



# Superfast broadband access service – access determination inquiry

## **Final decision**

March 2024

## **Acknowledgement of country**

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# Abbreviations and acronyms

ACCC	Australian Competition and Consumer Commission
ADSL	Asymmetric Digital Subscriber Line
AVC	Access Virtual Circuit carries traffic to and from an end-user on the access provider's network. It is charged on a per-connection basis.
CCA	<i>Competition and Consumer Act 2010</i>
CPI	Consumer Price Index
CVC	Connectivity Virtual Circuit is the bandwidth capacity required to serve a collection of end-user premises on an aggregate basis.
GST	Goods and Services Tax
Layer 2 service	Layer 2 has the same meaning as in the Open System Interconnection Reference Model. In general terms, it provides a point-to-point dedicated connection between 2 fixed points in a network.
LTIE	Long-term Interests of End-users
Mbps	Megabits Per Second
NBN	National Broadband Network
NNI	Network-to-network Interface
Overage	A charge that applies when the CVC daily peak bandwidth utilised by a relevant access product exceeds the CVC included in that product. It is a charge retail service providers pay to cover excess bandwidth usage by their customers.
RBS	Regional Broadband Scheme
SAU	Special Access Undertaking
SBAS	Superfast Broadband Access Service

# Executive summary

The ACCC has decided to issue a final access determination for the superfast broadband access service (SBAS). The new determination will specify the essential price and non-price terms of access to apply until 1 March 2027 should access seekers be unable to reach commercial agreement with the access provider.

This report sets out the ACCC's final decision on the regulated price and non-price terms to be included in the new SBAS final access determination. We have made this decision after considering submissions made throughout this inquiry and the relevant statutory criteria.

The access arrangements specified in this access determination include:

- the monthly recurring charge for access to some wholesale access services, with the determined monthly charges to be inclusive of the supply of any aggregation and transit components, as well as any contributions the access provider is to make under the regional broadband scheme levy
- connection, transfer, and end-user appointment fees
- charges for interconnection (network-to-network interface (NNI)) for the purpose of acquiring the SBAS
- consultation arrangements prior to access providers implementing any changes to wholesale access prices, including a requirement to explain to access seekers how their feedback was taken into account
- transparency obligations so that access seekers have visibility on the performance, quality, and reliability of SBAS that access providers supply.

We have decided to target the monthly recurring charges to those SBAS access products with a 25/5 megabits per second (Mbps) or 50/20 Mbps speed inclusion only. This approach keeps more-affordable, entry level retail plans in the market, and gives access seekers greater certainty over their access costs when supplying the most popular retail plans. Access providers will continue to have the flexibility to set their own prices for other speed inclusions on a commercially agreed basis with access seekers.

That said, we expect that the access determination will have an anchoring effect on the maximum wholesale access charges commercially offered for 100 Mbps or higher speed inclusions. This is because access providers would still need to set the monthly charges for these SBAS products based on the incremental value that customers place on them over and above the regulated charges, to efficiently grow demand for these higher yielding products.

We have decided to continue to set regulated access charges for the SBAS by benchmarking these charges against the equivalent charges for access to the National Broadband Network (NBN). While we do not consider that the NBN will necessarily have the same cost structure as other superfast broadband networks, we consider that benchmarking is still an appropriate method for regulatory purposes to estimate the efficient costs of operating and investing in an SBAS network. We also consider that broadband demand on the NBN is well established and encapsulates a broad range of access seekers, end-user demographics, and price points, and is therefore broadly representative of end-user preferences and willingness to pay for non-NBN superfast broadband services.

We consider that the benchmarking approach is in the long-term interests of end-users of SBAS as it will:

- lower barriers to entry and promote competition by enabling access seekers to develop retail offers that can be supplied over both the NBN and SBAS networks
- lead to those consumers and businesses that receive their broadband services over SBAS networks to access retail offers that are as least as attractive as those supplied over the NBN in terms of range and level
- enable access providers that are as efficient as NBN Co to continue to invest and operate their networks and earn an appropriate return on their investment.

In this regard, we note that access providers have continued to enter and expand their operations following the adoption in 2017 of price benchmarking in our SBAS access determinations, and that the NBN access arrangements against which the final SBAS access determination charges have been benchmarked have themselves been subject to extensive regulatory scrutiny, most recently in the inquiry we conducted into NBN Co's variation to its special access undertaking (SAU).

Further, we note that benchmarking avoids the need for more detailed cost modelling of each SBAS network, which would be an impracticable and costly exercise. Such alternative methods for setting SBAS access prices did not receive stakeholder support throughout our inquiry.

We have decided to regulate certain additional charges, and to provide for greater transparency over service quality and pending price changes, to promote retail competition and encourage efficiency in investment in, and operation of, SBAS networks and retail networks.

This includes reducing end-user transfer charges to promote competition between access seekers and specifying NNI charges to apply at various network capacity levels to lower barriers to entry by access seekers due to cost disadvantages that they may otherwise face while they build scale on SBAS networks.

Obligations to consult ahead of changes to wholesale access pricing will provide access seekers with greater confidence of the overall costs that they will likely face over time when acquiring SBAS. This additional cost certainty will promote competition and efficiency in the supply of services over SBAS networks.

Similarly, greater transparency on service levels will provide stronger incentives for access providers to deliver the service levels expected by access seekers and end-users, as well as identify and address poor performance where it arises.

We acknowledge that this decision introduces several new requirements that may require access providers to make necessary systems changes as well as undertake consultation with their customers. Accordingly, this access determination will commence on 1 September 2024. Until then, the regulated terms and conditions under the ACCC's July 2021 interim access determination will continue to apply.<sup>1</sup>

The access determination also removes the current exemption for networks that were built before 2011 and which supply less than 12,000 end-users. We are not aware of any such networks that would now qualify for the previous exemption.

We thank all stakeholders for their engagement throughout the inquiry.

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<sup>1</sup> The July 2021 SBAS interim access determination is available on the [ACCC public register](#).

# Overview of the final decision

## **Pricing methodology and regulated price components for the SBAS**

The methodology for setting regulated prices for the SBAS will continue to be benchmarking against prevailing NBN pricing for similar wholesale access residential grade products (with an exception for Telstra's fibre access broadband service, discussed below). Details are set out in the SBAS final access determination and this decision. In summary, access providers can adopt either of the following options for their regulated services to satisfy their obligations under the SBAS access determination:

- NBN Co's 'floor and ceiling' pricing approach, as recently accepted and set out in the NBN Co SAU variation, or
- a total monthly charge that does not exceed NBN Co's regulated price ceilings for equivalent residential grade products. This would not require access providers to adopt NBN Co's two-tier (access and usage) pricing structure and recognises that access providers may prefer to adopt alternative price structures for access, for example a single fixed charge incorporating usage.

Monthly recurring access prices will be regulated at the 25/5 Mbps and 50/20 Mbps speed tiers.

## **Non-recurring and ancillary charges**

The access determination will regulate charges levied on SBAS access seekers for service activation, service reactivation, service transfer, service transfer reversal, and end-user premises appointments. These regulated charges will apply for all access products offered by an access provider (that is, not limited to the 25/5 Mbps and 50/20 Mbps products).

Consistent with the NBN, SBAS service activation and transfer charges will adopt a two-tiered approach that distinguishes between an NBN-benchmarked nominal fee for 'standard' connections and cost recovery of labour time and materials for 'non-standard' connections. End-user appointment charges will allow access providers to recover their legitimately incurred costs in labour hours and materials.

Access providers will be required to consult with access seekers at least 2 months before making changes to their wholesale price list and provide a statement to access seekers before the price changes are made responding to how their feedback was considered.

## **Regional Broadband Scheme levy**

Regulated access prices for the SBAS will be inclusive of the regional broadband scheme (RBS) levy.

We note that stakeholder views on whether providers should be allowed to charge an additional amount to cover the levy were mixed, with access providers generally of the view that the new access determination should continue to provide this flexibility. The regulatory arrangements for the NBN under its varied SAU are intended to allow access prices that contribute to the recovery of government-imposed costs that NBN Co incurs under a statutory requirement such as the RBS levy. Benchmarking SBAS access prices against NBN access prices therefore mitigates the financial impact of the RBS levy on access providers and ensures that regulated access prices are not set at levels that are likely to undermine a provider's legitimate business interests or be below the direct costs of supplying the SBAS.

We note that the ACCC has a role to review the RBS levy amount every 5 years, with the next review to commence later this year. We will consider issues regarding the calculation of the levy in this upcoming inquiry. Our reports have the status of advice, and the levy can only be changed by the relevant Minister.

## **Fibre Access Broadband service regulation**

Regulated access prices for Telstra's fibre access broadband service will continue to be benchmarked to Telstra's wholesale asymmetric digital subscriber line (ADSL) service until the end of 2024. This is based on Telstra's advice that the service will be withdrawn by April 2024.

From 2025 an access provider will cease to have the option to offer a fibre access broadband service to satisfy its obligations under the SBAS access determination and will be required to make available access products at each speed tier referenced in the SBAS access determination at NBN-equivalent prices.

## **Network-to-network interconnection**

The access determination will regulate setup and monthly recurring charges levied by access providers for 1 gigabit, 10 gigabit, and 100 gigabit NNI charges.

These are the various capacity interfaces offered by NBN Co and SBAS providers that retailers must purchase to acquire access to a superfast broadband service. Under the SBAS access determination, regulated NNI charges are benchmarked to NBN Co's equivalent charges. This is inclusive of NBN Co's current 'NNI Upsize Migration Rebate', which provides credits to retailers to partially offset the costs of upgrading NNIs.

The SBAS access determination now provides that the monthly recurring charges in Schedule 2 are inclusive of transmission from the end-user interface to the NNI. Access providers will be required to recover these costs through the regulated monthly recurring charges, rather than levying an additional charge.

## **Non-price terms and conditions**

Current regulated non-price terms and conditions will be maintained with the additional requirement for access providers to provide information to access seekers covering network service quality and reliability attributes if requested (e.g., when the parties are negotiating an access agreement) and on a quarterly basis, covering the following service attributes:

- availability, performance, quality, and reliability of the network
- timeframes for – fault rectification services, and end-user connection, activation, and transfer services.

This information is to be made available by access providers from the 1 October 2024 to 31 December 2024 reporting period. These requirements will not apply to Telstra's fibre access broadband service.

## **Small network and competition-based exemptions**

The current exemption from the standard access obligations for small network operators (i.e., with <12,000 end-users) built prior to 1 January 2011 will be removed and networks will be subject to the SBAS access determination irrespective of their size and when they were built. We are not aware of any such networks that would be subject to these exemptions.



Exemptions from the standard access obligations on the basis that a network is competing directly with an alternative superfast broadband network will not apply for the term of the new access determination.

### **Duration of the access determination**

The price and non-price terms set out in the SBAS access determination will commence on 1 September 2024, to provide access providers adequate time to make any required system changes and allow for NBN Co's new pricing structure to be established. It will apply until 1 March 2027.

# 1. Introduction

The superfast broadband access service (SBAS) is a non-National Broadband Network (NBN) wholesale telecommunications service that access seekers can use to supply broadband and other services to end-users that are connected to a superfast broadband fixed line network. A superfast broadband network is one that is normally capable of download data speeds of 25 megabits per second (Mbps) or higher.<sup>2</sup>

The SBAS is a 'declared' telecommunications service.<sup>3</sup> 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. The declaration provides a retailer of broadband services with a right of access to the SBAS. The service description for the SBAS as set out in the July 2021 declaration is at **Appendix B**. The declaration does not apply to NBN services<sup>4</sup> or fixed wireless, satellite, and mobile technologies. Also, access prices for backhaul transmission services are regulated separately under the ACCC's domestic transmission capacity service access determination.<sup>5</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 (i.e., the access provider and access seeker) can rely on the terms and conditions set out in an access determination, or they can negotiate and agree to commercial terms and conditions regarding access to the service. However, an access determination 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 access determination made by the ACCC, 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 promote the long-term interests of end-users (LTIE).

An access determination can also serve other purposes, including specifying circumstances in which the access provider is excluded from complying with the standard access obligations.

Consequently, an access determination 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 LTIE.

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<sup>2</sup> See <https://www.accc.gov.au/regulated-infrastructure/communications/fixed-line-services/lbas-sbas-declarations-inquiry-2020/final-decision>.

<sup>3</sup> See <https://www.accc.gov.au/public-registers/telecommunications-registers/s152aq-declared-services-register/superfast-broadband-access-service>.

<sup>4</sup> The ACCC does not need to specifically exclude services provided by NBN Co as a declaration by default does not apply to services supplied, or eligible to be supplied, by an NBN Corporation (CCA, subsection 152AL (3A)).

<sup>5</sup> See <https://www.accc.gov.au/regulated-infrastructure/telecommunications-internet/transmission-services-and-facility-access-regulation/domestic-transmission-capacity-service-final-access-determination-inquiry-2019-2020/final-report>.

## 1.1. Background

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 local bitstream access service declaration. The ACCC declared the SBAS in July 2016, which applied to superfast fixed line networks that were built before 1 January 2011.

In July 2021, we decided to vary and extend the SBAS declaration until 28 July 2026. The decision combined the SBAS and previous local bitstream access service declarations to apply to all superfast broadband networks (i.e., built both before and after 1 January 2011). We revoked the local bitstream access service declaration concurrently to the varied SBAS declaration taking effect.

We subsequently commenced an SBAS final access determination inquiry and made an interim access determination to preserve the existing regulated terms during the inquiry period, as allowed under the *Competition and Consumer Act 2010 (Cth)* (CCA).

To date we have benchmarked SBAS access pricing with NBN, or Telstra wholesale access prices for ADSL services, depending on the SBAS variant. We adopted this approach in the 2017 access determination and maintained it in the July 2021 interim access determination.

## 1.2. Inquiry and consultation process

On 19 July 2021, we commenced a public inquiry under Part 25 of the *Telecommunications Act 1997* to make an access determination for the SBAS to consider the price and non-price terms and conditions of access.

On 4 November 2021, we released a discussion paper which considered relevant market developments since the previous access determination was made and discussed several pricing options for public consultation. We received 6 public submissions, which are available [on the ACCC's website](#).

In May-June 2022, ACCC staff met with stakeholders, including several that had not provided a submission, to discuss issues raised in our November 2021 discussion paper. The meetings are listed in **Appendix G**.

On 27 October 2022, we released a draft decision after having considered stakeholders' feedback to the discussion paper. The ACCC proposed to continue to benchmark regulated SBAS prices to NBN prices for equivalent residential broadband services. New measures proposed in the draft decision included regulation of access prices at the 25/10 Mbps and 50/20 Mbps speed tiers and charges for customer connections, transfers, and appointments. The draft decision included new requirements to improve the transparency of SBAS network performance and reliability. We received 8 submissions in response to the draft decision which are available [on the ACCC's website](#).

On 23 March 2023, we released an exposure draft of the SBAS access determination instrument for stakeholder comment, reflecting the positions reached in our draft decision. We received 6 submissions which are available [on the ACCC's website](#).

On 3 November 2023, we undertook further public consultation to provide guidance regarding how the ACCC proposes to implement the NBN price benchmarking approach for SBAS regulation and to seek feedback. This followed the ACCC's acceptance of NBN Co's

product and pricing changes in its special access undertaking (SAU) variation. We received 7 submissions which are available [on the ACCC's website](#).

This report sets out the ACCC's final decision on the regulated price and non-price terms in the new SBAS access determination. We have made this decision after considering submissions made throughout this inquiry and the relevant statutory criteria.

We thank all stakeholders for their engagement throughout the inquiry.

## 1.3. Outline of final decision

This decision is structured as follows:

- **Section 2** summarises the legislative framework under which the ACCC may make an access determination
- **Section 3** sets out the SBAS pricing approach
- **Section 4** considers matters associated with non-price terms and conditions
- **Section 5** considers exemptions to the SBAS access determination
- **Section 6** sets out the duration for the SBAS access determination
- **Appendix A** details the access determination legislative framework and our approach under this framework
- **Appendix B** sets out the service description of the declared SBAS
- **Appendix C** is the SBAS access determination instrument
- **Appendix D** provides an analysis of the estimated wholesale access prices under a retail minus approach
- **Appendix E** provides an analysis of the impact of the Government's regional broadband scheme levy on retailer margins
- **Appendix F** provides a table of Uniti retail prices and connection fee waivers
- **Appendix G** provides a list of submissions to our inquiry.

## 2. Legislative framework

Under the CCA, the ACCC may make an access determination that specifies terms and conditions of access to a declared service, which must include terms and conditions relating to price or a method of ascertaining price.<sup>6</sup> This enables the ACCC to determine pricing as well as other terms and conditions for access to a declared service which access seekers can rely on if they are unable to commercially agree on prices with the access provider.

The CCA requires the ACCC to take several matters into account when making an access determination, which are:

- whether the access determination will promote the LTIE, which involves considering the extent to which the access determination is likely to result in the achievement of the following objectives:
  - promoting competition in markets for listed services
  - achieving any-to-any connectivity
  - encouraging the economically efficient use of, and economically efficient investment in, the infrastructure by which the listed services are supplied, and any other infrastructure by which listed services are, or are likely to become, capable of being supplied<sup>7</sup>
- the legitimate business interests of a carrier or carriage service provider 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
- the interests of all persons who have rights to use the declared service
- the direct costs of providing access to the declared service
- the value to a person of extensions, or enhancement of capability, whose cost is borne by someone else
- the operational and technical requirements necessary for the safe and reliable operation of a carriage service, a telecommunications network, or a facility
- the economically efficient operation of a carriage service, a telecommunications network, or a facility.<sup>8</sup>

In considering whether an access determination is likely to encourage the economically efficient use of, and economically efficient investment in, infrastructure by which listed services are supplied, or are capable of being supplied, 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 certain matters<sup>9</sup>
- 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
- the incentives for investment in the infrastructure by which the services are supplied, and any other infrastructure by which services are, or are likely to become, capable of being

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<sup>6</sup> CCA, subsection 152BC(8), by reference to paragraphs 152BC(3)(a), (b) and (f).

<sup>7</sup> CCA, subsection 152AB(2).

<sup>8</sup> CCA, subsection 152BCA(1).

<sup>9</sup> CCA, subparagraphs 152AB(6)(a)(i), (ii) and (iii) describes these certain matters in detail.

supplied, which must involve consideration of the risks involved in making the investment.<sup>10</sup>

The ACCC may also take into account the supply of other eligible services by the access provider and any other matters that it considers relevant.<sup>11</sup>

Further detail in relation to the legislative framework for making an access determination is provided at **Appendix A**.

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<sup>10</sup> CCA, subsections 152AB(6) and (7A).

<sup>11</sup> CCA, subsections 152BCA(2) and (3).

## 3. SBAS pricing regulation

### Key points

- Regulated access prices for the SBAS will continue to be benchmarked directly to the wholesale access charges for equivalent residential grade products for NBN services. Access providers can adopt either of the following options to satisfy their obligations under the SBAS access determination:
  - NBN Co's 'floor and ceiling' pricing approach, as recently accepted and set out in the NBN Co SAU variation, or
  - A total monthly charge that does not exceed NBN Co's Average Combined Charge for equivalent residential grade services, which an access provider is required to update annually as a price ceiling for individual products.
- Access prices will be regulated at the 25/5 Mbps and 50/20 Mbps speed tiers.
- Regulated access prices for the SBAS are inclusive of the supply of any aggregation and transit components, as well as any contributions the access provider is to make under the regional broadband scheme (RBS) levy.
- The access determination will regulate non-recurring charges levied on access seekers for service activation, service reactivation, service transfer, service transfer reversal, and end-user premises appointments. These charges will use a two-tier approach that distinguishes between a nominal fee for standard connections and transfers, and cost recovery in labour and materials for non-standard connections and in-premises appointments.
- The access determination will regulate setup and monthly recurring charges levied by access providers for 1 gigabit, 10 gigabit, and 100 gigabit network-to-network interface (NNI) charges, which will be benchmarked to NBN Co's equivalent charges. This will be inclusive of NBN Co's current 'NNI Upsize Migration Rebate', which provides credits to retailers to partially offset the costs of upgrading NNIs.
- Access providers will be required to consult with access seekers at least 2 months before making changes to their wholesale price list and provide a statement to access seekers before the price changes are made responding to how their feedback was considered.

This section sets out the pricing approach the ACCC has adopted for the SBAS access determination. It first sets out the ACCC's draft decision before summarising stakeholder submissions. We then set out our final decision, having regard to subsequent submissions and the legislative criteria.

### 3.1. ACCC's draft decision

#### Pricing approach

Our draft decision was to continue to benchmark regulated access terms for the SBAS against NBN wholesale pricing for similar wholesale access residential grade products (with an exception for Telstra's fibre access broadband service, discussed below).

Under this approach, regulated access prices for the SBAS would continue to be referenced directly to the monthly wholesale access charges for equivalent residential grade products for NBN services, inclusive of the bundled access / usage charges offered by NBN Co.

We considered that the alternative methodologies canvassed in our discussion paper and in our 2017 inquiry, such as the building block model and retail minus approach, are resource intensive and overly complex to implement for SBAS networks.<sup>12</sup>

A benchmarking methodology where access prices are equivalent to NBN residential grade products (and benchmarked to ADSL for the fibre access broadband service) was and is considered straightforward to implement and well understood and accepted by access providers and access seekers. The approach has supported market entry by retailers for over a decade through common regulated access terms regardless of the location of the network.

We also considered that continuing with a benchmarking approach helps to ensure that access seekers are not paying more for equivalent NBN services, which will promote competition and benefit consumers.

However, we acknowledged that at the time there was uncertainty about NBN Co's future pricing path and regulated access terms due to the SAU variation inquiry and wholesale broadband agreement consultation then underway. We stated that we would make a final decision on regulated SBAS prices when these matters were clearer.

## **Regulated price components and anchor points for the SBAS**

Our draft decision was to regulate monthly recurring access at both the 25/5-10 Mbps and 50/20 Mbps speed tiers. This was an extension of our existing access determination, which regulates prices only for the entry level 25/5 Mbps speed tier.

We considered that anchoring price regulation at both the 25/5-10 Mbps and the 50/20 Mbps speed tiers reflected the change in consumer preferences since our previous inquiry in 2017. The 25/5-10 Mbps and 50/20 Mbps speed tiers together represent around 62% of the Australian broadband services market, with the 50/20 Mbps speed tier alone comprising 45%.<sup>13</sup>

Furthermore, we considered that:

- because consumer demand and pricing for 50/20 Mbps services is now well established, there is a low risk that regulating this speed tier at the same price as NBN services would result in inefficient pricing
- regulating SBAS prices at the 50/20 Mbps speed tier will be more effective in constraining prices of higher speed access services than if only the 25/5-10 Mbps speed tier is price regulated. In addition, continuing to regulate at the 25/5-10 Mbps speed tier would help to protect consumers of entry level broadband services from monopoly pricing.

Though captured within the scope of the declaration, we decided in our draft decision not to regulate access prices for 12/1 Mbps services supplied over SBAS networks. We considered that low-cost pre-paid and post-paid mobile phone and data services, which are readily available in geographic areas serviced by SBAS networks, are an effective substitute, and

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<sup>12</sup> Further background on the reasons for our decision can be found at: ACCC, *Combined SBAS & LBAS access determination inquiry draft decision*, July 2021, pp.17-23.

<sup>13</sup> ACCC, *NBN wholesale market indicators report*, September quarter 2023 report.



provide a sufficient competitive constraint on prices, for low data rate / allowance and voice only fixed line services.

We considered that our draft decision would facilitate uniform broadband service offerings to access seekers across the NBN and SBAS networks, while allowing for flexible SBAS access pricing arrangements through negotiation, with the fallback to regulated prices that reflect consumer demand for broadband services. This would in turn promote competition at the wholesale level and in downstream retail markets for both entry level and higher speed tier broadband services.

## **Telstra's fibre access broadband service**

Telstra supplies a legacy fibre access broadband service on its South Brisbane and Velocity Estates networks, which is regulated under the current SBAS access determination. Regulated access prices for this service are benchmarked to the service-specific costs of Telstra's wholesale ADSL service, at download / upload speeds of 30/1 Mbps (based on the capability of the service).

The fibre access broadband service is currently being progressively withdrawn nationally following the sale of Telstra's South Brisbane and Velocity Estates networks to Uniti Group Limited (Uniti).

Our draft decision was to continue to benchmark regulated access prices for the fibre access broadband service to Telstra's legacy wholesale ADSL service,<sup>14</sup> at speeds of 30/1 Mbps, until the end of 2023.

Our draft decision was based on advice from Telstra that, by September 2023, it was anticipated the fibre access broadband service would be decommissioned, and customers would be fully migrated to Uniti Group's Layer 2 SBAS network servicing the South Brisbane and Velocity Estates network areas. We considered that maintaining the current approach in the interim would promote stability in the transition of customers to Uniti's SBAS network, where customers would benefit from competitive pricing and service offerings akin to those available on the NBN. Further, we considered that it would be disproportionate to introduce new regulated access terms for the fibre access broadband service during the migration process, given it was expected the service would be decommissioned by the end of 2023.

We noted that should the fibre access broadband service continue past 2023, and on an ongoing basis, we would consider regulating access prices for the service benchmarked against the nearest equivalent NBN service. This was reflected in our subsequent draft SBAS access determination instrument consultation in March 2023, where we proposed benchmarking pricing for the 30/1 Mbps fibre access broadband service against the NBN 25/5 Mbps service.

## **Non-recurring and ancillary charges**

Our draft decision was to regulate certain non-recurring and ancillary charges levied on access seekers by SBAS providers under the access determination. These charges are not currently regulated.

We considered that where non-recurring and ancillary charges are unreasonably high and do not reflect the costs to the provider of the service or function provided, these charges can

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<sup>14</sup> These prices were benchmarked to the wholesale ADSL service because they operate over Telstra's legacy copper-based architecture, ordering and business systems. Telstra also requires an active voice product to be supplied on the line (to the end-user) to supply the service.

impede customers transferring between networks and retailers and can be detrimental to competition and consumers.

Our draft decision was to regulate charges levied by access providers on access seekers for service activation, service reactivation, service transfer, service transfer reversal, and end-user premises appointments (i.e., including charges for end-user missed appointments and cancellations). Our proposed approach was to benchmark SBAS provider charges for these services against NBN Co's charges for the same or comparable services (i.e., recognising access technology type).

This means, for example, that a provider's charge for a simple transfer of an end-user between retailers (i.e., a transfer enabled remotely and not requiring a technician to visit the end-user's premises) could not exceed NBN Co's charge for the same service.<sup>15</sup>

Consistent with NBN activation charges, regulated activation and reactivation charges for the SBAS would incorporate a two-tiered approach that distinguishes between a nominal fee for standard connections and a cost recovery formula (based on hourly labour and material costs) for non-standard connections. This would allow access providers to seek a suitable upfront contribution to the costs of a new connection without creating barriers to end-user switching or seeking a contribution where the access provider does not incur a material cost. End-user appointment charges would similarly allow providers to recover its legitimately incurred costs in labour hours and materials.

While we noted stakeholder concerns raised regarding other ancillary charges, such as NNI and state-based aggregation service charges levied by some providers, we did not form a view in our draft decision on whether to regulate charges for these services.

## **Regional broadband scheme levy**

The RBS levy was established by the Australian Government in 2020 to fund fixed wireless and satellite broadband services in rural and remote areas.

Under the RBS, a carrier or declared nominated carrier is required to pay \$7.97 per month to the Government for each eligible premise on their telecommunication network that has an active fixed line that provides a designated (superfast) broadband service.

Our draft decision proposed that SBAS providers be required to recover the levy through their regulated access charges in the same way that NBN Co does, whereas the current SBAS access determination allows for pass-through of the levy in addition to the regulated access charges.

We considered on-balance that making the regulated access charges inclusive of the RBS levy would promote competition in:

- downstream retail markets, by enabling retailers to offer uniform retail offerings across the NBN and SBAS networks. Where retailers are subject to the levy in addition to their SBAS access charges, they are at a disadvantage in comparison to retail offerings for NBN-based services. Also, where access providers operate at both the wholesale and retail level there is the risk that giving the provider the flexibility to pass through the levy to its wholesale customers but not its retail arm is likely to result in its retail arm having an unfair cost and price advantage in the market

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<sup>15</sup> NBN Co's current non-recurring charges are set out in its [Price List nbn™ Ethernet Product Module Wholesale Broadband Agreement](#).

- wholesale markets, recognising that allowing an access provider that is also a network builder to charge an access price above its costs (i.e., incorporating the regulated access prices and the RBS levy) could distort competition, given the higher returns available to the provider could be used to gain an unfair advantage over entities that are network builders only bidding for the right to install fibre networks.

We considered that the RBS levy contains exemptions which would prevent it from disproportionately impacting small network owners and dissuading new entrants. Networks with less than 2,000 end-users are not required to pay the levy. Further, the first 25,000 residential and small business premises or alternatively, the first 55,000 recently connected new developments, on a carrier's network will not be subject to the levy until July 2026.

## 3.2. Submissions to the draft decision

### Pricing approach

Submissions to our discussion paper were supportive of the ACCC's current approach of regulating SBAS access prices in line with NBN wholesale access prices. Generally, stakeholders considered that benchmarking:<sup>16</sup>

- is more straightforward to implement than other approaches and in ensuring that access seekers do not pay more than for the NBN
- is consistent with the level playing field provisions as well as being a simple means to ensure compliance
- ensures consumers are not disadvantaged by the network they are connected to.

However, some responses to our draft decision and November 2023 consultation were mixed, with several stakeholders focusing on our proposal to benchmark additional access products and one-off charges against the NBN.

Access seekers (Aussie Broadband, Internet Association of Australia (IAA), Leaptel) and consumer groups (Australian Communications Consumer Action Network (ACCAN) and the Australian Small Business and Family Enterprise Ombudsman (ASBFEO)) supported stronger regulation of SBAS networks as necessary to protect against price shocks and poor service standards. Retailers generally considered that the ACCC needed to go further in its draft decision to adhere to NBN benchmarking, such as:

- regulating additional speed tiers, including either entry level 12/1 Mbps services (Aussie Broadband), higher speed 100/20 Mbps services (ASBFEO, IAA, Launtel), or all speed tiers offered by NBN Co (Leaptel).<sup>17</sup> Those favouring regulation of higher speed tiers noted growing consumer demand for broadband services and NBN Co's pricing changes under its varied SAU (i.e., the removal of usage / CVC charging on 100 Mbps and above speed tiers, and a price increase for the 50 Mbps speed tier)<sup>18</sup> as reasons for further regulation
- further regulating (through benchmarking against the NBN) or precluding additional charges levied by some access providers, such as the NNI charge, state-based

<sup>16</sup> ACCAN, Telstra, and TPG supported the benchmarking approach in response to our discussion paper.

<sup>17</sup> Aussie Broadband [submission](#), p.1; IAA [submission](#), pp.1-2; ASBFEO [submission](#), p.1; Leaptel [submission](#), pp.4-6.

<sup>18</sup> Some industry stakeholders considered this change will cause a price convergence between the 50 Mbps and 100 Mbps and above services which will effectively force consumers to higher speed tiers.

aggregation charge, and CVC coverage waivers for smaller retailers (Aussie Broadband, IAA, Leaptel).<sup>19</sup>

Conversely, several access providers opposed the new regulated access terms, and instead considered that the ACCC should either maintain its current approach of regulating only the 25/5 Mbps speed tier (Uniti) or adopt a 'monitoring with threat of regulation' approach (TPG).<sup>20</sup> Both argued that the new regulated terms limit their ability to compete with NBN Co, and mobile and wireless networks, and fail to take account of NBN Co's cost and financing advantages.<sup>21</sup> Uniti also made the general point that rapid changes in the property market (for example, though build-to-rent and mixed residential and business use properties) have made it increasingly costly for telecommunications companies to comply with regulations. TPG also noted that the 25/5 Mbps service is supported both by Government policy (through the Statutory Infrastructure Provider regime), and NBN Co's recent positioning of the 25/5 Mbps speed tier, as the entry level broadband service.

TPG and Uniti requested further consultation on the SBAS access determination once the NBN SAU variation inquiry was finalised.

## **Telstra's fibre access broadband service**

There were 2 submissions on regulated access prices for the legacy fibre access broadband service.

Telstra advocated that the current approach should remain because:

- the approach (i.e., regulated access prices based on Telstra's wholesale ADSL service) avoids the costs and time involved in implementing a revised approach, noting that its service is being progressively withdrawn following the sale of the South Brisbane and Velocity Estate networks to Uniti
- it will provide regulatory certainty and stability for Telstra and its wholesale customers during the migration of services to Uniti's SBAS network.

Telstra considered that differential treatment should remain until the earlier of the completion of the migration to Uniti or the end of the access determination period (July 2026). Telstra considered that ending the treatment earlier, as proposed in our draft decision, would risk it needing to seek forbearance in the event of unexpected delays. It also stated that it should be made clear that the fibre access broadband service is excluded from new obligations introduced in the draft decision.<sup>22</sup>

ACCAN was not supportive of maintaining the current arrangements. While it acknowledged that Telstra's networks have been sold, it was concerned about the potential for delays and considered the ACCC should act to reduce consumer harm should this occur. ACCAN proposed the ACCC should either:

- adjust the fibre access broadband service pricing to account for the lower attainable upload speeds compared to the NBN 25/5 Mbps service, or

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<sup>19</sup> Leaptel stated in its submission that SBAS providers offer lower CVC coverage waivers than NBN Co (e.g., that Uniti offered 1.1 Gbps compared to NBN Co's 1.5 Gbps at the time of submission, and that some SBAS providers offered as low as 500 Mbps). Leaptel considered that these waivers are important for smaller providers to build up economies of scale and to reliably offer 1 Gbps services. NBN Co reduced its coverage waiver to 700 Mbps in its latest wholesale access agreement, effective from 1 December 2023.

<sup>20</sup> TPG [submission](#), pp.1-4; Uniti [submission](#), pp.8-10.

<sup>21</sup> These stakeholders raised issues such as NBN Co's economies of scale as the dominant provider, its government funding and implied guarantees and the uneven application of regulation across broadband networks.

<sup>22</sup> Telstra [submission](#), pp.3,5.

- benchmark the 100/5 Mbps fibre access broadband service as the nearest equivalent to the NBN 25/5 Mbps service, as this is the only service which meets the minimum upload speed requirements under the Government’s statutory infrastructure provider regime.<sup>23</sup>

## Non-recurring and ancillary charges

ACCAN, Aussie Broadband, IAA, Leaptel, NBN Co, and Telstra all welcomed the ACCC’s draft decision to benchmark non-recurring charges for service activations, transfers, and end-user appointments against equivalent NBN prices.

Aussie Broadband and Leaptel both considered that the charges levied by some access providers, particularly \$99 connection / transfer charges, are unreasonable and unlikely to be cost reflective of the function being provided (particularly considering NBN Co’s comparable charges). Each supported a two-tier structure for connection charges, noting that this approach strikes an appropriate balance between allowing access providers to recover their legitimately incurred costs while setting the default charges at a level that is not a barrier to end-user onboarding and switching.<sup>24</sup> Aussie Broadband also considered that the regulated charges should be backdated to 19 July 2021 (the inquiry commencement date) given both the excessive fees being charged and expected delay of the ACCC’s final decision on SBAS regulation.<sup>25</sup>

Several other stakeholders that ACCC staff met with in mid-2022 had raised similar concerns, noting that connection / transfer charges levied by access providers often materially exceeded those levied by NBN Co and by Telstra on its wholesale ADSL network.<sup>26</sup> There were also concerns raised with ACCC staff about access providers recovering the cost of a new connection multiple times each time a new resident moves in,<sup>27</sup> and charges levied for service appointments (e.g., fault rectification) being manifestly greater than the cost to the provider of the service or function provided.

Aussie Broadband, IAA, and Leaptel all considered that the state-based aggregation charge, currently levied by Uniti at \$2.80 (excluding GST) per service, should either be regulated or disallowed.<sup>28</sup> These stakeholders noted several concerns with the charge, specifically:

- the charges levied by Uniti exceeded those for similar transmission services that access seekers can acquire commercially or through ACCC regulated services
- as transmission costs are a function of the data throughput, it was not clear how a \$2.80 charge across all services is cost reflective (Leaptel). Leaptel also considered the flat fee is regressive, as its proportion of the cost of an entry level plan would exceed that of higher speed plans
- it was noted that statements by some access providers appeared to indicate that pricing of the state aggregation service is not set to reflect the costs of providing the service but rather to either cover broader business costs or to grow revenues per user (Leaptel)<sup>29</sup>

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<sup>23</sup> ACCAN [submission](#), p.7.

<sup>24</sup> Aussie Broadband [submission](#), p.2.

<sup>25</sup> Aussie Broadband [submission](#), p.2.

<sup>26</sup> The stakeholders explained that end-user transfers between retailers are usually enabled remotely and generally do not require a technician to visit the customer’s premises.

<sup>27</sup> This covers the initial installation of the local network infrastructure and / or the lead-in cable to the premises (i.e., connecting the premises to the network).

<sup>28</sup> Uniti levies the state-based aggregation charge to hand-over traffic to retailers at state capital points of interconnect. In September 2022, Uniti increased its monthly charge by 40%, from \$2 to \$2.80 per service.

<sup>29</sup> See *Communications Day Issue 5991*, 25 August 2020 and *Opticomm June Newsletter & Notification*, 3 June 2022.

- it was further noted that NBN Co carries out a significant degree of backhaul aggregation as part of the 121 points of interconnect for the NBN, and therefore this aggregation service is already reflected in the NBN access charges that SBAS charges are benchmarked to (Leaptel).<sup>30</sup>

Aussie Broadband and Leaptel also considered that NNI charges should be regulated. Leaptel considered that high NNI charges (for example, the \$5,000 charge for a 10 gigabit interface) are a barrier to entry for smaller retailers.<sup>31</sup>

Leaptel submitted the following proposals:

- in addition to regulating specific prices of concern, the ACCC should define a principle that gives it the ability to intervene where ancillary charges for the SBAS are counter to the NBN benchmarking principle
- providers that exceed a certain size should be required to consult the ACCC and key stakeholders before changing their price lists.<sup>32</sup>

TPG and Uniti opposed regulation of non-recurring charges and considered there was no evidence that access providers are charging excessive amounts that would warrant the ACCC's intervention. TPG provided evidence that its \$99 connection charges were reflective of its legitimate costs [c-i-c] [c-i-c]. TPG considered that it should be given the opportunity to recover these costs.<sup>33</sup>

TPG and Uniti further submitted that NBN Co's costs were not a reasonable benchmark for non-recurring SBAS charges, as its economies of scale, government funding and ownership, and access to cheap market debt meant its costs were lower than private operators.<sup>34</sup> Both argued that the regulated charges should allow a margin of return for providers<sup>35</sup> Uniti considered that a commercial return was important to fund its growth and future network expansion.<sup>36</sup>

Regarding its state-based aggregation charge, Uniti submitted that under NBN Co's 121 points of interconnect, retailers are obliged to either acquire a backhaul service from a third party or acquire their own network infrastructure to connect to their state points of presence (as NBN Co does not provide backhaul services). Either method would require access seekers to incur additional charges to offer an NBN service. Uniti noted that it is replicating the former service (i.e., third-party provision of backhaul) through the aggregation charge for its SBAS, which it levies to recover its own backhaul investment and ongoing bandwidth costs. Uniti contended that this service is a point of differentiation for Uniti as not all access providers offer state-based aggregation.<sup>37</sup>

## Regional Broadband Scheme levy

Submissions differed on whether access providers should be required to absorb the RBS levy or continue to be allowed to explicitly pass on the levy to retailers, in addition to the regulated SBAS access charges, should they choose to.

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<sup>30</sup> Aussie Broadband [submission](#), p.2; Leaptel [submission](#), pp.8-9.

<sup>31</sup> Aussie Broadband [submission](#), p.2; Leaptel [submission](#), p.7.

<sup>32</sup> Leaptel [submission](#), pp.5,12.

<sup>33</sup> TPG [submission](#), pp. 6-7.

<sup>34</sup> TPG [submission](#), pp.7-8; Uniti [submission](#), pp.3-4.

<sup>35</sup> TPG [submission](#), p.4; Uniti [submission](#), p.12.

<sup>36</sup> Uniti [submission](#), p.12.

<sup>37</sup> Uniti [submission](#), p.13-14.

Several stakeholders supported our draft decision to make the regulated access charges inclusive of the RBS levy (Leaptel, Telstra, NBN Co, IAA). They submitted that:

- adding the levy to access charges could result in wholesale (and consequently retail) charges for broadband services supplied over non-NBN networks being higher than those for NBN customers. This would run contrary to the ACCC's 'no worse off than on the NBN' approach (Telstra, Leaptel)
- precluding pass-through would not place undue financial burden on providers, as NBN Co's prices are inclusive of the RBS levy (Telstra, NBN Co)<sup>38</sup> and SBAS networks are lower cost than the NBN by virtue of having the freedom to service only lucrative markets (Leaptel). Leaptel further posited that highly profitable margins and company sales (e.g., of Uniti to Morrison-Brookfield) reported by access providers in recent years are evidence that they are not unduly burdened
- it is not clear to what extent, if at all, access providers are paying the levy due to the numerous exemptions that exist in the first 5 years of the scheme (Telstra)
- the intent of the legislation was to ensure that access providers were contributing to the funding of regional broadband services, and it was not intended that these charges would be passed on to subsets of consumers (Leaptel).<sup>39</sup>

ACCAN submitted that the ACCC should go further in its decision and require access providers who are exempt from the levy to adjust their prices down by the levy amount.<sup>40</sup>

TPG and Uniti opposed the proposed change, considering that access providers should be given the opportunity to explicitly pass on the RBS levy to protect their legitimate business interests.<sup>41</sup> Both considered that being required to absorb the levy would worsen their financial position relative to their major competitors, such as NBN Co (which receives the levy amount back) and alternative mobile and wireless technologies (which are not subject to the levy).

Uniti further submitted that the cost impost is significant (13.5% of its per-service price) and will likely grow as its exemptions sunset in 2026.<sup>42</sup> It considered that NBN Co's proposal to write down \$31 billion of its accumulated losses (through its SAU variation proposal) is a reason to reduce the levy.

Both TPG and Uniti noted that they do not pass through the levy to retailers due to strong wholesale price competition.

### 3.3. Further consultation paper

On 2 November 2023, the ACCC contacted stakeholders who provided submissions to the inquiry to provide guidance regarding how the ACCC proposed to implement the NBN price benchmarking approach and to seek stakeholder feedback on the proposed approach. This recognised the ACCC's acceptance of NBN Co's varied SAU and implementation of its new wholesale pricing approach for relevant lower speed services (the 'floor and ceiling' price) from 1 December 2023.

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<sup>38</sup> The RBS levy replaces a previous internal cross-subsidy between NBN Co's revenue generating fixed line services and loss-making satellite and fixed wireless services. NBN Co also effectively pays the levy on its own fixed line services, which it is required to recover through its wholesale access charges.

<sup>39</sup> IAA [submission](#), p.3; Leaptel [submission](#), p.12; NBN Co [submission](#), p.2; Telstra [submission](#), p.4.

<sup>40</sup> ACCAN [submission](#), p.2.

<sup>41</sup> TPG [submission](#), p.8; Uniti [submission](#), pp.4, 15-18.

<sup>42</sup> Uniti also referred to ACMA's discretion to increase the annual levy amount by up to CPI as a potential cost driver.

We also sought feedback on proposed regulated access terms for certain NNI charges, which are required to connect to and acquire an SBAS.

## Pricing approach

Our proposed approach was to retain the NBN benchmarking approach. We proposed 2 options under which access providers can supply the declared Layer 2 wholesale SBAS in compliance with the standard access obligations. Access providers could adopt either of the following options:

1. NBN Co's 'floor and ceiling' pricing approach, as recently accepted and set out in the NBN Co SAU variation. Maximum monthly charges would be benchmarked against NBN Co's AVC TC-4 bundle and CVC TC-4 overage (access and usage) product charges. This would be subject to a price ceiling that would ensure that the total charge, inclusive of overage, cannot exceed the price of the NBN 100 Mbps service (equal to \$55/month in 2023-24 with provision for escalation for subsequent years). Access seekers would no longer be able to pool CVC entitlements across services (that is, the price ceiling would apply on a per-service basis).
2. An SBAS total monthly charge that does not exceed NBN Co's Average Combined Charge (the combined access and usage charge) for equivalent residential grade services.<sup>43</sup> This would not require access providers to adopt NBN Co's two-tier pricing structure and recognises that access providers may prefer to adopt alternative price structures for access, for example a single fixed charge incorporating usage.

Our proposal was to benchmark access prices at the 25/5 Mbps and 50/20 Mbps speed tiers against NBN Co's equivalent charges published in its Tariff List and 3 Year Pricing Roadmap each financial year. CVC Inclusions and the Average Combined Charge would also be re-adjusted in the middle of each financial year as allowed for in NBN Co's varied SAU. Finally, access providers would be required to implement the NBN pricing and CVC Inclusion changes for regulated SBAS speed tiers within 6 months from the date NBN Co updates its Tariff List and Pricing Roadmap.

## NNI charges

The second proposal in the consultation paper was aimed at addressing ongoing competition concerns with current NNI charges, which retailers raised as impediments to onboarding and expanding their operations over SBAS networks.

We proposed to regulate setup and monthly recurring charges levied by SBAS providers for 1 gigabit and 10 gigabit NNIs, which we considered were of most relevance to smaller retailers competing to build market share. Regulated NNI charges would be benchmarked against NBN Co's equivalent charges published in its annual Tariff List. An outcome we sought to achieve from this benchmarking approach is a similar relative cost to access NNI capacity for the NBN and SBAS networks. This referenced the approach of some access providers to bundling additional charges to interconnect with and access SBAS networks (for example, through the state-based aggregation charge).

We note that NBN Co reduced its NNI charges in its varied SAU and latest wholesale broadband access agreement and has committed to further reductions for higher capacity interfaces by July 2024.

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<sup>43</sup> The Average Combined Charge operates as an average price ceiling for NBN Co's bundled wholesale offers, which it has committed to [publish and update](#) in its 3 Year Pricing Roadmap at the same time it updates its annual Tariff List under its varied SAU obligations.



## 3.4. Submissions to the further consultation paper

### Pricing approach

Consistent with submissions in response to our draft decision, retailers, Telstra, and the IAA each supported SBAS regulation and the NBN benchmarking approach. They considered it necessary to ensure that retailers and their end customers will not be made worse off, in terms of higher prices or lower quality of service, than if they were supplied broadband services by the NBN.

Conversely, TPG and Uniti both opposed extending the benchmarking approach beyond the 25/5 Mbps speed tier. They reiterated their earlier positions that to do so will limit their ability to compete with NBN Co and wireless networks and fails to take account of NBN Co's cost and financing advantages. These providers considered that they should be allowed flexibility to offer prices based on their own forecasts, cost profile, technology, and customer mix, as opposed to being bound to those applicable to NBN Co.

Uniti also questioned the ACCC's assertion that NBN Co is currently recovering the RBS levy through its price structure and noted the substantial range of revenue outcomes between its floor and ceiling price, particularly for the 25/5 Mbps speed tier.

There was broad agreement among stakeholders that it was unlikely that SBAS providers would adopt NBN Co's floor and ceiling approach, due to IT & compliance costs as well as the short time period before NBN Co transitions to access only pricing. Retailers supported a two-tier approach to SBAS pricing as being more supportive of pricing certainty. The access providers did not support this approach and proposed the following alternatives:

- TPG submitted that the ACCC should adopt the NBN floor-and-ceiling approach, but only the NBN price ceiling of \$55 as a regulated maximum
- Uniti proposed 2 alternatives that each adjust the NBN Average Combined Charge. Its first preference was to adjust the charge for differences in usage and other costs between networks, while its second preference was to adopt the average of the Average Combined Charge and the price ceiling.

Launtel, Leaptel, and the IAA each considered that the ACCC should regulate the 100 Mbps speed tier, in addition to the 25 Mbps and 50 Mbps tiers currently proposed. They reiterated previous reasoning for regulating these services (i.e., growing consumer demand, technology differences, and NBN Co's pricing changes under its varied SAU).

### NNI charges

Retailers supported the benchmarking of NNI charges against equivalent NBN prices, however they generally considered that this should also be extended to high capacity (100 gigabit) interfaces.<sup>44, 45</sup> Some retailers indicated that this should be implemented as a total 'cost to interconnect' charge, due to concerns of cost-shifting by access providers levying unregulated charges.

TPG and Uniti both opposed regulation of NNI charges. TPG noted that with significantly greater economies of scale NBN Co can spread these access costs across a larger

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<sup>44</sup> While in our consultation paper we considered lower capacity NNIs as being of most direct relevance to small retailers, Launtel and Telstra both noted that SBAS networks aggregate consumers over a small number of points of interconnect (e.g., 5 for Uniti versus 121 for the NBN). This, they consider, increases its relevance for SBAS networks.

<sup>45</sup> Launtel also noted that, unlike the NBN, Uniti does not provide access seekers the option to use their own backhaul.

customer base. Uniti noted similar concerns and reiterated its view that its NNI and state-based aggregation charges include value-add services incorporate additional backhaul / aggregation services that access seekers are obliged to acquire separately on the NBN.

## 3.5. ACCC's final decision

### Pricing approach

The ACCC has considered submissions to our inquiry, and we remain of the view that a benchmarking approach to regulated price setting for SBAS is appropriate having regard also to the relevant matters under subsection 152BCA(1) of the CCA.

We consider that NBN price benchmarking is an appropriate methodology for setting regulated SBAS price terms and meets the legislative criteria for the following reasons:

- enabling the option of common regulated access terms regardless of location or network will likely promote participation of retailers in the relevant markets by lowering their costs of connecting to multiple networks. It will also help to ensure that access seekers are not paying more than for equivalent NBN services, which will promote competition and benefit consumers
- it reflects the positive relationship between competitive tension and economic efficiency in the market. In other words, firms that face greater competition will tend to charge lower prices, have lower supply costs, and make increased efforts to lower their costs and improve service levels over time
- NBN Co is an entity subject to extensive regulatory scrutiny and governance obligations to ensure that its operations and access arrangements align with those of an efficient network operator over time<sup>46</sup>
- Broadband demand on the NBN is well established and encapsulates a broad range of retailers, end-user demographics, and price points and is therefore broadly representative of end-user preferences and willingness to pay
- NBN Co is subject to individual product price caps (on top of an overall average price cap) that provide for a stable path of annual average price increases. These are a consumer price index (CPI) cap for the 25/5 Mbps speed tier and a cap of the higher of CPI or 5% for the 50 Mbps speed tier.<sup>47</sup> Benchmarking SBAS prices to the NBN will therefore help alleviate the impact of any extraneous cost increases while protecting retailers and end-users from price shocks.

Regarding NBN Co's cost and financing advantages, we note that these matters have been considered through our review of NBN Co's SAU variation.<sup>48</sup> The regulatory arrangements allow for cost recovery by NBN Co over time and are intended to generate efficient outcomes for pricing of wholesale broadband access services. While benchmarking the SBAS to NBN prices allows for the NBN's cost structure to be reflected in SBAS pricing, we consider that because SBAS are generally supplied in more densely populated areas, the average costs of supplying the services in these areas are likely to be lower than the costs recovered in the NBN's prices, which reflect more diverse geographic areas and servicing

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<sup>46</sup> We note that NBN Co's expenditures, price controls, product development and service standard proposals, and pricing strategies and underlying customer & technology mix assumptions are all subject to disclosure and ACCC / industry review.

<sup>47</sup> The price caps apply to the Average Combined Charge for each of these speed tiers.

<sup>48</sup> See ACCC, [NBN Co SAU variation \(August 2023\)](#).

costs, and variable population densities.<sup>49</sup> We also note that most SBAS providers are able to leverage economies from vertical integration with associated retailers under ACCC approved functional separation undertakings.

We remain of the view that NBN-benchmarked prices will allow an equally efficient access provider to recover their direct costs of access, including an appropriate return on their investment. While TPG and Uniti have both generally noted differences in cost profiles, technologies, and customer mixes across networks, we consider that to adequately account for such cost differences would require us to undertake a full-cost review of the various SBAS networks, and that such an analysis could drive broader changes in SBAS regulated prices. Such an approach has not been supported by stakeholders to this inquiry.

Further, we do not agree that adopting a benchmarking approach would stifle innovation or product differentiation in the market. It is our view that the SBAS access determination will allow access providers to also offer alternative commercial pricing and product arrangements and allow access providers flexibility to price higher speed services in a way that will promote greater uptake and use. We note that providers have done so since the SBAS was first declared in 2012 with current examples including flat-rate pricing, symmetrical download and upload speed services, additional Layer 3 services, and bundled telecommunications services.<sup>50</sup> Access seekers that consider that those alternative commercial offers represent greater value to them than regulated SBAS terms will choose to acquire an SBAS on commercial terms, however the regulated terms in the access determination will remain as a fallback option.

TPG and Uniti proposed alternatives to our proposed NBN benchmarking approach. These can broadly be described as either an upward adjustment to the maximum regulated price or to maintain NBN Co's legacy 'national pooling' access and usage pricing model. We do not consider that either approach will promote the LTIE. The regulated prices proposed are likely to result in price increases for end-users as they are set above currently in-market offers and contain limited or no price differentiation between low- and high-speed tier services.<sup>51</sup> Further, while most access providers have already established the systems necessary to offer a national pooling approach, we note that the industry has long raised concerns (including in ACCC public inquiries) with the cost uncertainties associated with managing usage charges under such a pricing model. We therefore consider it unlikely that regulated prices under either model proposed by TPG and Uniti would serve as an effective regulatory fall-back if parties cannot agree on reasonable terms.

We also note Uniti's comments on the constraining impact of competition from NBN Co and wireless operators, which we considered in our decision to extend the declaration of the SBAS.<sup>52</sup> In summary, the ACCC considered that:

- improvements in wireless technologies (such as mobile, satellite, and fixed wireless) may provide end-users some choice in network operator. However, we did not consider that this yet negated the need for declaration as these services were not widely available outside metropolitan areas, including in new regional developments
- competition between SBAS providers and NBN Co has mostly been 'for the market' (that is, to be the first to roll out a fixed network at a given location), with only limited

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<sup>49</sup> Other factors likely to contribute to NBN Co's higher cost base include its fixed wireless and satellite networks, status as the default statutory infrastructure provider, line-of-business restrictions, and initial requirement to prioritise regional areas.

<sup>50</sup> These may include bundling of internet and security services (utilised in gated estates) or the bundling of internet and other utility services, as is popular in the developing build-to-rent market.

<sup>51</sup> For instance, under TPG's proposal both the 25/5 Mbps and 50/20 Mbps speed tiers would be charged at equivalent prices to NBN Co's 100/20 Mbps speed tier.

<sup>52</sup> ACCC, *SBAS and LBAS combined declaration inquiry final decision*, July 2021, sections 3.1 and 3.2.

instances of overlap once the initial 'first mover' network has been built. This means in most instances end-users and retailers only have a single choice of network operator. While we noted the potential for competitive overlap to gradually increase over time, we considered that this was likely to be at the margin and vary by network and location.

We acknowledge that the superfast broadband market is undergoing changes, and these developments will warrant review when the SBAS declaration and future regulatory arrangements are considered in 2025-26.

## Regulated price components and anchor points for the SBAS

Our final decision is to continue to reference regulated access prices for the SBAS directly to the access prices for equivalent residential grade NBN services. Consistent with our further consultation paper, access providers can adopt either of the following options to satisfy their obligations under the SBAS access determination:

- NBN Co's 'floor and ceiling' pricing approach, as recently accepted and set out in the NBN Co SAU variation
- an SBAS total monthly charge that does not exceed NBN Co's Average Combined Charge for equivalent residential grade services.

These options are set out in more detail in the instrument at **Appendix C**. NBN Co's charges for 2024-25 are also reproduced in Table 1 below. Parties will not be precluded from making commercial agreements on alternative price structures for access or from offering prices lower than the regulated prices as specified in this access determination.

**Table 1: NBN Co's wholesale offers for 2024-25**

Charge component		Monthly recurring fixed charge	CVC Inclusion (Mbps)	Average Combined Charge
Effective price per Month	25/5 Mbps	\$27.95	0.23	\$33.47
	25-50/5-20 Mbps	\$52.52	3.56	\$53.60
CVC Overage per Mbps		\$4.50		
Price ceiling		\$57.22		

Source: <https://www.nbnco.com.au/rsps/special-access-undertaking-sau>

Our decision is that access prices for the SBAS will be regulated at the 25/5 Mbps and 50/20 Mbps speed tiers. This will capture the current most popular speed tier on the NBN and NBN Co's designated entry level broadband service. We appreciate that there are a range of views on the appropriate anchor product for SBAS regulation. However, we consider that regulation at these tiers strikes an appropriate balance between allowing access providers the flexibility in adjusting their headline prices for higher speed services and to innovate with new product offers, while constraining excessive pricing.

We have decided not to regulate access to the 25/10 Mbps speed tier. Since the time of our draft decision NBN Co has not proceeded to reposition the 25/10 Mbps tier as its entry level broadband service.<sup>53</sup> Consequently, we do not expect a significant migration of consumers

<sup>53</sup> See ACCC, *Proposed variation to the NBN Co special access undertaking consultation paper*, May 2022, p.3.

to this speed tier such that regulation is currently necessary. However, we do not consider this precludes future consideration of mandated wholesale access at this speed tier, with demand for greater upload speeds likely to accelerate as consumers increasingly engage in home-based work, education, and health services, and as new use cases emerge.<sup>54</sup>

Both TPG and Uniti submitted that the 25/5 Mbps service was the only appropriate anchor product for price regulation. However, we consider that the 25/5 Mbps service's impact alone as a competitive constraint on higher speed services has declined since the SBAS was first declared. As noted in our draft decision, the 50 Mbps speed tier is currently the most popular service by a significant margin, alone comprising 45% of the broadband services market. **[c-i-c] [c-i-c]**.

We have also considered the impact of NBN Co's new pricing initiatives under the SAU variation and whether these initiatives would adversely impact the combined effectiveness of regulating the SBAS at the 25/5 Mbps and 50/20 Mbps speed tiers. We considered NBN Co's removal of usage charges on 100 Mbps and above services and whether this would lead to a significant shift in consumers to higher speed tiers (which would effectively supersede the 50 Mbps speed tier as the dominant service). We note however that NBN Co has stated in its statement of pricing intent that it intends to price its services to support the ongoing viability of the 50 Mbps service.<sup>55</sup> This suggests that, although there is the potential over time for a growing proportion of services acquired under the 50 Mbps wholesale offer to be more commercially attractive if acquired under the 100 Mbps wholesale offer, the 50 Mbps service would remain competitive in the medium term.

Consequently, we consider that pricing for the 50/20 Mbps service will serve as an effective anchor for higher speed services over the term of the SBAS access determination. We consider that this will act to constrain wholesale pricing of higher speed services so that these remain attractive, while offering a viable alternative and the choice of a lower bandwidth service at a lower price for retailers and end-users.

We have also accounted for inherent technology limitations that may limit the ability of certain technologies to reliably offer a 100 Mbps and above service. This would likely require a significant investment by certain providers to upgrade their network architecture to be able to reliably comply with the SBAS access determination. We note that TPG has raised similar concerns with the existing anchor products and proposed a minor amendment to express the relevant bandwidth profiles as a range (for example, 25-50 Mbps download / 5-20 Mbps upload). We have reflected this in the access determination instrument to ensure that providers do not commit a breach of the regulated SBAS access terms by virtue of their network technology limitations, and that the approach aligns with NBN Co's own wholesale product commitments. We note that this distinction will not be relevant for all access technologies.

We acknowledge TPG's and Uniti's concerns that the current 3-month window to implement new regulated access terms for the SBAS may not allow sufficient notice for providers to undertake relevant consultation (including to comply with their non-discrimination obligations) and provide sufficient notice to their customers in accordance with wholesale broadband agreements. Having regard to these timing issues, the ACCC will provide an extended timeframe under this final decision for access providers to implement the new access terms in this determination, to 1 September 2024 (discussed in chapter 6).

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<sup>54</sup> For example, rising demand for cloud services, adoption of virtual / augmented reality, internet-of-things deployments, and an increased number of connected devices in a household all have the potential to add to consumer upload utilisation. The revised NBN SAU will similarly empower the ACCC to nominate a new entry level NBN service from July 2026.

<sup>55</sup> NBN Co has also forecast that its 50 Mbps speed tier will comprise 40-45% of all residential grade wholesale access in 2025-26. NBN Co, *Statement of pricing intent: 1 December 2023 to 30 June 2026*, August 2023, p.4.

SBAS at the 25/5 Mbps and 50/20 Mbps speed tiers will be benchmarked against NBN Co's equivalent charges published in its Tariff List and 3 Year Pricing Roadmap each financial year. CVC Inclusions and the Average Combined Charge will also be re-adjusted in the middle of each financial year. Access providers will be required to implement the NBN pricing and CVC Inclusion changes for regulated SBAS speed tiers within 6 months from the date NBN Co updates its Tariff List and Pricing Roadmap.

## **Telstra's fibre access broadband service**

We have reviewed our position on the treatment of the fibre access broadband service, in view of submissions and advice received from Telstra that its expected customer migration completion date has been delayed but will be completed in 2024.

Our final decision is that regulated access prices for the fibre access broadband service will continue to be benchmarked to Telstra's wholesale ADSL service, at download / upload speeds of 30/1 Mbps, until the earlier of the completion of migration to Uniti's Layer 2 SBAS network or 31 December 2024. From 2025 an access provider will cease to have the option to offer a fibre access broadband service to satisfy its obligations under the SBAS access determination and will be required to make available access products at each speed tier referenced in the SBAS access determination at NBN-equivalent prices.

Based on advice provided by Telstra, we consider this timeframe will provide Telstra and Uniti sufficient opportunity to complete the migration of existing services to Uniti's SBAS network, after which we understand the fibre access broadband networks operating in the South Brisbane and Velocity Estate areas will be decommissioned.<sup>56</sup>

While we acknowledge Telstra's submission that such a timeframe may risk it needing to seek forbearance from the ACCC in the event of further delays that may be outside of its control,<sup>57</sup> we consider that a 31 December 2024 cut-off date provides sufficient contingency in lead-in time to reduce this risk and will not disrupt the timely migration of end-users to Uniti's SBAS network or be detrimental to Telstra's legitimate business interests.

In response to concerns from Telstra that the new obligations with respect to one-off charges and network reporting obligations (discussed below) would apply to it during the customer migration period, we have clarified in the access determination that these obligations will not apply to the fibre access broadband service.

## **Non-recurring and ancillary charges**

TPG and Uniti were critical of our draft decision to regulate non-recurring charges on service activations, service reactivations, service transfers, service transfer reversals, and end-user premises appointments. While generally considering them unjustified, they also raised 2 specific concerns:

- it is inappropriate to benchmark these charges against NBN Co due to its unique economies of scale as the dominant national provider
- that the charges should allow access providers to earn a commercial return in addition to the cost of providing the service.

We remain of the view that setting regulated prices for these non-recurring and ancillary services will promote the LTIE. As noted in our draft decision and as discussed above,

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<sup>56</sup> We understand from recent updates from Telstra that they are currently on-track to meet this new deadline.

<sup>57</sup> Telstra [submission](#), p.2.

several stakeholders throughout our inquiry have raised concerns about charges for these services.<sup>58</sup>

We consider that setting an efficient charge for service activations, reactivations, transfers, and transfer reversals will reduce barriers to entry, making market entry by efficient retailers more likely and encourage use of the networks. Further, reducing transfer charges will help to facilitate competition by reducing end-user barriers to switching, encouraging retailers to compete more vigorously on price and non-price terms to win customers. Establishing an efficient charge for connection and transfer fees also provides an appropriate price signal for retailers and end-users regarding the cost of these services and allows access providers to recover reasonable costs.

As noted above, a common concern raised in this inquiry was the \$99 service activation fee charged by Uniti. Stakeholders expressed the view that this fee was not justified as the churn process was essentially a billing change (i.e., because the service port was not decommissioned and then recommissioned). Retailers are forced to either absorb the cost or charge the end-user. We note that Uniti regularly waives the service activation fee on retail offerings sold through its Uniti Retail brand (**Appendix F**).

We consider that access providers' legitimate interests are protected by adopting a two-tiered approach that distinguishes between a nominal fee (benchmarked to NBN Co's equivalent fees) for standard connections and transfers, and a cost recovery formula (based on hourly labour and material costs) for non-standard connections and transfers where in-building work is required. This will allow providers to seek a suitable up-front contribution to the costs of a new connection without creating barriers to end-users switching between retailers as well as preventing an access provider from charging where it does not legitimately incur a similar cost for providing the service.

We note that the regulated service / reactivation charges are not inclusive of the cost of deploying new network infrastructure to a new dwelling or premises. The costs of rolling out additional network infrastructure are normally recovered from building developers, though access providers may seek an end-user contribution through a separate 'new development charge'. The maximum end-user contribution charge is set by the Government's telecommunications in new developments policy at \$300 for a telephone and broadband service.

TPG submitted that certain non-recurring charges, such as those related to service appointments and cancellations, are likely to differ between access providers due to the underlying costs of technicians and contractors. [c-i-c] [c-i-c]. It considered that benchmarking these to underlying costs, as is the case with non-standard connections, would be more consistent with the ACCC's 'two-tier' principle. In response, we have clarified in the SBAS access determination that providers are able to incur their legitimately incurred costs in labour time and materials.<sup>59</sup>

We note that although TPG and Uniti have both stated that the regulated charges should allow for a commercial return, neither provided information on how this could be calculated or what would constitute a reasonable return. While we recognise the importance of allowing access providers to recover their efficiently incurred costs including a reasonable rate of return, we do not consider it appropriate to guarantee a return to access providers for each component of their services. As discussed below, we consider the current regulated

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<sup>58</sup> See ACCC, *SBAS access determination inquiry draft decision*, pp.20-21 for further discussion on the issues raised by stakeholders.

<sup>59</sup> This will likely lead to differences in charges to NBN equivalent services as service appointments will necessitate a technician visit.

wholesale access prices for the SBAS allow a sufficient return to providers so as not to impede efficient investment in networks and allied services.

## NNI charges

We are aware from both our consultation in this inquiry and our recent SAU variation inquiry that current NNI charges levied by access providers are a source of competition concerns, particularly for small access seekers.

The concerns arise in part because of the economies of scale embedded in the current pricing structures (levied by both NBN Co and SBAS providers) which can disadvantage small retailers or otherwise act as a potential barrier to retail entry or expansion. Among the concerns raised include large setup and recurring monthly costs, that setup costs are not able to be easily amortised through a loan structure as the interface does not provide a product for financial security, and that costs are sunk before retailers build scale and upgrade their capacity. A further concern raised specific to SBAS networks was for initial access to be cost effective but subsequently offset by higher charges on upgraded interfaces. This forces retailers to choose between paying the higher charge or limiting their customer base.<sup>60</sup>

As noted above, NBN Co has committed in its varied SAU to reduce its setup and monthly recurring NNI charges. These include cost reductions for 1 gigabit, 10 gigabit, and 100 gigabit interfaces (the latter 2 to occur from 1 July 2024), and a rebate for NNI upgrades to offset the set-up and activation charges for new upgraded NNI ports when the old NNI port is 'returned'.

In response to these concerns and NBN Co's recent commitments to reduce its NNI charges, our decision is to regulate setup and monthly recurring charges levied by SBAS providers for 1 gigabit 10 gigabit and, following our further consultation paper, 100 gigabit NNI charges. Under the SBAS access determination, regulated NNI charges would be benchmarked against NBN Co's equivalent charges published in its annual Tariff List. NBN Co's charges for 2024-25 are reproduced in Table 2 below.

**Table 2: NBN Co's Network-to-Network Interface offers for 2024-25<sup>61</sup>**

NNI product	Monthly recurring charge	Set-up charge
1000BaseLX	\$100.00	\$1000.00
1000BaseEX	\$125.00	\$2000.00
10GBaseLR	\$400.00	\$3000.00
10GBaseER	\$500.00	\$4,000.00
100GBaseLR4	\$2,400.00	\$20,000.00
100GBaseER4	\$3,000.00	\$24,000.00

Source: <https://www.nbnco.com.au/rsps/special-access-undertaking-sau>

The regulated charges will be inclusive of NBN Co's 'NNI Upsize Migration Rebate', in effect between 31 March 2024 and 30 June 2027. We understand that unlike NBN Co's recent commitments, SBAS providers do not provide rebates for returned NNIs when a retailer

<sup>60</sup> Leaptel [submission](#), p.2.

<sup>61</sup> These are NBN Co's wholesale offers for its 'long reach' and 'extended reach' (i.e., fibre length) NNI products, respectively.



upgrades to a higher capacity NNI – this means that for the retailer the cost is sunk despite the provider recovering both the laser and the switch port that it plugs into for reuse.<sup>62</sup> This creates barriers to retail expansion through the over / multiple recovery of direct NNI costs and limits a retailer’s ability to obtain financing for the NNI, as the costs can only be treated as a business expense rather than an asset investment.

We consider that the NNI price reductions and upgrade rebates will encourage more efficient use of available NNI capacity, as well as reduce cost disadvantages that entrants may otherwise face in acquiring capacity and upgrading their interfaces as network utilisation increases. Addressing economies of scale issues will help to promote entry and expansion by smaller retailers, thereby promoting greater retail competition. We consider that establishing an efficient charge will also mitigate against ‘over-optimisation’, that is, continual upgrading and downgrading of capacity, which directly drives incremental operational cost for the access provider. This will promote the efficient economic operation of, and investment in, network capacity and resources.

We acknowledge that in some instances access seekers may connect to an SBAS network through a virtual NNI as opposed to a physical interface. For small access providers / seekers, we understand this may effectively address some of the scale issues discussed above. However, we consider these are less likely to be a viable alternative as the scale of the access provider / seeker grows, as SBAS providers typically set a limit on how much capacity they will deliver through a virtual NNI.<sup>63</sup> That is, a retailer growing its customer base on an SBAS network will eventually be required to replace the virtual interface with a physical interface.<sup>64</sup>

Access providers will not be precluded from offering NNI products at access prices below the regulated maximum and we note that currently some access providers temporarily discount or waive NNI charges from time-to-time or set lower market rates to attract retailers.<sup>65</sup>

## State-based aggregation charges

We have decided to regulate the ‘state-based aggregation charges’ currently levied by some access providers. These are additional charges levied to aggregate traffic from their serving areas (e.g., residential developments, multi-dwelling units, etc) to their nearest point of interconnect, typically located in the capital city of each state or territory, and handed over to the retailer at the NNI. These are typically bundled as an additional charge that access seekers must pay to retail an SBAS.<sup>66</sup>

The SBAS access determination now provides that the monthly recurring charges in Schedule 2 are inclusive of transmission from the end-user interface to the network-to-network interface. Access providers will be required to recover these costs through the regulated monthly recurring charges, rather than levying an additional charge.

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<sup>62</sup> Launtel submission to NBN Co SAU variation consultation, 20 September 2022, pp.4-8. Launtel commented that it is not unusual for smaller retailers to start off with a 1 gigabit NNI, adding in extra ones before finally upgrading to a 10 gigabit NNI.

<sup>63</sup> For example, Uniti limits Megaport NNIs to 2 Gbps.

<sup>64</sup> Other reasons that retailers may not consider a virtual NNI an effective substitute include greater economies of scale via a physical NNI as bandwidth needs grow, as well as greater reliability as the access seeker is not connecting indirectly via a third-party intermediary.

<sup>65</sup> For example, Gigafy offers a 10 gigabit interface with a set-up fee of \$1,100, compared to NBN & Uniti’s \$5,000 fee for an equivalent capacity interface of <10km. Gigafy currently waives its monthly recurring charge.

<sup>66</sup> Uniti and Lightning Wholesale currently levy these charges as a monthly state-based aggregation charge at \$2.80 and \$2 per service, respectively.

We note Uniti's comments regarding its state-based aggregation charges for additional backhaul that access seekers are obliged to acquire separately when accessing the NBN. We acknowledge that such services can represent a legitimate value-add, particularly where it allows a retailer access to a reasonable number of potential customers to justify interconnection to the SBAS network. However, we note that several stakeholders have provided information that Uniti's charges exceed those for similar transmission services that access seekers can acquire commercially or through ACCC regulated services. For example, Leaptel estimate that their backhaul costs from a capital city data centre to an outer metro NBN point of interconnect (a comparable locality to many SBAS networks) is on average between \$0.15-\$0.3/megabit.<sup>67, 68</sup> [c-i-c] [c-i-c].<sup>69</sup> Unlike other transmission services, Uniti also does not levy this charge as a function of data throughput or make the charge proportional to service speed, which makes lower speed tiers less viable to retailers, therefore disproportionately impacting low-income end-users.

We also consider that there is a significant degree of backhaul service already built into NBN Co's wholesale access charges under its 121 points of interconnect. NBN Co operates a significant number of points of interconnect that it defines as regional, and which cover large geographic areas. For example, an NBN service in Mount Isa, Queensland, is backhauled by NBN Co over 1300 kilometres to Rockhampton Queensland, to be handed over to the retailer. In metro and outer-metro locations, NBN is carrying out backhauling and aggregation to transfer services across suburbs to the point of interconnect 'hand off location' to retailers. For example, in 2022-23, NBN Co spent \$290 million on transit and distribution infrastructure (approximately 10% of its total nominal 2022-23 capital expenditure).<sup>70</sup>

## Other matters

We note that Leaptel proposed that the SBAS access determination include broader powers for the ACCC to periodically review and make determinations on wholesale price changes proposed by access providers that reach a certain threshold. We are not persuaded that the benefits of such a process would outweigh the costs. The type of review proposed by Leaptel would require a public inquiry along with detailed cost, demand, and price data from access providers subject to the inquiry each time such a review was undertaken.<sup>71</sup> We note however that the ACCC has powers to intervene (e.g., through a binding rule of conduct) if it considers that access providers are implementing anti-competitive terms.

Several stakeholders to our inquiry have also raised concerns about access providers failing to sufficiently consider stakeholders' views before implementing changes to their prices and other wholesale access terms.<sup>72</sup> Most examples concerned an access provider implementing changes on a take-it-or-leave-it basis, including changing billing from arrears to in advance, and introducing new charges at short notice.

In response to these concerns, we have included an additional clause in the SBAS access determination which requires access providers to consult with access seekers at least 2 months before making changes to their wholesale price list or other access terms. At the

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<sup>67</sup> Leaptel [submission](#), p.9.

<sup>68</sup> Competition between providers, along with technology improvements, has led to regular year-on-year reductions in the megabit cost of data. For instance, the regulated price of high-capacity transmission services fell by 60% (and by 35% for low-capacity transmission) between the ACCC's 2015 and 2020 domestic transmission capacity service access determination.

<sup>69</sup> [c-i-c] [c-i-c].

<sup>70</sup> NBN Co, *SAU variation, public version: NBN Co 2009-2023 core services building block model*, 14 August 2023.

<sup>71</sup> This would unwind some of the benefits of the ACCC's benchmarking approach, as covered in our discussion paper.

<sup>72</sup> Concerns were raised by Leaptel and Aussie Broadband in submissions, as well as several stakeholders we held meetings with in May-June 2022.

completion of consultation, and before changes are made, the access provider will be required to provide a statement to access seekers outlining how it has accounted for stakeholder feedback. This will provide greater transparency to access seekers on how their views were considered in changes to prices and other wholesale access terms. We do not consider this requirement to be an unreasonable burden and note that TPG and Uniti have advised that they currently provide a minimum 90 days' notice to their customers for any pricing changes.

## Regional Broadband Scheme levy

Our final decision is that regulated access prices for the SBAS will be inclusive of contributions the access provider is to make under the RBS levy.

The regulatory arrangements for the NBN under its varied SAU are intended to allow access prices that contribute to the recovery of government-imposed costs that NBN Co incurs under a statutory requirement such as the RBS levy. These access prices are the benchmark for regulated SBAS access prices under this final decision.

Further we observe that access providers have continued to invest in networks since the RBS levy was introduced in 2020 and see no evidence that the levy has or will dissuade new investment as claimed by TPG in its submission. We note that SBAS providers predominately serve business, greenfield, and multi-dwelling end-users in the more heavily populated areas which, among other factors, contribute to their generally lower average costs compared to the NBN.

In reaching our final decision, we have also considered a potential scenario (at **Appendix E**) where SBAS providers pass through the RBS levy costs directly to retailers through an additional charge. Based on this analysis we believe it is unlikely that retailers would be able to absorb these costs and would either pass through the costs through price increases to end-users or exit the market. We consider there is the potential for market exit by some retailers under this scenario and diminished retail competition.<sup>73</sup>

We note that submissions have raised broader concerns with the RBS levy, including impacts of growing competition from mobile and wireless networks (which are not required to pay the levy)<sup>74</sup> and whether NBN Co's decision to write down \$31 billion of its accumulated losses in its SAU variation is a reason to reduce the levy.

The design of the RBS levy, its application to other telecommunications services and providers, and the levy amount, is ultimately a matter for the Government and is currently being reviewed.<sup>75</sup> The ACCC is required by legislation to review the RBS levy amount every five years, however our reviews have the status of advice, and the levy can only be changed by the relevant Minister.

Our next review of the RBS levy will commence later this year and we will consider issues regarding the calculation of the levy in this inquiry.

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<sup>73</sup> Counter-intuitively, from our analysis the 25/5 Mbps is the speed tier best placed to absorb the impact of the RBS levy, due to NBN repositioning this speed tier as its entry level service.

<sup>74</sup> This includes the proliferation of low-Earth orbit satellites which are increasingly being seen as a potential replacement for NBN Co's satellite and fixed wireless services and could provide a universal service at a lower overall cost.

<sup>75</sup> On 30 October 2023, the Government released a [discussion paper](#) seeking views on the delivery and funding of universal telecommunications services in Australia.

## 3.6. Assessment against legislative requirements

As summarised in chapter 2 of this report and **Appendix A**, section 152BCA of the CCA sets out the matters the ACCC must take into account in making an access determination.

### **Whether the access determination will promote the LTIE**

In determining whether the SBAS access determination price terms will promote the LTIE, the ACCC must consider the likely effect they will have on the promotion of competition in relevant markets, the achievement of any-to-any connectivity and the encouragement of the economically efficient use of, and investment in, relevant infrastructure.

#### Promoting competition

We are satisfied that the price terms will promote competition in the supply of listed services because they are likely to lower barriers to entry in downstream retail markets, or support greater product differentiation by retailers, including by:

- providing additional certainty to retailers on the access costs that they will face, such as by ensuring a regulatory fall-back that enables consistency of product offerings across NBN and SBAS networks, lowering retail costs associated with connecting to multiple networks and managing exposure to usage-based charges, and providing greater certainty over the timing and nature of price changes
- reducing end-user barriers to switching, which will encourage retailers to compete more vigorously on price and non-price terms to win customers
- reducing barriers to retailer onboarding and expansion due to the reforms to NNI pricing
- requiring access providers to consult with retailers ahead of pricing changes to protect against unexpected price increases and provide greater accountability that access providers are operating in a prudent and efficient manner. This will encourage greater confidence in SBAS networks by retailers.

Our view is that the price terms and conditions will facilitate market entry and increased retail competition, which will facilitate improved price and quality of service offerings, and provide incentives to innovate and a wider array of differentiated retail products.

We consider on-balance that preventing access providers from levying an additional charge to pass through the RBS levy to retailers and end-users will promote competition in:

- downstream retail markets, by enabling retailers to offer uniform retail offerings across the NBN and SBAS networks. Where retailers are subject to the levy in addition to their SBAS access charges, they are at a disadvantage in comparison to retail offerings for NBN-based services. Also, where access providers operate at both the wholesale and retail level there is the risk that giving the provider the flexibility to pass through the levy to its wholesale customers but not its retail arm is likely to result in its retail arm having an unfair cost and price advantage in the market
- wholesale markets, recognising that allowing an access provider that is also a network builder to charge an access price above its costs (i.e., incorporating the regulated access prices and the RBS levy) could distort competition, given the higher returns available to the provider could be used to gain an unfair advantage over entities that are network builders only bidding for the right to install fibre networks.

While we note that some stakeholders have called for higher speed products to be included within the scope of the access determination, we do not consider this is necessary to promote the LTIE. As discussed in this final decision, the 25/5 Mbps and 50/20 Mbps speed tiers together represent a significant proportion of broadband market demand and so anchoring price regulation to these products will protect end-users against excessive pricing of lower and higher speed products.

## Efficient use of and investment in infrastructure

We are satisfied that the price terms will encourage the efficient use of, and investment in, SBAS infrastructure. In this regard, we expect the SBAS access determination will:

- allow a suitable degree of pricing discretion to optimise demand on SBAS networks based on reasonably anticipated market conditions by giving access providers flexibility to offer other SBAS products at different prices and / or configurations and price higher speed services in a way that will promote greater uptake and use
- give retailers greater certainty over future access costs across NBN and non-NBN networks to plan their market offers, which will allow them to better target latent demand in fixed broadband markets
- reduce barriers to end-user connection, switching, and service issue resolution by ensuring that these charges do not exceed the reasonable cost to the provider of the service or function for which the charge is levied. Establishing an efficient charge also provides an appropriate price signal for retailers and end-users regarding efficient use of the service.

We consider that the price terms appropriately reflect the positive relationship between the levels of competitive tension and economic efficiency in the market. Access providers that are subject to competition from the NBN or other superfast broadband networks are incentivised to invest and innovate in ways that ensure they provide services at efficient cost and meeting consumer preferences.

## Any-to-any connectivity

We consider that the SBAS access determination is unlikely to have any material or direct impacts on realising any-to-any connectivity.

## The legitimate business interests of access providers

Benchmarking SBAS prices to NBN prices provides consistency with the NBN price terms and conditions which have been the subject of extensive public consultation and consideration against the section 152BCA matters in the ACCC's review of NBN Co's SAU variation, which has occurred concurrently to this inquiry. The regulatory arrangements allow for cost recovery by NBN Co over time and are intended to generate efficient outcomes for pricing of wholesale broadband access services. While benchmarking the SBAS to NBN prices allows for the NBN's cost structure to be reflected in SBAS pricing, we consider that because SBAS are generally supplied in more densely populated areas, the average costs of supplying the services in these areas are likely to be lower than the costs recovered in the NBN's prices, which reflect more diverse geographic areas and servicing costs, and variable population densities. Having regard to this we consider that regulated SBAS prices will be at levels that support providers' legitimate business interests.

We note that since we implemented the benchmarking approach in 2017, SBAS providers have continued to enter the market and invest in broadband networks. In the limited areas

where there is competitive overlap between SBAS networks and the NBN, we also understand that SBAS networks have been relatively successful in building market share.<sup>76</sup>

In relation to Telstra's fibre access broadband service pricing, these prices will continue to be based on wholesale ADSL pricing which in the 2017 access determination decision we considered to be a suitable proxy for the direct costs of the service. Maintaining these access price means that Telstra's legitimate business interests are likely to be met for the remaining period that the fibre access broadband service operates.

## The interests of persons who have rights to use the declared service

The pricing approach in this final decision will meet the interests of access seekers who have rights to use the declared service by ensuring that they are no worse off than if they were connected to the NBN. Our view is that prices set in line with the NBN will mean that retailers are more likely to use SBAS networks, including offering services on these networks as part of their national pricing offers, and provide for retail competition by delivering price, quality, and diversity benefits to end-users connected to these networks.

Regulation of connection and transfer charges, as well as ensuring that SBAS providers match NBN Co's NNI Upsize Migration Rebate, establishes safeguards against retailers paying access costs which have already been recovered by the provider.

## The direct costs of providing access to the declared service

We consider the price terms will result in a consideration of the direct costs of providing access to the declared SBAS. Although we have not received any information from the providers of their direct costs of providing access, we have estimated a reasonable proxy for the per unit wholesale cost based on a retail minus approach (**Appendix D**).

## The economically efficient operation of a carriage service, a telecommunications network, or a facility

We consider that the price terms will promote the economically efficient operation of the SBAS as well as other networks and facilities.

In this regard, we note the views that we have expressed above concerning how the regulated price terms will encourage more efficient use of and investment in SBAS infrastructure.

These price terms will also promote more efficient use of and investment in the networks and facilities operated by retailers that interconnect with SBAS networks. This is because more efficient SBAS services will lower the costs and/or increase the use of these networks.

Further, regulated prices are not being set too high so as to encourage unnecessary duplication of SBAS infrastructure.

## Other factors

We consider that the regulated price terms will not:

- impede the safe and reliable operation of SBAS networks and services, or

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<sup>76</sup> NBN Co previously submitted that in areas where it has a fixed line competitor its market share is approximately 36-37%, which is below its 68% share of residential lines overall. NBN Co, *November 2022 SAU variation – supporting submission; executive summary and key narratives*, 30 November 2022, p.27.

- negatively impact upon the value to a person of extensions, or enhancement of capability, whose cost is borne by someone else.

We also consider that the overall regulated price terms and conditions promote other important objectives that we consider are relevant in the circumstances (under section 152BCA(3)), specifically they:

- provide for reasonable consistency of regulation of all superfast broadband services (on NBN and non-NBN networks)
- are well understood, can be implemented easily and at relatively low regulatory cost for both providers and the ACCC, rather than approaches involving extensive cost analysis or adjustment.

## 4. Non-price terms and conditions

### Key points

- The ACCC's final decision is that the current regulated non-price terms and conditions be maintained with the additional requirement for access providers to provide information to retailers on the service attributes and metrics set out in Schedule 13 of the SBAS access determination.
- This reporting information is to be made available from the 1 October 2024 to 31 December 2024 reporting period.

### 4.1. ACCC's draft decision

Our draft decision was that the current regulated non-price terms and conditions be maintained with the additional requirement for access providers to provide information to retailers if requested (e.g., when the parties are negotiating an access agreement) and on a quarterly basis, covering the following service attributes:

- availability, performance, quality, and reliability of the network
- timeframes for – fault identification and fault rectification services, and end-user connection, activation, and transfer services, provided by the access provider.

Retailers rely on this information when marketing, activating, and providing ongoing assurance activities to their customers. Consequently, impediments to timely and efficient access to this information can raise supply costs, such as by introducing additional customer touch points, dampening retail competition, and jeopardising end-user outcomes arising from incomplete or incorrect information.

Under our draft decision, an access provider would be required to specify and keep current its service standards for the attributes above, along with a benchmark level of service (for example, maximum timeframes for connections and repairs, the number of minutes a customer can expect to be without a service in a year). The provider would then be required to report actual performance against its service standards each quarter, including information on whether compensation would be paid to retailers and end-users when service standards are not met.

The new requirements proposed in the draft decision were set out in an exposure draft of the SBAS access determination instrument released for public consultation on 23 March 2023.<sup>77</sup> Under these proposed arrangements access providers would be required to provide:

- to each access seeker, by no later than one month after the end of each quarterly reporting period, a report setting out the service quality and performance information prescribed in the instrument
- the prescribed information for the nearest quarterly reporting period on request, or as soon as practical, to a prospective access seeker negotiating access in good faith.

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<sup>77</sup> See Schedule 13 of the SBAS access determination draft instrument, available on [the ACCC's website](#).



## 4.2. Submissions

Submissions to our draft decision by Aussie Broadband, Leaptel, NBN Co, ASBFEO, ACCAN, and the IAA supported the introduction of performance reporting by SBAS providers.<sup>78</sup>

TPG considered that any performance reporting obligations imposed on access providers should apply equally to NBN Co to ensure there is a level playing field.<sup>79</sup> TPG's submission to the exposure draft of the SBAS access determination instrument noted that the proposed timing for introduction of performance reporting by access providers would be appropriate, however that it may require additional time to implement these arrangements.<sup>80</sup>

Uniti's submission to the exposure draft of the SBAS access determination instrument supported the introduction of performance reporting for SBAS networks.<sup>81</sup> Uniti noted that the SBAS access determination should have a commencement date at least 12 months after it is finalised to provide it with a reasonable period to comply with the new performance reporting requirements.<sup>82</sup>

Telstra's submission to our draft decision agreed that improved transparency of service levels provides greater incentives for access providers to provide a level of service that meets the expectations of retailers and end-users but considered it would be premature - and potentially distort competition - to impose regulatory obligations on SBAS providers that are not yet imposed on NBN. Telstra considered that it is not clear that there is currently a market failure in the provision of such information in relation to SBAS networks and considered that access providers have sufficient incentive to provide information to retailers to promote competition on these networks.<sup>83</sup>

Telstra's submission to the exposure draft of the SBAS access determination instrument noted that the new network performance reporting requirements should only apply to the SBAS and not the fibre access broadband service. Telstra advised that currently, the migration of customers currently connected to the fibre access broadband service is scheduled to be completed in 2024, and ultimately the service would be withdrawn, and all migrated customers connected to Uniti's SBAS network. Telstra considered that the regulatory burden of requiring Telstra to implement new reporting obligations for its fibre access broadband service for one or 2 reporting periods is likely to far outweigh any benefits.<sup>84</sup>

In response to our November 2023 consultation paper, Launtel submitted that the ACCC should set regulated minimum service standards, which it considers are lower on SBAS networks relative to the NBN. It considered network congestion to be a particular issue, and considered an alternate first step may be to require the providers to publish details of the utilisation in various parts of their network.<sup>85</sup>

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<sup>78</sup> Aussie Broadband [submission](#) p.3; Leaptel [submission](#) p.13; NBN Co [submission](#) p.2; the Australian Small Business and Family Enterprise Ombudsman [submission](#) p.1; ACCAN [submission](#) p.1; IAA [submission](#) p.3.

<sup>79</sup> TPG [submission](#) p.8.

<sup>80</sup> TPG [submission](#) p.5.

<sup>81</sup> Uniti [submission](#) p.18.

<sup>82</sup> Uniti [submission](#) p.19.

<sup>83</sup> Telstra [submission](#) p.5.

<sup>84</sup> Telstra [submission](#) p.3.

<sup>85</sup> Launtel [submission](#), p.3.

### 4.3. ACCC's final decision

Our final decision is that the current regulated non-price terms and conditions be maintained with the additional requirement for access providers to provide information to access seekers (retailers) on service attributes and metrics as set out in Schedule 13 of the access determination.

We consider that improved transparency of service levels will provide greater incentives for access providers to ensure their networks and customer support systems are of an acceptable standard and support the service level expectations of retailers and end-users. Further, we consider that improving the transparency of service levels and support offered by SBAS networks will promote the LTIE by ensuring there is a regulatory fall back for matters that might impact detrimentally on consumers and competition, or potentially be the subject of dispute between access providers and access seekers.

This information is to be made available by access providers from 1 October 2024. The information is to be provided when a retailer in good faith expresses interest in gaining network access, and updated and provided on a quarterly basis to retailers that have access to an SBAS network. The first reporting period for this information to be made available by access providers to retailers is the 31 December 2024 reporting period. These requirements will not apply to Telstra's fibre access broadband service.

On 7 December 2022, we announced our proposal to develop a new record keeping rule to enable the ACCC to collect service quality and network performance information from NBN Co, and in the future SBAS providers, and introduce public reporting of this information.<sup>86</sup> While it is envisaged that the arrangements currently being developed for NBN Co will inform our approach for SBAS providers, the ACCC will consult further with SBAS providers on these matters.

We envisage that a record keeping rule for SBAS providers would apply to larger scale SBAS networks in the first instance and we will have regard to the costs and benefits of implementation across SBAS networks. This record keeping rule for SBAS providers may be a variation of the rule for NBN Co. Any decision to make a record keeping rule, including its form and the timeframe for implementation and reporting, will be informed by consultation with SBAS providers and other stakeholders.

### 4.4. Assessment against legislative requirements

We have previously had regard to the matters specified in section 152BCA of the CCA in approving the existing non-price terms for the declared services, most recently in the ACCC's *Domestic transmission capacity service final access determination inquiry, final report, October 2020*.<sup>87</sup>

The ACCC considers that maintaining the existing non-price terms (with the addition of service quality reporting, discussed below) will promote the LTIE by ensuring, on an as needs basis, there is a regulatory fall back for matters that have typically raised competition concerns or are potentially the subject of dispute between the access provider and access seekers. The ACCC is not aware of any material problems with the non-price terms in

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<sup>86</sup> See the ACCC consultation on the [NBN service quality and network performance record keeping rule](#). A draft record keeping rule was subsequently released for public consultation in December 2023.

<sup>87</sup> ACCC, *Domestic transmission capacity service final access determination inquiry, final report, October 2020*, pp.51-53. The non-price terms were subject to extensive consultation when [first developed in 2014-15](#) and provided a list of general commercial and service specific conditions that could be utilised in subsequent ACCC access determinations.

the existing access determination and notes that no issues have been raised in relation to the non-price in submissions. This supports the ACCC's assessment that they are fit for purpose and appropriate for the new access determination.

We consider that improved service quality reporting will enhance transparency of access providers' performance and, where relevant, provide accountability in meeting their service level commitments. The inclusion of operational reporting will provide for more seamless delivery of services, leading to increased efficiency for the end-user. This additional information will also allow for informed decision making, supporting economic efficiency.

We consider that improved transparency measures will provide greater certainty about services delivered on SBAS networks and improve competition in downstream markets by:

- providing retailers with a reliable basis on which to develop differentiated product offerings. With clear service levels, retailers will have more capacity to develop a portfolio of differentiated product offerings to appeal to different groups of consumers. Retailers will also have greater ability to develop different remedies for service quality issues as a point of differentiation to other retailers
- allowing retailers to better manage end-user expectations and outcomes where service quality issues occur, as it improves their capacity to better support customers in these circumstances, such as through making goodwill payments
- reducing barriers to end-user switching created through negative service quality perceptions and ensuring that accountability for resolving service quality issues is appropriately allocated between the retailer and access provider. This will provide incentives for retailers to compete for customers by varying or improving their service offerings, including with respect to non-price factors.

Further, we consider the transparency and monitoring provisions within the access determination will provide an incentive for access providers to continue to uplift their overall service performance to benefit end-users.

We do not consider that service quality reporting is relevant to the objective of achieving any-to-any connectivity.

We recognise that this requirement will likely add an additional cost impost in cases where access providers are required to adapt their operational reporting systems to allow dissemination to access seekers. However, providers will have flexibility to meet these reporting requirements in a least cost way (that is, in a way that most closely aligns with their own operational requirements and internal reporting arrangements). As discussed above, stakeholders have not raised concerns regarding the additional cost to meet these requirements. We consider that the service quality disclosure requirements appropriately balance the legitimate business interests of access providers with those with a right to use the declared service. We also do not consider it will impede access providers from recovering the direct costs of providing access to the declared service.

We acknowledge that some stakeholders may prefer the ACCC to introduce stronger requirements, such as regulated minimum service standards. Our view, however, is that a well-defined service quality disclosure framework is sufficient at this time to promote the LTIE. We also consider that a greater understanding and transparency of current service levels is an important first step towards further consideration of this matter in the future.

We do not consider that the proposed service quality reporting arrangements will have a significant bearing upon extensions or enhancements of capability whose cost is borne by others or upon the safe and reliable operation of any network.

# 5. Exemptions

## Key points

- The ACCC's final decision is not to provide competition-based exemptions and to remove the current exemption for small scale operators in existence before January 2011 from the standard access obligations.

## 5.1. ACCC's draft decision

### Competition-based exemption

Our draft decision was to not provide any competition-based exemptions from the standard access obligations for access providers for the term of the access determination.

Our draft decision considered TPG's proposal for an exemption for its PIPE and TransACT networks, but we did not see information for our draft decision or receive feedback in subsequent submissions that would support an exemption for these or other SBAS network(s) that would be in the LTIE.

However, our draft decision considered there is merit in considering exemptions from the standard access obligations in the future as circumstances change.

### Small network exemption

Our draft decision was to remove the current exemption from the standard access obligations under the access determination for small scale operators of SBAS networks (i.e., those with less than 12,000 end-users) built prior to 1 January 2011.

We considered this would promote competition at the wholesale level and in downstream retail markets for broadband services including those supplied over smaller scale networks, benefitting consumers connected to those networks.

Our draft decision was to remove the small-scale operator exemption, noting that:

- we are not aware of any networks subject to the exemption and so do not consider removing the exemption to be an increase in regulatory burden
- removing the exemption is consistent with the ACCC's *Telecommunications (Superfast Broadband Network Class Exemption) Determination 2020* made in August 2020.<sup>88</sup> The determination provides that networks with no more than 12,000 end-users that are exempt from wholesale-only requirements must provide a wholesale access service and designates the SBAS as that wholesale access service
- it is a statutory obligation<sup>89</sup> for a network that is a designated statutory infrastructure provider, which can include SBAS networks, to offer wholesale access to its network irrespective of network size.

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<sup>88</sup> See <https://www.legislation.gov.au/Details/F2021C00171>.

<sup>89</sup> Section 360P *Telecommunications Act 1997*.

## 5.2. Submissions

Submissions to our draft decision by Telstra, Leaptel, and NBN Co supported our draft decision on both competition-based and small network exemptions.<sup>90</sup> Common concerns raised were the potential for harm to investment and competition due to regulatory complexity and uncertainty, which could outweigh the benefits of a competition-based exemptions framework.

Submissions by Aussie Broadband and the IAA supported our draft decision on competition-based exemptions.<sup>91</sup> The IAA commented that while network competition should be encouraged, baseline obligations should always apply to protect against inferior service quality and poor consumer experiences.

TPG did not support our draft decision not to exclude its PIPE and TransACT networks, because these networks are in areas where NBN Co has substantially overbuilt the networks and the NBN is an alternative for wholesale and retail customers in these areas.<sup>92</sup> TPG referred to its previous submissions and information provided in response to its proposed exemption, and commented that it does not have the ability or incentive to raise wholesale access prices above the NBN's because customers can easily switch to the NBN.

ACCAN's submission supported our draft decision on small network exemptions.

Aussie Broadband considered the exemption for small networks should be retained where there is a competitive environment and noted that small scale providers must offer wholesale access on non-discriminatory terms.<sup>93</sup>

## 5.3. ACCC's final decision

Our final decision is to:

- not provide competition-based exemptions from the standard access obligations for access providers for the term of the SBAS access determination
- remove the exemption from the standard access obligations under the access determination for small scale operators of SBAS networks (i.e., <12,000 end-users) built prior to 1 January 2011.

To date we have not seen information that would support a competition-based exemption for an SBAS network(s) that would be in the LTIE. We consider there is merit in considering exemptions from the standard access obligations in the future as circumstances change. We acknowledge that in some areas it may be commercially viable for multiple networks to co-exist and compete, such that regulation would not promote further competition and may impose unnecessary regulation and cost. Should circumstances change during the term of the access determination we would consider a variation, or alternatively a review of the issue as part of the next declaration inquiry. We consider that in areas where it is currently not commercially viable for carriers to duplicate fixed line networks, other technologies (such as mobile, fixed wireless or satellite) have the potential to gain prominence as practical and effective substitutes for fixed line networks in the future.

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<sup>90</sup> Telstra [submission](#) pp.5-6; Leaptel [submission](#) p.14; NBN Co [submission](#) pp.1-2.

<sup>91</sup> Aussie Broadband [submission](#) p.3; IAA [submission](#) p.4

<sup>92</sup> TPG [submission](#) p.8.

<sup>93</sup> ACCAN [submission](#) p.1; Aussie Broadband [submission](#) p.3.

We have considered TPG's proposal for an exemption for its PIPE and TransACT networks. TPG's proposal was on the basis that its PIPE and TransACT networks have been substantially overbuilt by the NBN. It considered that the NBN is an alternative for most end-users in the areas served by the networks but acknowledged that the NBN is not ubiquitous in these areas. TPG's December 2021 and October 2022 confidential submissions outlined the proportions of its PIPE and TransACT networks that have not been overbuilt by the NBN. Its proposal for an exemption was on the basis that the exemption includes service areas that have not been overbuilt by the NBN (i.e., the exemption would cover premises that do not have NBN access). The information provided by TPG established that a large proportion of the PIPE and TransACT network service areas have been overbuilt by the NBN [c-i-c] [c-i-c]. However, the number of premises and therefore end-users in these areas connected to TPG's network but without access to the NBN as an alternative is not insignificant.

TPG's public submission stated that if its networks are subject to different regulations depending on whether the NBN or another superfast fixed line provider is present, then this would have the effect of unwinding some of the benefits it intends to achieve through its functional separation undertaking. TPG's confidential supplementary submission proposed that any exemptions should be network not competition-based (i.e., it proposed that an exemption should cover the entire PIPE and TransACT networks including premises served by these networks that do not have NBN access). It considered that an exemption based on the parts of its networks that face direct competition would lead to a patchwork of regulation across its networks and an increase in regulatory costs.

Our draft decision noted that a likely precondition for applying an exemption would be the presence of the NBN as an alternative network for retailers and end-users. Although this is generally the case in areas served by TPG's PIPE and TransACT networks, many premises served by these networks do not currently have NBN access. We consider that if an exemption was in place for the entire PIPE and TransACT networks (including premises that do not have NBN access), TPG would have the incentive and opportunity to seek monopoly rents from retailers and, by extension, end-users that do not have the NBN as an alternative. The end-users are likely to be in areas where it is not commercially viable for carriers to duplicate TPG's existing fixed line networks. Where these circumstances prevail, we consider that access and price regulation is necessary to promote the LTIE.

We agree with TPG's view that a patchwork of regulation whereby an exemption from the standard access obligations applies to parts of a network, on the basis that those parts are subject to effective competition, would create regulatory complexity for access seekers and raise costs for access providers. For example, we consider that it would be impractical and inefficient for access providers to have exemptions in place at a premises level. Such an approach is likely to create uncertainty and confusion for end-users about the range and choice of superfast broadband networks and retailers able to provide services to their serving areas and premises.

Further, we consider that for the foreseeable future competitive overlap is likely to remain limited outside of densely populated areas where economic and technical barriers to entry prevent multiple access providers from operating in the same service area and competing at a wholesale level. This appears to be the case in greenfield areas, where the 3 major fixed network operators are competing to win the right to deploy new fibre networks, but which generally do not have sufficient customer demand to sustain 2 rival fixed line networks. For example, Uniti previously estimated that it had approximately 55,000 premises where it had been overbuilt, predominately by NBN Co,<sup>94</sup> which comprised [c-i-c] [c-i-c] and

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<sup>94</sup> Uniti [submission](#), p.5.

approximately 9% of its total secured footprint (that is, active, ready-to-connect, in-construction or contracted, and Telstra Velocity premises).<sup>95</sup>

We did not receive any substantive comments on our draft decision to remove the small network exemptions applying to networks built prior to 1 January 2011.

## 5.4. Assessment against legislative requirements

Consistent with our 2021 declaration final decision, we consider that application of the SBAS standard access obligations will constrain the ability of access providers to set unreasonable terms of access and inefficiently high prices where effective competition does not exist.<sup>96</sup> The SBAS declaration and access determination alone are unlikely to generate greater competition in competing networks and the wholesale market within which superfast broadband services are provided. However, we expect they will promote competition in downstream retail markets where they facilitate the entry of retailers utilising an incumbent's monopoly infrastructure.

Applying the standard access obligations for all networks is in the LTIE because it provides price stability and certainty of regulated access arrangements across SBAS networks. We consider that our final decision on exemptions avoids the regulatory costs and inefficiency that would arise from a combination of regulatory approaches across different SBAS networks based on network size and / or service area.

Our approach gives assurance to retailers on the access costs that they will face irrespective of network size and location, which will provide a stable investment environment for retailers to develop and market consistent product offerings across networks. We consider this will promote greater competition in downstream retail markets by facilitating the efficient entry in and use of SBAS networks and, in turn, provide for a wider variety of product and pricing offerings for end-users. For these reasons we also consider that our approach will promote the interests of persons who have the right to use the declared SBAS.

The ACCC has taken account of the access providers' legitimate interests in determining our exemption approach. As discussed above, we agree with TPG's view that applying different regulatory settings to parts of a network contingent on whether effective competition exists is likely to result in customer confusion and greater regulatory complexity and costs.<sup>97</sup>

We have not received any submissions on the estimated costs to comply with the SBAS standard access obligations, however, we note that these were considered in our 2021 declaration final decision.<sup>98</sup> We do not consider that SBAS compliance will adversely affect the recovery of an access provider's direct costs to provide access to the SBAS.

We do not consider that our exemption approach will impact upon the objectives of any-to-any connectivity, the value to a person of extensions whose cost are born by someone else, or the requirements necessary for the safe and reliable operation of the service / network.

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<sup>95</sup> Uniti Group Scheme Booklet registered with ASIC; Appendix C – Independent expert's report, June 2022, pp.22-26. The report also noted a high activation rate (as a proportion of connected premises) in Uniti's greenfield broadacre (88%) and multi dwelling (64%) sites relative to its brownfield (18%) sites, indicating a substantially lower degree of competitive overlap in these areas.

<sup>96</sup> ACCC, *Combined LBAS & SBAS declaration inquiry final decision*, July 2021, pp.20-22. In our decision we also noted clear evidence of retailer entry to regulated networks over the period of the SBAS declaration.

<sup>97</sup> It may also result in indirect costs through additional reporting requirements for the ACCC to reasonably determine whether and where competitive overlap is present.

<sup>98</sup> ACCC, *Combined LBAS & SBAS declaration inquiry final decision*, July 2021, pp.23-24.

## 6. Duration

### Key points

- The ACCC's final decision is that the price and non-price terms set out in the SBAS access determination will commence on 1 September 2024, as the specified start-date in the instrument, and apply until 1 March 2027.

Section 152BCF of the CCA sets out the commencement and expiry rules for final access determinations. In particular, it sets out the principle that an access determination should expire when the relevant declaration expires unless, in the Commission's opinion, there are circumstances that warrant a different date.<sup>99</sup> The related explanatory memorandum states that declarations and access determinations should run in parallel to promote regulatory certainty and procedural efficiency as it enables the ACCC to conduct a declaration inquiry and access determination inquiry at the same time.

The current declaration for the SBAS is due to expire on 28 July 2026.

### 6.1. ACCC's draft decision

The ACCC's draft decision was that the price and non-price terms set out in the SBAS access determination would apply until 28 July 2026. This reflected that this period was supported by those submissions expressing a view on the duration of the access determination and the period is long enough to provide for regulatory certainty.

We also proposed to monitor the market during this period for pricing and other industry developments that may affect the potential scope of the SBAS declaration. Any decision to initiate such an inquiry would be informed by consultation with stakeholders.

### 6.2. Submissions

Submissions that commented on the duration of the access determination (i.e., Telstra, Aussie Broadband and Leaptel) supported aligning it with the expiry of the SBAS declaration on 28 July 2026.

TPG and Uniti raised concerns with the current 3-month window to implement the new access terms and considered a longer lead time was necessary (they proposed 6 and 12 months, respectively).

### 6.3. ACCC's final decision

We have further considered our position on the duration of the SBAS access determination. Our final decision is that the price and non-price terms set out in the SBAS access determination will apply until 1 March 2027, being approximately 3 years after the publication of the ACCC's final decision.

We consider it appropriate to undertake the next SBAS declaration inquiry before commencing a new final access determination inquiry for SBAS. The access determination

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<sup>99</sup> CCA, subsection 152BCF(6).



for SBAS applying until 1 March 2027 will provide additional certainty to industry regarding the regulated terms of access while our declaration inquiry is underway in 2026.

We acknowledge that our decision on the SBAS access determination introduces several new requirements that may require access providers to make systems changes as well as undertake consultation with their customers. For these reasons the SBAS access determination will commence on 1 September 2024.

Although Uniti nominated an extended 1-year implementation timeframe, we do not consider that such a timeframe is sufficiently justified noting [c-i-c] [c-i-c] and Uniti's 6-month estimated timeframe to implement product & pricing changes (including consulting with stakeholders).<sup>100</sup>

## 6.4. Assessment against legislative requirements

We consider that an access determination that applies until 1 March 2027 will give regulatory certainty and promote the achievement of the matters specified in section 152BCA of the CCA in relation to carriage services that involve communication between end-users.

We note that should circumstances warrant a review of any aspect of the access determination during this timeframe we can conduct a variation inquiry into the access determination.

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<sup>100</sup> We note that Uniti released an updated wholesale rate card on its Opticomm network, which took effect from 1 February 2024, in response to NBN Co's product & pricing changes which took effect from 1 December 2023. Uniti indicated in its November 2023 submission that the pricing construct introduced in its February 2024 rate card was its most reasonable means of complying with the proposed SBAS obligations. We therefore consider it unlikely on available evidence that Uniti will be required to make significant product or provisioning / billing systems changes to ensure its compliance.

# Appendix A: Legislative framework

This section sets out the relevant legislative framework in relation to final access determinations.

## **Content of final access determinations**

Section 152BC of the CCA specifies what an access determination may contain. It includes, among other things, terms, and conditions on which a carrier or carriage service provider is to comply with the standard access obligations and terms and conditions of access to a declared service.

An access determination may make different provisions with respect to different access providers or access seekers.<sup>101</sup>

## **Fixed principles provisions**

An access determination may contain a fixed principles provision, which allows a provision in an access determination to have an expiry date after the expiry date of the access determination.<sup>102</sup> Such a provision allows the ACCC to 'lock-in' a term so that it would be consistent across consecutive access determinations.

## **Varying final access determinations**

Section 152BCN allows the ACCC to vary or revoke an access determination, provided that certain procedures are followed.

A fixed principles provision cannot be varied or removed unless the access determination sets out the circumstances in which the provision can be varied or removed, and those circumstances are present.<sup>103</sup>

## **Commencement and expiry provisions**

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

An access determination 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>104</sup>

## **Matters to consider when making access determinations**

The ACCC must have regard to the matters specified in subsection 152BCA (1) of the CCA when making an access determination. 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 carriage service provider 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

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<sup>101</sup> CCA, subsection 152BC (5).

<sup>102</sup> CCA, section 152BCD.

<sup>103</sup> CCA, subsection 152BCN (4).

<sup>104</sup> CCA, subsection 152BCF (6).

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

Subsection 152BCA (2) sets out other matters that the ACCC may consider in making access determinations 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 access determination process are set out below.

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

The first matter for the ACCC to consider when making an access determination 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>105</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 access determinations 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>106</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]...

\* 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 ...

<sup>105</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>106</sup> ACCC, *Telecommunications services – declaration provisions: a guide to the declaration provisions of Part XIC of the Trade Practices Act*, August 2016, p.28,

\* 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>107</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
- encouraging the economically efficient use of, and economically efficient investment in:
  - the infrastructure by which listed carriage services are supplied
  - any other infrastructure by which listed services are, or are likely to become, capable of being supplied.<sup>108</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>109</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 a final access determination for the SBAS are the wholesale and retail markets for all broadband services supplied over fixed line superfast broadband networks.

### **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 the case whether or not the end-users are connected to the same telecommunications network.<sup>110</sup>

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

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<sup>107</sup> *Seven Network Limited (No 4)* [2004] ACompT 11 at [120].

<sup>108</sup> CCA, subsection 152AB(2).

<sup>109</sup> CCA, subsection 152AB(4). 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].

<sup>110</sup> CCA, subsection 152AB (8).

## ***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
  - 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
- the risks involved in making the investment.<sup>111</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 3 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)
- 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>112</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>113</sup>

...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>114</sup>

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<sup>111</sup> CCA, subsections 152AB (6) and (7A).

<sup>112</sup> *Telstra Corporation Ltd (No. 3)* [2007] ACompT 3 at [159].

<sup>113</sup> *Telstra Corporation Ltd (No. 3)* [2007] ACompT 3 at [164].

<sup>114</sup> *Telstra Corporation Ltd (No. 3)* [2007] ACompT 3 at [159].

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

The second matter requires the ACCC to consider 'the legitimate business interests' of the carrier or carriage service provider when making an access determination.

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 access determinations should be interpreted in a similar manner, consistent with the phrase 'legitimate commercial interests' used elsewhere in Part XIC of the CCA.<sup>115</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 an access determination.

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>116</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 an access determination.

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

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

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<sup>115</sup> *Telstra Corporation Ltd (No. 3)* [2007] ACompT 3 at [159].

<sup>116</sup> *Telstra Corporation Ltd (No. 3)* [2007] ACompT 3 at [159].

Tribunal's approach in an undertaking decision. A contribution to indirect costs can also be supported by other matters.<sup>117</sup>

However, the matter does not extend to compensation for loss of any 'monopoly profit' that occurs as a result of increased competition.<sup>118</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>119</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>120</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 an access determination.

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>121</sup>

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

### **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 an access determination.

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>122</sup>

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

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<sup>117</sup> Application by Optus Mobile Pty Limited and Optus Networks Pty Limited [2006] ACompT 8 at [137].

<sup>118</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>119</sup> *Telstra Corporation Limited* [2006] ACompT 4 at [92].

<sup>120</sup> *Telstra Corporation Limited* [2006] ACompT 4 at [139].

<sup>121</sup> ACCC, *1997 access pricing principles*, p. 11,

<sup>122</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 an access determination.

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>123</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 an access determination that applies to a carrier or carriage service provider 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>124</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
- the demand for those other eligible services.

The Explanatory Memorandum stated that this provision is intended to ensure that the ACCC, in making an access determination, does not consider the declared service in isolation, but also considers other relevant services.<sup>125</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>126</sup>

## Subsection 152BCA(3)

This subsection states the ACCC may consider any other matters that it thinks are relevant when making an access determination.

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

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<sup>123</sup> ACCC, *Resolution of telecommunications access disputes—a guide*, p.57,

<sup>124</sup> ‘Eligible service’ has the same meaning as in section 152AL of the CCA.

<sup>125</sup> Explanatory Memorandum, *Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2010*, p. 178.

<sup>126</sup> Explanatory Memorandum, *Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2010*, p. 178.



The ACCC also considers that it may also 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 under record-keeping rules.

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

### **Restrictions on access determinations**

Section 152BCB imposes certain restrictions on the ACCC's ability to make an access determination.

More specifically, the ACCC is restricted in making an access determination that would have any of the following effects:

- preventing a service provider who already has access to the declared service from obtaining a sufficient amount of the service to be able to meet its reasonably anticipated requirements
- preventing a carrier or carriage service provider from obtaining a sufficient amount of the service to be able to meet its reasonably anticipated requirements
- preventing a person from obtaining, by exercise of a pre-determination right, a sufficient level of access to the declared service to be able to meet their actual requirements
- depriving any person of a protected contractual right
- resulting in an access seeker becoming the owner (or one of the owners) of any part of a facility without the consent of the owner of the facility
- requiring a person (other than an access seeker) to bear an unreasonable amount of costs of:
  - extending or enhancing the capability of a facility
  - maintaining extensions to or enhancement of the capability of a facility
- requiring a carrier or carriage service provider to provide an access seeker with access to a declared service if there are reasonable grounds to believe that:
  - the access seeker would fail, to a material extent, to comply with the terms and conditions on which the carrier or provider provides, or is reasonably likely to provide, that access, or
  - the access seeker would fail, in connection with that access to protect the integrity of a telco network or to protect the safety of individuals working on, or using services supplied by means of, a telco network or a facility.

The ACCC is also unable to make an access determination (under section 152BCB(3)) that is inconsistent with any of the standard access obligations that are, or will be, applicable to a carrier or carriage service provider.

# Appendix B: SBAS declaration service description

The superfast broadband access service (SBAS) is a point-to-point service for the carriage of communications in digital form between a **network-network interface** and an **end-user interface** that is:

- (a) a **Layer 2 bitstream service** and is supplied over a **superfast telecommunications network**; or
- (b) a **Fibre Access Broadband service**.

This service does not include:

- i. a service supplied through an **access multiplexer** located in a **multi-unit building** in a **central business district area** or in a **node** in a **central business district area** where all end-users of the services supplied or proposed to be supplied through that access multiplexer and any other access multiplexers owned or controlled by the same access provider located in the same **multi-unit building** or **node** are **business customers, public bodies** or **charity customers**;
- ii. a service supplied other than through an **access multiplexer** located in a **multi-unit building** or in a **node** where the premises of the end-users of the service is in a **central business district area** and all end-users of the service are **business customers, public bodies** or **charity customers**;
- iii. services supplied, or capable of being supplied, using a hybrid-fibre coaxial cable network that was in existence on 27 July 2021 and in respect of which there are agreements for the network to be transferred to NBN corporation;
- v. the domestic transmission capacity service defined in the Domestic Transmission Capacity Service Declaration 2019, as that declaration may be varied, extended or replaced from time to time.

## Definitions

Unless otherwise defined in this declaration, words or phrases defined in the *Competition and Consumer Act 2010* or the *Telecommunications Act 1997* have the same meaning in this declaration.

**access line** means a line used to connect the access multiplexer to the end-user interface.

**access multiplexer** means a device that separates communications carried by means of guided electromagnetic energy to enable an end-user to make use of high data rate services.

**business customer** means a customer that:

- (a) carries on a business or enterprise from a premises, regardless of whether there is any incidental use of the premises for occupation (from time to time) as a place of residence; and
- (b) has an ABN for the business or enterprise.

**central business district area** means a geographic area with one of the following postcodes:

- (a) Canberra CBD: 2600-2601
- (b) Sydney CBD: 1000-1299; 2000-2009
- (c) Melbourne CBD: 3000-3010; 8000-8010
- (d) Brisbane CBD: 4000-4004
- (e) Adelaide CBD: 5000-5005; 5800-5879
- (f) Hobart CBD: 7000-7003; or
- (g) Perth CBD: 6000-6005; 6800-6899.

**charity customer** means a charity registered with the Australian Charities and Not-for-profits Commission.

**end-user interface** means an interface located at either:

- (a) a physically defined end-user's premises where the access provider's network is directly or indirectly present to an end-user; or
- (b) the jumper cable termination on the customer side of a main distribution frame located in a multi-unit building.

**Fibre Access Broadband service** means a carriage service that:

- (a) is supplied or offered to be supplied by means of an optical fibre line; and
- (b) is offered as a **superfast carriage service** or with the following maximum data transfer rates;
  - (i) download data transfer rate of 30Mbps and upload data transfer rate of 1Mbps; and
  - (ii) download data transfer rate of 100Mbps and upload data transfer rate of 5Mbps; and.
- (c) has the following configurations:
  - (i) a 'best effort' or non-prioritised service, as characterised by the Differentiated Services Code Point Default Forwarding per-hop behaviour; and
  - (ii) connectivity made with static Layer 2 Tunnelling Protocol (L2TP) tunnels and Broadband Virtual Local Area Networks giving direct access to end-user sessions; and
  - (iii) end-user sessions are aggregated together via static L2TP tunnels supplied over Ethernet.

**Layer 2 bitstream service** has the meaning given by section 7 of the *Telecommunications Act 1997*.

**line** has the meaning given by section 7 of the *Telecommunications Act 1997*.

**multi-unit building** has the meaning given by section 142A of the *Telecommunications Act 1997*.

Note: For the avoidance of doubt, if a **line** in a **multi-unit building** is used to supply a superfast carriage service to an end-user occupying or using a unit in the building:

- (a) the line is taken to be an **access line**; and
- (b) the line is taken to form part of the infrastructure of a **superfast telecommunications network**.

The line does not need to be physically connected to a unit in a multi-unit building because, pursuant to section 24 of the *Telecommunications Act 1997*, “used” means use in isolation or in conjunction with one or more other things.

**NBN corporation** has the meaning given in the *National Broadband Network Companies Act 2011*.

**network-network interface** means an interface provided by an access provider at a **point of interconnection** where the access seeker’s telecommunications network can interface to the access provider’s network.

**node** means a roadside cabinet, pillar, pit or distribution point, but does not include an exchange, that:

- (a) houses the equipment for the supply of services, including access multiplexers, and
- (b) enables the physical connection to the end-user premises using access lines.

**point of interconnection** is a physical point of interconnection which allows the interconnection of facilities in accordance with subsection 152AR(5) of the *Competition and Consumer Act 2010*.

**public body** means:

- (a) the Commonwealth, a State or a Territory; or
- (b) a municipal authority or other local governing body; or
- (c) a public authority that is constituted by or under a law of the Commonwealth, a State or a Territory.

**superfast carriage service** has the meaning given by section 142A of the *Telecommunications Act 1997*.

**superfast telecommunications network** means a telecommunications network, where:

- (a) the network enables end-users to download communications; and
- (b) the network is normally capable of enabling end-users to download communications with a data transfer rate of 25 megabits per second or more; and
- (c) the carriage service is supplied using a line to premises occupied or used by an end-user.

Note: The word “normally” is akin to “usually”; it recognises that circumstances may arise that temporarily displace usual data transfer rates.

**telecommunications network** has the meaning given by section 7 of the *Telecommunications Act 1997*.

# Appendix C: SBAS access determination instrument



## **Final Access Determination No. 1 of 2024 (SBAS)**

### *Competition and Consumer Act 2010*

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The AUSTRALIAN COMPETITION AND CONSUMER COMMISSION makes this final access determination under section 152BC of the *Competition and Consumer Act 2010*.

Date of decision: 26 February 2024

## **1. Application**

- 1.1 This instrument sets out the Final Access Determination (FAD) in respect of the Superfast Broadband Access Service (SBAS) declared on 16 July 2021.
- 1.2 This FAD replaces the previous interim access determination for the SBAS (Interim Access Determination No.1 of 2021), as varied.
- 1.3 The prices in this FAD are exclusive of tax payable under *The Utilities (Network Facilities Tax) Act 2006* (ACT).
- 1.4 The prices in this FAD are exclusive of Goods and Services Tax (GST)

## **2. Definitions and interpretation**

- 2.1 Schedule 1 applies to the interpretation of this instrument.
- 2.2 The Schedules form part of this instrument.

## **3. Commencement and duration**

- 3.1 This FAD commences on 1 September 2024.
- 3.2 Unless sooner revoked, this FAD remains in force up until and including 1 March 2027.

## **4. Terms and conditions of access**

- 4.1 If a Carrier or Carriage Service Provider is required to comply with any or all of the standard access obligations in respect of the SBAS, the Carrier or Carriage Service Provider must comply with those obligations on the terms and conditions set out in this clause 4.

Note: The terms and conditions in an FAD apply only to a matter where terms and conditions on that matter in an Access Agreement cannot be reached, no special access undertaking is in operation setting out terms and conditions on that matter and no binding rules of conduct have been made setting out terms and conditions on that matter: section 152AY of the CCA.

- 4.2 If the Carrier or Carriage Service Provider is required to supply the SBAS to a service provider, the Carrier or Carriage Service Provider must supply the service at the price specified in Schedule 2. The non-price terms and conditions set out in Schedules 3–13 apply to access to the SBAS.
- 4.3 A Carrier or Carriage Service Provider, if it is required to supply the SBAS, must supply upon receiving a request from an access seeker made validly in accordance with any requirements under the *Competition and Consumer Act 2010* (Cth), the following wholesale product/s to that access seeker:
  - (a) in the case of the Fibre Access Broadband service, a service with the following maximum transmission speeds:
    - (i) download data transfer rate of 30 Mbps (peak information rate)
    - (ii) upload data transfer rate of 1 Mbps (peak information rate)
  - (b) in all other cases, the SBAS with the following characteristics:
    - (i) 25 Mbps download and 5 Mbps upload data transfer rates (peak information rate)
    - (ii) 25-50 Mbps download and 5-20 Mbps upload data transfer rates (peak information rate)
    - (iii) residential grade service characteristics

(iv) if requested by the access seeker, a prioritized, symmetric bitstream of sufficient capacity to provide a voice service.

4.4 Nothing in this FAD restricts a Carrier or Carriage Service Provider that is required to supply the SBAS from supplying additional wholesale products to those specified in 4.3.

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# Schedule 1 - Interpretation and definitions

## *Interpretation*

In this FAD, unless the contrary intention appears:

- (a) the singular includes the plural and vice versa;
- (b) the words “including” and “include” mean “including, but not limited to”; and
- (c) terms defined in the *Competition and Consumer Act 2010* or the *Telecommunications Act 1997* have the same meaning.

## *Definitions*

**ACCC** means the Australian Competition and Consumer Commission

**Access Agreement** has the same meaning as given to that term in section 152BE of the CCA

**Access Provider** has the same meaning as given to that term in subsection 152AR(2) of the CCA

**Access Seeker** has the same meaning as given to that term in section 152AG of the CCA

**ACDC** means the Australian Commercial Disputes Centre Limited

**ACDC Guidelines** means the Guidelines for Commercial Mediation published by the ACDC as in force from time to time and available at: <https://disputescentre.com.au/adr-guidelines/>

**ACMA** means the Australian Communications and Media Authority

**Aggregation Charge** means a charge for the transport of customer traffic from multiple end-users on an aggregated basis

**AVC TC-4** refers to 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 premises, in traffic class 4. See section 3.1 and 3.2 of the Product Description of Wholesale Broadband Agreement NBN Ethernet Product at <https://www.nbnco.com.au/rsps/supply-agreements/wba> as amended from time to time

**Billing Dispute** means a dispute relating to a Charge or an invoice issued by the Access Provider

**Billing Dispute Notice** means a notice given pursuant to clause 3.10 in Schedule 3

**Billing Dispute Procedures** means the procedures set out in clauses 3.10 to 3.30 in Schedule 3

**Breach Notice** has the meaning set out in clause 7.5 of Schedule 7

**Bundled Offer Ceiling** refers to a reference AVC TC-4 product defined in the NBN Co Ethernet Product Module Price List at <https://www.nbnco.com.au/rsps/supply-agreements/wba> as amended from time to time. The monthly charge for the relevant Bundled TC-4 Offer, including CVC Overage, must not exceed this price. For clarity, for financial year 2024 the reference offer is the NBN 100/20 Mbps TC-4 product.

**Business Day** means any day other than Saturday or Sunday or a day which is a gazetted public holiday in the place concerned

**Calendar Day** means a day reckoned from midnight to midnight

**Carriage Service Provider** has the same meaning given to that term in section 87 of the *Telecommunications Act 1997* (Cth)

**Carrier** has the same meaning given to that term in section 7 of the *Telecommunications Act 1997* (Cth)

**Carriage Service** has the same meaning given to that term in section 7 of the *Telecommunications Act 1997* (Cth)

**CCA** means the *Competition and Consumer Act 2010* (Cth)

**Charge** means a charge for the supply of a Service

**Confidential Information** means all information, know-how, ideas, concepts, technology, manufacturing processes, industrial, marketing and commercial knowledge of a confidential nature (whether in tangible or intangible form and whether coming into existence before or after the commencement of this FAD) relating to or developed in connection with or in support of the Service supplied under this FAD (the “**first mentioned party**”) but does not include:

- (a) information which is or becomes part of the public domain (other than through any breach of this FAD);
- (b) information rightfully received by the other party from a third person without a duty of confidentiality being owed by the other party to the third person, except where the other party has knowledge that the third person has obtained that information either directly or indirectly as a result of a breach of any duty of confidence owed to the first mentioned party; or

(c) information which has been independently developed or obtained by the other party;

or

(d) information about Services supplied by the Access Provider (including where that information is generated by the Access Provider) that has been aggregated with other information of a similar or related nature, such that the Access Seeker cannot be identified by the information or any part of it

**CVC Inclusion** means a CVC TC-4 symmetrical bandwidth inclusion. See section 11 of the Price List of Wholesale Broadband Agreement NBN Ethernet Product at <https://www.nbnco.com.au/rsps/supply-agreements/wba> as amended from time to time

**CVC TC-4** refers to 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. See section 2.1 and 2.2 of the Product Description of Wholesale Broadband Agreement NBN Ethernet Product at <https://www.nbnco.com.au/rsps/supply-agreements/wba> as amended from time to time

**Daily Peak Hour** means, on a given day for a given Access Seeker, the 60-minute period during which the Access Provider observes the highest aggregate download usage (in megabits) across all AVC TC-4 products on that day to that Access Seeker

**Daily Peak Utilisation** means the download usage (in megabits) observed by the Access Provider for a given AVC-TC4 product during the Daily Peak Hour for the relevant Access Seeker, divided by 3600 (seconds)

**Demerged Telstra Company** has the meaning given by section 581J of the *Telecommunications Act 1997(Cth)*

**Disclosing Party** has the meaning set out in clause 6.5 in Schedule 6 of this FAD

**Emergency** means an emergency due to an actual or potential occurrence (such as fire, flood, storm, earthquake, explosion, accident, epidemic or war-like action) which:

- (a) endangers or threatens to endanger the safety or health of persons or
- (b) destroys or damages, or threatens to destroy or damage property, being an emergency which requires a significant and co-ordinated response

**Emergency Network Modernisation and Upgrade** means a modernisation or upgrade of a Network that is required or reasonably necessary and is a proportionate response to address an Emergency

**Equivalent Period of Notice** means a period of notice commencing at the time that the Access Provider has approved and allocated the capital expenditure or otherwise approved and made a decision to commit to a Major Network Modernisation and Upgrade

**Ethernet** has the same meaning given to that term by the Institute of Electrical and Electronics Engineers

**Event** means an act, omission or event relating to or arising out of this FAD or part of this FAD

**Expert Committee** means a committee established under clause 5.11 in Schedule 5

**FAD** means Final Access Determination made under section 152BC of the *Competition and Consumer Act 2010* (Cth)

**Fault** means:

- (a) a failure in the normal operation of a Network or in the delivery of a Service; or
- (b) any issue as to the availability or quality of a Service supplied to an end-user via the Access Seeker, notified by the end-user to the Access Seeker's help desk, that has been reasonably assessed by the Access Provider as being the Access Provider's responsibility to repair

**Fibre Access Broadband service** has the meaning given by Annexure 1 to the written instrument (as available on the ACCC's [public register](#)) by which the ACCC varied, pursuant to subsection 152AL(3) of the CCA, its declaration of the SBAS and which took effect on 27 July 2021

**General Notification** has the meaning set out in clause 10.1 in Schedule 10

**HFC network** has the same meaning as hybrid fibre-coaxial network in section 7 of the *Telecommunications Act 1997* (Cth)

**Indemnifying Party** means the Party giving an indemnity under this FAD

**Individual Notification** has the meaning set out in clause 10.1 of Schedule 10

**Initiating Notice** has the meaning as set out in clause 5.11 of Schedule 5

**Innocent Party** means the Party receiving the benefit of an indemnity under this FAD

**Labour Rate** means the cost associated for the total number of staff-hours of labour required to perform the relevant activity (rounded up to the next full hour). For the avoidance of doubt, a Carrier or Carriage Service Provider may recover its Labour rate costs

**Liability** (of a party) means any liability of that party (whether in contract, in tort, under statute or in any other way and whether due to negligence, wilful or deliberate breach or any other cause) under or in relation to this FAD, or part of this FAD or in relation to any Event or series of related Events

**Listed Carriage Service** has the same meaning given to that term in section 16 of the *Telecommunications Act 1997* (Cth)

**Loss** includes liability, loss, damage, costs, charges, or expenses (including legal costs)

**Major Network Modernisation and Upgrade** means a modernisation or upgrade that results in a Service no longer being supplied or adversely affects the quality of that Service (or any services supplied by an Access Seeker to their end-users using the Service), but does not mean, or include, an Emergency Network Modernisation and Upgrade or a National Broadband Network related upgrade

**Materials** means the cost of materials (including parts) necessary to perform the relevant activity. For the avoidance of doubt, a Carrier or Carriage Service Provider may recover the cost of Materials

**Month** means a period commencing at the beginning of any day of a named month and ending:

- (a) at the end of the day before the corresponding day of the next named month; or
- (b) if there is no such corresponding day – at the end of the next named month

**National Broadband Network** means a national telecommunications network for the high-speed carriage of communications, where NBN Co has been, is, or is to be, involved in the creation or development of the network. To avoid doubt, it is immaterial whether the creation or development of the network is, to any extent, attributable to:

- (a) the acquisition of assets that were used, or for use, in connection with another telecommunications network; or
- (b) the obtaining of access to assets that are also used, or for use, in connection with another telecommunications network

**NBN Co** means NBN Co Limited (ACN 136 533 741), as the company exists from time to time (even if its name is later changed)

**Network** of a party, means that party's system, or series of systems, that carries, or is capable of carrying communications by means of guided or unguided electromagnetic energy

**Network-network Interface** means an interface provided by an Access Provider at a point of interconnection where the Access Seeker's telecommunications network can interface to the Access Provider's network

**Non-Billing Dispute** means a dispute other than a Billing Dispute

**Non-recurring Charge** means a charge payable only when a certain activity or event occurs, where that certain activity or event is not reasonably anticipated by the charger to re-occur on a regular or routine basis

**Ongoing Creditworthiness Information** has the meaning as set out in clause 4.8 of Schedule 4 of this FAD

**Overage Amount** has the meaning as set out in section 11 of the Price List of Wholesale Broadband Agreement NBN Ethernet Product at <https://www.nbnco.com.au/rsps/supply-agreements/wba> as amended from time to time

**Party** means a party to this FAD

**People** of a party, means each of that party's directors, officers, employees, agents, contractors, advisers, and representatives but does not include that party's end-users or the other party

**Prohibited Traffic** means traffic offered across a POI for which there is no agreement between the Access Provider and the Access Seeker that the Access Provider will carry such traffic or provide a related service to the Access Seeker

**Regulatory Determination** means an access determination or a binding rule of conduct

**Reporting Period** means each three-Month period ending on 31 March, 30 June, 31 September, or 31 December in a year. That is, 1 January to 31 March, 1 April to 30 June, 1 July to 30 September, and 1 October to 31 December, in each year

**Representative** of a Party means each of that party's directors, officers, employees, agents, contractors, advisers and representatives, but does not include that Party's end-users or the other Party

**SBAS** means the superfast broadband access service as described in Annexure 1 to the written instrument (as available on the ACCC's [public register](#)), by which the ACCC varied, pursuant

to subsection 152AL(3) of the CCA, its declaration of the SBAS and which took effect on 27 July 2021

**Security** means the amount and type of security provided, or required to be provided, to the Access Provider in respect of the provision by the Access Provider of Services, as set out in Schedule 4

**Security Deposit** means any sum of money deposited by the Access Seeker with the Access Provider, from time to time, for the purposes of fulfilling in whole or in part the requirement under this FAD that the Access Seeker provide Security to the Access Provider

**Service** means an eligible service declared under section 152AL of the CCA

**Service Transfer** means the transfer of an end user service from one Access Seeker to another

**Structural Separation Undertaking** means:

- (a) an undertaking given by Telstra Corporation Limited under subsection 577A(1) of the *Telecommunications Act 1997* (Cth) which came into force in accordance with section 577AB, and any amendment to that undertaking which comes into force in accordance with subsection 577B(6); and
- (b) a migration plan approved by the ACCC under Subdivision B of Division 2 of Part 33 of the *Telecommunications Act 1997* (Cth) which, pursuant to subsection 577BE(5), formed part of the undertaking referred to in paragraph (a), and any amendment to that plan which is approved by the ACCC in accordance with section 577BF, and includes all binding schedules, annexures and attachments to such documents

**Suspension Event** has the meaning set out in clause 7.2 of Schedule 7

**Suspension Notice** has the meaning set out in clause 7.2 of Schedule 7

**Telstra Provider** means a Demerged Telstra Company that is required to comply with any or all of the standard access obligations as defined in the *Competition and Consumer Act 2010* in respect of the relevant declared service

**Transfer Reversal** means the reversal of a Service Transfer in circumstances where the transfer order placed is unauthorised, was placed in error or is a result of an end user rescinding or cancelling a Service Transfer within the cooling off period in accordance with the applicable fair-trading legislation

## Schedule 2 - Prices

2.1 This Schedule sets out maximum prices which may be charged for the wholesale products specified in clause 4.3 of the terms and conditions of access on page 2 of this determination instrument.

2.2 In the case of a Telstra Provider and the products specified in clause 4.3(a) the following Monthly charges apply until 31 December 2024:

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

From 1 January 2025, a Telstra Provider or other Carrier or Carriage Service Provider will be required to provide the products specified in 4.3(b), and the charges in clauses 2.3 to 2.5 of this Schedule 2 will apply.

2.3 In the case of other Carriers or Carriage Service Providers and the products specified in 4.3(b), the provider must offer the service specified at clause 4.3(b) at a price not exceeding the maximum Monthly charges listed in either 2.3(a) or 2.3(b):

a)

Charge component	Initial prices	CVC Inclusion (Mbps)	Subsequent prices
Effective price per Month	25/5 Mbps	\$27.95	0.23
	25-50/5-20 Mbps	\$52.52	3.56
CVC Overage per Mbps	\$4.50		The price for the NBN Co Bundled AVC TC-4 and CVC TC-4 product components, as amended from time to time
Bundled Offer Ceiling	\$57.22		The price for the NBN Co Overage Amount as amended from time to time
			The price for the Bundled Offer Ceiling as amended from time to time

For the purposes of 2.3(a):

- (i) The Overage amount applies if, across a billing period and for each Bundled TC4 Offer, the Daily Peak Utilisation is more than the bundled inclusions contained in that Bundled TC-4 Offer. The price for the relevant Bundled TC-4 Offer, including CVC Overage, must not exceed the Bundled Offer Ceiling, as amended from time to time.



- (ii) The Access Provider must, in a timely manner, provide to each Access Seeker reports for each day, the utilisation (in Mbps) of each AVC TC-4 product component observed by the Access Provider during the Daily Peak Hour.

b)

Charge component		Initial prices	Subsequent prices
Effective price per Month	25/5 Mbps	\$33.47	The price for the NBN Co Average Combined Charge for a Bundled TC-4 Offer, as amended from time to time
	25-50/5-20 Mbps	\$53.60	

The initial prices listed in 2.3(a) and 2.3(b) will apply until such time as NBN Co publishes subsequent pricing for these NBN Co products in its Tariff List and 3 Year Pricing Roadmap for each financial year at <https://www.nbnco.com.au/rsps/special-access-undertaking-sau>. The subsequent pricing will apply to carriers and carriage service providers six Months from the date of publication of the subsequent pricing on the NBN Co website.

For the avoidance of doubt, the maximum Monthly charges listed in clause 2.3 of this Schedule 2 are inclusive of transmission from the End-user Interface to the Network-to-network Interface.

## Non-recurring charges

2.4 The following maximum non-recurring charges apply to the products specified in 4.3(b):

a) Installations and activations

Activity	Initial prices	Subsequent prices
Standard Installation	\$5.00	The price charged for the NBN Co service reactivation as set out in the applicable NBN price list
Non-standard Installation	Labour Rate + Materials over and above Initial standard installation	Labour Rate + Materials over and above Initial standard installation
Service transfer	\$5.00	The price for the NBN Co service transfer as set out in the applicable NBN price list
Transfer reversal	\$5.00	The price for the NBN Co transfer reversal as set out in the applicable NBN price list

For the purposes of 2.4(a):

- (i) The Installation charge applies to the installation, connection, or activation of a new service (including the reactivation of a previously existing service) for an Access Seeker. It is not inclusive of the cost of deploying new network infrastructure to a new dwelling or premises.

- (ii) A Standard Installation refers to an Installation where no in-premises appointment by a technician is required (for example, including self-installation of a modem by an end-user).
- (iii) A Non-standard Installation charge applies where an in-premises appointment is required to install the connecting equipment (for example, installation of a jumpering cable, lead-in cable, or network termination device).
- (iv) A Carrier or Carriage Service Provider may apply a Standard Installation charge for a Non-standard Installation.
- (v) The charge for Service Transfer and Transfer Reversal does not apply where an in-premises appointment is required for a technician to install or uninstall the connecting equipment (for example, installation of a jumpering cable, lead-in cable, or network termination device).

b) Service management

Activity	Initial price	Subsequent prices
On-site Maintenance Call Out	\$0.00	The price for the NBN Co On-site Maintenance Call Out activity as set out in the applicable NBN price list
No Fault Found (No Truck Roll Required)	\$50.00	The price for the NBN Co No Fault Found (No Truck Roll Required) activity as set out in the applicable NBN price list
No Fault Found (Truck Roll Required)		Labour Rate
No Fault Found (Truck Roll Required and Professional Wiring Service)		Labour Rate + Materials
Late Cancellation (Site Visit Required)		\$0.00 (Labour Rate + Materials if the Access Provider has incurred incidental costs)
First Missed Appointment		Labour Rate
Subsequent Missed Appointment		Labour Rate

The initial prices listed in 2.4(a) and 2.4(b) will apply until such time as NBN Co publishes subsequent pricing for these NBN Co products in its Tariff List and 3 Year Pricing Roadmap for each financial year at <https://www.nbnco.com.au/rsps/special-access-undertaking-sau>. The subsequent pricing will apply to carriers and carriage service providers six Months from the date of publication of the subsequent pricing on the NBN Co website.

## Network-to-network interconnection

2.5 In the case of the products specified in 4.3(b), the following maximum prices apply in respect

to Network-to-network Interface (NNI) offers:

a) Monthly recurring charges

NNI product	Capacity	Distance	Initial prices	Subsequent prices
1000BaseLX - per NNI Bearer	1 Gigabit	<10 kms	\$100.00	The price charged for the NBN Network to Network Interface Offer as set out in the applicable NBN price list
10GBaseLR - per NNI Bearer	10 Gigabit	<10 kms	\$400.00	
100GBaseLR4 - per NNI Bearer	100 Gigabit	<10 kms	\$2,400.00	
1000BaseEX - per NNI Bearer	1 Gigabit	10 – 40 kms	\$125.00	
10GBaseER - per NNI Bearer	10 Gigabit	10 – 40 kms	\$500.00	
100GBaseER4 - per NNI Bearer	100 Gigabit	10 – 40 kms	\$3,000.00	

a) Set-up and activation charges

NNI product	Capacity	Distance	Initial prices	Subsequent prices
1000BaseLX - per NNI Bearer	1 Gigabit	<10 kms	\$1,000.00	The price charged for the NBN Network to Network Interface Offer as set out in the applicable NBN price list
10GBaseLR - per NNI Bearer	10 Gigabit	<10 kms	\$3,000.00	
100GBaseLR4 - per NNI Bearer	100 Gigabit	<10 kms	\$20,000.00	
1000BaseEX - per NNI Bearer	1 Gigabit	10 – 40 kms	\$2,000.00	
10GBaseER - per NNI Bearer	10 Gigabit	10 – 40 kms	\$4,000.00	
100GBaseER4 - per NNI Bearer	100 Gigabit	10 – 40 kms	\$24,000.00	

For the purposes of 2.5(a) and 2.5(b):

- (i) The maximum prices are inclusive of the NBN Co NNI Upsize Migration Rebate which is in effect from 31 March 2024 to 30 June 2027 and published in the Discounts, Credits and Rebates Annexure to the nbn® Ethernet Price List, as amended from time to time.
- (ii) The initial prices listed in 2.5(a) and 2.5(b) will apply until such time as NBN Co publishes subsequent pricing for the NBN Network to Network Interface Offer in its Tariff List for each financial year at <https://www.nbnco.com.au/rsps/special-access->

[undertaking-sau](#). The subsequent pricing will apply to carriers and carriage service providers six Months from the date of publication of the subsequent pricing on the NBN Co website.

## **Consultation and transparency**

2.6 The Access Provider must consult with its Access Seekers for a period of no less than two Months prior to making changes to its wholesale price list. On completion of this consultation period and prior to making changes to its wholesale price list, the Access Provider must provide a statement to its Access Seekers responding to how their feedback was considered.

## Schedule 3 - Billing and notification

- 3.1 The Access Seeker's liability to pay Charges for the Service to the Access Provider arises at the time the Service is supplied by the Access Provider to the Access Seeker, unless the parties agree otherwise.
- 3.2 The Access Seeker must pay Charges in accordance with this FAD, including but not limited to this Schedule 3.
- 3.3 The Access Provider must provide the Access Seeker with an invoice each Month in respect of Charges payable for the Service unless the parties agree otherwise.
- 3.4 The Access Provider is entitled to invoice the Access Seeker for previously uninvoiced Charges or Charges which were understated in a previous invoice, provided that:
- a) the Charges to be retrospectively invoiced can be reasonably substantiated to the Access Seeker by the Access Provider; and
  - b) subject to clause 3.5, no more than 6 Months have elapsed since the date the relevant amount was incurred by the Access Seeker's customer, except where:
    - i. the Access Seeker gives written consent to a longer period (such consent not to be unreasonably withheld); or
    - ii. to the extent that the Charges relate to services supplied by an overseas carrier and the Access Provider has no control over the settlement arrangements as between it and the overseas carrier, in which case the Access Provider shall invoice such amounts as soon as is reasonably practicable.
- 3.5 The parties must comply with the provisions of any applicable industry standard made by the ACMA pursuant to Part 6 of the *Telecommunications Act 1997 (Cth)* (Standard) and the provisions of any applicable industry code registered pursuant to Part 6 of the *Telecommunications Act 1997 (Cth)* (Code) in relation to billing. Where the effect of a Standard or Code is that an Access Seeker is not permitted to invoice its customers for charges that are older than a specified number of days, weeks or Months (the Backbilling Period), the Access Provider must not invoice the Access Seeker for a Charge which was incurred by the Access Seeker's customers that, as at the date the invoice is issued, is older than the Backbilling Period.
- 3.6 Subject to clause 3.12
- a) An invoice is payable in full 30 Calendar Days after the date the invoice was issued or such other date as agreed between the parties.
  - b) The Access Seeker may not deduct, withhold, or set-off any amounts for accounts in credit, for counter-claims or for any other reason or attach any condition to the payment, unless otherwise agreed by the Access Provider.
  - c) All amounts owing and unpaid after the due date shall accrue interest daily from the due date up to and including the date it is paid at the rate per annum of the 90 day

authorized dealers bank bill rate published in the *Australian Financial Review* on the first Business Day following the due date for payment, plus 2.5 per cent.

- 3.7 In addition to charging interest in accordance with clause 3.6 or exercising any other rights the Access Provider has at law or under this FAD, where an amount is outstanding and remains unpaid for more than 20 Business Days after it is due for payment, and is not an amount subject to any Billing Dispute notified in accordance with this FAD, the Access Provider may take action, without further notice to the Access Seeker, to recover any such amount as a debt due to the Access Provider.
- 3.8 Unless the parties otherwise agree, there is no setting-off (i.e. netting) of invoices except where a party goes into liquidation, in which case the other party may set-off. However, in order to minimise administration and financial costs, the parties must consider in good faith set-off procedures for inter-party invoices which may require the alignment of the parties' respective invoice dates and other procedures to allow set-off to occur efficiently.
- 3.9 The Access Provider must, at the time of issuing an invoice, provide to the Access Seeker all information reasonably required by the Access Seeker to identify and understand the nature and amount of each Charge on the invoice, and the service the Charge relates to. Nothing in this clause 3.9 is intended to limit subsections 152AR(6) and 152AR(7) of the CCA.
- 3.10 If the Access Seeker believes a Billing Dispute exists, it may invoke the Billing Dispute Procedures by providing written notice to the Access Provider (Billing Dispute Notice). A Billing Dispute must be initiated only in good faith.
- 3.11 Except where a party seeks urgent injunctive relief, the Billing Dispute Procedures must be invoked before either party may begin legal proceedings in relation to any Billing Dispute.
- 3.12 If a Billing Dispute Notice is given to the Access Provider by the due date for payment of the invoice containing the Charge which is being disputed, the Access Seeker may withhold payment of the disputed Charge until such time as the Billing Dispute has been resolved or otherwise terminated. Otherwise, the Access Seeker must pay the invoice in full in accordance with this FAD (but subject to the outcome of the Billing Dispute Procedures).
- 3.13 Except where payment is withheld in accordance with clause 3.12, the Access Provider is not obliged to accept a Billing Dispute Notice in relation to an invoice unless the invoice has been paid in full.
- 3.14 A Billing Dispute Notice must be given to the Access Provider in relation to a Charge, at the earlier of:
  - a) as soon as reasonably practicable after the Access Seeker becomes aware a Billing Dispute exists, or
  - b) within six Months of the invoice for the Charge being issued in accordance with clause 3.6.

### 3.15

- a) The Access Provider must acknowledge receipt of a Billing Dispute Notice within two Business Days by providing the Access Seeker with a reference number.
- b) Within five Business Days of acknowledging a Billing Dispute Notice under clause 3.15(a), the Access Provider must, by written notice to the Access Seeker:
  - i. accept the Billing Dispute Notice; or
  - ii. reject the Billing Dispute Notice if the Access Provider reasonably considers that:
    - A. the subject matter of the Billing Dispute Notice is already being dealt with in another dispute;
    - B. the Billing Dispute Notice was not submitted in good faith; or
    - C. the Billing Dispute Notice is incomplete or contains inaccurate information.
- c) If the Access Provider fails to accept or reject the Billing Dispute Notice within five Business Days of acknowledging the Billing Dispute Notice under clause 3.15(a), the Access Provider is taken to have accepted the Billing Dispute Notice.
- d) For avoidance of doubt, if the Access Provider rejects a Billing Dispute Notice under clause 3.15(b)(ii)C, the Access Seeker is not prevented from providing an amended Billing Dispute Notice to the Access Provider relating to the same dispute provided that the amended Billing Dispute Notice is provided within the timeframe under clause 3.14.

3.16 The Access Seeker must, as early as practicable and in any case within five Business Days, unless the Parties agree on a longer period, after the Access Provider acknowledges a Billing Dispute Notice, provide to the other party any further relevant information or materials (which were not originally provided with the Billing Dispute Notice) on which it intends to rely (provided that this obligation is not intended to be the same as the obligation to make discovery in litigation).

3.17 Without affecting the time within which the Access Provider must make the proposed resolution under clause 3.1, the Access Provider may request additional information from the Access Seeker that it reasonably requires for the purposes of making a proposed resolution pursuant to clause 3.18. This additional information may be requested up to 10 Business Days prior to the date on which the Access Provider must make the proposed resolution under clause 3.18. The Access Seeker must provide the requested information within five Business Days of receiving the request. If the Access Seeker fails to do so within five Business Days, the Access Provider may take the Access Seeker's failure to provide additional information into account when making its proposed resolution.

3.18 The Access Provider must try to resolve any Billing Dispute as soon as practicable and in any event within 30 Business Days of accepting a Billing Dispute Notice under clause 3.15 (or longer period if agreed by the parties), by notifying the Access Seeker in writing of its proposed resolution of a Billing Dispute. That notice must:

- a) explain the Access Provider's proposed resolution (including providing copies where necessary of all information relied upon in coming to that proposed resolution); and
- b) set out any action to be taken by:
  - i. the Access Provider (e.g. withdrawal, adjustment or refund of the disputed Charge); or
  - ii. the Access Seeker (e.g. payment of the disputed Charge).

If the Access Provider reasonably considers that it will take longer than 30 Business Days after accepting a Billing Dispute Notice to provide a proposed resolution, then the Access Provider may request the Access Seeker's consent to an extension of time to provide the proposed resolution under this clause 3.18 (such consent not to be unreasonably withheld).

3.19 If the Access Seeker does not agree with the Access Provider's decision to reject a Billing Dispute Notice under clause 3.15 or the Access Provider's proposed resolution under clause 3.17, it must object within 15 Business Days of being notified of such decisions (or such longer time as agreed between the parties). Any objection lodged by the Access Seeker with the Access Provider must be in writing and state:

- a) what part(s) of the proposed resolution it objects to;
- b) the reasons for objection;
- c) what amount it will continue to withhold payment of (if applicable); and
- d) any additional information to support its objection.

If the Access Seeker lodges an objection to the proposed resolution under this clause, the Access Provider must, within 5 Business Days of receiving the objection, review the objection and

- e) provide a revised proposed resolution (Revised Proposed Resolution in this Schedule 3); or
- f) confirm its proposed resolution.

3.20 Any:

- a) withdrawal, adjustment or refund of the disputed Charge by the Access Provider; or
- b) payment of the disputed Charge by the Access Seeker (as the case may be),

must occur as soon as practicable and in any event within one Month of the Access Provider's notice of its proposed resolution under clause 3.18 or its Revised Proposed Resolution under clause 3.19 (as applicable), unless the Access Seeker escalates the Billing Dispute under clause 3.23. If the Access Provider is required to make a withdrawal, adjustment or refund of a disputed Charge under this clause but its next invoice (first invoice) is due to be issued within 48 hours of its proposed resolution under clause 3.18 or its Revised Proposed Resolution under clause 3.19 (as applicable), then the Access Provider may include that withdrawal, adjustment or refund in the invoice following the first invoice



notwithstanding that this may occur more than one Month after the Access Provider's notice of its proposed resolution or Revised Proposed Resolution.

3.21 Where the Access Provider is to refund a disputed Charge, the Access Provider must pay interest (at the rate set out in clause 3.6) on any refund. Interest accrues daily from the date on which each relevant amount to be refunded was paid to the Access Provider, until the date the refund is paid.

3.22 Where the Access Seeker is to pay a disputed Charge, the Access Seeker must pay interest (at the rate set out in clause 3.6) on the amount to be paid. Interest accrues daily from the date on which each relevant amount was originally due to be paid to the Access Provider, until the date the amount is paid.

3.23 If

- a) the Access Provider has not proposed a resolution according to clause 3.18 or within the timeframe specified in clause 3.18, or
- b) the Access Seeker, having first submitted an objection under clause 3.19 is not satisfied with the Access Provider's Revised Proposed Resolution, or the Access Provider's confirmed proposed resolution, within the timeframes specified in clause 3.19,

the Access Seeker may escalate the matter under clause 3.24. If the Access Seeker does not do so within 15 Business Days after the time period stated in clause 3.18 or after being notified of the Access Provider's Revised Proposed Resolution under clause 3.19(e) or confirmed proposed resolution under clause 3.19(f) (or a longer period if agreed by the parties), the Access Seeker is deemed to have accepted the Access Provider's proposed resolution made under clause 3.18 or Revised Proposed Resolution under clause 3.19(e) or confirmed proposed solution under clause 3.19(f) and clauses 3.21 and 3.22 apply.

3.24 If the Access Seeker wishes to escalate a Billing Dispute, the Access Seeker must give the Access Provider a written notice:

- a) stating why it does not agree with the Access Provider's Revised Proposed Resolution or confirmed proposed resolution; and
- b) seeking escalation of the Billing Dispute.

3.25 A notice under clause 3.24 must be submitted to the nominated billing manager for the Access Provider, who must discuss how best to resolve the Billing Dispute with the Access Seeker's nominated counterpart. If the Parties are unable to resolve the Billing Dispute within five Business Days of notice being given under clause 3.24 (or such longer period as agreed between the parties) the Billing Dispute must be escalated to the Access Provider's nominated commercial manager and the Access Seeker's nominated counterpart who must meet in an effort to resolve the Billing Dispute.

3.26 If the Billing Dispute cannot be resolved within five Business Days of it being escalated to the Access Provider's nominated commercial manager and the Access Seeker's nominated counterpart under clause 3.25 (or such longer period as agreed between the parties):

- a) either party may provide a written proposal to the other party for the appointment of a

mediator to assist in resolving the dispute. Mediation must be conducted in accordance with the mediation guidelines of the ACDC and concluded within three Months of the proposal (unless the parties agree to extend this timeframe); or

- b) if the parties either do not agree to proceed to mediation within five Business Days of being able to propose the appointment of a mediator under clause 3.26(a) or are unable to resolve the entire Billing Dispute by mediation, either party may commence legal proceedings to resolve the matter.

3.27 The parties must ensure that any person appointed or required to resolve a Billing Dispute takes into account the principle that the Access Seeker is entitled to be recompensed in circumstances where the Access Seeker is prevented (due to regulatory restrictions on retrospective invoicing) from recovering from its end-user an amount which is the subject of a Billing Dispute (a Backbilling Loss), provided that:

- a) such principle applies only to the extent to which the Billing Dispute is resolved against the Access Provider; and
- b) such principle applies only to the extent to which it is determined that the Backbilling Loss was due to the Access Provider unnecessarily delaying resolution of the Billing Dispute.

3.28 Each party must continue to fulfil its obligations under this FAD while a Billing Dispute and the Billing Dispute Procedures are pending.

3.29 All discussions and information relating to a Billing Dispute must be communicated or exchanged between the parties through the representatives of the parties set out in clause 3.25 (or their respective nominees).

3.30 There is a presumption that all communications between the Parties during the course of a Billing Dispute are made on a without prejudice and confidential basis.

3.31 If it is determined by the Billing Dispute Procedures, any other dispute resolution procedure, or by agreement between the parties, that three or more out of any five consecutive invoices for a given Service are incorrect by 5 per cent or more, then, for the purposes of clause 3.21, the interest payable by the Access Provider in respect of the overpaid amount of the invoices in question is the rate set out in clause 3.6, plus 2 per cent. The remedy set out in this clause 3.31 is without prejudice to any other right or remedy available to the Access Seeker.

## Schedule 4 - Creditworthiness and Security

4.1 Unless otherwise agreed by the Access Provider, the Access Seeker must (at the Access Seeker's sole cost and expense) provide to the Access Provider and maintain, on terms and conditions reasonably required by the Access Provider and subject to clause 4.2, the Security (as is determined having regard to clause 4.3 and as may be varied pursuant to clause 4.4) in respect of amounts owing by the Access Seeker to the Access Provider under this FAD.

4.2

- a) The Access Seeker acknowledges that unless otherwise agreed by the Access Provider, it must maintain (and the Access Provider need not release or refund) the Security specified in clause 4.1 for a period of six Months following (but not including) the date on which the last of the following occurs:
  - i. cessation of supply of the Service under this FAD, and
  - ii. payment of all outstanding amounts under this FAD.
- b) Notwithstanding clause 4.2(a), the Access Provider has no obligation to release the Security if, at the date the Access Provider would otherwise be required to release the Security under clause 4.2(a), the Access Provider reasonably believes any person, including a provisional liquidator, administrator, trustee in bankruptcy, receiver, receiver and manager, other controller or similar official, has a legitimate right to recoup or claim repayment of any part of the amount paid or satisfied, whether under the laws or preferences, fraudulent dispositions or otherwise.

4.3 The Security (including any varied Security) may only be requested where an Access Provider has reasonable grounds to doubt the Access Seeker's ability to pay for services, and must be of an amount and in a form determined reasonably by the Access Provider taking into account all the relevant circumstances. As a statement of general principle the amount of any Security is calculated by reference to:

- a) the aggregate value of all Services likely to be provided to the Access Seeker under this FAD over a reasonable period; or
- b) the value of amounts invoiced in respect of the Service but unpaid (excluding any amounts in respect of which there is a current Billing Dispute notified in accordance with this FAD).

For the avoidance of doubt, any estimates, forecasts, or other statements made or provided by the Access Seeker may be used by the Access Provider in determining the amount of a Security

4.4 Examples of appropriate forms of Security, having regard to the factors referred to in clause 4.3, may include without limitation:

- a) fixed and floating charges;
- b) personal guarantees from directors;

- c) Bank Guarantees;
- d) letters of comfort
- e) mortgages;
- f) a right of set-off;
- g) a Security Deposit; or
- h) a combination of the forms of Security referred to in paragraphs (a) to (g) above.

If any Security is or includes a Security Deposit, then:

- i) the Access Provider is not obliged to invest the Security Deposit or hold the Security Deposit in an interest bearing account or otherwise; and
- j) the Access Seeker is prohibited from dealing with the Security Deposit or its rights to that Security Deposit (including by way of assignment or granting of security).

If any security is or includes a Bank Guarantee and that Bank Guarantee (Original Bank Guarantee) has an expiry date which is the last day by which a call may be made under a Bank Guarantee, the Access Seeker must procure a replacement Bank Guarantee for the amount guaranteed by the Original Bank Guarantee no later than two Months prior to the expiry date of the Original Bank Guarantee, such replacement Bank Guarantee to have an expiry date of no less than 14 Months from the date of delivery of the replacement Bank Guarantee.

If the Access Seeker fails to procure a replacement Bank Guarantee, then in addition to any other of the Access Provider's rights under this FAD, the Access Provider may, at any time in the Month prior to the expiry date of the Bank Guarantee, make a call under the Bank Guarantee for the full amount guaranteed. The amount paid to the Access Provider pursuant to a call on the Bank Guarantee will become a Security Deposit.

- 4.5 The Access Provider may from time to time where the circumstances reasonably require, request Ongoing Creditworthiness Information from the Access Seeker to determine the ongoing creditworthiness of the Access Seeker. The Access Seeker must supply Ongoing Creditworthiness Information to the Access Provider within 15 Business Days of receipt of a request from the Access Provider for such information. The Access Provider may, as a result of such Ongoing Creditworthiness Information, having regard to the factors referred to in clause 4.3 and subject to clause 4.7, reasonably require the Access Seeker to alter the amount, form or the terms of the Security (which may include a requirement to provide additional security), and the Access Seeker must provide that altered Security within 20 Business Days of being notified by the Access Provider in writing of that requirement.
- 4.6 The Access Seeker may from time to time request the Access Provider to consent (in writing) to a decrease in the required Security and/or alteration of the form of the Security. The Access Provider must, within 15 Business Days of the Access Seeker's request, comply with that request if, and to the extent, it is reasonable to do so (having regard to the factors referred to in clause 4.3). The Access Provider may request, and the Access Seeker must promptly provide, Ongoing Creditworthiness Information, for the purposes of this clause 4.6.

4.7 If the Access Seeker provides Ongoing Creditworthiness Information to the Access Provider as required by this Schedule 4, the Access Seeker must warrant that such information is true, fair, accurate and complete as at the date on which it is received by the Access Provider and that there has been no material adverse change in the Access Seeker's financial position between the date the information was prepared and the date it was received by the Access Provider. If there has been a material adverse change in the Access Seeker's financial position between the date the information was prepared and the date it was received by the Access Provider, the Access Seeker must disclose the nature and effect of the change to the Access Provider at the time the information is provided.

4.8 For the purposes of this Schedule 4, **Ongoing Creditworthiness Information** means:

- a) a copy of the Access Seeker's most recent published audited balance sheet and published audited profit and loss statement (together with any notes attached to or intended to be read with such balance sheet or profit and loss statement);
- b) a credit report in respect of the Access Seeker or, where reasonably necessary in the circumstances, any of its owners or directors (Principals) from any credit reporting agency, credit provider or other third party. The Access Seeker must co-operate and provide any information necessary for that credit reporting agency, credit provider or other independent party to enable it to form an accurate opinion of the Access Seeker's creditworthiness. To that end, the Access Seeker agrees to procure written consents (as required under the *Privacy Act 1988* (Cth)) from such of its Principals as is reasonably necessary in the circumstances to enable the Access Provider to:
  - i. obtain from a credit reporting agency, credit provider or other independent party, information contained in a credit report;
  - ii. disclose to a credit reporting agency, credit provider or other independent party, personal information about each Principal; and
  - iii. obtain and use a consumer credit report;
- c) a letter, signed by the company secretary or duly authorised officer of the Access Seeker, stating that the Access Seeker is not insolvent and not under any external administration (as defined in the *Corporations Act 2001* (Cth)) or under any similar form of administration under any laws applicable to it in any jurisdiction; and
- d) the Access Seeker's credit rating, if any has been assigned to it; and
- e) any other information reasonably required to determine the ongoing creditworthiness of the Access Seeker, as agreed between the parties before the request under clause 4.5 is made.

4.9 The Access Seeker may require a confidentiality undertaking to be given by any person having access to confidential information contained in its Ongoing Creditworthiness Information prior to such information being provided to that person.

4.10 Subject to this Schedule 4, the parties agree that a failure by the Access Seeker to provide the warranties set out in clause 4.7 or to provide Ongoing Creditworthiness Information constitutes:

- a) an event entitling the Access Provider to alter the amount, form or terms of the Security (including an entitlement to additional Security) of the Access Seeker and the Access Seeker must provide that altered Security within 15 Business Days after the end of the period set out clause 4.5; or
- b) breach of a material term or condition of this FAD.

Any disputes arising out of or in connection with Schedule 4 must be dealt with in accordance with the procedures in Schedule 5. Notwithstanding that a dispute arising out of or in connection with Schedule 4 has been referred to the procedures in Schedule 5 and has not yet been determined, nothing in this clause 4.10 or Schedule 5 prevents the Access Provider from exercising any of its rights to suspend the supply of a Service under Schedule 7.

## Schedule 5 - General dispute resolution procedures

- 5.1 If a dispute arises between the parties in connection with or arising from the terms and conditions set out in this FAD for the supply of the Service, the dispute must be managed as follows:
- a) in the case of a Billing Dispute, the dispute must be managed in accordance with the Billing Dispute Procedures; or
  - b) subject to clause 5.2, in the case of a Non-Billing Dispute, the dispute must be managed in accordance with the procedures set out in this Schedule 5.
- 5.2 To the extent that a Non-Billing Dispute is raised or arises in connection with, or otherwise relates to, a Billing Dispute, then unless otherwise determined, that Non-Billing Dispute must be resolved in accordance with the Billing Dispute Procedures. The Access Provider may seek a determination from an independent third party on whether a dispute initiated by the Access Seeker as a Billing Dispute is a Non-Billing Dispute. If the independent third party deems the dispute to be a Non-Billing Dispute, the Access Provider may provide written notice to the Access Seeker to pay any withheld amount to the Access Provider on the due date for the disputed invoice or if the due date has passed, immediately on notification being given by the Access Provider.

For the purposes of this clause 5.2:

- a) the independent third party must be a person who:
    - i. has an understanding of the relevant aspects of the telecommunications industry (or have the capacity to quickly come to such an understanding);
    - ii. have an appreciation of the competition law implications of their decisions; and
    - iii. not be an officer, director or employee of a telecommunications company or otherwise have a potential for a conflict of interest;
  - b) the independent third party may include an arbiter from the ACDC.
- 5.3 If a Non-Billing Dispute arises, either party may, by written notice to the other, refer the Non-Billing Dispute for resolution under this Schedule 5. A Non-Billing Dispute must be initiated only in good faith.
- 5.4 Any Non-Billing Dispute notified under clause 5.3 must be referred:
- a) initially to the nominated manager (or managers) for each party, who must endeavour to resolve the dispute within 10 Business Days of the giving of the notice referred to in clause 5.3 or such other time agreed by the parties; and
  - b) if the persons referred to in paragraph (a) above do not resolve the Non-Billing Dispute within the time specified under paragraph (a), then the parties may agree in writing within a further five Business Days to refer the Non-Billing Dispute to an Expert Committee

under clause 5.11, or by written agreement submit it to mediation in accordance with clause 5.10.

5.5 If:

- a) under clause 5.4 the Non-Billing Dispute is not resolved and a written agreement is not made to refer the Non-Billing Dispute to an Expert Committee or submit it to mediation; or,
- b) under clause 5.10(f), the mediation is terminated; and
- c) after a period of five Business Days after the mediation is terminated as referred to in paragraph (b), the parties do not resolve the Non-Billing Dispute or agree in writing on an alternative procedure to resolve the Non-Billing Dispute (whether by further mediation, written notice to the Expert Committee, arbitration or otherwise)

either party may terminate the operation of this dispute resolution procedure in relation to the Non-Billing Dispute by giving written notice of termination to the other party.

5.6 A party may not commence legal proceedings in any court (except proceedings seeking urgent interlocutory relief) in respect of a Non-Billing Dispute unless:

- a) the Non-Billing Dispute has first been referred for resolution in accordance with the dispute resolution procedure set out in this Schedule 5 or clause 5.2 (if applicable) and a notice terminating the operation of the dispute resolution procedure has been issued under clause 5.5; or
- b) the other party has failed to substantially comply with the dispute resolution procedure set out in this Schedule 5 or clause 5.2 (if applicable).

5.7 Each party must continue to fulfil its obligations under this FAD while a Non-Billing Dispute and any dispute resolution procedure under this Schedule 5 are pending.

5.8 All communications between the parties during a Non-Billing Dispute and in connection with that Non-Billing Dispute, are made on a without prejudice and confidential basis.

5.9 Each party must, as early as practicable, and in any case within 14 Calendar Days unless a longer period is agreed between the parties, after the notification of a Non-Billing Dispute pursuant to clause 5.3, provide to the other party any relevant materials on which it intends to rely (provided that this obligation is not intended to be the same as the obligation to make discovery in litigation).

5.10 Where a Non-Billing Dispute is referred to mediation by way of written agreement between the parties, pursuant to clause 5.4(b):

- a) any agreement must include:
  - i. a statement of the disputed matters in the Non-Billing Dispute; and



- ii. the procedure to be followed during the mediation, and the mediation must take place within 15 Business Days upon the receipt by the mediator of such agreement;
- b) it must be conducted in accordance with the ACDC Guidelines and the provisions of this clause 5.10. In the event of any inconsistency between them, the provisions of this clause 5.10 prevail;
- c) it must be conducted in private;
- d) in addition to the qualifications of the mediator contemplated by the ACDC Guidelines, the mediator must:
  - i. have an understanding of the relevant aspects of the telecommunications industry (or have the capacity to quickly come to such an understanding);
  - ii. have an appreciation of the competition law implications of his/her decisions; and
  - iii. not be an officer, director or employee of a telecommunications company or otherwise have a potential for a conflict of interest;
- e) the parties must notify each other no later than 48 hours prior to mediation of the names of their representatives who will attend the mediation. Nothing in this subclause is intended to suggest that the parties are able to refuse the other's chosen representatives or to limit other representatives from the parties attending during the mediation;
- f) it must terminate in accordance with the ACDC Guidelines;
- g) the parties must bear their own costs of the mediation including the costs of any representatives and must each bear half the costs of the mediator; and
- h) any agreement resulting from mediation binds the parties on its terms.

5.11 The parties may by written agreement in accordance with clause 5.4(b), submit a Non-Billing Dispute for resolution by an Expert Committee (**Initiating Notice**), in which case the provisions of this clause 5.11 apply as follows:

- a) The terms of reference of the Expert Committee are as agreed by the parties. If the terms of reference are not agreed within five Business Days after the date of submitting the Initiating Notice (or such longer period as agreed between the parties), the referral to the Expert Committee is deemed to be terminated.
- b) An Expert Committee acts as an expert and not as an arbitrator.
- c) The parties are each represented on the Expert Committee by one appointee.
- d) The Expert Committee must include an independent chairperson agreed by the parties or, if not agreed, a nominee of the ACDC. The chairperson must have the qualifications listed in paragraphs 5.10(d)(i), (ii) and (iii).

- e) Each party must be given an equal opportunity to present its submissions and make representations to the Expert Committee.
- f) The Expert Committee may determine the dispute (including any procedural matters arising during the course of the dispute) by unanimous or majority decision.
- g) Unless the parties agree otherwise the parties must ensure that the Expert Committee uses all reasonable endeavours to reach a decision within 20 Business Days after the date on which the terms of reference are agreed or the final member of the Expert Committee is appointed (whichever is the later) and undertake to co-operate reasonably with the Expert Committee to achieve that timetable.
- h) If the dispute is not resolved within the timeframe referred to in clause 5.11(g), either party may by written notice to the other party terminate the appointment of the Expert Committee.
- i) The Expert Committee has the right to conduct any enquiry as it thinks fit, including the right to require and retain relevant evidence during the appointment of the Expert Committee or the resolution of the dispute.
- j) The Expert Committee must give written reasons for its decision.
- k) A decision of the Expert Committee is final and binding on the parties except in the case of manifest error or a mistake of law.
- l) Each party must bear its own costs of the enquiry by the Expert Committee including the costs of its representatives, any legal counsel and its nominee on the Expert Committee and the parties must each bear half the costs of the independent member of the Expert Committee.

5.12 Schedule 5 does not apply to a Non-Billing Dispute to the extent that:

- a) there is a dispute resolution process established in connection with, or pursuant to, a legal or regulatory obligation (including any dispute resolution process set out in a Structural Separation Undertaking);
- b) a party has initiated a dispute under the dispute resolution process referred to in clause 5.12(a); and
- c) the issue the subject of that dispute is the same issue in dispute in the Non-Billing Dispute.

## Schedule 6 – Confidentiality

- 6.1 Subject to clause 6.4 and any applicable statutory duty, each party must keep confidential all Confidential Information of the other party and must not:
- a) use or copy such Confidential Information except as set out in this FAD; or
  - b) disclose or communicate, cause to be disclosed or communicated or otherwise make available such Confidential Information to any third person.
- 6.2 For the avoidance of doubt, information generated within the Access Provider’s Network because of or in connection with the supply of the relevant Service to the Access Seeker or the interconnection of the Access Provider’s Network with the Access Seeker’s Network (other than information that falls within paragraph (d) of the definition of Confidential Information) is the Confidential Information of the Access Seeker.
- 6.3 The Access Provider must upon request from the Access Seeker, disclose to the Access Seeker quarterly aggregate traffic flow information generated within the Access Provider’s Network in respect of a particular Service provided to the Access Seeker, if the Access Provider measures and provides this information to itself. The Access Seeker must pay the reasonable costs of the Access Provider providing that information.
- 6.4 Subject to clauses 6.5 and 6.10, Confidential Information of the Access Seeker may be:
- a) used by the Access Provider:
    - i. for the purposes of undertaking planning, maintenance, provisioning, operations or reconfiguration of its Network;
    - ii. for the purposes of supplying Services to the Access Seeker;
    - iii. for the purpose of billing; or
    - iv. for another purpose agreed to by the Access Seeker; and
  - b) disclosed only to personnel who, in the Access Provider’s reasonable opinion require the information to carry out or otherwise give effect to the purposes referred to in paragraph (a) above.
- 6.5 A party (**Disclosing Party**) may to the extent necessary use and/or disclose (as the case may be) the Confidential Information of the other party:
- a) to those of the Disclosing Party’s directors, officers, employees, agents, contractors (including sub-contractors) and representatives to whom the Confidential Information is reasonably required to be disclosed in connection with the provision of the Service to which this FAD relates;
  - b) to any professional person for the purpose of obtaining advice in relation to matters arising out of or in connection with the supply of a Service under this FAD;

- c) to an auditor acting for the Disclosing Party to the extent necessary to permit that auditor to perform its audit functions;
- d) in connection with legal proceedings, arbitration, expert determination and other dispute resolution mechanisms set out in this FAD, provided that the Disclosing Party has first given as much notice (in writing) as is reasonably practicable to the other party so that the other party has an opportunity to protect the confidentiality of its Confidential Information;
- e) as required by law provided that the Disclosing Party has first given as much notice (in writing) as is reasonably practicable to the other party, that it is required to disclose the Confidential Information so that the other party has an opportunity to protect the confidentiality of its Confidential Information, except that no notice is required in respect of disclosures made by the Access Provider to the ACCC under section 152BEA of the CCA;
- f) with the written consent of the other party provided that, prior to disclosing the Confidential Information of the other party:
  - i. the Disclosing Party informs the relevant person or persons to whom disclosure is to be made that the information is the Confidential Information of the other party;
  - ii. if required by the other party as a condition of giving its consent, the Disclosing Party must provide the other party with a confidentiality undertaking in the form set out in Annexure 1 of this Schedule 6 signed by the person or persons to whom disclosure is to be made; and
  - iii. if required by the other party as a condition of giving its consent, the Disclosing Party must comply with clause 6.6;
- g) in accordance with a lawful and binding directive issued by a regulatory authority;
- h) if reasonably required to protect the safety of personnel or property or in connection with an emergency;
- i) as required by the listing rules of any stock exchange where that party's securities are listed or quoted;
- j) in accordance with a reporting obligation, or in response to a request from a regulatory authority or any other Government body, in connection with the Access Provider's Structural Separation Undertaking where the party cannot comply with the reporting obligation or request without using or disclosing the Confidential Information, provided that:
  - i. prior to disclosing the Confidential Information of the other party the Disclosing Party informs the relevant person or persons to whom disclosure is to be made that the information is the Confidential Information of the other party; and

- ii. unless prohibited by law, the Disclosing Party informs the other Party in writing as soon as reasonably practicable after receiving the request that the Disclosing Party will disclose Confidential Information to the regulatory authority or any other Government body to fulfil that reporting obligation or respond to that request.
- k) in response to a request from a regulatory authority or any other Government body in connection with interception capability (as that term is used in Chapter 5 of the *Telecommunications (Interception and Access) Act 1979* (Cth)) relating to access to a declared service, where the party cannot comply with the request without using or disclosing the Confidential Information, provided that:
- i. prior to disclosing the Confidential Information of the other party the Disclosing Party informs the relevant person or persons to whom disclosure is to be made that the information is the Confidential Information of the other party; and
  - ii. unless prohibited by law, the Disclosing Party informs the other Party as soon as reasonably practicable after receiving the request that the Disclosing Party will disclose Confidential Information to the regulatory authority or any other Government body to respond to that request.

6.6 Each party must co-operate in any action taken by the other party to:

- a) protect the confidentiality of the other party's Confidential Information; or
- b) enforce its rights in relation to its Confidential Information.

6.7 Each party must establish and maintain security measures to safeguard the other party's Confidential Information from unauthorised access, use, copying, reproduction, or disclosure.

6.8 Confidential Information provided by one party to the other party is provided for the benefit of that other party only. Each party acknowledges that no warranty is given by the Disclosing Party that the Confidential Information is or will be correct.

6.9 Each party acknowledges that a breach of this Schedule 6 by one party may cause another party irreparable damage for which monetary damages would not be an adequate remedy. Accordingly, in addition to other remedies that may be available, a party may seek injunctive relief against such a breach or threatened breach of this Schedule 6.

6.10 If:

- a) the Access Provider has the right to suspend or cease the supply of the Service under:
  - i. Schedule 7 due to a payment breach, or
  - ii. under clause 7.8
- b) after suspension or cessation of supply of the Service under this FAD, the Access Seeker fails to pay amounts due or owing to the Access Provider by the due date for payment,

then the Access Provider may do one or both of the following:

- i) notify and exchange information about the Access Seeker (including the Access Seeker's Confidential Information) with any credit reporting agency or the Access Provider's collection agent; and
- ii) without limiting clause 6.10, disclose to a credit reporting agency:
  - the defaults made by the Access Seeker to the Access Provider; and
  - the exercise by the Access Provider of any right to suspend or cease supply of the Service under this FAD.

## Annexure 1 of Schedule 6

### Confidentiality undertaking form

*[Amend where necessary]*

#### CONFIDENTIALITY UNDERTAKING

I, \_\_\_\_\_ of [employer's company name] ([undertaking company]) undertake to [full name of party who owns or is providing the confidential information as the case requires] ([Provider]) that:

- 1 Subject to the terms of this Undertaking, I will keep confidential at all times the information listed in Attachment 1 to this Undertaking (Confidential Information) that is in my possession, custody, power or control.
- 2 I acknowledge that:
  - (a) this Undertaking is given by me to [Provider] in consideration for [Provider] making the Confidential Information available to me for the Approved Purposes (as defined below);
  - (b) all intellectual property in or to any part of the Confidential Information is and will remain the property of [Provider]; and
  - (c) by reason of this Undertaking, no licence or right is granted to me, or any other employee, agent or representative of [undertaking company] in relation to the Confidential Information except as expressly provided in this Undertaking.
- 3 I will:
  - (a) only use the Confidential Information for:
    - (i) the purposes listed in Attachment 2 to this Undertaking; or
    - (ii) any other purpose approved by [Provider] in writing;(the Approved Purposes);
  - (b) comply with any reasonable request or direction from [provider] regarding the Confidential Information.
- 4 Subject to clause 5, I will not disclose any of the Confidential Information to any other person without the prior written consent of [Provider].
- 5 I acknowledge that I may disclose the Confidential Information to which I have access to:
  - (a) any employee, external legal advisors, independent experts, internal legal or regulatory staff of [undertaking company], for the Approved Purposes provided that:
    - (i) the person to whom disclosure is proposed to be made (**the person**) is notified in writing to [Provider] and [Provider] has approved the person as a person who may receive the Confidential Information, which approval shall not be unreasonably withheld;
    - (ii) the person has signed a confidentiality undertaking in the form of this Undertaking or in a form otherwise acceptable to [Provider]; and

- (iii) a signed undertaking of the person has already been served on [Provider];
  - (b) other persons, if required to do so by law, but then only:
    - (i) if I notify [Provider] of that request within 7 days of receiving the request;
    - (ii) to the person(s) to whom I am obliged to provide the Confidential Information;
    - (iii) to the extent necessary as required by law; and
    - (iv) if I notify the recipient of the Confidential Information that the information is confidential and is the subject of this Undertaking to the [Provider]; and
  - (c) any secretarial, administrative and support staff, who perform purely administrative tasks, and who assist me or any person referred to in paragraph 5(a) for the Approved Purpose.
- 6 I will establish and maintain security measures to safeguard the Confidential Information from unauthorised access, use, copying, reproduction or disclosure and will protect the Confidential Information using the same degree of care as a prudent person in my position would use to protect their own confidential information.
- 7 Except as required by law and subject to paragraph 10 below, within 14 days after whichever of the following first occurs:
- (a) termination of this Undertaking;
  - (b) my ceasing to be employed or retained by [undertaking company] (provided that I continue to have access to the Confidential Information at that time); or
  - (c) my ceasing to be working for [undertaking company] in respect of the Approved Purposes (other than as a result of ceasing to be employed by [undertaking company]);
- I will destroy or deliver to [Provider] the Confidential Information and any documents or things (or parts of documents or things), constituting, recording or containing any of the Confidential Information in my possession, custody, power or control other than electronic records stored in IT backup system that cannot be destroyed or deleted.
- 8 Nothing in this Undertaking shall impose an obligation upon me in respect of information:
- (a) that is in the public domain; or
  - (b) that has been obtained by me otherwise than from [Provider] in relation to this Undertaking;
- provided that the information has not been obtained by me by reason of, or in circumstances involving, any breach of this Undertaking, any other confidentiality undertaking in favour of [Provider] for the Approved purpose, or by any other unlawful means.
- 9 I acknowledge that damages may not be a sufficient remedy for any breach of this Undertaking and that [Provider] may be entitled to specific performance or injunctive relief (as appropriate) as a remedy for any breach or threatened breach of this Undertaking, in addition to any other remedies available to [Provider] at law or in equity.



- 10 The obligations of confidentiality imposed by this Undertaking survive the destruction or delivery to [Provider] of the Confidential Information pursuant to paragraph 7 above.
- 11 I acknowledge that this Undertaking is governed by the law in force in the State of [insert relevant state] and I agree to submit to the non-exclusive jurisdiction of the court of that place.

Signed: \_\_\_\_\_

Print name: \_\_\_\_\_

Dated: \_\_\_\_\_

Witness signature: \_\_\_\_\_

Witness name: \_\_\_\_\_

## **ATTACHMENT 1**

Any document, or information in any document provided by [provider] to [undertaking company] which [provider] claims is confidential information for the purposes of this Undertaking.

**ATTACHMENT 2**

**[Approved purpose(s)]**

## Schedule 7 – Suspension and Termination

7.1 The Access Provider may immediately suspend the supply of a Service or access to the Access Provider’s Network, provided it notifies the Access Seeker where practicable and provides the Access Seeker with as much notice as is reasonably practicable:

- a) during an Emergency; or
- b) where in the reasonable opinion of the Access Provider, the supply of that Service or access to the Access Provider’s Network may pose a threat to safety of persons, hazard to equipment, threat to Network operation, access, integrity or Network security or is likely to impede the activities of authorised persons responding to an Emergency;
- c) where, in the reasonable opinion of the Access Provider, the Access Seeker’s Network or equipment adversely affects or threatens to affect the normal operation of the Access Provider’s Network or access to the Access Provider’s Network or equipment (including for the avoidance of doubt, where the Access Seeker has delivered Prohibited Traffic onto the Access Provider’s Network);
- d) where an event set out in clauses 7.8(a) to (i) occurs
- e) and is entitled to continue such suspension until (as the case requires) the relevant event or circumstance giving rise to the suspension has been remedied.

7.2 If:

- a) the Access Seeker has failed to pay monies payable under this FAD;
- b) a Court determines that (and the decision is not subject to an appeal) the Access Seeker’s use of:
  - a. its Facilities in connection with any Service supplied to it by the Access Provider;
  - b. the Access Provider’s Facilities or Network; or
  - c. any Service supplied to it by the Access Providers,is in contravention of any law; or
- c) the Access Seeker breaches a material obligation under this FAD (**Suspension Event**) and:
- d) as soon as reasonably practicable after becoming aware of the Suspension Event, the Access Provider gives a written notice to the Access Seeker:
  - i. citing this clause;
  - ii. specifying the Suspension Event that has occurred;
  - iii. requiring the Access Seeker to institute remedial action (if any) in respect of that event; and

- iv. specifying the action which may follow due to a failure to comply with the notice, (**Suspension Notice**) and:
  - e) the Access Seeker fails to institute remedial action as specified in the Suspension Notice within 10 Business Days after receiving the Suspension Notice (in this clause 7.2, the **Remedy Period**), the Access Provider may, by written notice given to the Access Seeker as soon as reasonably practicable after the expiry of the Remedy Period:
  - f) refuse to provide the Access Seeker with the Service:
    - i. of the kind in respect of which the Suspension Event has occurred; and
    - ii. a request for which is made by the Access Seeker after the date of the breach, until the remedial action specified in the Suspension Notice is completed or the Suspension Event otherwise ceases to exist; and
  - g) suspend the provision of the Service until the remedial action specified in the Suspension Notice is completed.
- 7.3 For the avoidance of doubt, subclause 7.2(a) does not apply to any monies payable that are the subject of a Billing Dispute that has been notified by the Access Seeker to the Access Provider in accordance with the Billing Dispute Procedures set out in this FAD.
- 7.4 In the case of a suspension pursuant to clause 7.2, the Access Provider must reconnect the Access Seeker to the Access Provider's Network and recommence the supply of the Service as soon as practicable after there no longer exists a reason for suspension and the Access Provider must do so subject to payment by the Access Seeker of the Access Provider's reasonable costs of suspension and reconnection.
- 7.5 If:
- a) an Access Seeker ceases to be a carrier or carriage service provider; or
  - b) an Access Seeker ceases to carry on business for a period of more than 10 consecutive Business Days or
  - c) in the case of an Access Seeker, any of the reasonable grounds specified in subsection 152AR(9) of the CCA apply; or
  - d) an Access Seeker breaches a material obligation under this FAD, and:
    - i. that breach materially impairs or is likely to materially impair the ability of the Access Provider to deliver Listed Carriage Services to its customers; and
    - ii. the Access Provider has given a written notice to the first-mentioned party within 20 Business Days of becoming aware of the breach (**Breach Notice**); and
    - iii. the Access Seeker fails to institute remedial action as specified in the Breach Notice within 10 Business Days after receiving the Breach Notice (in this clause

7.5, the **Remedy Period**), or

- e) the supply of the Service(s) to the Access Seeker has been suspended pursuant to the terms and conditions of this FAD for a period of three Months or more, the Access Provider may cease supply of the Service under this FAD by written notice given to the first-mentioned party at any time after becoming aware of the cessation, reasonable grounds or expiry of the Remedy Period specified in the Breach Notice (as the case may be).

7.5A If an Access Provider ceases to carry on business for a period of more than 10 consecutive Business Days, the other party may cease acquisition of the Service under this FAD by written notice given to the Access Provider at any time after becoming aware of the cessation.

7.6 A party must not give the other party both a Suspension Notice under clause 7.2 and a Breach Notice under clause 7.5 in respect of:

- a) the same breach; or
- b) different breaches that relate to or arise from the same act, omission or event or related acts, omissions or events;

except:

- c) where a Suspension Notice has previously been given to the Access Seeker by the Access Provider in accordance with clause 7.2 in respect of a Suspension Event and the Suspension Event has not been rectified by the Access Seeker within the relevant Remedy Period specified in clause 7.2; and
- d) where an Access Seeker has not rectified a Suspension Event, then notwithstanding clause 7.5(d)(ii), the time period for the purposes of clause 7.5(d)(ii) will be 20 Business Days from the expiry of the time available to remedy the Suspension Event.

7.7 For the avoidance of doubt, a party is not required to provide a Suspension Notice under clause 7.2 in respect of a breach before giving a Breach Notice in respect of that breach under clause 7.5.

7.8 Notwithstanding any other provision of this FAD, either Party may at any time immediately cease the supply of the Service under this FAD by giving written notice of termination to the other Party if:

- a) an order is made or an effective resolution is passed for winding up or dissolution without winding up (otherwise than for the purposes of solvent reconstruction or amalgamation) of the other Party; or
- b) a receiver, receiver and manager, official manager, controller, administrator (whether voluntary or otherwise), provisional liquidator, liquidator, or like official is appointed over the undertaking and property of the other Party; or
- c) a holder of an encumbrance takes possession of the undertaking and property of the other party, or the other party enters or proposes to enter into any scheme of arrangement or any

composition for the benefit of its creditors; or

- d) the other party is or is likely to be unable to pay its debts as and when they fall due or is deemed to be unable to pay its debts pursuant to section 585 or any other section of the *Corporations Act 2001* (Cth); or
- e) as a result of the operation of section 459F or any other section of the *Corporations Act 2001* (Cth), the other party is taken to have failed to comply with a statutory demand; or
- f) a force majeure event substantially and adversely affecting the ability of a party to perform its obligations to the other party, continues for a period of three Months; or
- g) the other party breaches any of the terms of any of its loans, security or like agreements or any lease or agreement relating to significant equipment used in conjunction with the business of that other party related to the supply of the Service under this FAD; or
- h) the other party seeks or is granted protection from its creditors under any applicable legislation; or
- i) anything analogous or having a substantially similar effect to any of the events specified above occurs in relation to the other party.

7.9 The cessation of the operation of this FAD:

- a) does not operate as a waiver of any breach by a party of any of the provisions of this FAD; and
- b) is without prejudice to any rights, liabilities or obligations of any party which have accrued up to the date of cessation.

7.10 Without prejudice to the parties' rights upon termination of the supply of the Service under this FAD, or expiry or revocation of this FAD, the Access Provider must refund to the Access Seeker a fair and equitable proportion of those sums paid under this FAD by the Access Seeker which are periodic in nature and have been paid for the Service:

- a) for a period extending beyond the date on which the supply of the Service under this FAD terminates, or this FAD ceases to have effect, and/or,
- b) as applicable, in respect of a Service which has been suspended for a period of 10 or more consecutive Business Days under Schedule 7 of this FAD, for the period extending beyond that 10 Business Day suspension period to the extent the Service remains suspended under Schedule 7 of this FAD,

subject to any invoices or other amounts outstanding from the Access Seeker to the Access Provider. In the event of a dispute in relation to the calculation or quantum of a fair and equitable proportion, either party may refer the matter for dispute resolution in accordance with the dispute resolution procedures set out in Schedule 5 of this FAD.

## Schedule 8 - Liability and Indemnity

8.1 Subject to clause 8.2, each Party's liability in respect of:

- a) the 12 Month period commencing on the date of the first supply of the Service under this FAD is limited to the aggregate amount paid or payable by the Access Seeker to the Access Provider for the Service provided by the Access Provider in that initial 12 Month period;
- b) any subsequent 12 Month period commencing on any anniversary of the date of the first supply of the Service under this FAD is limited to the aggregate amount paid or payable by the Access Seeker to the Access Provider for the Service provided by the Access Provider in the 12 Month period immediately prior to that anniversary.

For the purposes of this clause 8.1, Liability arises when the act or omission giving rise to the Liability occurs, not when any claim is made by a party under this FAD in connection with that Liability.

8.2 The liability limitation in clause 8.1 does not apply to the Access Seeker's liability to pay the Charges for the Service provided under this FAD, or the Parties' indemnification obligations under clauses 8.3 and 8.4.

8.3 Each Party indemnifies the other Party against all Loss arising from the death of, or personal injury to, a Representative of the other Party, where the death or personal injury arises from:

- a) an act or omission that is intended to cause death or personal injury; or
- b) a negligent act or omission;

by the first Party or by a Representative of the first Party.

8.4 Each Party indemnifies the other Party against all Loss arising from any loss of, or damage to, the property of the other party (or the property of a representative of the other Party), where the loss or damage arises from:

- a) an act or omission that is intended to cause death or personal injury; or
- b) a negligent act or omission;

by the first Party or by a Representative of the first Party.

8.5 Each Party indemnifies the other Party against all Loss arising from a claim by a third person against the Innocent Party to the extent that the claim relates to a negligent act or omission by the first Party or by a Representative of the first Party.

8.6 Subject to clauses 8.3 and 8.4, a Party has no Liability to the other Party for or in respect of any consequential, special or indirect Loss or any loss of profits or data.



- 8.7 A Party has no Liability to the other Party for or in relation to any act or omission of, or any matter arising from or consequential upon any act or omission of, any end-user of a Party or any other third person who is not a Representative of a Party.
- 8.8 The Indemnifying Party is not obliged to indemnify the Innocent Party under this Schedule 8 to the extent that the liability the subject of the indemnity claim is caused or contributed to by:
- a) a breach of this FAD;
  - b) an act intended to cause death, personal injury, or loss or damage to property; or
  - c) a negligent act or omission;
- by the Innocent Party.
- 8.9 The Indemnifying Party is not obliged to indemnify the Innocent Party under this Schedule 8 or for in respect of a claim brought against the Innocent Party by an end-user of the Innocent Party, or a third person with whom the Innocent Party has a contractual relationship, to the extent that the Loss under such claim could have been excluded or reduced (regardless of whether such a Liability actually was excluded or reduced) by the Innocent Party in its contract with the end-user or third person.
- 8.10 The Innocent Party must take all reasonable steps to minimise the Loss it has suffered or is likely to suffer as a result of an event giving rise to an indemnity under this Schedule 8. If the Innocent Party does not take reasonable steps to minimise such Loss then the damages payable by the Indemnifying Party must be reduced as is appropriate in each case.
- 8.11 A Party's liability to the other Party for Loss of any kind arising out of the supply of the Service under this FAD or in connection with the relationship established by it is reduced to the extent (if any) that the other Party causes or contributes to the Loss. This reduction applies whether the first Party's liability is in contract, tort (including negligence), under statute or otherwise.
- 8.12 The Indemnifying Party must be given full conduct of the defence of any claim by a third party that is the subject of an indemnity under clause 8.3 or 8.4, including, subject to the Indemnifying Party first obtaining the written consent (which must not be unreasonably withheld) of the Innocent Party to the terms thereof, the settlement of such a claim.
- 8.13 Nothing in this Schedule 8 excludes or limits a Party's entitlement to damages under Part 5 of the *Telecommunications (Consumer Protection and Service Standards) Act 1999* (Cth).

## Schedule 9 - Communication with end users

- 9.1 The Access Provider may communicate and deal with an Access Seeker's end-users as expressly provided in clauses 9.2 to 9.4 and as otherwise permitted by law.
- 9.2 Subject to clause 9.3, the Access Provider may communicate and deal with the Access Seeker's end-users:
- a) in relation to goods and services which the Access Provider currently supplies or previously supplied to the end-user provided that the Access Provider only communicates and deals through its retail division;
  - b) as members of the general public or a part of the general public or members of a particular class of recipients of carriage or other services;
  - c) where the Access Provider performs wholesale operations which require communications or dealings with such end-users, to the extent necessary to carry out such operations;
  - d) in a manner or in circumstances agreed by the Parties; or
  - e) in or in connection with an Emergency, to the extent it reasonably believes necessary to protect the safety of persons or property.
- 9.3 If:
- a) an end-user of the Access Seeker initiates a communication with the Access Provider in relation to goods and/or services supplied to that end-user by the Access Seeker, the Access Provider must advise the end-user that they should discuss any matter concerning the Access Seeker's goods and/or services with the Access Seeker and must not engage in any form of marketing or discussion of the Access Provider's goods and/or services;
  - b) an end-user of the Access Seeker initiates a communication with the Access Provider in relation to goods and/or services supplied to that end-user by the Access Provider, the Access Provider may engage in any form of marketing or discussion of the Access Provider's goods and/or services; and
  - c) an end-user of the Access Seeker initiates a communication with the Access Provider in relation to goods and/or services supplied to that end-user by the Access Provider and the Access Seeker, the Access Provider must advise the end-user that they should discuss any matter concerning the Access Seeker's goods and/or services, with the Access Seeker, but may otherwise engage in any form of marketing or discussion of the Access Provider's goods and/or services.
- 9.4 Where a Party communicates with the end-user of the other Party, that first mentioned Party must, where practicable, make and maintain records of that communication with the other Party's end-user in circumstances where that communication discusses anything concerning the other Party's goods or services with the end-user. For the avoidance of doubt, the obligation in this paragraph does not include a requirement to provide such

records to the other Party (however such a requirement may arise pursuant to any dispute resolution procedure).

9.5 For the purposes of clauses 9.2 to 9.4, a “**communication**” shall include any form of communication, including without limitation telephone discussions and correspondence.

9.6 Neither Party may represent that:

- a) it has any special relationship with or special arrangements with the other Party, including through the use of the other party’s trade marks, service marks, logos or branding unless otherwise agreed;
- b) there are no consequences for an end-user when an end-user signs an authority to transfer their accounts or services;
- c) a Service has any characteristics or functionality other than as specified in a relevant standard form of agreement or the service description for the Service or in any specifications, collateral or brochures published in relation to the Service; or
- d) the other Party participates in the provision of the first mentioned Party’s services, provided that a Party may, upon enquiry by an end-user, inform the end-user of the nature of its relationship with the other Party.

9.7 Where a Party communicates with an end-user of either Party, the first mentioned Party shall ensure that it does not attribute to the other Party:

- a) blame for a Fault or other circumstance; or
- b) the need for maintenance of a Network; or
- c) the suspension of a Service,

provided that this requirement does not require a Party to engage in unethical, misleading or deceptive conduct.

9.8 This Schedule 9 shall be subject to any applicable industry standard made by the ACMA pursuant to Part 6 of the *Telecommunications Act 1997* (Cth) and any applicable industry code registered pursuant to Part 6 of the *Telecommunications Act 1997* (Cth) in relation to communications or dealings with end-users.

## Schedule 10 - Network modernisation and upgrade notice periods

*Notice to be provided where Access Provider undertakes a Major Network Modernisation and Upgrade*

10.1 Except where the parties agree otherwise, the Access Provider may make a Major Network Modernisation and Upgrade by:

- a) providing the Access Seeker with notices in writing in accordance with clauses 10.2 and 10.4 (**General Notification**) and clauses 10.3 and 10.5 (**Individual Notification**); and
- b) consulting with the Access Seeker, and negotiating in good faith, to address any reasonable concerns of the Access Seeker, in relation to the Major Network Modernisation and Upgrade.

This clause 10.1 does not apply to an Emergency Network Modernisation and Upgrade.

10.2 The period of notices given under a General Notification provided by the Access Provider to the Access Seeker:

- a) must be an Equivalent Period of Notice; and
- b) in any event, must not be less than 30 weeks before the Major Network Modernisation and Upgrade is scheduled to take effect.

10.3 An Individual Notification must be provided by the Access Provider to the Access Seeker as soon as practicable after the General Notification, taking account of all the circumstances of the Major Network Modernisation and Upgrade.

*Information to be provided in the notices*

10.4 A General Notification must include a general description of the proposed Major Network Modernisation and Upgrade, including the indicative timing for the implementation of the Major Network Modernisation and Upgrade.

10.5 An Individual Notification must include the following information in addition to the information provided in the relevant General Notification:

- a) the anticipated commencement date for implementing the Major Network Modernisation and Upgrade
- b) the anticipated amount of time it will take to implement the Major Network Modernisation and Upgrade;
- c) details of the Access Seeker's activated Services, or Services in the process of being activated at the date of the notice, that are likely to be affected by the Major Network Modernisation and Upgrade;
- d) the likely action required by the Access Seeker as a result of the Major Network Modernisation and Upgrade (including the possible impact of the Major Network

Modernisation and Upgrade upon the Access Seeker's Service); and

- e) details of who the Access Seeker may contact to obtain further information about the Major Network Modernisation and Upgrade.

10.6 An Individual Notification only needs to be given where a Service has been activated or the Access Provider is in the process of activating a service as at the date of the Individual Notification, and:

- a) the Major Network Modernisation and Upgrade will require the Access Seeker to take particular action in order to continue to use the Service; or
- b) the Major Network Modernisation and Upgrade will result in the Service no longer being supplied or the Service being suspended for a period of no less than 20 Business Days.

10.7 Where the Access Provider has provided the Access Seeker with an Individual Notification, the Access Provider must provide the Access Seeker with:

- a) updates about the Major Network Modernisation and Upgrade covered by the notice, including:
  - i. any update or change to the information provided in the Individual Notification;
  - ii. any new information available at the time of the update about:
    - 1. how the Access Seeker may be impacted by the Major Network Modernisation and Upgrade; and
    - 2. what steps the Access Seeker will be required to take to facilitate the Major Network Modernisation and Upgrade.

10.8 The updates referred to in subclause 10.7(a) must be provided regularly (which is not required to be any more frequently than Monthly) after the Individual Notification.

#### *Emergency Network Modernisation and Upgrade*

10.9 In the event of an Emergency, the Access Provider may conduct an Emergency Network Modernisation and Upgrade, and

- a) must use its best endeavours to provide the Access Seeker with an Individual Notification prior to the Emergency Network Modernisation and Upgrade being implemented; or
- b) where it is not practicable for prior notice to be given, the Access Provider must provide the Access Seeker with an Individual Notification as soon as reasonably practicable after the Emergency Network Modernisation and Upgrade is implemented.

#### *Negotiations in good faith*

10.10 Except where the parties agree otherwise, the Access Provider must not commence implementation of a Major Network Modernisation and Upgrade unless:

- a) it complies with clauses 10.1 to 10.8; and

- b) it has consulted with the Access Seeker and has negotiated in good faith, and addressed the reasonable concerns of the Access Seeker in relation to the Major Network Modernisation and Upgrade.

10.11 Notwithstanding any continuing negotiations between the Access Provider and the Access Seeker pursuant to clauses 10.1 and 10.10, if the Access Provider has complied with this Schedule 10, a Major Network Modernisation and Upgrade may proceed within a reasonable time period, taking account of all the circumstances, after an Individual Notification has been issued, unless both parties agree otherwise.

10.12 In attempting to reach a mutually acceptable resolution in relation to a variation under clauses 10.1 and 10.10, the parties must recognise any need that the Access Provider may have to ensure that the specifications for the Services which the Access Providers supplies to more than one of its customers need to be consistent (including, without limitation having regard to the incorporation by the Access Provider of any relevant international standards).

#### *Dispute Resolution*

10.13 If a dispute arises in relation to a Major Network Modernisation and Upgrade, then the matter may be resolved in accordance with the dispute resolution procedures set out in Schedule 5 of this FAD.

#### *Miscellaneous*

10.14 A requirement for the Access Provider to provide information in written form includes provision of that information in electronic form.

10.15 Any information provided by the Access Provider in electronic form must be in a text-searchable and readable format.

## Schedule 11 - Changes to operating manuals

11.1 Operational documents concerning the Service that have been provided to the Access Seeker by the Access Provider, or should be provided because they affect the supply of the Service including the technical and operational quality of the Service, or affect the rights and/or obligations of an Access Seeker, may be amended:

- (a) by the Access Provider from time to time to implement or reflect a change to its standard processes, subject to:
  - i. giving 20 Business Days prior written notice to the Access Seeker including a documented list of all amendments, and a marked-up copy of the proposed new operational document that clearly identifies all amendments; and
  - ii. allowing the Access Seeker to provide comments during the notice period on the proposed amendments, and where provided, the Access Provider having reasonably considered those comments and implemented any such comments where the Access Provider considers it reasonable to do so; and
- (b) otherwise, by agreement of the parties.

11.1A Operational documents referred to in this clause include ordering and provisioning manuals, fault management procedures and operational manuals.

11.1B For the purposes of 11.1(a)(ii), an Access Provider in considering whether it is reasonable for it to implement any comments may consider whether the changes reflect all Access Seeker and the Access Provider's interests.

11.2 Upon completion of the process set out in clause 11.1, the Access Provider must notify the Access Seeker and make available to the Access Seeker a copy of the new operational document

11.3 Where operational documents concerning the Service are amended in accordance with clause 11.1 and the Access Seeker believes that the amendments:

- a) are unreasonable; or
- b) deprive the Access Seeker of a fundamental part of the bargain it obtained under this FAD;

the Access Seeker may seek to have the matter resolved in accordance with the dispute resolution procedures set out in Schedule 5 of this FAD.

## Schedule 12 - Recourse to regulated terms

12.1 Unless otherwise agreed by the parties, if

- (a) an Access Agreement between an Access Provider and an Access Seeker is in force and the Access Agreement relates to access to the same Service which this FAD relates to;
- (b) the ACCC makes or varies a Regulatory Determination in relation to the Service and the new Regulatory Determination or the variation deals with a matter other than price; and
- (c) a party to the Access Agreement proposes, by written notice, to the other party to vary the Access Agreement to reflect the terms and conditions in the new or varied Regulatory Determination about that matter, each party must:
  - (i) consider the proposed changes in good faith; and
  - (ii) negotiate the proposed changes in good faith for a reasonable period not exceeding 20 Business days unless a longer period of time is agreed in writing, including, if requested by the other party, to meet with the other party to discuss the other party's proposal.

12.1A If the process under clause 12.1 does not result in a variation to the Access Agreement, this is not a Non-Billing Dispute or Billing Dispute for the purposes of this FAD.

12.2 Unless otherwise agreed by the parties, if

- (a) an Access Agreement between an Access Provider and an Access Seeker is in force and the Access Agreement relates to access to the same Service which this FAD relates to; and
- (b) the ACCC makes or varies a Regulatory Determination in relation to the Service and the new Regulatory Determination or the variation deals with a matter other than price;

either party may terminate the Access Agreement in respect of that Service (but only in respect of that Service) by providing the other party with a written notice, and termination will take effect on the expiry of the period specified in the notice, which must be no less than 120 Business Days after the day that notice is provided.



## Schedule 13 – Network performance reporting

13.1 This Schedule 13 contains performance reporting requirements relating to access by Access Seekers to superfast broadband networks used to supply a declared SBAS Service.

13.2 The Access Provider:

- (a) must measure and monitor its performance, and based on that information, produce reports about the performance metrics set out in this Schedule 13;
- (b) must use its best endeavours to ensure that any reports provided or otherwise made available under this Schedule 13 are accurate in all material respects; and
- (c) must correct, and notify each Access Seeker of the correction of, any inaccuracies (including omissions) in any such report within 30 business days.

13.3 The Access Provider must:

- (i) specify and keep current its Service standards in relation to the attributes in this Schedule 13, inclusive of a benchmark level of performance to be determined by the Access Provider; and
- (ii) provide information to each Access Seeker on any corrective action taken by the Access Provider when it fails to meet its own benchmark Service standards including, but not limited to, any compensation available.

13.4 The Access Provider must provide to each Access Seeker, by no later than one Month after the end of each Reporting Period, a report setting out the following minimum information in respect of the relevant Reporting Period:

- (a) in relation to the connection, activation, and transfer of Services, the benchmark number of business days to complete these activities, whether the Access Provider has met its benchmark timeframes and, if not, the number of Services for which the benchmark was exceeded
- (b) the number of network faults, the benchmark number of business days to rectify the fault, whether the Access Provider has met its benchmark fault rectification timeframes and, if not, the number of faults for which the benchmark was exceeded
- (c) the number of Services experiencing recurring faults, defined as Services with 3-plus faults in any 60-day period or 4-plus faults in any 12-Month period (where the exceeding fault falls within the Reporting Period)
- (d) the number of Services experiencing multiple dropouts (lasting 30 seconds or more) or temporary loss of Service within a 24-hour day
- (e) the number of network outages, including both planned and emergency outages, the duration of outages, and the number of Services impacted by the outages
- (f) network performance metrics aggregated across the entirety of the Access Provider's network through which it provides the declared SBAS, including:

- i. information on attainable download and upload speeds of Services on the Access Provider's network
  - ii. the Access Provider's network performance regarding traffic frame delays
  - iii. Network utilisation on the Access Provider's network, including the number of times its shared network resource exceeds a benchmark threshold and the duration of the exceedance
- 13.5 The manner and format of the reports to be delivered may be determined by the Access Provider.
- 13.6 The Access Provider is required to provide the information in clause 13.4, for the nearest Reporting Period, on request or as soon as practical to:
- (a) a prospective Access Seeker negotiating access in good faith; and
  - (b) the ACCC on request.

*Commencement and duration*

- 13.7 This Schedule 13 commences from 1 October 2024 and remains in force for the duration of this FAD.

Note: For the avoidance of doubt, the first Reporting Period for which the above information is to be made available to Access Seekers is the 31 December 2024 Reporting Period.

- 13.8 This Schedule is not applicable to a Telstra Provider in respect of the supply of the Fibre Access Broadband Service for the duration of this FAD.

# Appendix D: Retail minus approach to estimated wholesale SBAS prices

We have conducted this analysis in response to concerns raised by Uniti regarding whether the NBN-benchmarked prices in this decision would allow it to recover its direct cost of providing access to the declared SBAS. As discussed in the main body of this paper, we have received limited information in this inquiry on the actual cost to SBAS providers to provide wholesale access, recognising that regulated prices for the SBAS are based on price benchmarking with the NBN rather than a cost build up approach such as a building block model. For this reason, we have utilised a retail minus approach to consider a proxy for Uniti's direct cost of providing access to the SBAS.<sup>127</sup>

The retail minus approach<sup>128</sup> involves estimating a per unit retail costs and subtracting this cost from a provider's retail offers to arrive at a proxy wholesale price.

For the purposes of this analysis, we have:

- assumed a benchmark average retail transformation cost of \$15. This estimate was provided to us by stakeholders for our 2019-20 [NBN pricing inquiry](#)<sup>129</sup>
- assumed two scenarios for retail prices: the headline retail price for Uniti Retail's 25Mbps, 50Mbps and 100 Mbps services,<sup>130</sup> and Uniti's temporary discounted retail prices
- applied an upward adjustment of \$2.80 to the retail transformation cost on the Uniti network to account for its state-based aggregation charge
- removed the impact of GST from the estimates.

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<sup>127</sup> For the purposes of this analysis we focus on the Uniti network. We note that TPG does not currently offer retail plans for the regulated speed tiers to conduct a similar analysis of the Vision Network.

<sup>128</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 ADSL interim access determination in 2012 but adopted a building block model for subsequent wholesale ADSL access determinations.

<sup>129</sup> [c-i-c] [c-i-c]

<sup>130</sup> We have included the 100 Mbps speed tier for illustrative purposes only and note that this speed tier is not subject to regulation under the access determination.

**Table D.1 Estimated wholesale access price of Uniti network**

Product	25/5Mbps	50/20Mbps	100/20Mbps
<b>Retail price<sup>131</sup></b>	<b>\$53.64</b>	<b>\$62.73</b>	<b>\$71.82</b>
less State aggregation charge		\$2.80	
less Transformation cost		\$15.00	
less 10% retail margin	\$5.36	\$6.27	\$7.18
<b>Estimated wholesale price</b>	<b>\$30.47</b>	<b>\$38.65</b>	<b>\$46.84</b>

**Table D.2 Estimated wholesale access price of Uniti network (discounted prices)**

Product	25/5Mbps	50/20Mbps	100/20Mbps
<b>Retail price</b>	<b>\$44.55</b>	<b>\$53.64</b>	<b>\$62.73</b>
less State aggregation charge		\$2.80	
less Transformation cost		\$15.00	
<b>Estimated wholesale price</b>	<b>\$26.75</b>	<b>\$35.84</b>	<b>\$44.93</b>

**[c-i-c] [c-i-c]**


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<sup>131</sup> Source: Uniti Retail website. Accessed on 7 February 2024. Discounted prices are based on ACCC web capture data from May 2023 to February 2024 (see **Appendix F**). For the discounted prices we assume no retail margin.

# Appendix E: Analysis of the impact of the RBS levy on retailer margins

We have estimated the impact of full pass-through of the RBS levy on average retailer margins utilising the following assumptions:

- NBN and SBAS network wholesale prices are equivalent because of the benchmarking approach to SBAS regulation. We have included the 100 Mbps speed tier for illustrative purposes only and note that this speed tier is not subject to regulation under the access determination<sup>132</sup>
- The wholesale access price is inclusive of the average CVC overage charge retailers incur for the applicable speed tiers. We recognise that retailers may have different usage profiles on SBAS networks
- We have assumed a benchmark retail transformation cost of \$15 (see **Appendix D**)
- Full pass through of the RBS levy cost to retailers and no pass through to end-users
- We have removed the impact of GST from the estimates
- Profit margins are per service per month.

The potential impact of an RBS levy pass-through is shown in the tables below. Table F.2 shows the estimated negative impact on retail profit margins where the RBS levy is passed through in full to retailers without retailers passing on this cost to end-users.

**Table F.1 Retail margins with average transformation costs and no RBS levy pass through to retailers or end-users**

	Product	25/5 Mbps	50/20 Mbps	100/20 Mbps
<b>NBN / SBAS network wholesale charge</b>	<b>Estimated wholesale charge</b>	\$47.16	\$66.12	\$70.00
	Retail price	\$63.63	\$68.17	\$81.81
TPG	Gross profit margin	\$16.47	\$2.05	\$11.81
	Retail price	\$59.08	\$71.81	\$77.26
Exetel	Gross profit margin	\$11.92	\$5.69	\$7.26
	Retail price	\$53.64	\$62.73	\$71.82
Uniti	Gross profit margin	\$6.48	<b>-\$3.39</b>	\$1.82
	Retail price	\$77.27	\$90.91	\$100.00
Telstra	Gross profit margin	\$30.11	\$24.79	\$30.00
	Retail price	\$59.09	\$72.73	\$77.27
Dodo	Gross profit margin	\$11.93	\$6.61	\$7.27
	Retail price	\$68.18	\$77.27	\$86.36
Aussie Broadband	Gross profit margin	\$21.02	\$11.15	\$16.36
	Retail price	\$63.64	\$77.27	\$80.91
Optus	Gross profit margin	\$16.48	\$11.15	\$10.91
	Retail price	\$63.59	\$68.14	\$81.77
Leaptel	Gross profit margin	<b>-\$1.62</b>	\$2.74	\$8.23

<sup>132</sup> Source: Retailer websites and NBN Co's price list as of 1 December 2023. We have chosen the NBN for the analysis as it has a competitive retail market with a cross-section of tier one, challenger, and budget brands.

**Table F.2 Retail margins with full RBS levy pass-through to retailers without retailers passing on RBS levy cost to end-users**

NBN / SBAS wholesale charge	Product	25/5 Mbps	50/20 Mbps	100/20 Mbps
		Estimated wholesale charge	\$56.44	\$76.57
TPG	Retail price	\$63.63	\$68.17	\$81.81
	Gross profit margin	\$7.19	<b>-\$8.40</b>	\$1.62
Exetel	Retail price	\$59.08	\$71.81	\$77.26
	Gross profit margin	\$2.64	<b>-\$4.76</b>	<b>-\$2.93</b>
Uniti	Retail price	\$53.64	\$62.73	\$71.82
	Gross profit margin	<b>-\$2.80</b>	<b>-\$13.84</b>	<b>-\$8.37</b>
Telstra	Retail price	\$77.27	\$90.91	\$100.00
	Gross profit margin	\$20.83	\$14.34	\$19.81
Dodo	Retail price	\$59.09	\$72.73	\$77.27
	Gross profit margin	\$2.65	<b>-\$3.84</b>	<b>-\$2.92</b>
Aussie Broadband	Retail price	\$68.18	\$77.27	\$86.36
	Gross profit margin	\$11.74	\$0.70	\$6.17
Optus	Retail price	\$63.64	\$77.27	\$80.91
	Gross profit margin	\$7.20	\$0.70	\$0.72
Leaptel	Retail price	\$63.59	\$68.14	\$81.77
	Gross profit margin	\$7.15	<b>-\$8.43</b>	\$1.58

**Table F.3 Retail price increases that would be necessary to maintain a 10% margin under full RBS levy pass-through**

	25/5 Mbps	50/20 Mbps	100/20 Mbps
TPG	-	23.5%	7.8%
Exetel	5.1%	17.3%	14.2%
Uniti	15.7%	34.3%	22.8%
Telstra	-	-	-
Dodo	5.1%	15.8%	14.2%
Aussie Broadband	-	9.0%	-
Optus	-	9.0%	9.0%
Leaptel	-	23.6%	7.9%

# Appendix F: Uniti Retail prices

**Table F1: Uniti Retail prices and discounts, May 2023 to February 2024**

Month	Uniti Retail prices <sup>133</sup>		Activation fee waiver	Other inclusions
	25/5 Mbps	50/20 Mbps		
February 2024	\$49.00 <del>\$59.00</del>	\$59.00 <del>\$69.00</del>	Free Activation	
January 2024	\$59.00	\$69.00	Free Activation	12-month plan: 2 months free 24-month plan: 4 months free
December 2023	\$49.00 <del>\$59.00</del>	\$59.00 <del>\$69.00</del>		
November 2023	\$49.00 <del>\$59.00</del>	\$59.00 <del>\$69.00</del>	Free Activation	12-month plan: 2 months free 24-month plan: 4 months free
October 2023	-	-	-	-
September 2023	\$69.00	\$79.00		
August 2023	\$69.00	\$79.00	Free Activation, 12 or 24-month contract only.	
July 2023	\$44.95 <del>\$64.95</del>	\$54.95 <del>\$74.95</del>	Free Activation, 12 or 24-month contract only.	
June 2023	\$44.95 <del>\$64.95</del>	\$54.95 <del>\$74.95</del>	Free Activation, 12 or 24-month contract only.	First 2 months free
May 2023	\$44.95 <del>\$64.95</del>	\$54.95 <del>\$74.95</del>	Free Activation, 12 or 24-month contract only.	First 2 months free

<sup>133</sup> Figures that have been struck through indicate a mark-down in price for the first 6 months.

# Appendix G: List of submissions

## Submissions in response to discussion paper

- **ACCAN**, 20 December 2021
- **Gary McLaren**, 20 December 2021
- **Internet Association of Australia**, 20 December 2021
- **Telstra**, 20 December 2021
- **TPG**, 20 December 2021 (and 1 July 2022, confidential submission)
- **NBN Co**, 24 February 2022

## Stakeholder meetings

- **TPG**, 18 May 2022
- **Launtel**, 19 May 2022
- **Telstra**, 20 May 2022
- **Lightning Broadband**, 24 May 2022
- **Telair**, 25 May 2022
- **Centorrino Technologies**, 27 May 2022
- **Uniti Group**, 9 June 2022
- **Leaptel**, 16 June 2022
- **Aussie Broadband**, 20 June 2022

## Submissions in response to draft decision

- **ACCAN**, 15 December 2022
- **Australian Small Business and Family Enterprise Ombudsman**, 15 December 2022
- **Aussie Broadband**, 15 December 2022
- **NBN Co**, 15 December 2022
- **Telstra**, 15 December 2022
- **X Integration (Leaptel)**, 15 December 2022
- **Internet Association of Australia**, 19 December 2022
- **TPG**, 19 December 2022

## Further consultation on exposure draft of access determination instrument

- **ACCAN**, 28 April 2023
- **Aussie Broadband**, 28 April 2023
- **Internet Association of Australia**, 28 April 2023
- **Telstra**, 28 April 2023
- **TPG**, 28 April 2023
- **Uniti Group**, 28 April 2023
- **X Integration (Leaptel)**, 28 April 2023



## Further consultation on price benchmarking approach

- **Aussie Broadband**, 27 November 2023
- **Internet Association of Australia**, 30 November 2023
- **Launtel**, 30 November 2023
- **Leaptel**, 30 November 2023
- **Telstra**, 30 November 2023
- **TPG**, 30 November 2023
- **Unifi Group**, 18 October 2023 and 30 November 2023, confidential submissions