

TELSTRA CORPORATION LIMITED

Superfast Broadband Access Service Declaration Inquiry

Response to Discussion Paper

19 June 2015

Public version

Table of Contents

Executive Summary	3
1. SBAS declaration	4
2. Service description	6
3. Coverage	7
4. Duration of declaration	7
5. Regulatory burden associated with declaration.....	7

Executive Summary

Telstra welcomes the opportunity to respond to the Australian Competition and Consumer Commission's (ACCC) Discussion Paper on the Superfast Broadband Access Service (SBAS) (Discussion Paper).

As has been acknowledged previously by Telstra, the ACCC and other industry participants, this inquiry comes at a critical time for the industry which will be undergoing a major and permanent structural transition to the National Broadband Network (NBN).

Telstra considers that the declaration of a SBAS would be in the long-term interests of end-users (LTIE), provided that the service description is appropriately defined to apply only to those carriage services where there is a technical or commercial limitation to the provision of equivalent broadband services to end-users. A declaration should seek to replicate the outcomes of the Carrier Licence Conditions (Networks supplying Superfast Carriage Services to Residential Consumers) 2014 (CLC) which are aimed at ensuring that there is a level playing field for all carriers in the provision of superfast broadband services to residential (and small business) customers.

The purpose of declaration of a SBAS should be similar to the CLCs in seeking to address the bottleneck that arises - whether for technical and/or commercial reasons - that results in a service becoming an effective monopoly. In doing so, declaration will facilitate third party access to such services and ensure that customers are able to benefit from equivalent outcomes that they would otherwise enjoy on the NBN. However, declaration will only be in the LTIE if the service description is appropriately framed to ensure that it only captures those bottleneck services and does not retrospectively capture existing networks built in accordance with other regulatory and legislative obligations.

Consistent with the principles and detail of the submission made by the Communications Alliance Working Committee 58 (WC58), Telstra's position is that the service description for a SBAS should adopt and build on the existing legislative definition for a superfast carriage service and maintain consistency with the CLCs. This will result a service description with technical elements that specify a download data rate at layer 2 of at least 25 Mbps, supplied to an end-user by metallic twisted pair cable and makes use of spectrum above 2.2MHz which will ensure that only the intended services are captured by declaration. Although specifying technical characteristics, the service description is intended to be technology neutral to the extent possible in order to provide for coverage of existing and likely future twisted pair technologies that may emerge. Telstra notes that the Communications Alliance submission only addresses technical elements of a service description. Telstra further considers that, in keeping with the coverage of the CLCs, any SBAS service description should expressly only apply to residential (and small business) customers.

Telstra considers that declaration of a SBAS should be national in coverage to align with the operation of the NBN. At this stage, Telstra is not in a position to determine whether any exemptions to a declaration are necessary, particularly as the detail of proposed amendments to Parts 7 and 8 of the *Telecommunications Act 1997* (Cth) (**Telecommunications Act**) are unknown. Once these are known, it may be necessary for the ACCC to revisit the coverage and/or service description for a SBAS declaration during the period of the declaration to ensure that it remains relevant and captures services as intended. Similarly, in determining the coverage of the declaration and the accompanying service description, the ACCC's guiding principle should be to ensure that it does not inadvertently create confusion or conflicts with the various other legislative provisions and government policies that are currently in place.

In determining the appropriate duration of declaration, the ACCC should be mindful of the need to provide regulatory certainty for infrastructure providers in relation to the treatment of certain superfast carriage services during the transition to the NBN. Telstra therefore considers that the declaration of a SBAS should be for an initial period of five years. This will also ensure that residential and small business customers enjoy the benefits of the NBN, even where the underlying superfast broadband service is provided by an different carrier.

1. SBAS declaration

The ACCC can declare a service if it is satisfied that doing so would promote the LTIE of carriage services or of services supplied by means of carriage services. For the reasons outlined in this submission, Telstra considers that declaration of a SBAS would be in the LTIE, provided that the service description is appropriately defined as set out in Section 2 of this submission.

1.1 Current regulation

Telstra considers that the relevant markets which would be affected by declaration are the national retail and wholesale markets for the provision of superfast broadband services to residential customers or small business customers - that is, broadband services with a downstream rate of at least 25Mbps.

Broadband services can be provided by a number of means, including by wireless, mobile, satellite, HFC and subscriber line technology (ADSL, ADSL2+ and more recently VDSL).

As noted by the Commission, retail service providers can supply ADSL broadband services to end-users by:

- building their own access network infrastructure;
- acquiring the unconditioned local loop service (**ULLS**) or line sharing service (**LSS**) from Telstra and installing their own digital subscriber line access multiplexors (**DSLAMs**);
- acquiring wholesale ADSL services from Telstra; or
- acquiring wholesale ADSL services from access seekers that have their own infrastructure and use the ULLS to sell wholesale services.

The ULLS, LSS and wholesale ADSL services are each declared under Part XIC of the *Competition and Consumer Act 2010 (Cth)* (**CCA**).

VDSL2 and G.fast, more recent generations of subscriber line technology, are capable of delivering up to 100 Mbps in both directions simultaneously over shorter lengths of twisted pair cable and are therefore superfast carriage services.

The provision of superfast carriage services is regulated under the NBN level playing field provisions in the Telecommunications Act and Local Bitstream Access Services Declaration (**LBAS declaration**) under Part XIC of the CCA.¹

Unless an exemption under the Telecommunications Act applies, the NBN level playing field provisions prohibit the use of networks that were built or extended by more than 1km, or upgraded after 1 January 2011, other than the NBN, to supply superfast carriage services wholly or principally to small business or residential customers or prospective small business or residential customers, unless the network operator:

- makes a layer 2 bitstream service available for supply to those customers or prospective customers using the network (Part 7); and
- supplies on a wholesale basis only (Part 8).

These services are also subject to the LBAS declaration and, hence, the Category A standard access obligations (**SAOs**) under Part XIC of the CCA.

In addition, on 12 December 2014, the Minister for Communications, the Hon. Malcolm Turnbull, MP, declared Carrier Licence Conditions (Networks supplying Superfast Carriage Services to Residential Consumers) 2014 (CLC). These CLC apply from 1 January 2015 to 31 December 2016. The CLCs include two sets of obligations:

¹ The local bitstream access service (**LBAS**) declaration commenced on 13 April 2012 and does not expire.

- Transitional obligations that carriers supplying the covered services must provide wholesale services to other carriers or carriage service providers on a non-discriminatory and equivalent basis. These apply until 30 June 2015.
- Longer term obligations that carriers supplying the covered services comply with wholesale/retail separation and supply obligations and offer a 25/5 Mbps wholesale bitstream service at no more than \$27 per month. These apply from 1 July 2015 to 1 to 31 December 2016.

The CLCs do not apply to the NBN, specified HFC networks, networks covered by the level playing field provisions in the Telecommunications Act and networks which are subject to a ministerial exemption.

The Government has announced it will repeal Part 7 of the Telecommunications Act and amend Part 8² with effect from 1 January 2017. Accordingly, from that time, (in conjunction with the expiration of the CLC), access to superfast carriage services will be dealt with under Part XIC of the CCA.

1.2 Declaration of SBAS is in the LTIE

Telstra considers that declaration of a SBAS is in the LTIE provided that the service description is defined to apply only to those carriage services where there is a technical or commercial limitation to the provision of equivalent broadband services to end-users. That is, declaration should be restricted to apply only to those superfast carriage services where it is not possible to provide an alternative service (either at all or without degrading existing services resulting in sub-optimal outcomes for consumers). Telstra's position on the appropriate service description is set out in Section 2 below.

The declaration of a SBAS is effectively seeking to replicate the outcomes of the CLC which are aimed at ensuring that there is a level playing field for all carriers in the provision of superfast broadband services to retail customers. The CLC were developed to address a 'loophole' in the Telecommunications Act which meant that certain categories of superfast carriage services were not captured by the level playing field requirements in Parts 7 and 8 even where there was an effective monopoly.

Telstra supported the CLC on the basis that, in the NBN environment, there should be a level playing field for industry participants in the supply of services to residential and small business customers. Telstra therefore supported the application of separation obligations to carriers offering superfast broadband services where they are not subject to the rules in Parts 7 and 8 of the Telecommunications Act. Telstra also considered that the obligations should, at a minimum, be analogous to the obligations Telstra faces under its Structural Separation Undertaking (SSU). However, Telstra also expressed concern that networks built in compliance with existing Superfast Network Obligations should not be captured by the CLC on the basis that this would have detrimental consequences for customers. Telstra's position on the coverage of the declaration is set out in Section 3 below.

Telstra submits that a similar approach should be taken with respect to the declaration of a SBAS. The purpose of the declaration should be to address the specific bottleneck that arises when there are technical or commercial reasons that result in a service becoming an effective monopoly. For example, a building owner may choose to allow only one provider of vectored VDSL2 technology

² The Government has announced it will amend Part 8 (with effect from 1 January 2017) to remove the one kilometre statutory exemption; give the ACCC the power to authorise the functional separation arrangements of a carrier, as opposed to structural separation, in circumstances where it considers that an undertaking submitted by the carrier stipulates acceptable arrangements for access and equivalence and minimises potential anti-competitive effects; provide for grand-fathering arrangements for high-speed broadband networks that were in place prior to 2011 and any networks rolled out under the interim carrier licence condition described above, but not to future extensions of those networks.

to connect to its in-building cabling using a FTTB deployment. Telstra understands that this was the policy concern that led to the introduction of the CLC.³

Telstra considers that the declaration of a SBAS is in the LTIE as it will:

- Facilitate third party access to certain superfast carriage services that exhibit bottleneck characteristics due to technical and commercial features of the service(s);
- Promote competition by ensuring that customers are able to benefit from equivalent outcomes that they would otherwise enjoy on the NBN through increased retail competition, such as service innovation and lower prices; and
- Promote efficient investment by ensuring that there is no inefficient duplication of the infrastructure required to supply superfast broadband services.

However, as noted above, Telstra only considers that the declaration of a SBAS will be in the LTIE if the service description is appropriately framed to ensure that it captures only those services that result in an effective bottleneck and does not retrospectively capture existing networks built in accordance with other regulatory and legislative obligations.

2. Service description

Telstra believes that it is important that the declaration be focused on the limited set of networks that impact on the principle of the level playing field. Accordingly, Telstra considers that the service description should adopt and build on the existing legislative definition for a superfast carriage service and maintain consistency with the CLCs. Telstra is aware that the Communications Alliance Working Committee 58 (**WC58**) is intending to make a submission on the appropriate technical elements of a service description for the SBAS and agrees with the principles and detail of that submission. The proposed technical elements will result in a service description for the SBAS that:

- has a normal download data rate at layer 2 of at least 25 Mbps;
- is supplied using a metallic twisted pair cable to a residential end user; and
- makes use of spectrum above 2.2MHz on the metallic twisted pair.

The download data rate specified is consistent with existing legislative definitions for a superfast carriage service, while the addition of the layer 2 specification gives an unambiguous definition for assessment, compliance or enforcement purposes.

Including references to a 'metallic twisted pair cable' to a 'residential end user' is consistent with the CLC, and excludes services delivered via optical fibre (such as FTTP) and HFC networks, which is also consistent with the CLC.

WC58 also recommends that a service description for a SBAS include the use of spectrum above 2.2MHz on the metallic twisted wire cable. The inclusion of such a reference will effectively exclude legacy broadband services via technology such as ADSL, ADSL2+ and SHDSL. These technologies can be deployed using multiple twisted pairs that are 'bonded' to achieve download rates that exceed a normal download data rate (at layer 2) of 25 Mbps. Relying on the download data rate alone is not sufficient to exclude these legacy technologies.

Telstra considers that the service description should be, as far as possible, technology neutral in order to provide for coverage of any future technologies that may emerge. Although the service description proposed by WC58 is limited to technologies that use twisted pair cables, it is sufficiently broad to capture future twisted pair digital subscriber line technologies that may exhibit the bottleneck characteristics with which the declaration is concerned.

Telstra supports the service description recommendation of WC58 but also considers that 'residential (and small business)' should be added to end-user in order to reflect the scope of the CLC.

³ Explanatory Statement, Carrier Licence Conditions (Networks supplying Superfast Carriage Services to Residential Customers) Declaration 2014, p.2.

3. Coverage

Telstra considers that if the ACCC were to declare a SBAS, the declaration should apply on a national basis. This is because, like the CLC, declaration is intended to ensure that all end-users should be able to benefit from NBN-equivalent services (and competition at the retail level). The NBN is required to operate on a national basis. If the declaration does not apply on a national basis, Telstra considers that this exposes NBN to the risk of other providers cherry-picking service provision which is contrary to government policy and the intent of the NBN rollout.

The CLC apply to fixed line networks which are used to supply superfast carriage service, regardless of when they were built, unless the conditions specify that the network is not covered by the conditions. As noted in Section 1 networks that are not covered include the NBN, specified HFC networks, networks covered by the level playing field obligations and networks subject to a ministerial exemption. Telstra considers that the same conditions should apply to the declaration of SBAS. That is, the declaration should not apply to networks that are not covered by the CLCs.

The Discussion Paper notes that proposed amendments to Part 8 of the Telecommunications Act will provide for grandfathering arrangements for high-speed networks that were in place prior to 2011 and any networks rolled out under the CLC, but not to future extensions of those networks. The proposed amendments to Part 8 will also remove the one kilometre statutory exemption which provides for networks to be extended and have additional buildings connected to them provided that no point on the extended network is more than one kilometre from the network.

Telstra understands that the removal of the one kilometre statutory exemption is intended to remove the 'loophole' which resulted in the introduction of the CLC. However, Telstra also considers that there are legitimate instances in which existing networks may be extended without causing competition concerns or resulting in the creation of an effective monopoly. That said, the amendments to Parts 7 and 8 of the Telecommunications Act have not yet been specified and at this stage it would be inappropriate for any account to be taken of the amendments as part of a SBAS declaration process. This may, however, require that the ACCC revisit the coverage and/or service description for a SBAS declaration during the period of the declaration to ensure that it remains relevant and captures services as intended.

Telstra further considers that the ACCC's guiding principle in determining the coverage of a SBAS declaration (as well as the accompanying service description) should be to ensure that it does not inadvertently create confusion or conflicts with the various other legislative provisions and government policies that are currently in place. Again, these may change during the period of the declaration but it would be more appropriate to revisit the declaration, if and when any change occurs, rather than to attempt to anticipate what these changes may be and risk regulatory error or creating a regulatory regime that would not be in the LTIE.

4. Duration of declaration

Telstra considers that the declaration of a SBAS should be for an initial period of five years, with commencement of the declaration from 1 January 2017 to align with expiry of the CLCs and proposed changes to the Telecommunications Act. This will provide regulatory certainty for infrastructure providers in relation to the treatment of certain superfast carriage services during the transition to the NBN. It will also ensure that residential and small business customers benefit from the competition benefits of the NBN, even where the underlying superfast broadband carriage service is provided by an alternate carrier.

5. Regulatory burden associated with declaration

The ACCC notes that the practical effect of declaration will be that access providers must supply any services that are captured by the service description in accordance with the category A SAOs in the CCA. Further the ACCC considers that the access providers likely to be affected by a SBAS declaration are generally already providing access to wholesale services under commercially agreed terms and that there will therefore be minimal costs imposed on access providers to comply with the category A SAOs.

Telstra agrees with the ACCC's assessment regarding the regulatory burden associated with declaration. Telstra is already providing wholesale services under commercially agreed terms, is subject to the category A SAOs for a number of declared services and the requirements of the SSU. As a result Telstra does not anticipate that there will be a substantial increase in regulatory burden as a result of the declaration of a SBAS.

TELSTRA RESPONSES TO SPECIFIC ACCC QUESTIONS

Question	Response
What are the relevant markets for the purpose of this Discussion Paper and the application of the LTIE test?	The national retail and wholesale markets for the provision of superfast broadband services to residential customers or small business customers
Would declaring a superfast broadband access service promote the long-term interests of end users? Please give reasons, referring to the implications for competition, any-to-any connectivity (where relevant) and the efficient use of and investment in infrastructure.	Yes, declaration of a SBAS will promote the LTIE. See Section 1.2.
Do any superfast broadband networks represent, or are they likely to represent in the future, a bottleneck for providing broadband services to end-users? Please give reasons referring to the state of competition in broadband (and other relevant) markets, any-to-any connectivity and the efficient use and investment in infrastructure.	Yes – for technical or commercial reasons, certain superfast broadband services represent a bottleneck for providing broadband services to end-users. See Section 1.2.
Do you consider that any existing wholesale commercial terms and conditions of access to superfast broadband networks inhibit competition? If so, what have been the effects on the ability of access seekers to compete? In the future, what are the likely effects on the ability of access seekers to compete?	Telstra does not consider that any existing wholesale commercial terms and conditions of access to superfast broadband networks inhibit competition. The ability of access seekers to compete in future, however, may be affected where effective monopoly services are not subject to the level playing field provisions or equivalent regulatory obligations.
What would be an appropriate service description?	See Section 2.
Should the service description be technology neutral?	Telstra considers that the service description should be, as far as possible, technology neutral in order to capture any future technologies that may exhibit the bottleneck characteristics that are the subject of a SBAS declaration. See Section 2.
What specifications, if any, should the service description include? For example, should the service description include specifications as to	See Section 2.

Question	Response
quality of service (for instance, speed)?	
Which types of services should be captured and/or excluded by the service description? Please give reasons, referring to the implications for competition, any-to-any connectivity (where relevant) and the efficient use of and investment in infrastructure.	See Section 2.
Do you consider that the LBAS service description is an appropriate starting point for the SBAS service description?	See Section 2.
Should the service description cover the SBAS nationally, or be limited in geographic scope? Please give reasons why/why not.	The declaration should be national in scope. See Section 3.
Will carrier-specific exemptions promote the LTIE? Please give reasons why/why not.	Telstra does not believe that there is any requirement for carrier-specific exemptions at this stage so long as the service description is appropriately defined. See Section 3.
What is an appropriate duration for the declaration? Please give reasons.	Declaration should apply for an initial period of 5 years. See Section 4.
Having regard to the potential sources of regulatory burden listed above, would declaration of an SBAS lead to a substantial increase in regulatory burden on your business? If so, please provide details and where possible evidence of the likely increase in regulatory burden.	Telstra does not consider that declaration of an SBAS would lead to a substantial increase in regulatory burden. See Section 5.