

The logo for Optus, consisting of the word "OPTUS" in a bold, teal, sans-serif font.

Submission to the Senate
Environment and
Communications Legislation
Committee

**Telecommunications
Legislation Amendment
(Competition and Consumer)
Bill 2017**

and

**Telecommunications
(Regional Broadband
Scheme) Charge Bill 2017**

July 2017

INTRODUCTION

1. Optus welcomes the opportunity to provide further comment to the Senate Inquiry into the *Telecommunications Legislation Amendment (Competition and Consumer Bill) 2017* and the *Telecommunications (Regional Broadband Scheme) Charge Bill 2017*. These two Bills form part of the telecommunications reform package that will implement the main legislative components of the Government's response to the Vertigan Review.
2. While Optus agrees with the original policy intentions of the Bills, we have concerns over the application of the Regional Broadband Scheme (RBS) charge to fibre networks that provide services to enterprise and government customers – networks which do not compete with NBN Co and which are not subject to any NBN-related obligations.
3. Extending the RBS charge to enterprise and government networks could result in a significant and unexpected annual liability to owners of business networks that were in place prior to the roll-out of the NBN. This in effect is a new levy on enterprise and government providers to fund NBN Co's fixed wireless and satellite networks – which is, in itself, already funded by government. Importantly, the provision of Optus business services to these business multi-dwelling units (MDUs) does not, and will not, displace any NBN revenue or connection. These networks were in place prior to the NBN being rolled out and unlike alternate residential high speed fibre networks are not cherry picking the NBN. It will have absolutely no impact on the ability of the NBN Co to cross-subsidise its wireless and satellite networks.
4. On the face of it, the application of the RBS charge to business services appears to be an opportunistic levy on the supply of competitive business communication services. Optus finds that no valid reason has been outlined in the Bill documents which demonstrate that the benefits of taxing enterprise networks outweighs the cost and efficiency implications to continued investments in the competitive business communication services market.
5. This submission addresses the following:
 - (a) The RBS charge is not a universal service scheme;
 - (b) Wireless services are not a threat to NBN Co;
 - (c) RBS charge should not extend to enterprise and government networks;
 - (d) Concerns with the reliance on 'premises' for enterprise multi-dwelling units;
 - (e) Removal of small business from Part 8 of the Telco Act; and
 - (f) Support for the SIP provisions.
6. For clarity, Optus has no concerns with the application of the RBS levy to residential alternate high speed networks that will cherry-pick the NBN metro-based services.

REGIONAL BROADBAND SCHEME IS NOT A UNIVERSAL SERVICE SCHEME

7. The Committee may likely face calls from some parties to extend the RBS charge to wireless services as well as superfast broadband networks. It is instructive for the Committee to acknowledge that the proposed RBS is not a universal service scheme, nor is it designed to be a universal service-replacement.

8. Optus acknowledges the recent work by the Productivity Commission (PC) which made many recommendations on ways to improve the current flawed Universal Service Obligation (USO) regime. The PC recommended the USO be scrapped and replaced with a smaller scheme targeting the 90,000 or less premises that fall outside existing mobile coverage, funded out of general revenue. Optus supports these recommendations.
9. However, this is not the role of the RBS. It is not a levy or charge relating to the obligations of providing universal service. The RBS is a specific scheme addressing the potential lost revenue from metropolitan connections due to 'over-build' by non-NBN networks and the loss of access service revenues by NBN Co, which would otherwise have been used to cross-subsidise NBN Co's fixed wireless and satellite networks.
10. Optus submits it is important that the RBS and USO not be conflated into the same policy. The Committee should not accept arguments to extend the RBS to wireless services on general universal service grounds.

WIRELESS SERVICES ARE NOT A THREAT TO NBN Co

11. Optus notes that some parties may argue that the RBS charge should be extended to wireless providers, as these providers have the potential to bypass NBN Co connections. Optus strongly rejects such arguments. Extension of the RBS charge to wireless services is clearly counter to the policy intent of the charge (this is discussed in more detail below). Optus also questions the extent to which wireless services are actually displacing NBN Co connections in the current market. Optus sees wireless and NBN Co connections as complementary rather than substitutable.
12. Further, rather than seeing potential wireless bypass as a threat to NBN Co revenue, the Committee should acknowledge that the 'threat' of bypass is a key driver to ensure NBN Co operates efficiently and continues to deliver good outcomes to customers. Both NBN Co and the ACCC have accepted this. For example:
 - (a) NBN Co submitted that its pricing is efficient because it minimises the threat of consumers moving to mobile services;¹
 - (b) NBN Co submitted that it would operate and price efficiently, as "NBN Co will continue to face potential competition from some services delivered on other networks (such as 3G and 4G mobile)."²; and
 - (c) The ACCC accepted the revenue sufficiency risk as being a key driver of investment and cost efficiency given the NBN Co will face significant demand risk and revenue sufficiency risk.³
13. The 2013 Strategic Review also highlighted the important role that potential diversion to mobile services could play if NBN Co raised prices to high levels – the potential diversion to mobile services was a key reason why the IRR target was changed from 7% to 3%.⁴
14. Optus submits that the *threat* of the use of alternative wireless networks for the supply of broadband is a vital driver of NBN Co efficiency and delivers real benefits to consumers of NBN

¹ NBN Co, 2011, SAU Supporting Submission, December, p.48

² Ibid., p.99

³ ACCC, 2013, NBN Co SAU Final Decision

⁴ NBN Co, 2013, Strategic Review: Final Report, p.106

through lower prices and better services. An RBS charge that is extended to wireless services would remove these market restraints on NBN Co.

RBS CHARGE SHOULD NOT EXTEND TO ENTERPRISE AND GOVERNMENT NETWORKS

15. Optus is also concerned that the RBS charge, as currently designed, would act as a levy on providers of enterprise and government communications services. The RBS EM states that one objective of the scheme is to ensure NBN Co and NBN-competitors are treated equally.⁵ However, the provision of services to enterprise and government customers over non-NBN networks does not displace any NBN Co revenue or preclude NBN Co from making sufficient revenue from its metro connections to internally cross-subsidy the fixed wireless and satellite networks.
16. NBN Co may or may not wish to provide services in markets other than the residential broadband market. However, any such service effectively goes beyond its original mandate to deliver best efforts highspeed broadband services to Australian premises. And importantly, would also extend beyond the original intention of the RBS charge.
17. To that end, Optus wishes to provide to the Committee:
 - (a) Information on 'protected' and 'contestable' services over the NBN and why this distinction is important for the RBS charge;
 - (b) Background on the policy development of the RBS charge; and
 - (c) Reasons why reducing competition for contestable services is likely to increase costs and operational inefficiencies of NBN Co.

Identifying protected and contestable NBN services

18. Optus supports making the internal NBN Co cross-subsidy explicit; and supports the introduction of a levy on NBN-replacement residential high-speed broadband networks. This position is consistent with the recommendations of the Vertigan Report and the Government's response.
19. In order to properly implement these policies, there is a need to distinguish between NBN Co's protected monopoly services and its future plans to deploy services in contestable non-residential markets. These terms are defined below.
 - (a) **Protected services** relate to residential services delivered over high-speed broadband networks covered by *Parts 7 and 8 of the Telecommunications Act 1997* (the Act). It is these services where the monopoly protection is granted to ensure that NBN Co has sufficient metro revenue to cover the loss-making regional network. It is these services where the potential for 'cherry-picking' puts the internal cross-subsidy of NBN Co at risk.
 - (b) **Contestable services** are services in competitive markets. We are aware that NBN Co may have future plans to deploy services in this area; however, in doing so it will be entering an existing competitive market and competing with existing commercial services. The original NBN legislation never extended to these services. There are no cease sale or separation obligations for these services because there was no evidence of market failure that necessitated NBN displacing these existing networks. These services were never

⁵ RBS Bill, EM, p.38

covered by Parts 7 and 8 of the Act. Therefore, these are services from which there was no expectation NBN Co would acquire an internal cross subsidy.

20. As discussed below, the Vertigan Review and the Government's response recommended legislative reform to the protected services obligations on the proviso that any foregone subsidy revenue by NBN Co is recovered from non-NBN Co providers of residential high-speed broadband networks. The reform of Parts 7 and 8 of the Act have the potential to deprive NBN Co the opportunity to acquire metro revenue required to fund the regional cross-subsidy (referred to as cherry-picking).
21. However, the proposed Bill extends the application of the NBN levy beyond revenues from protected services to future revenue from services in contestable markets. The Department has explained that the intent of the levy is to protect all future revenue contained in NBN Co's Corporate Plan. This goes well beyond the intention of the Vertigan Report and the Government's response; and risks the RBS charge becoming a de-facto USO charge. It is also an opportunistic attempt to transfer revenue from competitive corporate markets to NBN Co.
22. Of most concern to Optus is that government and enterprise services provided over superfast fibre networks have never been included in any NBN-related instrument, and are not covered by Parts 7 and 8 of the Act. This is because these networks pre-dated the NBN and there was no evidence of market failure.

Background on the development of the RBS charge

23. The Government stated in its response to the Vertigan Review that it intended to ensure that NBN regulations did not unnecessarily restrict competition in telecommunications markets. The Government noted that the NBN reforms between 2009 and 2011 compromised the competitive neutrality of the communications industry which sought to provide competitive protections to NBN Co in commercially attractive areas so that non-commercial services could be funded through an internal cross-subsidy.⁶ The Government noted that this model is unsustainable in the long run. The Government, therefore, sought to establish a more competitive regulatory framework and to deliver competitive neutrality for NBN Co and other industry players.
24. The services discussed above refer to residential superfast broadband services which are 'protected' under Parts 7 and 8 of the Act. It is these provisions that protected NBN Co from competition in commercially attractive areas so that non-commercial services could be funded through an internal cross-subsidy. It is this model that the Government noted is unsustainable in the long run.
25. The Vertigan Report made clear that deployment of NBN-alternative networks in 'protected' areas had the potential to undermine the internal cross-subsidy used by NBN Co to provide services in non-commercial areas through deployment of high-speed residential networks.⁷ The Vertigan Report also notes that recommendations to "remove [Parts 7 and 8] restrictions on competition may exacerbate that erosion."⁸ After discussing the pros and cons of various forms of levies, the Report concludes that "it would be far better to have some form of levy scheme than to continue restrictions on the development of competition so as to protect any NBN Co cross-subsidy."⁹

⁶ Explanatory Notes, p.4

⁷ Vertigan, p.103

⁸ Ibid.

⁹ Vertigan, p.106

26. Optus submits that it is clear from the Vertigan Report and the Government's response that the development of the RBS charge is linked to the opening up of NBN Co 'protected' services to potential competition from ***non-NBN high-speed networks servicing residential customers***.
27. The Vertigan Report and the Government's response provide no justification for the application of a NBN cross-subsidy levy to networks that were never covered by Parts 7 and 8 of the Act.
28. Consequently, Optus finds that the proposed Bills are inconsistent with the Government's response to the Vertigan review. The Bills should not rely on the Vertigan recommendations or the Government's response to support the proposed application of the NBN-levy to enterprise superfast broadband networks.

Taxing contestable services would result in inefficiencies and higher costs for NBN

29. The application of the levy to contestable services is likely to give NBN Co an advantage over commercial operators and damage existing competition in the market, directly counter to the competitive neutrality rules.
30. Furthermore, it is unclear whether there are any benefits to end-users from NBN Co entering into enterprise markets when such markets are served by multiple high speed fibre broadband FTTP networks. For example, businesses in business parks typically have a choice of existing services from the major business FTTP networks such as Telstra, Optus, Macquarie, Vocus, NextGen and other TPG-Group companies. Allowing NBN Co to deploy a network in competition with existing fibre networks is unlikely to provide any end-user benefit nor provide any additional competition. In addition, there is a mature and well-functioning wholesale market enabling larger business network wholesalers selling capacity to other business networks to facilitate competition in downstream retail business market. There is no requirement under current legislation, and no requirement under changes proposed in these Bills to Part 8 of the Act, for separation between wholesale and retail arms of enterprise networks.
31. Should NBN Co chose to move away from its original natural monopoly mandate in the search of extra revenue and move into adjacent competitive markets (ie. markets that are well served through multiple existing networks), NBN Co should compete on its merit. As noted above with regards to the efficiency-enhancing and cost-reducing incentives for NBN Co arising from the threat of wireless bypass, Optus sees similar benefits for NBN Co if it chooses to compete in contestable markets.
32. However, the imposition of the RBS charge would dampen this impact. In effect, the RBS charge is a levy on competitors which could limit the efficient supply of communications services.

Reasons for including businesses are limited and flawed

33. This section directly addresses statements made in the RBS Bill Explanatory Memorandum (RBS EM) which outline reasons for including enterprise and government networks for the first time into NBN-related legislation.
34. Optus notes that the Bureau of Communications and Arts Research (BCAR) rejected an exemption for medium and large businesses on the basis that "the nbn was competing for business in the medium and large business markets."¹⁰ Optus addresses the flaws in this argument above by referencing the Vertigan Review and the Government response. While NBN Co offers several NBN product components that can be bundled to offer corporate services, this is limited in its ability to match the existing enterprises-grade services (in terms of bandwidth and quality) already available in the competitive business communications market. NBN Co may

¹⁰ RBS Bill, EM, p.29

have long term aims to offer corporate services; but as noted as early as 2010, imposing a levy to help NBN Co compete in the market breaches neutrality rules; imposes inefficiencies on NBN; and damages efficient competition.

35. The RBS EM adds three further reasons:

- (a) NBN Co has sought to expand its network to service medium and large business and is actively pursuing these commercial opportunities;
- (b) Medium and large business are also consumers of high speed broadband; and
- (c) Compliances costs would be too high to distinguish between small and medium businesses.¹¹

36. We address each of these below:

- (a) Optus further notes that while NBN Co offers several NBN product components that can be bundled to offer corporate services, this is limited in its ability to match the existing enterprises-grade services (in terms of bandwidth and quality) already available in the competitive business communications market.
- (b) Medium and large businesses are consumer of broadband; but they are not large consumers of NBN Co products. Medium and large business are served by a multitude of existing competitive suppliers like Optus, Telstra, Vocus, TPG, Macquarie and others. It is not clear what gap in the market NBN Co could serve.
- (c) Corporate customers operate on separate networks than those over which residential and small business are supplied. Optus anticipates little costs in distinguishing between superfast broadband networks that are covered by Parts 7 and 8 of the Telco Act; and those which are not. In fact, such distinction occurs already in the market. Finally, as noted elsewhere, compliance costs are extremely high trying to comply with the requirements in this Bill. Specifically regarding obligations to identify number of premises within a corporate MDU.

37. Finally, the RBS EM notes that the possibility of a charge was highlighted in the 2010 EM for the NBN Companies Act 2011. Optus submits this comment is somewhat misleading, because:

- (a) The discussion of the consideration of a levy to stop cherry-picking, as discussed in the Implementation Study and the 2010 EM, clearly relates to superfast broadband networks that cherry pick NBN connections.¹² Optus repeats that there never has been any obligation for enterprise networks to separate, or to operate on a wholesale-only basis, or to cease operations. Enterprise networks existed prior to NBN Co and cannot cherry pick NBN connections.
- (b) The 2010 EM notes the very problems that Optus is stating in this submission; namely that the extension of any levy to business customers:
 - (i) Could deter investment that could otherwise be beneficial by reducing the return from those investments;
 - (ii) Could affect incentives for NBN Co to expedite its network roll-out and operate efficiently as it may expect the levy to be directed at addressing shortfalls in its performance;

¹¹ RBS Bill, EM, p.29

¹² NBN Corporations Bill 2010, EM, p.52

- (iii) May breach the Government's competitive neutrality commitments;
 - (iv) Could be anti-competitive and would need to be tested against the Commonwealth's commitment to the Competition Principles Agreement; and
 - (v) While administratively practicable, experience with the universal service levy suggests it would be complex to design, implement and administer.¹³
38. Optus agrees with the problems with imposing a levy on corporate customers as identified in the original 2010 NBN analysis and legislation. These problems are only magnified when applied to existing corporate fibre networks that do not compete with NBN Co; and which do not cherry pick NBN Co connections. Optus again repeats that NBN Co does not have products that cater to corporate customers in the market.

CONCERNS WITH REPORTING OBLIGATIONS

39. The draft RBS Bill proposes reporting obligations on carriers. Carriers are obliged to report to the ACCC the total number of designated broadband service provided by CSPs over their local access line during July 2017. From 2018-19, annual reporting obligations begin. The proposed Bill imposes strict liability offences, with a fine of \$9,000 per day.
40. Two key reporting obligations have been proposed:
- (a) Once-off report to the ACCC¹⁴ which is required to set a baseline of total local access lines upon introduction of the new RBS scheme.
 - (b) Annual report to the ACMA¹⁵ will introduce another ongoing reporting obligation on CSPs, but will be additionally onerous given the requirement to provide information on a monthly basis. This forms the basis of the RBS levy assessment.
41. The one-off reporting obligations to the ACCC appear particularly onerous given the tight timeframes and the December period in which it is expected to be completed. The requirement for all CSPs to report by 31 December 2017 for the month of November 2017 seems an unreasonable expectation. First, carriers could not begin the process of collecting relevant data until the end of November. Taking into account the other commitments in December, this would in effect give carriers around two weeks to collect, verify, and report on total local access lines. It is not clear why such a tight timeframe is required.

REMOVAL OF SMALL BUSINESS FROM PART 8

42. Optus generally supports the proposed amendments to level playing rules set out in Parts 7 and 8 of the Act, which seek to make the rules clearer and more effective.
43. However, Optus does not agree with the removal of networks solely servicing small business customers from the scope of the obligations under Part 8 of the Act. This amendment is inconsistent with the principle that superfast broadband network infrastructure should operate on the basis of a level playing field.

¹³ NBN Corporations Bill 2010, EM, p.57

¹⁴ Draft Bill, s.102ZF, p.187

¹⁵ Draft Bill, s.100, p.169

44. Further, there is a risk that it will encourage alternate investment in such networks and create islands of customers that effectively have no choice of supplier. Unlike corporate fibre networks, networks solely focusing on small businesses are unlikely to be economically replicable by multiple networks. It may not be economic for third parties to seek wholesale access to such small scale networks.
45. Optus recommends this amendment is reversed.

STATUTORY INFRASTRUCTURE PROVIDER (SIP) REGIME

46. Finally, Optus welcomes the proposed amendments establishing a SIP regime that will create a legal obligation on NBN Co to connect every premise to its network. The SIP regime is appropriate given the role and policy objectives of the NBN and it will remove the uncertainty inherent from the fact that current obligations are set out in a Statement of Expectations that can be changed from time to time.