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Melbourne

To :

Australian Competition & Consumer Commission

via email : superfastbroadbandinquiry@accc.gov.au

Submission on SBAS and LBAS declaration draft decision

Thank you for the opportunity to submit comments on the ACCC's public inquiry into the local bitstream access services (LBAS) and superfast broadband access service (SBAS) declared services and the draft decision published by the ACCC on 18 December 2020.

The draft ACCC decision is to combine the LBAS and SBAS declaration under a single SBAS declaration instrument and extend the declaration until July 2026. This is clearly not in line with my original submission which advocated for the ACCC to geographically descope the coverage of the SBAS regulation so that it only applies where the National Broadband Network (NBN) has not been rolled out.

The ACCC decision that the declaration remain and is in the Long Term Interest of End Users (LTIE) appears to be based on two key conclusions, namely :

The ACCC therefore considers that extending declaration of superfast broadband access services would be in the LTIE because it:

- *is required to align wholesale prices with the efficient cost of the service, to promote competition in the downstream retail market for superfast broadband services*
- *will promote the efficient use of, and investment in, infrastructure, as in the absence of declaration, network operators have incentives to set prices above efficient costs.*

I will address each of these reasons in turn.

Competition in Downstream Markets

The ACCC is of the view that declaration is necessary to align wholesale prices with the efficient cost of the service, to promote competition in the downstream retail market for superfast broadband services (see p. 16 of the Draft Decision paper).

This would only be the case if the provision of wholesale services by SBAS providers was a competitive restraint on NBN Co's pricing of its own wholesale services and that NBN Co was otherwise unrestrained. The facts are that NBN Co is now the dominant provider of superfast broadband access like services (although NBN Co is not covered by the SBAS declaration) and has substantial market power. As a result NBN Co is the near 100% monopoly provider of SBAS-like services which has been the intent of government policy since its inception and the

subsequent agreements struck for Telstra to progressively handover its monopoly fixed telecommunications infrastructure position to NBN Co (ie. achieve structural separation).

As a consequence of this monopoly NBN Co is, rightly, subject to substantial regulation of both its price and non-price terms and conditions via the Special Access Undertaking process that the ACCC is responsible for.

Efficient pricing and functioning of the SBAS downstream markets is predominantly an outcome of the SAU regulatory process and other government restrictions on NBN Co (eg. its mandate to be wholesale only).

The declaration of the SBAS provides minimal, if any, competitive restraints on NBN Co and has negligible contribution to the downstream market.

The ACCC observes that the state of infrastructure competition in Australia is minimal and this is part of its justification for declaration of the SBAS (see below discussion on monopoly pricing power of broadband access providers). This lack of infrastructure competition is the core reason why SBAS regulation has little to no impact on downstream markets (which are dominated by the regulation of NBN Co and not SBAS).

The continuing declaration of SBAS services limits rather than increases competitive pressures on NBN Co as the regulations impose barriers to existing or new SBAS providers building more broadband infrastructure that would compete with NBN Co and hence provide more restraints on NBN Co's pricing power.

TPG Telecom, the operator with the most extensive non-NBN SBAS infrastructure, indicated this position clearly in its submission:

TPG's ability to effectively compete against NBN Co has been impeded by the costs and restrictions imposed by the current regulatory framework, including through the LBAS and SBAS declarations. TPG has faced a regulatory structure that was intended to protect NBN Co from competition, rather than promote competition with the NBN.

In particular any errors in the regulatory process that governs NBN Co's price and non-price terms that may result in NBN Co's regulated prices being set too high compared to those that would be efficiently provided by a competitive market would be less likely to be corrected by the operation of market forces compared to the scenario where existing and new entrants are not subject to additional regulation via the SBAS declaration. This would clearly not be in accordance with the LTIE.

An example may help illustrate this point more clearly. An existing or new entrant service provider may identify a geographic market that it believes it is worthwhile providing SBAS type products to. The service provider believes it has a lower cost structure over the long term by investing in the necessary broadband infrastructure rather than procuring services from NBN Co via the regulated Wholesale Broadband Agreement terms and conditions. If the service provider proceeds with the investment then NBN Co will be faced with competitive constraints in this particular geographic market and may decide to lower prices or offer different terms to its downstream customers in order to retain business. However, if the investment does not proceed because the service provider's costs are increased due to its

obligations under the SBAS declaration, then both NBN Co's downstream customers and end users will forgo the benefits that would have resulted from the investment. The LTIE test will have failed these end users.

Any arguments that the potential SBAS provider is in competition with NBN Co "for the market" (ie. looking to entrench a monopoly position by front-running the NBN Co build) have fallen by the wayside given NBN Co's rollout completion.

Some proponents for the declaration of the SBAS service may argue that NBN Co is not able to compete on a geographic basis due its policy of setting uniform wholesale pricing across all geographies regardless of costs and technologies. The ACCC, in addressing the scope of the wholesale market, stated its preference for a 'national market definition rather than according to a particular local or regional geographic market'. Support for this was taken from a view that RSPs and access providers tend to price their services on a national basis and to simplify administrative functions.

However, in its response to the Vertigan Inquiry in 2014, Government policy was explicitly changed to 'implement a wholesale price cap model' on NBN Co rather than uniform national pricing. The purpose of the change was to allow NBN Co 'increased flexibility and assist it to compete under the new more competitive market arrangements'.

It is not clear whether the ACCC's has the view that uniform pricing of wholesale SBAS and NBN services is part of its justification for the SBAS declaration being in the LTIE. However, if this ACCC is of this view, then this would be a significant error in reasoning. Price differentiation is at the heart of competition and competition has always been the key underpinning objective that best promotes the LTIE.

It is maintained that the SBAS declaration, by imposing more obligations on non-NBN service providers, acts as a disincentive to invest and compete with NBN Co. This disincentive can lead to inefficiencies in the wholesale market and higher prices in geographic markets than would otherwise be the case. Government policy recognised this in 2014 and was explicitly changed to allow NBN Co to respond to such competition and compete in these markets. The SBAS declaration puts a brake on this competition, restricts investment and leads to inefficiencies which are contrary to the LTIE.

As a result the SBAS declaration is a potential cause of inefficiencies in the wholesale market, especially in particular geographic markets that are attractive for broadband investment, rather than a vehicle for ensuring wholesale prices are aligned with the efficient cost of services.

Efficient Investment in Infrastructure

The ACCC contends that the declaration 'promote[s] efficient use of, and investment in, infrastructure, as in the absence of declaration, network operators have incentives to set prices above efficient costs' (see p.16 of Draft Decision).

In particular the ACCC states :

The ACCC's draft decision is that declaration of broadband access services supplied over fixed line superfast networks that hold monopoly pricing power remains in the LTIE.

This statement and reasoning is not in question. It is the basis for most declarations being in the LTIE.

However, in areas where the NBN is available, which is the vast majority of Australian market, any existing or new investment in competing SBAS infrastructure will be constrained by the regulated wholesale prices and downstream retail prices already established in the market by NBN Co and the regulation thereof. Any operator who seeks to set prices above these established prices, without commensurate improvements in quality or service, will likely not be successful in the market. In short, the SBAS declaration, which is only applicable to non-NBN fixed broadband operators, in the vast majority of the market is applicable to operators who do not have monopoly pricing power.

The ACCC explicitly acknowledges that : (p. 29 of Draft Decision paper)

non-NBN network operators hold only a small share of the wholesale superfast broadband market, and to the extent that effective competition exists (including from the ubiquitous NBN) this may constrain their ability to misuse their market power within a geographic area.

This acknowledgement that the non-NBN network operators are constrained in the ability to misuse their market power should be sufficient to refrain from regulating these same non-NBN network operators (via a continued SBAS declaration).

In the areas where the NBN is not operational (eg. some new developments and areas of South Brisbane), as per my original submission, it may be deemed necessary to retain the SBAS declaration to cover off any concerns around monopoly pricing power. However, a blanket SBAS declaration is certainly not justified to cover this minimal component of the Australian market.

The ACCC does flag it will consider a case-by-case assessment process to exclude networks covered by the SBAS declaration (p. 29 of Draft Decision paper) where there are ‘competing fixed line providers supplying services and there is evidence of effective competition benefitting end-users’.

Such an assessment process may have some merit but ignores the fact that the regulation on non-NBN network providers will likely restrict investment that is necessary for effective competition to develop. As a result the ACCC, through the continuing SBAS regulation, is placing a barrier to investment that is necessary for the case-by-case assessment process to enable de-regulation. The ACCC should instead be removing barriers to such investment, as this investment, driven by private sector interest in infrastructure competition and hence notionally efficient, is inherently in the Long Term Interests of End Users.

Conclusion

The ACCC has erred in its draft decision to extend the SBAS declaration for another five years. With the NBN rollout now officially completed, there are minimal prospects of competition ‘for the market’ and hence the establishment of local monopoly pricing power by SBAS providers is negligible.

To the contrary, SBAS providers without the burden of declaration, by competing with NBN Co in selected geographies where they are able to provide services more efficiently, will be able to enhance competition in downstream retail markets by providing lower cost and/or higher quality services than currently made possible by NBN Co and its resellers.

The LTIE will be enhanced by more market entry and more competition by SBAS providers in geographic areas where it is more efficient to deploy their own networks than rely on NBN Co wholesale services. This is in line with the policy response in 2014 to the Vertigan inquiry that permitted NBN Co to offer lower wholesale prices in geographic areas where competition challenged its regulated monopoly.