



Optus Submission

**Comments on Telecommunications Legislation
Amendment (Fibre Development) Bill 210**

April 2010

Introduction

The Senate Standing Committee on the Environment, Communications and the Arts has sought comments on the Telecommunications Legislation Amendment (Fibre Deployment) Bill 2010. Optus welcomes the opportunity to provide this submission to the Senate Committee.

Optus is broadly supportive of the intent of the draft legislation which is aimed at encouraging fibre roll-out in new developments to complement the Government's planned roll out of the National Broadband Network (NBN). Optus understands that the objective of the legislation is to ensure that Australian consumers and businesses in new developments will enjoy the benefits of the proposed high-speed broadband revolution either by having access to optical fibre now or ensuring that their properties can be easily and cost effectively upgraded to fibre at some later date.

However, whilst Optus is supportive of the overall intent of the legislation, we do have a number of specific concerns with the current drafting. These concerns are set out below.

For clarity, all of the points below are assumed to relate to the deployment of greenfield fibre where no existing fibre exists today to supply services to end-user premises. Optus does not believe that any further regulation is required to cover instances of fibre deployment to service end-user premises where that new fibre would offer competition to existing fibre already in place. Furthermore, it is appropriate that the legislation only applies to fibre that is deployed to service end-user premises and not fibre deployed to, for example, service exchange facilities and mobile facilities.

Deployment of fibre

It appears that a fundamental assumption underpinning the Fibre Deployment Bill is that there will be alternate suppliers of fibre access to NBN Co, specifically in new developments. This assumption should be subject to further scrutiny.

The Government's vision for the NBN is to have a ubiquitous high-speed broadband network that ultimately services 100 per cent of the population, with 90 per cent connected by fibre and 10 per cent by other technology. Given the costs of deploying fibre and the need to put in place a well defined regulatory framework to guarantee open access to what will be a bottleneck infrastructure there are some obvious benefits to having a single national high speed broadband network.

The present Bill appears to conflict with this objective in that it implies that customers in new developments may well be served by non-NBN Co fibre infrastructure. This raises a number of practical considerations that will have to be worked through to achieve the Government's vision. Questions that need to be considered include;

- How will the fibre in new developments be integrated into the existing core networks;
- What services will be provided over this fibre, by whom and how will it be provided;
- Will the services be comparable to and compatible with those offered over the NBN;
- What third party access arrangements will apply to the alternate fibre deployments (see further comments below);
- Will there be a common set of interfaces between these fibre developments and the NBN to enable efficient and cost effective interconnection; and

- Is it efficient to encourage alternate fibre deployment to serve the mass consumer market.

Clearly, deployment of greenfield fibre will pose a number of significant challenges for policy makers. In this respect the proposed legislation gives the Minister significant discretion through the provision of legislative instruments to subsequently specify very detailed conditions that must be met in respect of the proposed deployment of fibre.

Optus submits that there is an obvious practical solution to this potential problem. NBN Co could be required to deploy fibre into all new developments from 1 July 2010. This would address each of the issues noted above and ensure consistency with the Government's visions for all Australian customers to have access to high-speed broadband services.

If NBN Co will not be at a stage of readiness to commence greenfields fibre deployment by July 2010, then serious consideration should be given to adjusting the start date. If an extension of the commencement date is not considered acceptable, then a number of steps can be taken to ensure the close involvement of the NBN Co in any interim period before NBN Co could itself assume responsibility for greenfield fibre deployment.

- Firstly, NBN Co should be given the responsibility to provide the design requirements for all fibre deployment into greenfield developments. This should include the wholesale product specifications, to ensure that they are technically compatible with the NBN Co. Furthermore, NBN Co should be required to provide the necessary backhaul between its nearest Point of Interconnection and the greenfield fibre.
- Secondly, any new greenfield fibre deployment should be mandated to be deployed by a wholesale only service provider.
- Thirdly, any new greenfield fibre deployment should be done on the basis that it will be acquired at a future date by NBN Co at a pre-agreed price that compensates the developer for the efficient cost of deployment only, along with an acceptable rate of return equivalent to the funding costs of the developer.

The combination of each of these steps above, will help to ensure that whilst alternate fibre access is deployed, retail service providers are able to efficiently interface into the fibre without the need to develop a multitude of disparate systems and interfaces. Customers will, therefore, have the assurance that even though the fibre into their properties might have been deployed by an alternate provider, they will immediately be able to enjoy identical services from a choice of retail service providers as other customers served directly by NBN Co, and that at a future point in time their fibre connection will form part of the finished NBN.

Finally, if the Government is unwilling to commit NBN Co to either deploying or taking future ownership of all greenfield fibre deployments as recommended by Optus, then as a minimum the principles outlined in the first and second bullet points above should apply to all greenfield fibre deployments.

Third party access to fibre

In the Explanatory Memorandum to the legislation the Government has indicated its intention to ensure that any fibre deployed in new developments will be subject to an access regime to provide third parties with competitive access to such fibre networks. Indeed, in his press release of 18 March 2010, Senator Conroy noted that:

"The Government envisages that fibre networks in new developments will operate on an open access basis, just like the NBN, and that wholesale services will be offered on an equivalent basis".

Optus is supportive of this principle. It is essential that consumers and businesses in new developments are able to have access to competitive high-speed broadband services. This can only be achieved by ensuring that those customers have access to a choice of service provider and are not tied to the company that deployed the initial fibre.

However, this objective is not addressed in the legislation, rather it is noted that provision for third party access arrangements will be left to “regulations to be made at a later date”.

Overall, Optus believes the simplest approach to ensure appropriate open access to new fibre is to mandate that any new fibre must be deployed by a wholesale only player. As a wholesale only provider the fibre owner will have strong incentives to maximise the utility of that fibre by providing access to multiple retail service providers.

If this is not considered practicable, then Optus has two specific concerns with the legislation that must be addressed.

Firstly, whilst there are provisions for regulations to be made for third party access to “fibre ready facilities”, no such provisions are made in respect of deployed “optical fibre”. This appears to be a significant oversight. In practical terms it means that customers in new developments that will have fibre deployed have no guarantee that they will have a choice of access provider in the future. Presumably, such choice would only arise if a second fibre line was deployed to the property. However, given the cost of such deployment it is highly unlikely such deployment will occur.

Secondly, in respect of the regulations that are likely to be made to grant third party access to fibre-ready facilities the Explanatory Memorandum notes that such regulations could:

“provide that the terms and conditions of an access to a fibre-ready facility may be:

- *agreed between the owner or operator of the facility and the carrier who is to*

install the optical fibre (e.g. NBN Co); or

- *as determined by an arbitrator appointed by the owner or operator of the facility*

and the carrier who is to install the optical fibre (e.g. NBN Co); or

- *if the parties fail to agree on an arbitrator, arbitrated by the ACCC.*

This statement does not meet Optus’ expectations of the sort of regulatory arrangements that would constitute providing “open access” on an “equivalent basis”. It appears to contemplate that access will be provided under the present negotiate/arbitrate framework, which in no way can be said to provide open and equivalent access. To meet the benchmark of “open access” and “equivalence”, regulations must, as a minimum, guarantee that access will be provided on an equal basis on terms that are to be set or approved by the ACCC.

In summary, Optus considers that the present arrangements for dealing with the establishment of a third party access regime to greenfield fibre networks are inadequate. Such concerns will inevitably create market uncertainty which in turn is likely to discourage investment in new fibre networks.

Optus submits that the provisions relating to the establishment of a third party access regime should be amended to;

- Make it clear that an access regime providing for third party access will apply not only to fibre-ready facilities, but also to optical fibre deployed in new developments; and
- Make it clear that the subsequent regulations that will set out an access regime that will require the ACCC to set access terms upfront on an equivalence of inputs basis.

For the avoidance of doubt, the third party access regime should only apply to bottleneck fibre infrastructure where alternative access is either unavailable or unlikely to be available in the future.

Inability for customers to access existing high-speed infrastructure

A further concern with the proposed legislation is that it could unintentionally deny customers access to high speed broadband services until the NBN is rolled out to their properties.

The concern specifically relates to the implications of section 372B of the proposed legislation. This effectively prohibits the installation of non-fibre lines in specified real estate development projects that involve sub-division of the land. In practical terms this raises a real problem. A single dwelling unit might have access to high-speed services today over existing networks. If that property is subsequently knocked down and rebuilt or sub-divided into multiple units then, as currently drafted, the legislation would appear to prevent the new unit(s) from accessing the existing services without a specific direction of the Minister. Given the anticipated lengthy timeframes for the roll-out of the NBN this could leave customers without the ability to access voice and high-speed broadband services that would otherwise be readily accessible.

Optus submits that the legislation should be amended to address this concern. Specifically, section 372B should be deemed not to apply to developments, including single vacant lots, rebuilds and subdivisions that are currently serviceable by a non-optical network but which would not be serviceable from the NBN at the point of sub-division or redevelopment. Clearly, such an exemption would have a natural time limit that will be set by the availability of the NBN in any given location.