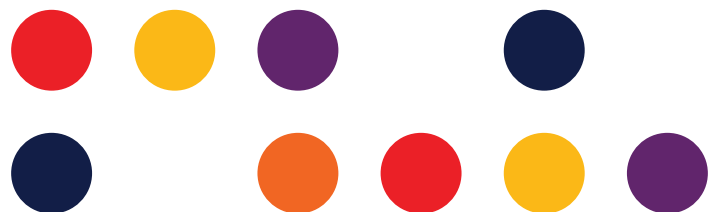


Superfast Broadband Access Service – access determination inquiry

ACCC

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Public version



Submission

TPG Telecom welcomes the opportunity to respond to the Australian Competition and Consumer Commission's (**ACCC**) draft decision in relation to the Final Access Determination (**FAD**) for the Superfast Broadband Access Service (**SBAS**), issued in October 2022 (**Draft Decision**).

In the Draft Decision, the ACCC appears intent on a regulated outcome which would extinguish any incentives for would be NBN competitors to provide compelling and differentiated services to end-users. The trajectory is a wholesale market of 'look-alikes', and a retail market of uninspired suppliers with no ability or incentive to improve customer experience or drive value for money.

In a superior counterfactual, the ACCC would take an even more light-handed approach (such as monitoring with the threat of regulation) to significantly increase the incentives for non-NBN providers to compete and differentiate against NBN provided services. This is because non-NBN providers are one of the limited parties to offer any real competitive constraint on NBN.

When considered in the broader context of the wider fixed broadband market, where NBN Co dominates with 94% share of fixed broadband connections,¹ this Draft Decision will not promote the LTIE.

We believe:

- the ACCC ought to continue benchmarking the SBAS against NBN Co's 25/5 Mbps speed tier only and not regulate the 50/20 Mbps speed tier. This provides an appropriate anchor product for SBAS providers and is the right product given NBN Co now considers 25/5 Mbps to be the 'entry level' speed and take-up of the 25/5-10 Mbps and 25/10 Mbps services on the NBN is very low;
- there is no evidence to suggest SBAS providers, such as Vision Network, are charging excessive amounts for non-recurring charges which are well above costs, such that it would warrant ACCC intervention; and
- the ACCC ought to continue to allow SBAS providers the opportunity to pass on the Regional Broadband Scheme (**RBS**) levy, in order to protect their legitimate business interests.

Given NBN Co's proposed SAU variation will directly impact the terms of the SBAS FAD, we strongly urge the ACCC to undertake further consultation once the outcome of the ACCC's

¹ See ACCC, *Internet Activity report – for period ending 30 June 2022*, page 5.

review is known, prior to the ACCC issuing a final decision.

Regulation of the 25/5-10 Mbps and 50/20 Mbps speed tiers not in the LTIE

The ACCC is proposing to regulate access prices for SBAS providers for the 25/5-10 Mbps and 50/20 Mbps speed tiers. We believe it is not in the LTIE for the ACCC to regulate the 25/5-10 Mbps speed tier, rather than the 25/5 Mbps speed tier, as is the case under the existing FAD.

We note:

- There is currently very low take-up of the 25/10 Mbps and 25/5-10 Mbps speed tiers on the NBN network. As of 30 June 2022, there were 176,833 wholesale NBN SIOs on these speed tiers, out of 8,722,459 total wholesale NBN SIOs.² This reflects around 2% of the entire NBN base, and 14% of SIOs on the NBN 25 Mbps bandwidth profile.
- This contrasts starkly with the 1,049,194 wholesale NBN SIOs on the 25/5 Mbps speed tier, which represents 12% of the entire NBN base, and 86% of SIOs on the NBN 25 Mbps bandwidth profile.

Given the comparatively higher popularity of the 25/5 Mbps speed tier, we believe regulating and benchmarking for the SBAS against what NBN charges for the equivalent 25/5 Mbps product will allow consumers to appropriately compare services across the NBN and non-NBN networks. This would also be consistent with NBN Co's proposal to make the 25/5 Mbps speed tier the new 'Entry Level Offer' under the revised SAU.

We note Vision Network does not currently offer a 25/5-10 Mbps product. The regulation of the 25/5-10 Mbps speed tier would require Vision Network to incur additional costs and time to develop and implement a new product. Requiring SBAS providers to do this, when the existing take-up of the same product on the NBN network is minimal, leads to inefficient investment in infrastructure.

The ACCC may be seeking to declare the 25/5-10 Mbps speed tier on the basis NBN Co is proposing to offer the 25/5 Mbps, 25/5-10 Mbps and 25/10 Mbps products for the same *initial* wholesale price. This could lead to an assumption that take-up of the 25/5-10 Mbps and 25/10 Mbps products will overtake the 25/5 Mbps product over the course of the FAD.

However, it is unclear whether NBN Co will charge the same wholesale price for all three products in the future. Under the proposed SAU variation:

- Each of the 25/5 Mbps, 25/5-10 Mbps and 25/10 Mbps products are considered separate 'Bundled TC-4 Offers'. Accordingly, each of these would be considered separate offers on NBN Co's Tariff List, and NBN Co would be allowed to adjust the AVC price for each individual product every year, subject to the allowable cap.

² ACCC, *NBN Wholesale Market Indicators Report*, June 2022.

- The availability of each product also differs depending on the network. While the 25/5 Mbps product is available on all of NBN's access technologies, the 25/5-10 Mbps product is available on NBN's FTTB and FTTN networks only and the 25/10 Mbps product is available on NBN Co's Fibre, FTTC and HFC networks only. This means the take-up of each product differs and could impact how NBN Co applies price adjustments under the 'weighted average price cap' mechanism.

There appears to be no certainty the 25/5 Mbps, 25/5-10 Mbps and 25/10 Mbps products will have the same wholesale price even beyond 12 months into the SAU.

If the ACCC believes it is in the LTIE to regulate the 25/5-10 Mbps speed tier, it will take some time for Vision Network to build, introduce and implement a new product. In insolation, the changes might not appear significant, but it is difficult to coordinate and secure resources to implement changes across different IT systems, especially when telecommunications companies like TPG Telecom schedule resources sometimes **[c-i-c]** in advance.

If the 25/5-10 Mbps products is declared, we believe the ACCC ought to afford SBAS providers with at least 6 months to give effect to the new FAD following any final decision. We note NBN Co has committed to implementing new wholesale prices within 3 months of any ACCC acceptance of the proposed SAU variation. The introduction of a new product takes a significantly longer time than simply changing prices or CVC inclusions, hence we believe 6 months is appropriate in the circumstances.

We also recommend the ACCC introduce grandfathering provisions which mean SBAS providers would not be required to shift consumers from the 25/5 Mbps speed tier to the 25/5-10 Mbps speed tier, should this product be declared.

TPG Telecom does not support the regulation of the 50/20 Mbps speed tier for SBAS providers. We believe it remains appropriate to regulate only the 25/5 Mbps speed tier. This approach will have a strong anchoring effect on higher speed tiers and is consistent with the approach the ACCC has historically taken to the SBAS FAD, and the ACCC has not justified this change in approach. We believe regulation of the 50/20 Mbps speed tier would hamper innovation and reduce competition, given it removes flexibility for SBAS providers to price higher speed access products as they wish, having regard to the strong competitive constraints already imposed by NBN Co without regulation.

Further, under the SAU variation proposal, NBN Co is proposing to immediately increase prices for the 50/20 Mbps speed tier.³ TPG Telecom's preliminary analysis shows the SAU variation proposal could see the average cost for the 50/20 Mbps speed tier being the same as the 100/20 Mbps speed tier within 1 year, thereby rendering the 50/20 Mbps speed tier obsolete over time and removing any reasonable price relativity between these two products.

NBN Co's new wholesale pricing will result in material changes in the wholesale and retail

³ Based on NBN Co's calculations, see NBN Co Media Release, *NBN Co lodges proposed SAU Variation with the ACCC*, 30 November 2022.

broadband markets. There remain a number of unknowns, including with respect to the impact of the introduction of a weighted average price cap mechanism and NBN Co's new wholesale pricing proposal, which includes immediate discounts for 100Mbps+ speed tiers.

The regulation of the 50/20 Mbps speed tier would reduce SBAS providers' flexibility to compete against NBN Co to supply higher speed tier products, particularly as the impact of any SAU variation becomes clearer. This in turn stifles competition between NBN Co and non-NBN providers and is not in the LTIE.

We note the Draft Decision states "*regulated access prices for the SBAS will continue to be referenced directly to the access charges for equivalent residential grade products for NBN services inclusive of the bundled access/usage charges and discounts offered by NBN Co from time to time*" (page 22). We assume the ACCC is proposing SBAS providers benchmark regulated access products to the equivalent NBN Co "Bundled TC-4 Offer" for the 25/5-10 Mbps and 50/20 Mbps speed tiers, plus CVC coverage. However, this is unclear from the drafting terms extracted above, given the reference to "*discounts offered by NBN Co from time to time*".

One potential interpretation of this drafting is it requires SBAS providers to also offer any other short term or temporary discounts offered by NBN Co. If this requirement is imposed, it would require SBAS providers to closely monitor all discounts from NBN Co, which would in turn introduce a significant amount of uncertainty regarding the appropriate benchmark NBN price applicable under the FAD. We do not support any such obligation, as it would impose high compliance costs for SBAS providers and would make it difficult for SBAS providers to compete and undertake their own short-term discounting activity. This would not promote competition between NBN and non-NBN providers and is not in the LTIE.

SBAS providers ought to be afforded additional time to implement pricing changes

An issue with NBN Co's SAU proposal is it does not provide adequate pricing certainty for its wholesale customers beyond one year. NBN Co proposes that on 1 May of each year it will publish prices for the upcoming financial year (i.e. from 1 July) in an SAU Tariff List. This contrasts with the current TC-4 Bundles Discount Roadmap, which outlines NBN Co's effective prices for 2 years.

Further, NBN Co is also proposing to alter CVC inclusions for 25 Mbps and 50 Mbps products every 6 months to reflect actual changes in CVC usage. These changes will apply on 1 January and 1 July every year (until 1 July 2026). NBN Co is proposing to advise its wholesale customers of the changes in CVC inclusions on 1 November and 1 May of each year (2 months prior to the change coming into effect).

Consequently, SBAS providers will only have 2 months' notice prior to being required to make any changes to reflect increases/decreases in NBN Co's wholesale prices or CVC inclusions for products regulated under the FAD. We believe a 2 month notice period does not provide adequate time for SBAS providers to implement changes to their price books, including reviewing and making product and pricing decisions, obtaining governance approvals and notifying wholesale customers.

A 2-month period would also conflict with Vision Network's terms and conditions. Vision Network has committed to providing wholesale customers with at least 60 days' notice prior to making any changes to price and non-price terms in its Price Book.⁴ We are concerned any shorter period would create pricing uncertainty for our existing wholesale customers and does not present an attractive wholesale offer for potential new customers.

In this regard, we believe the ACCC ought to allow SBAS providers at least 6 months to make any amendments to prices following the publication of revised NBN Co wholesale prices on 1 May and 1 November of each year.

This submission reflects our understanding of NBN Co's SAU variation proposal as of early December 2022. The SAU variation proposal may change in the course the ACCC's consultation process and at the time of writing, the full suite of NBN Co's SAU variation proposal and supporting materials has not yet been published.

We recognise the ACCC has stated it intends to publish an exposure draft of the FAD instrument in 2023, however it is unclear the extent to which the ACCC will further consult on specific aspects of the FAD price and non-price terms. Accordingly, we strongly recommend the ACCC undertake further industry consultation once there is certainty on these important matters, prior to issuing a final decision in relation to the SBAS FAD, given the outcome of NBN Co's revised SAU will directly impact the FAD terms.

Regulation of non-recurring charges

In the Draft Decision, the ACCC proposed to regulate non-recurring charges. We believe there is no evidence to suggest non-incurring charges are unreasonably high or that they fail to reflect the costs of the service, which would justify regulatory intervention in order to promote the LTIE.

The Draft Decision refers to "*an example of a \$99 charge currently levied on retailers by an SBAS provider for the transfer / activation of end-users to another retailer, noting that NBN Co and Telstra (i.e., for wholesale ADSL) currently charge \$5-\$15 for similar customer transfers / activations*". The Draft Decision proposes an SBAS provider's charge for transferring end-users between retailers should not exceed \$5 based on NBN Co's current charge for this service.

The ACCC may be referring in the above extract to the \$99 installation charge (excl GST) which Vision Network charges wholesale customers for some of its products. It is disappointing the ACCC has concluded that these charges do not reflect the costs of Vision Network to provide the service, without first seeking information from Vision Network about its actual costs.

⁴ See Vision Network – Price Book (Version 3), available at <https://www.visionnetwork.com.au/forms.php>. The Wholesale Price Book (1 October 2022) states "*Vision Network reserves the right to change the price and non-price terms set out in this Price Book (Version 3) by issuing a new version of this Price Book with 60 days' notice.*"

As the ACCC has identified, end-user transfers between retailers are usually enabled remotely through a network provider's customer relationship management system, which is the case for NBN products. [c-i-c]

In this respect, we believe the existing \$99 (excl GST) for installation costs reflects the cost of providing the installation service and the legitimate costs that Vision Network ought to be able to recoup.

[c-i-c]

If the ACCC considers it appropriate to regulate non-recurring costs for service activation, service reactivation, service transfer, service transfer reversal and end-user premises appointments, or any other costs, we welcome further consultation and engagement with the ACCC regarding the underlying cost of providing these services for SBAS providers.

As a general position, we do not believe benchmarking to NBN Co's charges for non-recurring costs is appropriate, given the different cost profile of NBN Co and the small scale of SBAS providers' networks in comparison to the 10.4 million premises passed by the NBN.

In addition, NBN Co dominates the home broadband market with 94% of all connections⁵ and NBN Co's OPEX profile is unjustifiably high relative to other regulated monopolies (as the ACCC would be aware through its work in the NBN SAU variation context). This suggests that NBN Co's cost profile is not only inefficient, but its auxiliary costs are also attributed in a way that is opaque, and therefore is not a reasonable point of reference to SBAS operators.

For the ACCC to proceed to benchmark SBAS operators to the NBN Co, it would have to disregard the fact the NBN has been built with \$32 billion in taxpayer funding, \$19.5 billion in taxpayer debt funding, which has now turned into \$19+ billion of cheap external debt⁶ that no commercial operator has access to. The way the Draft Decision proposes to benchmark non-NBN providers and NBN Co fails to acknowledge NBN Co has had an overwhelming advantage over non-NBN providers. The ACCC must have regard to this important context.

Information regarding performance and reliability

We note the ACCC proposes to require SBAS providers provide information to wholesale customers if requested on a quarterly basis, covering:

- 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 SBAS provider

The ACCC proposes such information be made available by SBAS providers from 1 July

⁵ See ACCC, *Internet Activity report – for period ending 30 June 2022*, page 5.

⁶ Productivity Commission, Australian Government Competitive Neutrality Complaints Office, *Report into investigation into NBN Co* (investigation no. 18, November 2022).

2023. Given it is uncertain when a final decision in relation to the SBAS FAD will be made, it is unclear why the ACCC has imposed a deadline of 1 July 2023.

To ensure there is a level playing field, the ACCC ought to also ensure any performance reporting obligations imposed on SBAS providers apply equally to NBN Co.

Pass through of Regional Broadband Scheme levy

We believe it is not in the LTIE for the ACCC to refuse to allow SBAS providers to have the flexibility to decide to pass through the RBS levy. The RBS levy reflects a significant cost and TPG Telecom expects to pay [c-i-c]. This amount will increase every year given the RBS is indexed to CPI and most recently increased by 5%, from \$7.10 to \$7.45 per month.

The RBS already handicaps the ability of non-NBN providers to compete against the NBN, as these providers immediately face a cost of \$7.45 per month from their bottom line for each service connected. The Draft Decision will mean the playing field is further tilted in favour of NBN Co, as non-NBN providers will be required to absorb this levy.

The Draft Decision states “*benchmarking SBAS access prices to the NBN already makes an allowance for levy recovery given NBN Co’s prices are inclusive of its levy costs.*” However, the Draft Decision also states “*NBN Co does not explicitly add the levy to its wholesale charges*”. These two statements appear to conflict. NBN Co has made it clear in its SAU-related materials that it is not currently recovering its total costs. Further, there is currently no explicit link between NBN Co’s wholesale prices and its underlying costs, including the RBS levy.

For the ACCC to believe SBAS providers could obtain an unfair advantage for the right to install fibre networks in new developments by passing on the RBS levy would require it to ignore the competitive constraints imposed by the NBN. Rather, it would hamper incentives to invest, such as to expand networks and attempt to compete with the NBN, if the ACCC refused to allow SBAS providers to even have the *opportunity* to decide whether to pass on the RBS levy. Whether or not SBAS providers are actually passing on the RBS levy is irrelevant – they ought to be allowed to protect their legitimate business interests and elect to pass on the cost of a significant Government levy.

Exemption for PIPE and TransACT networks

For brevity, TPG Telecom does not repeat the submissions previously made in relation to an exemption from the SBAS FAD for our PIPE and TransACT networks. However, we remain firmly of the view that an exemption is reasonable and appropriate in the circumstances. [c-i-c].

We note the ACCC considers that if an exclusion was in place for the entire PIPE and TransACT networks, then TPG Telecom would have the incentive and opportunity to seek monopoly rents from wholesale customers and, by extension, end-users that do not have the NBN as an alternative.

However, this argument ignores the fact Vision Networks is incentivised to pursue national pricing strategies, in line with the NBN, and is also subject to restrictive non-discrimination obligations in similar terms to NBN Co.

Rather, the perverse consequence of the ACCC's view is that NBN Co is incentivised to decide to *not* invest in the small subset of areas where TransACT and PIPE are present, regardless of whether or not it is commercially viable. This in turn removes the opportunity for end-users to access the NBN, reduces competition, and does not promote the LTIE.