



17 February 2022

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Australian Competition and Consumer Commission
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By email: sean.riordan@accc.gov.au
cc: superfastbroadbandinquiry@accc.gov.au

Dear Sean,

Superfast broadband access service – access determination inquiry

nbn welcomes the opportunity to provide comment on the ACCC's discussion paper. As the ACCC is aware, **nbn** is neither a supplier nor acquirer of the superfast broadband access service (**SBAS**). As such, this submission focusses on issues of good regulatory practice rather than elements specific to the price and non-price terms of the service.

SBAS providers should be subject to broadly similar regulation

nbn maintains its longstanding view¹ that regulation of **nbn** and non-**nbn** based superfast broadband networks should be symmetrical. That is, the long-term interest of end users (**LTIE**) will best be promoted by regulatory settings which are applied symmetrically and in a technologically agnostic manner across all access providers of the relevant service that is subject to regulation. Exemptions to regulation that apply to a carrier or class of carriers, or in certain geographic areas undermine the LTIE.

The LTIE is also undermined when exemptions are applied to one aspect of the regulatory framework that have the impact of undermining or weakening other aspect of the regulatory framework. In this respect **nbn** submits that regardless of competition in a geographic area, an exemption to supply a regulated wholesale service should not be granted to any carrier that is subject to functional or structural separation requirements.

The existing small provider exemptions are already contributing to a lessening of retail competition in certain areas

nbn maintains its previously stated position² that small provider exemptions are inappropriate and create an environment that allows for pockets of premises with significantly less retail choice than surrounding areas (i.e. localised economic bottlenecks). This is particularly the case in new housing estates, retirement / lifestyle villages

¹ as outlined in **nbn**'s submissions to the 2015 and 2021 SBAS declaration inquiries, and the 2016 SBAS FAD inquiry.

² as above



and new apartment complexes. In instances where the developer for these locations elects to use a small provider (i.e. one that falls under the existing small provider exemptions) to deliver telecommunications infrastructure to premises, it is likely that end-users in these premises will have a limited number of retail service providers (**RSPs**) from which to choose, in some cases as few as one. This is because RSPs are likely to be selective in respect of wholesale providers they on-board with due to both time and financial constraints, and as such, may elect to simply leave these small parts of the retail market alone. This is clearly not in the LTIE for these areas.

This issue is compounded in areas where the small provider is not the Statutory Infrastructure Provider (**SIP**) for the area, leaving **nbn** with the obligation to connect premises as the default national SIP under the SIP regime, leading to inefficient investment.³

Further, rather than discouraging small operators, the requirement to offer a standardised product through the SBAS declaration would likely lead to a higher propensity for RSPs to on-board with these operators due to the RSPs improved abilities to maintain their broader market offers over the relevant network. Likewise, end-users may be less likely to look for bypass options such as fixed wireless or mobile solutions due to the improved choice and comparability of market offers over their fixed connection.

Competition-based exemptions will not promote the LTIE.

nbn does not support the implementation of competition based SBAS exemptions. There is an active and growing competitive market for wholesale superfast broadband services, particularly in new housing estates, retirement / lifestyle villages and new apartment complexes. In these areas, if there is more than one SBAS provider (and **nbn** is not present), there is some degree of wholesale competition, however the level of downstream retail competition is entirely dependent on the number of RSPs who have made the decision and investment to on-board with each of the SBAS providers. Previous submissions from smaller superfast broadband providers suggests that RSP on-boarding has been extremely limited, or non-existent.⁴ It is also likely that even where there are two or more superfast broadband providers, there will be switching costs involved where an end-user wishes to move between infrastructure providers.

In areas where there is one SBAS provider and **nbn**, again it is incorrect to assume retail end users benefit from competitive outcomes one would typically associate with genuine infrastructure-based competition. **nbn**, due to its restrictive non-discrimination obligations (**NDOs**) is unable to respond directly to competitive activity in a specific geographic location, giving the SBAS provider a competitive advantage.

Further, providing exemptions from SBAS undermines the effectiveness of other regulatory settings – namely the wholesale only, or part 8 separation obligations including NDOs, which, apply to providers of superfast broadband services. While removing the requirement to supply the specific SBAS service does not remove the requirement to supply to wholesale altogether, it does allow the already advantaged superfast broadband provider to avoid offering a clearly comparable service to the **nbn** equivalent, leading to more difficult comparisons for consumers. **nbn** notes that SBAS regulation itself does not prevent providers offering different service plans and bundles, but it does ensure a degree of standardisation across retail offers on different infrastructure which supports better informed consumers, at least at the reference service levels specified in the SBAS service description. Given the

³ **nbn** is happy to meet with the ACCC to discuss some recent experiences of this occurring

⁴ for example - Frontier Networks submission to the 2016 joint SBAS/LBAS FAD inquiry, p2



wholesale only or separation requirements will continue to apply to superfast broadband providers, it is hard to see how providing exemptions to SBAS in competitive areas will reduce the regulatory burden that these providers currently face.

Finally, unlike the ACCC's previous experience with exemptions that existed on Telstra's fixed line networks, there is no straight forward process or regime for managing exemptions. In the legacy fixed line world, the general basis for exemptions (at least for fixed line and transmission services) revolved around an assessment of competition in relevant Exchange Service Areas. It is unclear what an appropriate approach could be in a scenario where **nbn** and other competitor's customer boundaries will be highly unlikely to align. That is, unless the exemptions were applied on a premises by premises basis. **nbn** considers this would be an unworkable approach to defining and managing exemptions that would lead to poor outcomes and confusion for end users and would not be in the LTIE.

The FAD should align to the term of the declaration.

nbn supports the ACCC's proposal to align the expiry of the SBAS FAD with that of the SBAS declaration. This will provide regulatory certainty for industry participants, noting the ACCC retains the ability to commence a variation inquiry during the term of the FAD if required.

To discuss further, please contact Matthew Scott, Principal Regulatory Advisor - Consumer & Network at matthewscott1@nbnco.com.au.

Yours sincerely

A handwritten signature in black ink, appearing to be 'SA', with a long horizontal stroke extending to the right.

Sarah Alderson
General Manager Regulatory Affairs – Consumer and Network