

The logo for Optus, consisting of the word "OPTUS" in a bold, teal, sans-serif font.

Submission in response to
ACCC Discussion Paper

**SBAS and LBAS final
access determination joint
inquiry**

Public Version

October 2016

OVERVIEW

1. Optus welcomes the opportunity to provide comments on the appropriate pricing of the Local Bitstream Access Service (LBAS) and Superfast Bitstream Access Service (SBAS). However, we cannot provide fully informed comments in response to the discussion paper as the scope of the SBAS declared service remains unclear.
2. Optus is concerned that the amendments to the SBAS declaration extend the declaration beyond its stated objective of NBN alternative high speed broadband networks. All NBN-related instruments (including LBAS) apply only to residential and small business premises. The Vertigan Report specifically advised against any special intervention in relation to business customers.
3. Notwithstanding this clear policy position, the SBAS service description has the effect of including previously unregulated business transmission and data products.
4. This issue has not been adequately addressed in either the declaration inquiry or in the current discussion paper.
5. Optus therefore requests the ACCC:
 - (a) Clarifies its intended scope of the SBAS service.
 - (b) Provide the information it relied upon to demonstrate that extending SBAS to previously unregulated business products is consistent with the legislative provisions.
6. Absent this information, Optus is not in a position to assess whether issues put in the FAD inquiry promote the LTIE.

SUMMARY OF NBN REGULATIONS

7. The NBN is a residential high speed broadband access network. It gives effect to the structural separation of Telstra's fixed line network. It does not, however, require Telstra to separate its business networks. NBN Co is the legislated monopoly provider of residential high speed broadband networks. There is no such monopoly for the provision of broadband networks to business end-users.
8. As a result, the superfast broadband rules in Parts 7 and 8 of the *Telecommunications Act* apply only to networks supplying services to residential and small business end-users.
9. This can be seen in the LBAS declared service. The declared LBAS service is a mandatory declared service under the Act, and was introduced during the time of the NBN reforms. It cannot be varied or revoked. The service description is consistent with the NBN policy framework, namely:
 - (a) Superfast telecommunications network used to supply a Layer 2 bitstream service to residential or small business customers;
 - (b) Service usually provides a download data rate 25 Mbps or higher;¹ and
 - (c) Applies to network built or upgraded after 1 January 2011.²

¹ Section 152AGA of the CCA.

10. Following the adoption of the multi-technology mix (MTM) approach to the NBN, NBN Co faced the potential for limited network competition from networks deploying VDSL-based technologies (e.g. FTTB/dp) utilising fibre networks that fell outside the restrictions under Parts 7 and 8 of the *Telecommunications Act* – that is, fibre networks built prior to 2011 or which required extensions of less than one kilometre.
11. The Vertigan Report addressed these concerns in its discussion on the terms on which competition between NBN Co and alternative providers should occur. However, the Vertigan Report made it very clear that its consideration of these issues did not extend to business customers. In fact, Vertigan specifically warned against any such intervention:

*Telecommunications service providers have generally been responsive to the needs of larger business customers and can have every incentive to remain so. Consistent with this observation, **no special intervention in support of those customers should be considered.*** [emphasise added]³
12. In December 2014 carrier licence conditions (CLCs) were introduced to address this perceived ‘loop-hole’ and to ensure a level playing field between NBN and potential competitor networks. This licence conditions, however, specifically exempted ‘any local access lines that are used to supply carriage services to business customers, public bodies, or large charity customers.’⁴ The CLCs impose functional separation and wholesale supply obligations on carriers who supply superfast carriage service to residential customers but were otherwise not captured by the Parts 7 and 8 restrictions.
13. As can be seen, the NBN policy itself, and all the related instruments addressing issues of NBN competition and level playing field issues, focus only on superfast networks that supply residential and small business premises. There is no, and never has been any, intention that these instruments extend to business customers.

THE SBAS DECLARATION

14. The ACCC stated that the SBAS declaration applies to:
 - (a) Networks existed prior to 2011 that are currently exempt from ‘level playing field provisions’ in Parts 7 and 8 of the *Telecommunications Act*; and
 - (b) Networks that have received ministerial exemptions from this Part, except to the extent that they are caught by the exceptions in the SBAS service description itself.⁵
15. The ACCC claim that the SBAS is very similar to other superfast carriage services supplied on a declared basis by NBN Co and providers who are subject to the level playing field provisions in Parts 7 and 8 of the *Telecommunications Act*.⁶
16. Optus does not agree with the description that SBAS is very similar to the other superfast services subject to NBN-related instruments. There is one fundamental difference which is not mentioned in this inquiry – SBAS applies to networks that supply services to business and residential premises.

² The definition in the Telco Act is imported into the CCA in section 152AC of the CCA

³ Independent cost-benefit analysis of broadband and review of regulation; Volume I – National Broadband Network Market and Regulatory Report, 2014, p.74

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

⁵ ACCC, 2016, SBAS Final Decision Report, p.vi

⁶ Op cit., ACCC 2016, p.vii

17. During the declaration consultation process the ACCC altered key elements of the existing NBN-related policy instruments. Namely, the ACCC decided to extend NBN-related remedies to business networks. The ACCC took the view that supply of superfast broadband to high revenue business customers as well as public bodies and charity customers in CBD areas were sufficiently competitive, but in areas outside of the CBDs, competition was not sufficient. Optus notes this view is inconsistent with the observations of the Vertigan Report. It also appears inconsistent with market realities – for example, the ACCC seems to assume there is only one business grade superfast network supplying key business areas in Sydney such as North Sydney, Chatswood and Macquarie Park. Such an assumption is clearly wrong.
18. Interestingly, while the ACCC expanded SBAS beyond the remit of the current NBN policy, there is no reference to the way in which business products are purchased and sold in related business markets is included in the final declaration decision or IAD.
19. The SBAS declaration does contain an exemption for services covered by the DTCS declaration. However, it appears the decision did not take into account the limited scope of DTCS and specifically, that the DTCS does not include transmission products that utilise IP or MPLS networks. The DTCS decisions consistently make clear that these services do not fall within the technical definition of DTCS. Optus notes the majority of business data products utilise such technology.
20. Both the declaration inquiry documents and this FAD discussion paper are silent on the impact of SBAS declaration on business products.
21. Optus therefore requests the ACCC clarifies its intended scope of the SBAS service. Optus further requests the ACCC provide the information it relied upon to demonstrate that extending SBAS to previously unregulated business products is consistent with the legislative provisions.

LBAS-SBAS COMBINED FAD PROCESS

22. Optus is concerned that the LBAS-SBAS FAD discussion paper is based on several incorrect statements:
 - (a) That the SBAS service gives effect to the Vertigan recommendations, even though the changes to the SBAS declaration including business services is directly counter to the Vertigan recommendation that no intervention should be considered.
 - (b) That the SBAS and LBAS are similar services, notwithstanding the materially different scope of the two services.
23. There is no reference to the extension of the SBAS service description beyond the residential focus of all other NBN-related instruments and the implications for the market or efficient pricing of the service.

LBAS and SBAS are fundamentally different services

24. The ACCC note to date the LBAS and SBAS services have been subject to similar pricing approaches; namely, benchmarked against NBN residential services.
25. As noted above, LBAS and SBAS are fundamentally different services given the unilateral change to the SBAS description. Consequently, Optus does not support the combined FAD process. LBAS is fundamentally an NBN replacement residential service. SBAS, while composing an element of residential services, covers the larger business market including business connectivity transmission products over IP-MPLS networks.

26. The pricing structure for business products, including service levels and other non-price elements, are materially different from that expected by residential end-users.
27. For example, the SBAS service description would cover Telstra Wholesale's Ethernet Access product. This is an Ethernet-based transmission network that traverses an MPLS core.⁷ As a result of this, it falls outside of the DTCS definition, but because it is a Layer 2 service with download speeds greater than 25 Mbps, it falls within SBAS. The pricing construct is materially different from that proposed in the FAD discussion paper. The price is based on a route matrix, with speeds up to 1 Gbps. There are also business grade service levels.

SBAS inconsistent with Vertigan recommendations

28. Optus repeats the direction in the Vertigan Report that *no special intervention in support of business customers should be considered*. By altering the SBAS service description, the ACCC has acted counter to this advice. It is not correct to say the SBAS service gives effect to the Vertigan recommendations.
29. The ACCC should note in its assessment of its approach to SBAS that it has taken a different position which is at odds with the NBN related-instruments and the Vertigan recommendations. Further, the ACCC should outline how such departure is consistent with the legislative criteria.

LBAS-SBAS FAD makes no reference to business services

30. Optus highlights that the FAD discussion paper makes no reference to the material issue of regulation of *all* superfast business networks outside of CBD areas. Further, it is not clear whether providers of business superfast communications networks are fully aware of the application of the SBAS.
31. Optus notes the discussion around price benchmarking refers to regulated residential prices for NBN and Telstra's WADSL services. Optus repeats that these services are materially different than the range of business services that will be covered by the SBAS declaration; for example, Telstra Wholesale's Ethernet Access product.
32. There is no other mention in the FAD of the impacts of declaration on the provision of business fibre services outside of CBD areas. For example, Vocus' fibre network connecting over 4,000 buildings would be declared.⁸ Only buildings in CBD areas would be exempt. It is not clear how the terms of the FAD promote competition or efficient use of the Vocus fibre network. It is not clear how regulating the prices to access Vocus' fibre network to be consistent with NBN or Telstra's WADSL service would promote the LTIE of business users.
33. It is not clear whether forcing Vocus to offer business grade fibre services at NBN-like price points would be consistent with Vocus' legitimate business interest.

⁷ See: <https://www.telstrawholesale.com.au/download/document/ethernet-access-factsheet.pdf>

⁸ Vocus, 2016, FY16 Presentation, p.12.