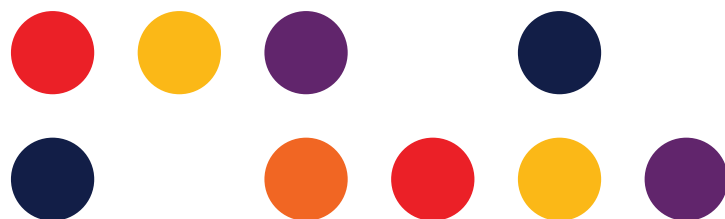


Superfast Broadband Access Service and Local Bitstream Access Service declaration inquiry – draft decision

ACCC

February 2021

Public submission



Public

Submission

TPG Telecom Ltd (**TPG**) makes this submission in response to the ACCC's draft decision on the Superfast Broadband Access Service (**SBAS**) and Local Bitstream Access Service declaration inquiry (**Draft Decision**) dated December 2020. Noting that the ACCC intends to combine the SBAS and LBAS under a single SBAS declaration instrument, references to SBAS in this submission are to the new SBAS declaration proposed by the ACCC.

TPG remains firmly of the view that:

- Re-declaration of the SBAS in any form is no longer necessary or appropriate and is not in the long-term interests of end users (**LTIE**), as required by Part XIC of the *Competition and Consumer Act 2010* (Cth) (**CCA**), given the NBN is now built and fully operational.¹ This material change in context requires an equally significant policy pivot towards promoting infrastructure-based competition, and away from protecting the NBN.
- If the ACCC considers that re-declaration of the SBAS is in the LTIE, it should only be re-declared for a maximum period of three years, given anticipated changes to the telecommunications industry, including the potential privatisation of NBN Co. Further, if the SBAS is re-declared, it should not be re-declared for those areas that have more than one fixed line provider. In this manner, declaration should only apply where this is no overbuild of TPG's network. Where there is overbuild of TPG's network, there is no need for regulation as the presence of infrastructure-based competition will constrain any market power.

TPG considers that a significant problem related to the regulation of telecommunications in Australia is that it creates legacies that are difficult to reverse. The next two to three years will likely see a significant transformation of the Australian telecommunications industry, including due to the deployment and uptake of 5G services, and, importantly, the likely privatisation of NBN Co. Against this background, TPG submits that now is an appropriate time for the ACCC to find that re-declaration of the SBAS is not in the LTIE under Part XIC of the CCA and instead allow market forces to be reintroduced into the fixed broadband market.

A SBAS declaration does not promote efficient investment in infrastructure

TPG's ability to effectively compete against NBN Co has been impeded by compliance costs and restrictions imposed by the current regulatory framework, which in turn impacts TPG's ability to undertake efficient investment and blunts TPG's incentives to engage in infrastructure-based competition in the fixed broadband market(s). The continued declaration of the SBAS will only exacerbate these issues.

¹ See <https://minister.infrastructure.gov.au/fletcher/media-release/nbn-declared-built-and-fully-operational>.

A simple comparison of the speed and price of TPG's FTTB service against another NBN Co service does not recognise the scale of TPG's FTTB network compared to NBN Co. [c-i-c]

These issues are magnified where NBN Co is able to benefit from a regulatory framework that seeks to insulate it from competition.

The existing regulatory framework already places NBN Co in a privileged position with a near-monopoly over the supply of certain wholesale services. This position is reinforced by NBN Co's artificially low cost of capital which arises by virtue of its government ownership and the extensive web of legislative, regulatory and policy protection and favouritism granted to NBN Co. The artificially low return on investment (**ROI**) thresholds under which NBN Co operates are not commensurate with realistic achievable cost of capital/ROI required by commercial organisations with whom NBN Co is supposed to compete on a level playing field. The cost of capital/ROI thresholds enable NBN Co's extensive and highly inefficient overbuild of existing non-NBN networks, forestalls efficient investment in the extension and upgrade of non-NBN networks, and therefore does not encourage the economically efficient use of, and economically efficient investment in, infrastructure. The transfer of these benefits to a privatised NBN Co would only exacerbate the present regulatory imbalances.

The broad and serious impacts of these distortions cannot be under-estimated. [c-i-c]

Within this commercial and regulatory reality, infrastructure providers such as TPG are prevented from engaging in competitive behaviour an economic regulator would otherwise encourage. The SBAS declaration is one regulatory barrier to promoting competition among many which should be dismantled now that the NBN is built and fully operational. The removal of the SBAS declaration will re-introduce market driven competition in the wholesale layer and will likely have wider and meaningful downward price pressure and product innovation in the retail layer that regulation under Part XIC could never compete with. Furthermore, by unshackling infrastructure owners like TPG, the incentives for private investments radically changes, ultimately leading to higher quality of services for end-users. Lower prices at higher quality, or more for less, is the fundamental goal of economic regulation. And in the current context, calls for the ACCC to exercise forbearance, and allow the invisible hand of the market to achieve better outcomes for end-users.

Accordingly, TPG considers that re-declaration of the SBAS does not promote the efficient investment in infrastructure and re-declaration of the SBAS would not be in the LTIE.

B Any re-declaration of SBAS should be for a maximum period of three years

Having regard to the above, if the ACCC considers it necessary to continue to declare the SBAS, TPG believes it would be appropriate for the ACCC to limit any continued declaration of the SBAS to a maximum period of three years. This will ensure that declaration of the SBAS remains relevant and necessary, having regard to the LTIE and significant changes to the telecommunications landscape over the coming years, including the potential privatisation of NBN Co.

Conversely, a longer declaration period will mean that the ability of operators like TPG to effectively compete against NBN Co will continue to be impeded. Hence, TPG will continue

to face costs and restrictions imposed by the current regulatory framework, including through the SBAS declaration.

C Any re-declaration of SBAS should exclude areas with multiple operators

If the ACCC considers that declaration of the SBAS remains in the LTIE, TPG welcomes the ACCC's recognition that (at page 29):

"[I]n areas where there is sufficient infrastructure-based competition, the ACCC recognises that declaration would not necessarily promote further competition and may impose unnecessary regulation and cost. Therefore, the ACCC will consider the merit or otherwise of a framework to exclude networks covered by the SBAS/LBAS declaration from future regulation under the declaration, following a case-by-case assessment process."

TPG urges the ACCC to immediately commence the assessment process to exclude networks from the SBAS where there is sufficient infrastructure-based competition, and hence it would not be appropriate to declare the SBAS for those areas. Such an approach would enable the ACCC to complete a fulsome and thorough assessment of whether declaration of the SBAS is appropriate and in the LTIE in those specific areas. This approach would also be consistent with the approach the ACCC has historically adopted in declaring the Domestic Transmission Capacity Service.

TPG believes that any case-by-case assessment conducted by the ACCC should include TPG's FTTB network, which NBN Co has overbuilt. The ACCC's Draft Decision states that:

"The ACCC considers that the key criteria for such an assessment would be whether there are competing fixed line providers supplying services and there is evidence of effective competition benefitting end-users."

In addition to the presence of multiple competing operators, the ACCC considers that a core requirement of any future exemption framework would be the absence of significant market power."

In Gary McLaren's submission to the Discussion Paper (dated 4 September 2020), his analysis of TPG's buildings and NBN Co's footprint shows that "NBN Co has overbuilt at least 94% of the buildings where TPG Telecom is able to provide a superfast broadband service. It is highly likely that this analysis underestimates rather than overestimates the degree of overlap between TPG Telecom's FTTB and NBN Co's superfast broadband footprints" (page 6-7). [c-i-c] The facts clearly show that there are competing fixed line providers supplying services in TPG's FTTB footprint. There is a case for the ACCC to assess whether continued declaration of areas where NBN Co has overbuilt, including TPG's FTTB network, is in the LTIE.

Where there are multiple competing operators (including the presence of NBN Co), it logically follows that there is an absence of significant market power, at least with respect to non-NBN networks. NBN Co is the only entity with substantial market power in the wholesale market for superfast broadband services.

The ACCC itself acknowledges that “*non-NBN network operators collectively 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.*” Accordingly, there is no incentive for operators to attempt to extract monopoly rents from end-users or engage in any conduct that may amount to a misuse of market power. To even attempt to do so would stymie any efforts by non-NBN operators to effectively compete against NBN Co, which already has significant market power.

Further, in the Draft Decision, the ACCC states that (at page 5):

“The draft decision is not to include services provided over fixed wireless or satellite networks within the scope of the declaration on the basis that such networks would not have monopoly pricing power in a given location due to the presence of the NBN, which will continue to be subject to regulation, or a competing superfast network.”

Adopting the same reasoning, it would be in the LTIE for the ACCC to exclude certain networks (such as TPG’s FTTB) from the SBAS declaration on the basis that TPG would not have monopoly pricing power where NBN or a competing superfast network is present.