



Submission by AAPT Limited (16 September 2011)

to the ACCC

Discussion Paper on *Layer 2 bitstream service description*,

dated August 2011



Introduction

1. AAPT Limited (**AAPT**) welcomes the opportunity to comment on the Australian Competition and Consumer Commission (**ACCC**) Discussion Paper “*Layer 2 bitstream service description*”, dated August 2011 (**Discussion Paper**).
2. AAPT agrees with the ACCC’s view that seeking industry’s view on the proposed service description of the declared Layer 2 bitstream service (**L2BS**) is “prudent” given that the Layer 2 bitstream declaration will (unlike other declarations) not have an expiry date and will stay in force indefinitely (as it cannot be varied or revoked by the ACCC).¹

Executive summary

3. AAPT considers that the permanency of, and the inability to, change the Layer 2 bitstream declaration should be an overriding consideration in formulating the proposed service description. While AAPT agrees with the ACCC’s approach to drafting the service description in technology neutral terms to ensure that it remains relevant over time, AAPT considers that the service description as it is currently drafted is too “open ended” in relation to defining the circumstances in which the obligation to provide a Layer 2 bitstream service on a non-discriminatory and wholesale basis will apply.
4. The lack of prescription in certain aspects of the service description, in particular the omission of explicit references to various ‘carve outs’ from the application of the declaration, does not deliver certainty. On the contrary, while hiding important details by cross-referencing definitions contained in legislative provisions may reduce clutter in the service description, it is likely to make it very difficult for service providers to

¹ Discussion Paper, p ages 3-4.



ascertain whether obligations in relation to the supply of the L2BS on an open-access and non-discriminatory basis will apply to their network.

5. It is AAPT's view that because of the enduring nature of the L2BS declaration and resulting obligations, it would be more appropriate to make the service description as well defined as possible (with the exception of the technical features) to:
 - ensure only the contemplated service (including any exceptions and carve outs) is covered by the declaration; and
 - provide clarity and certainty to those service providers who may be subject to the relevant obligations.

Exceptions and carve-outs should be explicitly included

6. AAPT considers that the service description should explicitly provide that the declaration only applies to designated superfast telecommunications network that target or service residential or small business customers, rather than merely referring to a legislative definition which can change over time. In other words, it should be made clear that networks servicing customers that are public bodies and companies are not captured as they are not networks wholly or principally for supplying carriage services to residential and small business customers.
7. As noted in the Explanatory Memorandum²: *“The term ‘small business customer’ is central to the definition of the type of networks to which the obligation to provide a Layer 2 bitstream service applies under the amendments to proposed subsection 141 [of the Telecommunications Act].”*
8. AAPT considers that this definition, which covers a customer who is a small business employer (within the meaning of the Fair Work Act 2009) (which

² Telecommunications legislation amendment (national broadband network measures—access Arrangements) bill 2011, Supplementary explanatory memorandum, page 18.



is intended to cover entities carrying on business and who employ fewer than 15 employees) and sole traders, should also be expressly included in the service description. This is particularly important to AAPT given our customer base does not include residential customers. AAPT is continually upgrading its current network and therefore requires certainty as to whether it will be subject to the obligation to provide a Layer 2 bitstream service on a non-discriminatory and wholesale-only basis.

9. In addition, the other statutory exemptions to the level playing field arrangements set out in Parts 7 and 8 of the *Telecommunications Act 1997* should also be explicitly referred to in the L2BS service description.³ These exemptions cover:
 - extensions to existing superfast networks within current real estate developments;
 - extensions to existing network footprints no more than one kilometre from a point on the infrastructure of the existing network, as the network stood immediately before 1 January 2011;
 - connections to premises in close proximity to existing network footprints.
10. AAPT notes that subsections 152AL(3F) and (3G) of the *Competition and Consumer Act 2010* clarifies that a declaration of the L2BS does not prevent the ACCC from making a declaration in relation to another, or the *same*, Layer 2 bitstream service. Accordingly, any future ‘broadening’ of the declaration can be addressed through the ACCC making a separate declaration as the need arises.

³ See section 141B of the Telecommunications Act 1997.



11. This approach would provide more certainty for industry than having to rely on the ability to seek exemptions from the obligations, particularly given the ever-changing nature of the telecommunications industry.
12. **Answers to the ACCC's questions** - AAPT has provided answers to the questions posed by the ACCC in the Discussion Paper in the last section of this submission.

Answers to the ACCC's questions

1. Does the draft service description sufficiently describe a Layer 2 bitstream service?

As set out above, AAPT considers that for clarity and certainty, any exceptions or carve-outs which go to defining the circumstances in which the obligation to supply a Layer 2 bitstream service on non-discriminatory wholesale basis applies should be explicitly included in the service description, rather than taking a cross-referencing to legislation approach.

2. Is the use of superfast carriage service an appropriate method to define the required throughput rate for the service? If not, what is an appropriate method to define the required throughput rate for the service, and why?

AAPT considers the use of superfast carriage service to define the required throughput rate for the service is appropriate and agrees it provides for some future flexibility.

3. Is the draft service description sufficiently technology neutral to be applicable as technology changes in the future?

AAPT considers the service description is sufficiently technology neutral so that it is not time bound and not affected by any technological change that may occur in the future.

4. Does the draft service description accurately represent the service depicted in figure 1 above? If not, how should the service description be amended to do so.

Yes, subject to changes being made to address AAPT's concerns set out above.



5. Will it be economically viable for Access Seekers to purchase backhaul from a point of interconnection to their PoP separately from the layer 2 bitstream service?

AAPT notes that the ACCC anticipates that Access Seekers will purchase backhaul from the point of interconnection to the PoP as a separate service from the Layer 2 bitstream access to the customer premises.

Whether it will be economically viable for Access Seekers to purchase backhaul from a point of interconnection to their PoP separately from the layer 2 bitstream service will depend on how many end users are connected to the superfast carriage service or network.

AAPT considers that this arrangement will suit the wholesale provider market and will tend to substantially benefit providers with a large existing customer base which can be migrated to the L2BS, particularly in less competitive or more remote geographic areas. This imbalance becomes even greater where a change to POI location occurs. For example, Telstra's cost of relocating will be disproportionately lower than smaller service providers. Nor will Telstra need to seek access to associated facilities given these are likely to be located at its own exchanges.

6. Should a connection protocol be specified in the service description? If so, what protocol?

AAPT does not consider that a "connection protocol" needs to be specified.

7. Should a quality of service be specified in the service description?

AAPT does not consider that "quality of service" needs to be specified.

8. Any other matters relating to the drafting of the service description.

AAPT has nothing further to add at this preliminary stage.