
14. Do you support a framework to provide an exemption from the Standard Access Obligations where there is effective competition with or between fixed line networks?
15. Would a framework that included localised network areas or developments being eligible for exemption once it meets a competition threshold be workable?
16. If a competition threshold is introduced, what number and type (i.e., NBN and non-NBN) of competing networks would be appropriate to give rise to an exemption?



17. Would defined geographic areas (e.g., by postcode, local government area or another type of geographic boundary) be appropriate for an ex-ante exemption and, if so, in which areas are you aware of a sufficient degree of competition now or in the foreseeable future?

18. Would you prefer a threshold-based exemption or a geographic area-based ex ante exemption?

19. Are there likely to be practical issues from implementing a competition-based exemption that would arise once an area becomes exempt from SBAS? If so, please explain why.

20. Would the application of SBAS to some areas of a providers' network and not others be costly for the infrastructure owner to implement or manage?

21. If we implement a competition-based exemption framework, should we only do it during the more standard inquiries prior to the expiry of a declaration or FAD; or rely on an ad hoc variation inquiry process for exemptions during a FAD period?

22. Do you support the term for the 2022 SBAS FAD aligning with the expiry of the SBAS declaration (28 July 2026)?

## Appendix C – Access determination statutory criteria

This section sets out the relevant legislative framework in relation to the FADs.

### **Content of final access determinations**

Section 152BC of the CCA specifies what a FAD may contain. It includes, among other things, terms and conditions on which a carrier or carriage service provider (CSP) is to comply with the Standard Access Obligations and terms and conditions of access to a declared service.

A FAD may make different provisions with respect to different access providers or access seekers.<sup>36</sup>

### **Fixed principles provisions**

A FAD may contain a fixed principles provision, which allows a provision in a FAD to have an expiry date after the expiry date of the FAD.<sup>37</sup> Such a provision allows the ACCC to 'lock-in' a term so that it would be consistent across consecutive FADs.

### **Varying final access determinations**

Section 152BCN allows the ACCC to vary or revoke a FAD, provided that certain procedures are followed.

A fixed principles provision cannot be varied or removed unless the FAD sets out the circumstances in which the provision can be varied or removed, and those circumstances are present.<sup>38</sup>

### **Commencement and expiry provisions**

Section 152BCF of the CCA sets out the commencement and expiry rules for FADs.

A FAD must have an expiry date, which should align with the expiry of the declaration for that service unless there are circumstances that warrant a different expiry date.<sup>39</sup>

### **Matters to consider when making FADs**

The ACCC must have regard to the matters specified in subsection 152BCA (1) of the CCA when making a FAD. These matters are:

- (a) whether the determination will promote the long-term interests of end-users of carriage services or services supplied by means of carriage services
- (b) the legitimate business interests of a carrier or CSP who supplies, or is capable of supplying, the declared service, and the carrier's or provider's investment in facilities used to supply the declared service
- (c) the interests of all persons who have rights to use the declared service
- (d) the direct costs of providing access to the declared service

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<sup>36</sup> Subsection 152BC (5) of the CCA.

<sup>37</sup> Section 152BCD of the CCA.

<sup>38</sup> Subsection 152BCN (4) of the CCA.

<sup>39</sup> Subsection 152BCF (6) of the CCA.

(e) the value to a person of extensions, or enhancement of capability, whose cost is borne by someone else

(f) the operational and technical requirements necessary for the safe and reliable operation of a carriage service, a telecommunications network or a facility, and

(g) the economically efficient operation of a carriage service, a telecommunications network or a facility.

The subsection 152BCA (1) matters reflect the repealed subsection 152CR (1) matters that the ACCC was required to consider in making a final determination (FD) in an access dispute. The ACCC interprets the subsection 152BCA (1) matters in a similar manner to the approach taken in access disputes.

Subsection 152BCA (2) sets out other matters that the ACCC may consider in making FADs in certain circumstances.

Subsection 152BCA (3) allows the ACCC to consider any other matters that it thinks are relevant.

The ACCC's views on how the matters in section 152BCA should be interpreted for the FAD process are set out below.

### **Paragraph 152BCA(1)(a)**

The first matter for the ACCC to consider when making a FAD is 'whether the determination will promote the long-term interests of end-users of carriage services or of services supplied by means of carriage services'.

The ACCC has published a guideline explaining what it understands by the phrase 'long-term interests of end-users' in the context of its declaration responsibilities.<sup>40</sup> This approach to the long-term interests of end-users was also used by the ACCC in making determinations in telecommunication access disputes. The ACCC considers that the same interpretation is appropriate for making FADs for the declared fixed line services.

In the ACCC's view, particular terms and conditions promote the interests of end users if they are likely to contribute towards the provision of:

- goods and services at lower prices
- goods and services of a high quality, and/or
- a greater diversity of goods and services.<sup>41</sup>

The ACCC also notes that the Australian Competition Tribunal (Tribunal) has offered guidance in its interpretation of the phrase 'long-term interests of end-users' (in the context of access to subscription television services):

Having regard to the legislation, as well as the guidance provided by the Explanatory Memorandum, it is necessary to take the following matters into account when applying the touchstone – the long-term interests of end-users:

\* End-users: "end-users" include actual and potential [users of the service]...

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<sup>40</sup> ACCC, [Telecommunications services – declaration provisions: a guide to the declaration provisions of Part XIC of the Trade Practices Act](#), August 2016, in particular pp. 28–31.

<sup>41</sup> ACCC, [Telecommunications services – declaration provisions: a guide to the declaration provisions of Part XIC of the Trade Practices Act](#), August 2016, p. 28,

\* Interests: the interests of the end-users lie in obtaining lower prices (than would otherwise be the case), increased quality of service and increased diversity and scope in product offerings. ... [T]his would include access to innovations ... in a quicker timeframe than would otherwise be the case ...

\* Long-term: the long-term will be the period over which the full effects of the ... decision will be felt. This means some years, being sufficient time for all players (being existing and potential competitors at the various functional stages of the ... industry) to adjust to the outcome, make investment decisions and implement growth – as well as entry and/or exit – strategies.<sup>42</sup>

To consider the likely impact of particular terms and conditions on the long-term interests of end-users, the CCA requires the ACCC to have regard to whether the terms and conditions are likely to result in:

- promoting competition in markets for carriage services and services supplied by means of carriage services
- achieving any-to-any connectivity, and
- encouraging the economically efficient use of, and economically efficient investment in:
  - the infrastructure by which listed carriage services are supplied, and
  - any other infrastructure by which listed services are, or are likely to become, capable of being supplied.<sup>43</sup>

### **Promoting competition**

In assessing whether terms and conditions will promote competition, the ACCC analyses the relevant markets in which the declared services are supplied (retail and wholesale) and considers whether the terms set in those markets remove obstacles to end-users gaining access to telephony and broadband services.<sup>44</sup>

Obstacles to accessing these services include the price, quality and availability of the services and the ability of competing providers to provide telephony and broadband services.

The ACCC is not required to precisely define the scope of the relevant markets in which the declared services are supplied. The ACCC considers that it is sufficient to broadly identify the scope of the relevant markets likely to be affected by the ACCC's regulatory decisions.

The ACCC's view is that the relevant markets for the purpose of making FADs for the declared fixed line services are:

- the market for the retail and wholesale supply of voice services (including Voice over Internet Protocol (VoIP) but excluding mobile originated calls)
- the market for the retail and wholesale supply of broadband, and
- the market for the retail supply of a bundle of voice and broadband services.

### **Any-to-any connectivity**

The CCA gives guidance on how the objective of any-to-any connectivity is achieved. It is achieved only if each end-user who is supplied with a carriage service that involves communication between end-users is able to communicate, by means of that service, with each other end-user who is supplied with the same service or a similar service. This must be

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<sup>42</sup> *Seven Network Limited (No 4)* [2004] ACompT 11 at [120].

<sup>43</sup> Subsection 152AB(2) of the CCA.

<sup>44</sup> Subsection 152AB(4) of the CCA. This approach is consistent with the approach adopted by the Tribunal in *Telstra Corporations Limited (No 3)* [2007] A CompT 3 at [92]; *Telstra Corporation Limited* [2006] A CompT at [97], [149].

the case whether or not the end-users are connected to the same telecommunications network.<sup>45</sup>

The ACCC considers that this matter is relevant to ensuring that the terms and conditions contained in FADs do not create obstacles for the achievement of any to any connectivity.

### ***Efficient use of and investment in infrastructure***

In determining the extent to which terms and conditions are likely to encourage the economically efficient use of and investment in infrastructure, the ACCC must have regard to:

- whether it is, or is likely to become, technically feasible for the services to be supplied and charged for, having regard to:
  - the technology that is in use, available or likely to become available
  - whether the costs involved in supplying and charging for, the services are reasonable or likely to become reasonable, and
  - the effects or likely effects that supplying and charging for the services would have on the operation or performance of telecommunications networks
- the legitimate commercial interests of the supplier or suppliers of the services, including the ability of the supplier or suppliers to exploit economies of scale and scope
- incentives for investment in the infrastructure by which services are supplied; and any other infrastructure (for example, the NBN) by which services are, or are likely to become, capable of being supplied, and
- the risks involved in making the investment.<sup>46</sup>

The objective of encouraging the 'economically efficient use of and economically efficient investment in ... infrastructure' requires an understanding of the concept of economic efficiency. Economic efficiency consists of three components:

- productive efficiency – this is achieved where individual firms produce the goods and services that they offer at least cost
- allocative efficiency – this is achieved where the prices of resources reflect their underlying costs so that resources are then allocated to their highest valued uses (i.e. those that provide the greatest benefit relative to costs), and
- dynamic efficiency – this reflects the need for industries to make timely changes to technology and products in response to changes in consumer tastes and in productive opportunities.

On the issue of efficient investment, the Tribunal has stated that:

An access charge should be one that just allows an access provider to recover the costs of efficient investment in the infrastructure necessary to provide the declared service.<sup>47</sup>

...efficient investment by both access providers and access seekers would be expected to be encouraged in circumstances where access charges were set to ensure recovery of the efficient costs of investment (inclusive of a normal return on investment) by the access provider in the infrastructure necessary to provide the declared service.<sup>48</sup>

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<sup>45</sup> Subsection 152AB (8) of the CCA.

<sup>46</sup> Subsections 152AB (6) and (7A) of the CCA.

<sup>47</sup> *Telstra Corporation Ltd (No. 3)* [2007] ACompT 3 at [159].

<sup>48</sup> *Telstra Corporation Ltd (No. 3)* [2007] ACompT 3 at [164].

...access charges can create an incentive for access providers to seek productive and dynamic efficiencies if access charges are set having regard to the efficient costs of providing access to a declared service.<sup>49</sup>

### **Paragraph 152BCA(1)(b)**

The second matter requires the ACCC to consider ‘the legitimate business interests’ of the carrier or CSP when making a FAD.

In the context of access disputes, the ACCC considered that it was in the access provider’s legitimate business interests to earn a normal commercial return on its investment. The ACCC is of the view that the concept of ‘legitimate business interests’ in relation to FADs should be interpreted in a similar manner, consistent with the phrase ‘legitimate commercial interests’ used elsewhere in Part XIC of the CCA.<sup>50</sup>

For completeness, the ACCC notes that it would be in the access provider’s legitimate business interests to seek to recover its costs as well as a normal commercial return on investment having regard to the relevant risk involved. However, an access price should not be inflated to recover any profits the access provider (or any other party) may lose in a dependent market as a result of the provision of access.

The Tribunal has taken a similar view of the expression ‘legitimate business interests’.

### **Paragraph 152BCA(1)(c)**

The third matter requires the ACCC to consider ‘the interests of all persons who have the right to use the service’ when making a FAD.

The ACCC considers that this matter requires it to have regard to the interests of access seekers. The Tribunal has also taken this approach. The access seekers’ interests would not be served by higher access prices to declared services, as it would inhibit their ability to compete with the access provider in the provision of retail services.

People who have rights to currently use a declared service will generally use that service as an input to supply carriage services, or a service supplied by means of carriage service, to end-users.

The ACCC considers that this class of persons has an interest in being able to compete for the custom of end-users on the basis of their relative merits. This could be prevented from occurring if terms and conditions of access favour one or more service providers over others, thereby distorting the competitive process.<sup>51</sup>

However, the ACCC does not consider that this matter calls for consideration to be given to the interests of the users of these ‘downstream’ services. The interests of end users will already be considered under other matters.

### **Paragraph 152BCA(1)(d)**

The fourth matter requires the ACCC to consider ‘the direct costs of providing access to the declared service’ when making a FAD.

The ACCC considers that the direct costs of providing access to a declared service are those incurred (or caused) by the provision of access.

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<sup>49</sup> *Telstra Corporation Ltd (No. 3)* [2007] ACompT 3 at [159].

<sup>50</sup> *Telstra Corporation Ltd (No. 3)* [2007] ACompT 3 at [159].

<sup>51</sup> *Telstra Corporation Ltd (No. 3)* [2007] ACompT 3 at [159].

The ACCC interprets this matter, and the use of the term 'direct costs', as allowing consideration to be given to a contribution to indirect costs. This is consistent with the Tribunal's approach in an undertaking decision. A contribution to indirect costs can also be supported by other matters.<sup>52</sup>

However, the matter does not extend to compensation for loss of any 'monopoly profit' that occurs as a result of increased competition.<sup>53</sup>

The ACCC also notes that the Tribunal (in another undertaking decision) considered the direct costs matter 'is concerned with ensuring that the costs of providing the service are recovered.'<sup>54</sup> The Tribunal has also noted that the direct costs could conceivably be allocated (and hence recovered) in several ways and that adopting any of those approaches would be consistent with this matter.<sup>55</sup>

### **Paragraph 152BCA(1)(e)**

The fifth matter requires that the ACCC consider 'the value to a party of extensions, or enhancements of capability, whose cost is borne by someone else' when making a FAD.

In the 1997 Access Pricing Principles, the ACCC stated that this matter:

...requires that if an access seeker enhances the facility to provide the required services, the access provider should not attempt to recover for themselves any costs related to this enhancement. Equally, if the access provider must enhance the facility to provide the service, it is legitimate for the access provider to incorporate some proportion of the cost of doing so in the access price.<sup>56</sup>

The ACCC considers that this application of paragraph 152BCA (1) (e) is relevant to making FADs.

### **Paragraph 152BCA(1)(f)**

The sixth matter requires the ACCC to consider 'the operational and technical requirements necessary for the safe and reliable operation of a carriage service, a telecommunications network or a facility' when making a FAD.

The ACCC considers that this matter requires that terms of access should not compromise the safety or reliability of carriage services and associated networks or facilities, and that this has direct relevance when specifying technical requirements or standards to be followed.

The ACCC has previously stated in the context of model non-price terms and conditions, it is of the view that:

...this consideration supports the view that model terms and conditions should reflect the safe and reliable operation of a carriage service, telecommunications network or facility. For instance, the model non-price terms and conditions should not require work practices that would be likely to compromise safety or reliability.<sup>57</sup>

The ACCC considers that these views will apply in relation to paragraph 152BCA (1) (f) for the making of FADs.

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<sup>52</sup> Application by Optus Mobile Pty Limited and Optus Networks Pty Limited [2006] ACompT 8 at [137].

<sup>53</sup> See Explanatory Memorandum for the *Trade Practices Amendment (Telecommunications) Bill 1996*, p. 44: [T]he 'direct' costs of providing access are intended to preclude arguments that the provider should be reimbursed by the third party seeking access for consequential costs which the provider may incur as a result of increased competition in an upstream or downstream market.

<sup>54</sup> *Telstra Corporation Limited* [2006] ACompT 4 at [92].

<sup>55</sup> *Telstra Corporation Limited* [2006] ACompT 4 at [139].

<sup>56</sup> ACCC, [1997 Access Pricing Principles](#), p. 11,

<sup>57</sup> ACCC, [Final Determination – Model Non-price Terms and Conditions](#), November 2008, p. 8,

## Paragraph 152BCA(1)(g)

The final matter of subsection 152BCA(1) requires the ACCC to consider ‘the economically efficient operation of a carriage service, a telecommunications network facility or a facility’ when making a FAD.

The ACCC noted in its publication the ‘Resolution of telecommunications access disputes—a guide’ (the Guide) that the phrase ‘economically efficient operation’ embodies the concept of economic efficiency as discussed earlier under the long-term interests of end-users. That is, it calls for a consideration of productive, allocative and dynamic efficiency. The Guide also noted that in the context of a determination, the ACCC may consider whether particular terms and conditions enable a carriage service, telecommunications network or facility to be operated efficiently.<sup>58</sup>

Consistent with the approach adopted by the Tribunal, the ACCC considers that in applying this matter, it is relevant to consider the economically efficient operation of:

- retail services provided by access seekers using the access provider’s services or by the access provider in competition with those access seekers, and
- the telecommunications networks and infrastructure used to supply these services.

## Subsection 152BCA(2)

Subsection 152BCA(2) provides that, in making a FAD that applies to a carrier or CSP who supplies, or is capable of supplying, the declared services, the ACCC may, if the carrier or provider supplies one or more eligible services,<sup>59</sup> take into account:

- the characteristics of those other eligible services
- the costs associated with those other eligible services
- the revenues associated with those other eligible services, and
- the demand for those other eligible services.

The Explanatory Memorandum stated that this provision is intended to ensure that the ACCC, in making a FAD, does not consider the declared service in isolation, but also considers other relevant services.<sup>60</sup> As an example, the Explanatory Memorandum stated:

...when specifying the access price for a declared service which is supplied by an access provider over a particular network or facility, the ACCC can take into account not only the access provider’s costs and revenues associated with the declared service, but also the costs and revenues associated with other services supplied over that network or facility.<sup>61</sup>

The ACCC proposes to consider the costs and revenues associated with other services—whether declared or not declared—that are provided over Telstra’s network when making FADs for the declared fixed line services.

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<sup>58</sup> ACCC, [Resolution of telecommunications access disputes—a guide](#), p. 57,

<sup>59</sup> ‘Eligible service’ has the same meaning as in section 152AL of the CCA.

<sup>60</sup> Explanatory Memorandum, Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2010, p. 178.

<sup>61</sup> Explanatory Memorandum, Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2010, p. 178.



### **Subsection 152BCA(3)**

This subsection states the ACCC may consider any other matters that it thinks are relevant when making a FAD.

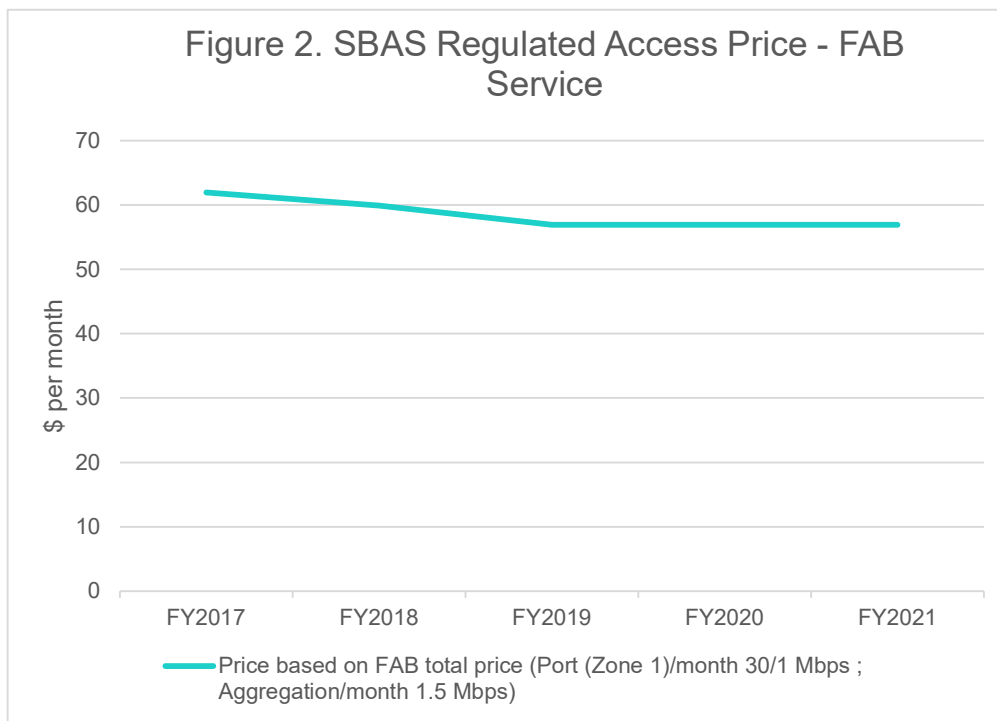
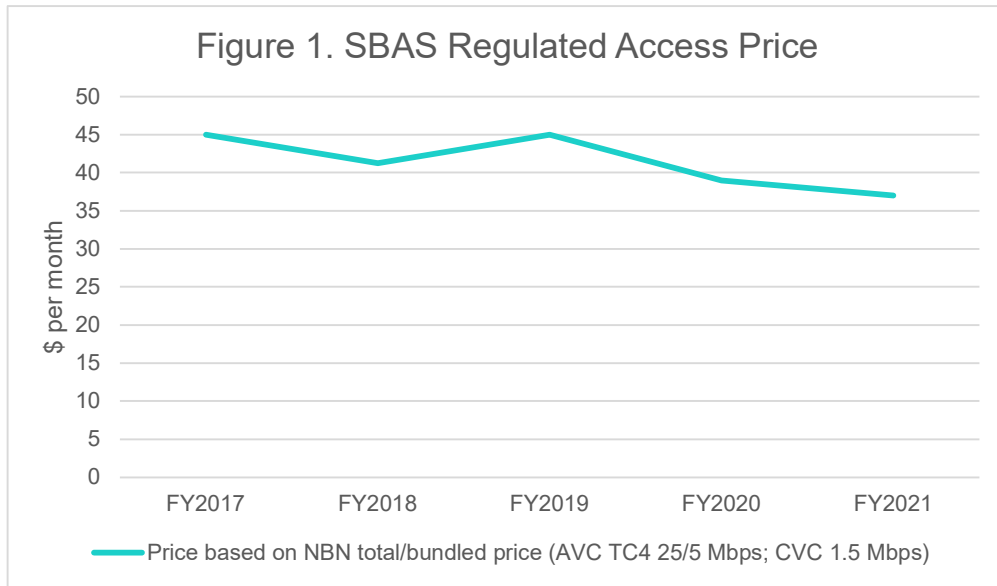
We consider that regulatory certainty and consistency will be important when setting the terms and conditions of the FADs.

The ACCC also considers that it should have regard to:

- its previous decisions in relation to the fixed line services (both arbitrations and access determinations)
- consultation documents and submissions in response to those documents
- information provided to the ACCC by Telstra under RKR.

These considerations and documents do not limit the matters that the ACCC may have regard to when making the FADs for the declared fixed line services.

## Appendix D – SBAS and FAB service prices since 2017



### Explanatory Notes

- SBAS and FAB service charges are set out in Appendix A of this document.
- SBAS charges are based on NBN Co.'s bundling/discount offers, as amended from time to time.
- The SBAS charges in Figure 1 represent monthly charges referenced to NBN Co.'s applicable combined Access Virtual Circuit (AVC) Traffic Class 4 - 25/5 Mbps charge and Aggregation (Connectivity Virtual Circuit (CVC) charges for 1.5 Mbps of CVC (including discounts).
- The FAB service charges in Figure 2 represent monthly charges for Port Zone 1 (metro) at 30/1 Mbps, and Aggregation at 1.5 Mbps – that is, the combined monthly Port and Aggregation charges.