TELSTRA CORPORATION LIMITED

Inquiry into the Telecommunications Legislation Amendment (Competition and Consumer) Bill 2017 and Telecommunications (Regional and Broadband Scheme) Charge Bill 2017

Submission to the Senate Environment and Communications Committee

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EXECUTIVE SUMMARY

Telstra supports the introduction of a Statutory Infrastructure Provider (**SIP**) regime and the Rural Broadband Scheme levy.

The SIP regime will give consumers, regardless of where they live, a guaranteed infrastructure provider of last resort, who is obliged to supply wholesale broadband services capable of supporting downstream retail competition. The RBS levy will help fund the higher cost infrastructure required to supply services in rural and regional Australia payable by networks which 'cherry pick' the NBN in the more profitable metropolitan areas.

Telstra is also supportive of changes which re-focus the Superfast Network Obligations (**SNOs**) on networks serving residential customers and which provide for improved exceptions for real estate development projects and networks being transferred to nbn co which will allow supply of superfast broadband services to end users pending the NBN reaching them.

However, Telstra has a number of concerns with the way in which the SIP and RBS regimes are proposed to be implemented. Telstra also questions why changes to the SNOs are being suggested given the NBN's likely completion within two and a half years.

There are gaps in the Statutory Infrastructure Provider (SIP) regime

Given the substantial investment being made by Australian taxpayers in the NBN, the SIP usually should be nbn co. But as framed in the proposed legislation, the SIP regime does not provide the requisite certainty to consumers and industry because nbn co is not made the SIP for all premises within a geographical area once that area goes ready for service prior to the end of the NBN rollout.

Other carriers are restricted in their ability to meet consumer demand for broadband services in these gaps in NBN coverage because of restrictions on network build under the SNOs. This can leave customers and third party carriers in a 'Catch-22' situation.

The Regional Broadband Scheme (RBS) scope is too wide

While we support the policy objective of the RBS, we have concerns about the form the RBS levy takes in the proposed legislation:

- the RBS applies far too broadly to services that are not a competitive with, or an economic threat to, nbn co, including enterprise services – the RBS has been transformed from its original intention as a 'anti-cherry picking measure' into an industry tax;
- applying the RBS criteria depends on information regarding the nature of services and the number of premises being supplied at a retail level which the carrier may not necessarily have, particularly in the wholesale context; and
- the lack of clarity in the design of the liability criteria for calculating the RBS means it will be complex and costly for industry to implement it accurately, made more difficult by the tight timeframe for implementation.

The clearest and simplest thing for carriers to count is 'services in operation' (**SIOs**) and Telstra proposes that the levy should be applied to SIOs. The base levy amount should be proportionally reduced to reflect a lower amount per SIO, so the overall revenue raised by the levy remains the same.

Revisions to the SNOs

Telstra has two key concerns with the new SNOs:

- The existing '1km rule' exemption should not be removed: this allowed modest, once-off extensions of pre-2011 superfast networks to address consumer demand for broadband services pending the deployment of the NBN. The 'loop holes' in the 1km rule have already been filled by the carrier licence condition for superfast networks. The 'close proximity' rule under the proposed legislation will allow some continued build to meet customer demand, but its inherent uncertainty makes it much more difficult to operationalise than the simple, fixed maximum distance '1km rule'.
- Where there is no NBN fixed infrastructure in place because of 'gaps' in the NBN footprint before the end of the rollout, Telstra will only be able to provide telephony and legacy non-superfast broadband services instead of offering customers superfast services.

01 Statutory Infrastructure Provider (SIP) regime

Reasonable and equitable access to telecommunication services is one of the fundamental principles of Australian telecommunications regulation. This responsibility is currently fulfilled by Telstra, which is required to ensure standard telephone services and payphones are reasonably accessible to all people in Australia in accordance with the statutory USO.

The core principle of the NBN policies of the previous and current Governments is that nbn co would be the provider of superfast broadband infrastructure to all premises in Australia. This principle is reflected in nbn co's Statement of Expectations (SOE). Telstra supports the implementation of the SIP that will codify the SOE.

However, the draft legislation appears to:

- Give nbn co discretion in determining which premises it will serve before the designated day in an area where it is the SIP;
- Impose less rigorous SIP obligations on nbn co than other nominated or designated SIP carriers as there are significant exceptions to the obligation to connect and supply services that are available only to nbn co; and
- Give the Minister an unconfined discretion to unilaterally designate another carrier as the SIP, in effect overriding the policy that nbn co should be the national broadband infrastructure provider.

The proposed SIP legislation also does not square with the SNOs or the USO, restricting other carriers stepping in to meet consumer demand for superfast broadband services where nbn co is not yet the SIP and limiting the network infrastructure Telstra builds to meet the USO to supporting non superfast broadband services.

1.1. The SIP regime should provide certainty and efficiency for consumers as well as wholesale and retail service providers

The current USO operates so that each premises within the USO service area must be connected and served (unless it falls within a limited set of exceptions).

By contrast, in the period prior to the designated day, nbn co's SIP obligations appear to apply only to the premises which nbn co chooses to include within its rollout regions.

Proposed sub-section 360D(2)(b) provides that nbn co must declare that an area is a provisional interim NBN service area if it begins to supply listed carriage services in that area.[1] This provision does not expressly require nbn co to declare all of the premises in a geographic area to comprise the provisional interim NBN service area. Currently, nbn co does not define its NBN rollout regions as complete geographic areas but instead as lists of individual premises. Whilst it is clear that nbn co will be the SIP for all premises within its footprint after the designated day, in the meantime there could be significant gaps in NBN rollout regions.

[1] *Telecommunications Legislation Amendment (Competition and Consumer) Bill 2017* (Cth), sch 3, s 7.

This will lead to a 'Swiss cheese' effect where large areas within a region are serviced by nbn co, but neighbouring pockets (or even a single neighbouring premises) have no SIP in the lead up to the designated day and are reliant on Telstra supplying services under the USO.

As USO provider, Telstra still has to meet service requests, and in the absence of NBN infrastructure, provide its own fixed or wireless infrastructure in order to supply services for a potentially indeterminate period prior to the designated day (after which nbn co will be the SIP and required to connect the premises and supply wholesale services).

This is likely to result in consumer confusion regarding why they are unable to get an NBN service initially (as their premises is not within an nbn rollout region) and are left with the option of having voice services supplied by Telstra under the USO for the short-medium term and then in a forced migration scenario when the nbn does become available for that premises.

Telstra acknowledges that network rollouts necessarily occur on an incremental basis and the network builder needs autonomy over how it plans and deploys network. However, at the same time, this needs to be balanced against the need for consumers and downstream services providers to have some consistency and predictability on service availability within new deployment areas once announced by the network provider.

Telstra proposes that nbn co should be the SIP for every premises in an area once it goes ready for service. If that is considered to impose a too onerous obligation on nbn co in the rollout phase, Telstra proposes that sub-section 360D(2)(b) be amended to require nbn co to saturate a service area by connecting all premises in the area (upon request from an RSP) within 12 months of first making service available in the area, including premises for which the NBN is not yet available and premises that are not serviceable. nbn co's SIP also should apply to new premises built in an area where the nbn has already been available for some time.

1.2. Minister's power to designate areas is overly broad

Section 360L provides that the Minister may declare a specified area to be a provisional designated area and subsequently declare that a specified carrier is the SIP for that designated area.[2] Designated areas are carved out of nbn co's SIP responsibilities by sub-sections 360D(1) and 360F. This Ministerial power applies both before and after the designated day.

This power is so broadly framed that it could be exercised in future to unreasonably shift responsibility for infrastructure deployment from nbn co to another carrier: in effect, to substantially reverse the policy that nbn co should be the primary provider of national broadband infrastructure.

To increase certainty for both consumers and the broader industry, Telstra recommends that these provisions be amended to provide that:

- The Minister must consider the extent to which the proposed exercise of power is consistent with nbn co being the primary SIP nationwide;
- This power should only be capable of being exercised in circumstances where a carrier other than nbn co has a contractual relationship with the government to service an area. This would create a logical relationship with the broadband funding mechanism, as a non-nbn co SIP provider should be a

[2] *Telecommunications Legislation Amendment (Competition and Consumer) Bill 2017* (Cth), sch 3, s 7.

beneficiary of the industry funding mechanism and a beneficiary of that funding should assume the SIP obligations in return. Again, that inter-relationship may well be the government's intention, but there is nothing in the draft legislation that requires that outcome; and

- The relationship between designated and nominated areas should be clarified. Under the current provision, nominated areas in which another non-nbn co carrier is proposing to build or has built are not carved out of designated areas (section 360L) so the Minister's designation could result in overbuild (including which is then funded by the industry under the broadband levy).[3] By contrast, if a non-nbn carrier decides to build in an area, nbn co's SIP obligation is reduced by carving out the nominated area from nbn co's SIP obligations. The same principle should apply to designated service areas.

1.3. Requirement for voice capable services should include satellite

Telstra welcomes the requirement that the wholesale service provided by the SIP should include the capability to support voice telephony (sub-section 360Q(1A)).[4]

However, sub-section 360Q(2A) provides that this requirement does not extend to satellite services supplied by the SIP.[5] While deployment of NBN fixed wireless services (and mobile services through Blackspot programs) in rural areas should reduce reliance on satellite services, it is likely that there will still be some end users in remote areas who can only be served by satellite and therefore will need to utilise satellite provided telephony unless they are provided with voice services via an altnerative network. Telstra understands that the current nbn satellite may not be suitable for voice, but that does not preclude the possibility that nbn satellite technology more appropriate to voice may be deployed in the future.

Telstra therefore proposes that rather than a complete statutory carve out, sub-section 360Q(2A) should be amended to provide that the Minister has a discretion to exempt satellite services from the voice capable requirement.[6] This would provide a mechanism to exempt satellite services on an interim basis until and unless a viable technical solution is developed by nbn co that is satisfactory to customers. In this way, the statutory regime is set up from day one in a consistent manner, with short-term relief from this technical issue being provided through a ministerial exemption that can then be easily wound back and eventually removed.

1.4. To successfully operationalise the SIP, there is a need for a single wholesale interface and service equivalence

One outcome of the proposed SIP regime is that there are likely to be multiple SIPs across Australia, including a number of smaller operators in Greenfields estates. Requiring RSPs to implement systems that separately interconnect with each of these operators is likely to be inefficient and costly.

To address this issue, in nominated and designated areas where nbn co is not the SIP for an area, the allocated SIP should be required to supply wholesale services via nbn co's B2B platform to facilitate a 'single wholesale shopfront' for all RSPs. This will support retail competition by ensuring that multiple RSPs are able to operationalise the SIP regime and provide services to end users in an efficient and consistent manner, whether or not nbn co is the SIP for the premise.

In addition to a single wholesale B2B interface there would also need to be consistency from SIP providers with nbn co's network specifications including, but not limited to product and pricing constructs, settings

[3] Ibid.
[4] Ibid.
[5] Ibid.
[6] Ibid.

(AVC/CVC model, traffic classes) and other product elements must be equivalent to the network specifications of nbn co's fixed-line national broadband network as well as equivalence with nbn co Network Termination Devices. Telstra acknowledges that this is likely to require some form of agreed network Points of Interconnection between the various SIPs, including nbn co. This would facilitate the ability of RSPs to offer consumers nationally the same experience, service commitments and pricing plans.

1.5. Any SIP arrangements need to be backed by a 'single source of truth' for carriers and developers to know who has infrastructure responsibility

One of the challenges Telstra has experienced under current policy arrangements is confirming who has infrastructure responsibility for a particular development or estate.

Therefore, Telstra welcomes the requirement for a carrier to notify the ACMA where they are the SIP. However, the timeframes for notification by non-nbn carriers to the ACMA under sub-section 360D(2)(d), as well as section 360HA (in spite of potential to request an extension to this timeframe from the ACMA), are quite tight.[7] Non-nbn carriers are required to notify the ACMA within 10 business days of completing installation of the infrastructure or within 10 business days of entering into a contract for a real estate development project.

This contrasts with the extra time nbn co has to notify the ACMA where it is the SIP in a provisional interim NBN service area (within 10 business days of the end of the month in which it issues a statement that a rollout region has gone RFS). Telstra proposes that a similar timeframe should apply to non-nbn carriers notifying the ACMA of completion of installation of infrastructure, such as within 10 business days of the end of the month in which installation has been completed or within 10 business days of entering into a contract for a real estate development project.

[7] Ibid.

02 Regional Broadband Scheme

The proposed Regional Broadband Scheme (RBS) is a new industry levy to fund nbn co's non-commercial regional fixed wireless and satellite services (including designated administrative costs incurred by APS employees, the ACMA and ACCC under the RBS).

Telstra considers that the RBS applies too broadly, is too uncertain in how it defines liability to pay and as a result will be difficult and costly for carriers to administer .

2.1. The RBS reaches beyond its original purpose

Telstra's support for the RBS was predicated on it being introduced to create a level playing field and support the provision of rural and regional broadband infrastructure, i.e. addressing "revenue-leakage" to networks competing with nbn co in more profitable areas which reduced the cross subsidy nbn co would otherwise earn to support its rural and regional broadband infrastructure. Under that approach the levy would only be payable by those networks that had infrastructure competing with NBN infrastructure: the levy would apply to networks "cherry picking" the NBN.

However, the RBS has been broadened into an industry tax applicable to all superfast broadband networks, regardless of whether they pose a competitive threat to, or create any revenue leakage from, the NBN business case.

In particular, the scope of the RBS has been extended beyond what was originally anticipated, and now also applies to enterprise and wholesale data services. The definition of 'designated broadband service' now covers:

- broadband services supplied to any customer, including the enterprise and wholesale market which was never subject to the protections that applied to nbn co under the SNOs; and.
- lines which are not actually being used to provide superfast broadband services but which are 'technically capable' of providing those services.

It was always envisaged that if nbn co chose to compete in the enterprise and wholesale segment it would do so on a competitive basis and would have factored this into its business case. Consequently, there has been no "revenue leakage" from this segment which would support a policy rationale which departs from the Vertigan recommendations and instead resembles an industry tax. The practical effect of such a broad definition of 'designated broadband service' will be to capture an extremely broad range of services, including fibre-based infrastructure being used to supply narrowband data services.

Telstra proposes that the RBS should be rebased to reflect its original intention under Vertigan as an 'anti-cherry picking' measure. Any additional funding required to support NBN infrastructure in regional and rural Australia should be funded in the same way as nbn co's other infrastructure.

2.2. Liability under the Bill is fundamentally unclear as currently structured and should be simplified

The RBS is fundamentally a tax. Like any tax legislation, it needs to be clear and unambiguous in its application in the real world, so that parties know when they are liable to pay the tax, the tax payable can be readily calculated with a high degree of accuracy, the taxpayer and the tax collection agency alike do

not face significant costs in administering the tax and a disproportionate burden does not fall on industry in implementing these arrangements. The RBS falls short of this standard.

Key elements which define the services which are to be included in the calculation of the levy are not clearly defined. Sections 93 and 94 provide that the RBS applies to "chargeable premises associated with a local access line."[8]

First, the term "premises" is not defined, and this is a notoriously uncertain term in the telecommunications industry. The Minister has the power to specify what are premises (section 79A).[9] While Telstra generally supports a mechanism that helps to more closely define the meaning of this central operational term, Telstra considers that it is appropriate that legislation which imposes a tax should be clear in its own terms about the circumstances in which it applies, rather than leaving the scope of the tax to the uncertain and potentially changing future exercises of Ministerial discretion.

Second, the term "local access line" is loosely defined as, effectively whatever the industry commonly understands to be a local access line (section 76A).[10] Telstra is concerned that it is not always clear whether lines within a local network are properly characterised as local access lines or as some other form of network infrastructure. This is further compounded by the fact that 'local access line' is terminology generally associated with copper networks and not with fibre based networks.

Figure 1 below illustrates some of the difficulties in applying the RBS as currently formulated.

[8] *Telecommunications Legislation Amendment (Competition and Consumer) Bill 2017* (Cth), sch 4, s 13.
[9] Ibid.
[10] Ibid.

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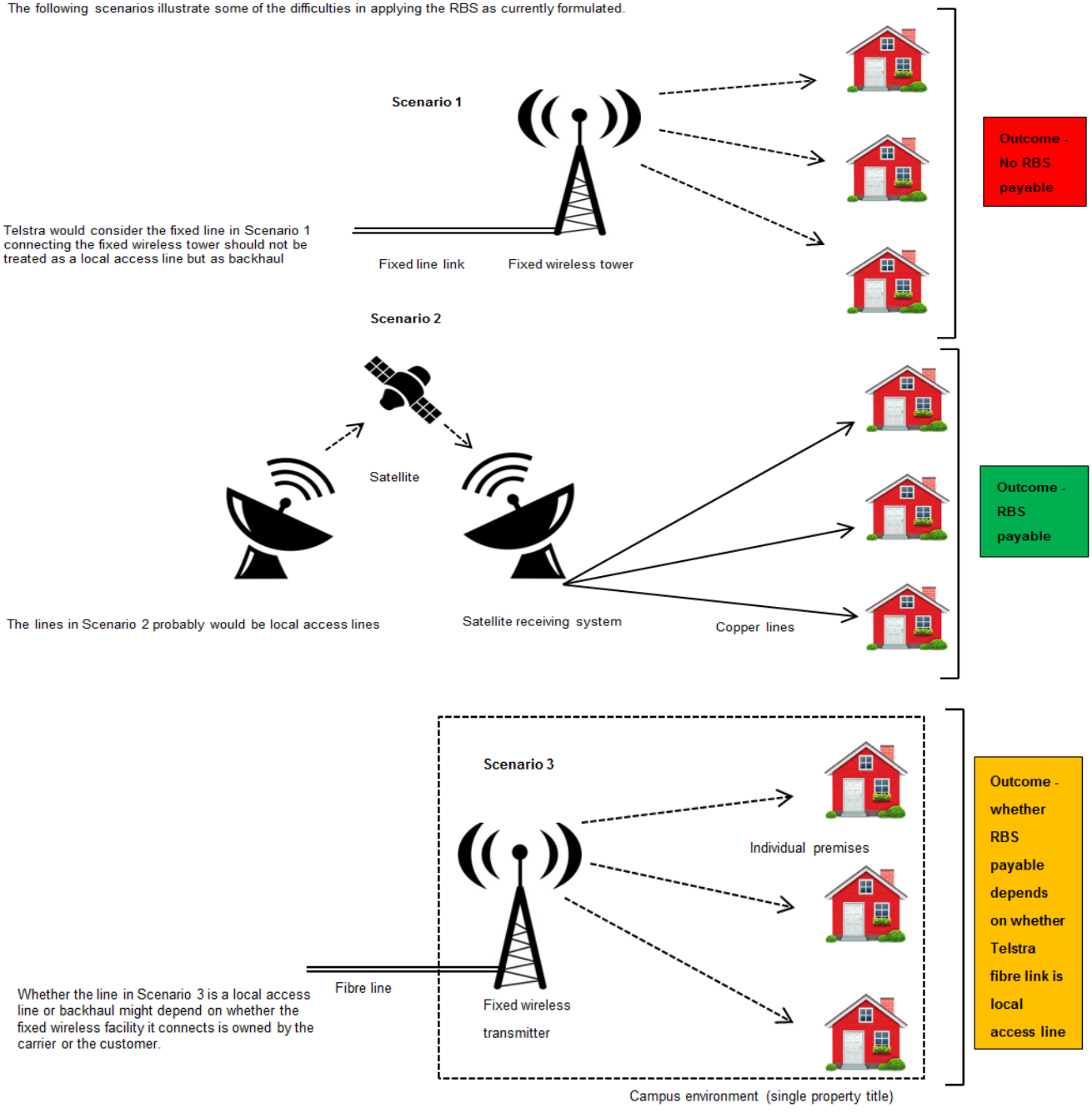
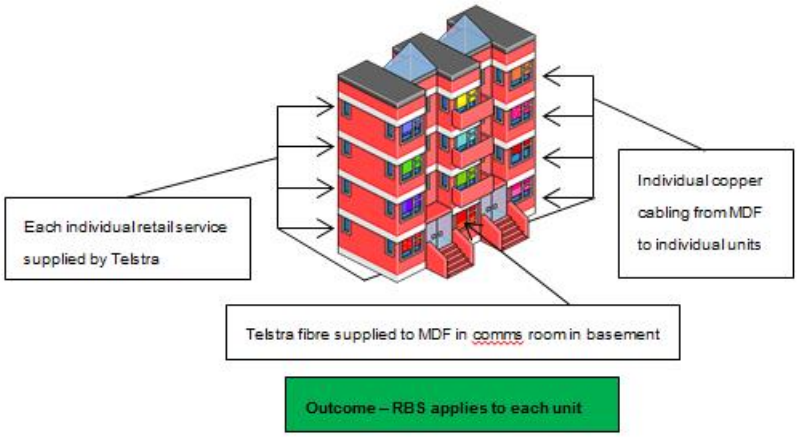
Figure 1

The following scenarios illustrate some of the difficulties in applying the RBS as currently formulated.

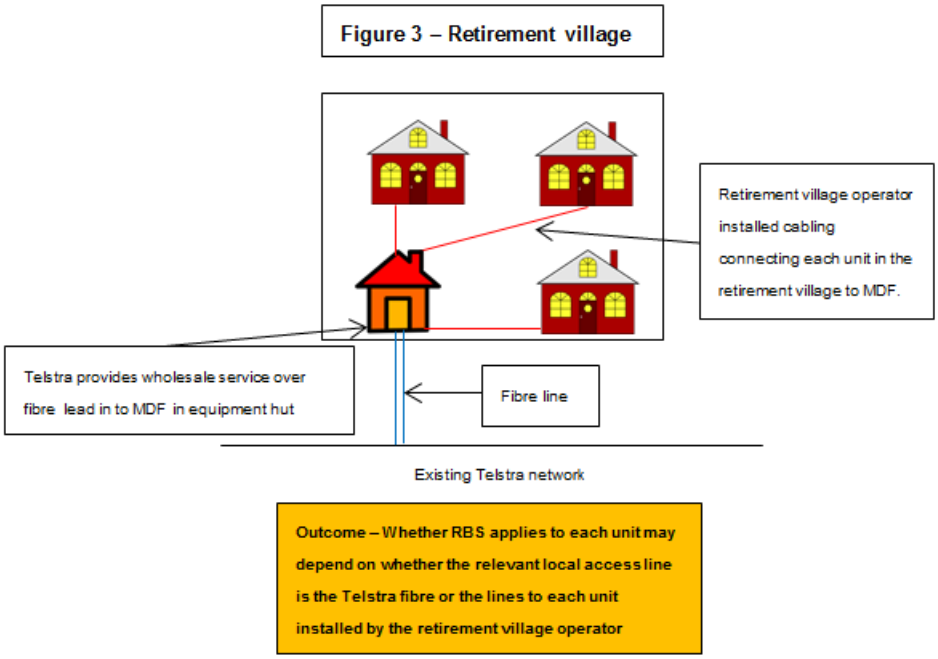


There also can be different outcomes where broadband services are supplied over a line to multiple customers at a location. The simplest situation is where the same provider owns the line into the location, such as a block of flats, and is the retail provider of the broadband services to the individual apartments, as illustrated in Figure 2. The carrier can readily identify and count the number of individual chargeable premises in the block of flats.

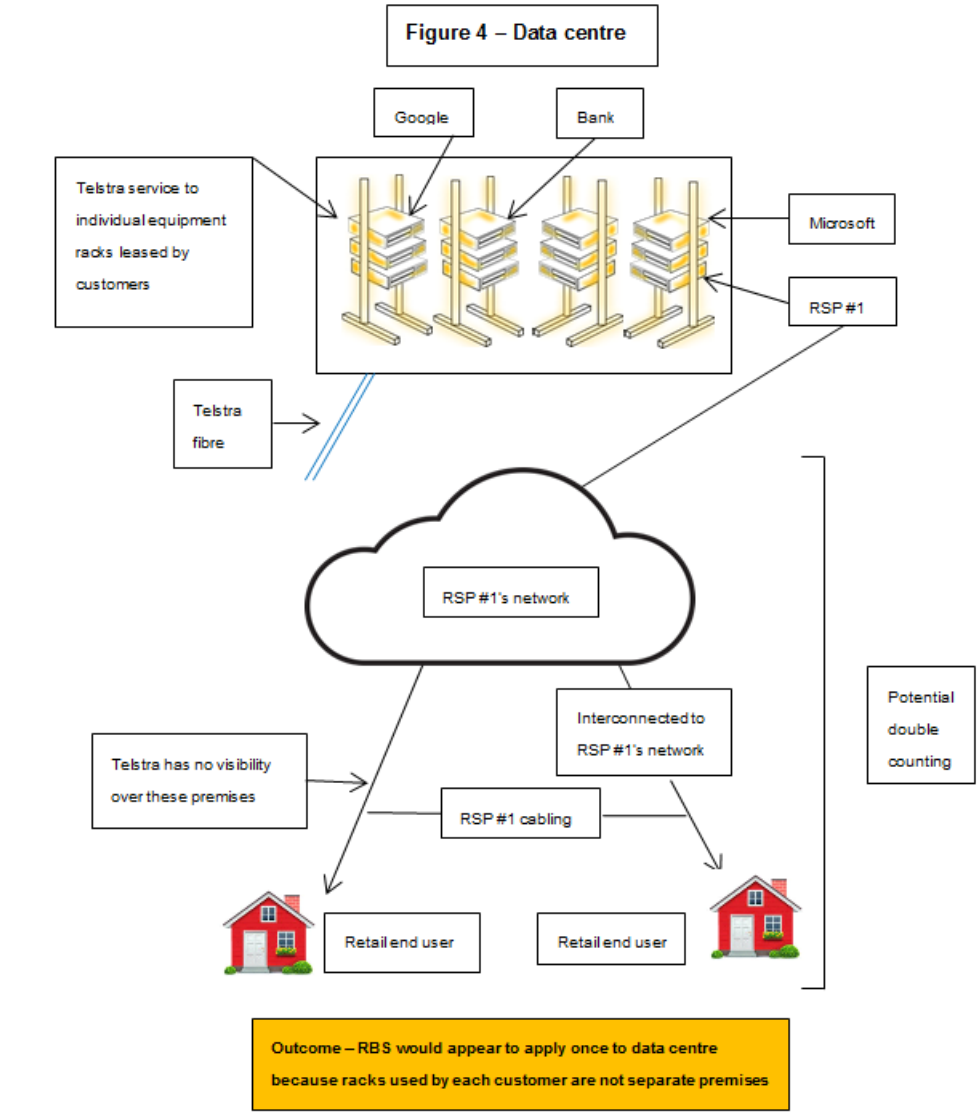
Figure 2 – Apartment block (direct relationship between network owner and residential end user)



Where the carrier is a wholesale provider, it often will not have access to the information about retail supply required to determine if the premises connected by the wholesale service qualifies as a 'chargeable premises'. For example, in Figure 3 below, the wholesale carrier may provide a fibre connection to a developer to connect a retirement village. The developer deploys and operates the local area network which connects the individual units within the development. The carrier will not necessarily know how many inidividual chargeable premises (i.e. the units) there are in the development, what services the developer provides to the residents and whether the individual services are superfast. There is also the question of whether the cabling built by the RSP is the 'local access lines', not the lead-in cable built by the wholesale supplier which instead should be characterised as lead-ins.



The situation is even more complicated where there may be multiple individual customers at a single location but it is unclear whether they each have separate premises within that location. For example, in Figure 4, a carrier connects a third party data centre and various entities, some of which are RSPs, acquire equipment racks While there are multiple broadband services supplied to multiple users over the line connecting the data centre, each customer's racks would not properly be regarded as a 'premises' in itself and the data centre would count as a single premises.



Third, it is unclear whether technically capable means 'currently capable' without any further work by the network provider (i.e. all the network provider has to do is 'flick a switch' or 'punch some keys' to increase the speed of service so that it crosses the superfast threshold); or whether a line is still 'capable' even though some work has to be done by the network provider, such as changing line cards in the exchange; or whether a line is not 'capable' unless the equipment in the customer premises is upgraded to enable higher speed services to be 'received' and processed in the customer premises.

This is further complicated by section 102ZH removing consideration of 'technically' when considering the meaning of 'capable',[11] which raises the question of why 'technically' is included in s 76AA at all. While 'superfast carriage service' is ordinarily defined as a service 25 Mbps or more, the Explanatory Memorandum provides that the technical speed requirement is on the line, not the service. This ensures

[11] Ibid.

nbn co's 12 Mbps services are captured and carriers cannot avoid the charge by offering sub-25 Mbps services over lines capable of 25 Mbps or more.[12]

The uncertainty inherent to the definition of "chargeable premises associated with a local access line" is likely to require an assessment at an individual premises basis, at least for a substantial number of premises where there is not a simple and obvious answer. This will impose a significant administrative burden on network providers. The cost of operationalising the new tax could be greater (in terms of manual labour and IT system changes) than the revenue the levy would raise, resulting in a 'double whammy' for operators, some of who are not in competition with, and are thus not cherry-picking, nbn co's business case.

2.3. An RBS which counts SIO, rather than premises is the right approach

An alternative calculation model, which Telstra considers could be implemented with far greater certainty and accuracy, is one which is based on the carrier's active superfast broadband Services in Operation (SIOs) delivered to end users over an underlying local access line that is owned or controlled by the carrier. Rather than count premises, the carrier would count network services. The key benefit of this SIO model is that a carrier's existing network record databases are likely to already identify SIOs and the speed of those services (e.g. for billing purposes). The carrier is also likely to be able to derive from product information whether, if a service is operating at a speed below 25 Mbits, the service has the capability of being increased to the superfast speeds.

There would of course need to be a commensurate adjustment to the base amount of the RBS that applies at the premises level, to reflect the greater number of SIOs than premises, so the changes keep the expected financial impact the same.

This model would require the RBS Bill to adopt a definition of 'potentially chargeable services', rather than 'potentially chargeable premises', 'chargeable service associated with a local access line' (rather than 'chargeable premises associated with a local access line', and 'potentially concessional services' rather than 'potentially conscessional premises' .

There would also need to be changes to the definition of 'exempt services' in s 95 for the small provider exemption to clarify that this applies to a maximum threshold of potentially chargeable services in relation to the members of the group, as opposed to a threshold number of services. Telstra notes that the threshold of 2,000 premises needs to be commensurately increased to reflect an appropriate number of services supplied to those premises (perhaps 5,000) and the terminology in the exemption would need to be changed.

The definition of designated broadband service in 76AA and superfast carriage service in 76 of the proposed revised Telecommunications (Consumer Protection and Service Standards) Act 1999 (Cth) would remain the same.

The existing exclusions in the definition of 'designated broadband service', including for local access lines used exclusively to carry either broadcast television streams or carriage services that can only be used for voice services, would be retained. Services that are not delivered over a local access line (such

[12] Explanatory Memorandum, Telecommunications Legislation Amendment (Competition and Consumer) Bill 2017, 164.

as virtual circuits internal to a carrier network, backhaul and transmission services) would be excluded from this model.

2.3.1. Implementation costs for industry are an impediment, and 1 July 2018 is not enough time to prepare for implementation

Even if the RBS was drafted more clearly, industry should be allowed a reasonable lead time to implement the systems and processes required to administer the RBS.

Telstra does not collect information about its services in the form required to determine whether a service qualifies the service location as a 'chargeable premises associated with a local access line'. It has previously had no business reason to do so, and thus has not set up its multitude of IT systems to enable it to do so. Telstra anticipates that it would need to introduce significant IT modifications to its network systems which record service and network information so that it could periodically run reports to prepare its RBS assessments as proposed. In addition, as flagged above, Telstra does not even have access to all the information required to properly calculate its liability under the RBS because of its lack of visibility over the services being supplied (e.g. by downstream RSPs) and any enhancements that have been made to the line at the retail level.

Achieving this level of system and process change to be ready to commence implementation by 1 July 2018 is simply not feasible. IT projects of this nature and size (including to identify the relevant impacted systems, define the business need, design the changes, code, test and commission IT changes into the IT build schedule) as a practical matter require longer time periods than the likely time between passage of the legislation through Parliament and when Telstra would need to be in a position to begin to track services and record the necessary data to make the first RBS payment less than 12 months later. Telstra therefore proposes a commencement date of 1 July 2019. If thought necessary, the charge could be increased incrementally to recover the liability for FY18-19, causing no detriment to nbn co but reducing what could otherwise be unnecessarily high compliance costs and the chances of unintentional non-compliance.

2.3.2. The costs associated with administering the RBS should be incurred by the public sector

Telstra disagrees that the administrative costs associated with the levying and distribution of the RBS should be collected from the industry as part of the levy. The administrative functions should be regarded as part of the normal functions of government and so should be recovered from consolidated revenue and therefore subject to the discipline and accountability measures which apply to government administration. Otherwise, appropriate incentives are not in place to minimise these costs.

2.3.3. The Bill treats Telstra and Optus differently and this should be rectified

Section 96 exempts Telstra's and Optus' fixed networks from the RBS which are covered by agreements with nbn co. As these agreements provide for the NBN to replace these Telstra and Optus networks, there is no risk of 'cherry picking' which undermines the cross subsidy which customers formerly covered by those networks would make to NBN rural and regional broadband infrastructure. With the decommissioning of these Telstra and Optus networks, customers formerly connected to them would need to migrate to the NBN if they wanted fixed line broadband services.

However, differences in wording between the exemptions for Telstra and Optus mean that Telstra is treated differently from Optus. The Optus exemption applies to any networks covered by an agreement between nbn co and Optus for the 'decommissioning or deactivation' of the network (sub-section

96(3)(e)(i)). By comparison, the Telstra exception applies to any Telstra networks covered by an agreement between nbn co and Telstra for the 'transfer of ownership or control' of the networks (sub-section 96(1)(e)).

Telstra's decommissioning obligations to nbn co are broader than its obligations to transfer ownership of its network. While nbn co wanted the option of acquiring some of Telstra's network – principally HFC (as with Optus) and copper lines – nbn co did not necessarily want to acquire Telstra's fibre Velocity networks. However,Telstra still has an obligation to decommission those fibre networks when the NBN fixed network is deployed, but it does not transfer ownership to nbn co. Telstra considers that the broader language used in relation to the Optus exemption in sub-section 96(3)(e)(i) regarding the contract providing for the 'deactivation or decommissioning' of the network should also be used in the exemption for Telstra in sub-section 96(1)(e)(i) to appropriately capture Telstra's decommissioning obligations, and provide equal treatment to both parties.

03 Superfast Broadband Obligations

Telstra considers that it is unnecessary for such significant changes to be made to the SNOs with the end of the NBN rollout less than 2.5 years away. The existing arrangements have been in place for over 5 years, are well-understood and there is no evidence that they are failing to meet their objective of ensuring a level playing field between nbn co and other builders of mass market high speed broadband networks. These changes will generate more confusion among customers about why they are unable to get access to superfast broadband services despite existing non-NBN network infrastructure being nearby.

3.1. The '1km rule' should be retained

Telstra does not support the removal of this exception for network extensions after 1 July 2018. The current '1km rule' strikes the right balance in permitting modest extensions to be made to existing superfast networks to meet consumer demand, while being unlikely to pose a material threat to nbn co's business case.

The problems that emerged with the rule since its introduction have been successfully addressed by the changes to the carrier licence conditions for superfast networks.[13] The CLC has already forced carriers which were trying to rely on the '1km rule' exemption to 'cherry pick' superfast services in the more profitable metropolitan areas to restructure their business to effectively be wholesale only and to supply the newly declared superfast broadband access service on regulated terms.

While Telstra welcomes the continued ability to install new lines to connect premises 'in close proximity' to pre 1 July 2018 network, this new test is less certain and more difficult to operationalise than a clear-cut distance based rule like the '1 km rule'.

No guidance is given in the legislation as to when a premises will be in 'close proximity' to a line that forms part of a pre-1 July 2018 network and the application of the limited guidance in the Explanatory Memorandum may result in inconsistent outcomes for customers in like situations. The Explanatory Memorandum regarding s143F says that it is '*envisaged the close proximity would facilitate the connection of existing network infrastructure in the street to premises, but not the extension of that network infrastructure to allow connection in a new location where the network is not already 'in close proximity'*.

This distinction is easier said than applied: what if the existing network is on the opposite side of the street? What if the existing network finishes half way down the street? What if the premises to be connected is on the corner with a street that has network and a street that does not? What about the house just next door a few metres further along in the street which has no existing network, but with the network just around the corner?

As illustrated in **Figure 5** below, interpreting the new 'close proximity' test based on the limited guidance in the Explanatory Memorandum may result in divergent outcomes in similar situations which consumers will find difficult to understand and accept. For example, while the exemption appears to allow a new premises that is the result of a subdivision on a block in a street that is already connected to the network

[13] *Carrier Licence Conditions (Networks supplying superfast carriage services to residential customers) Declaration 2014* (Cth).

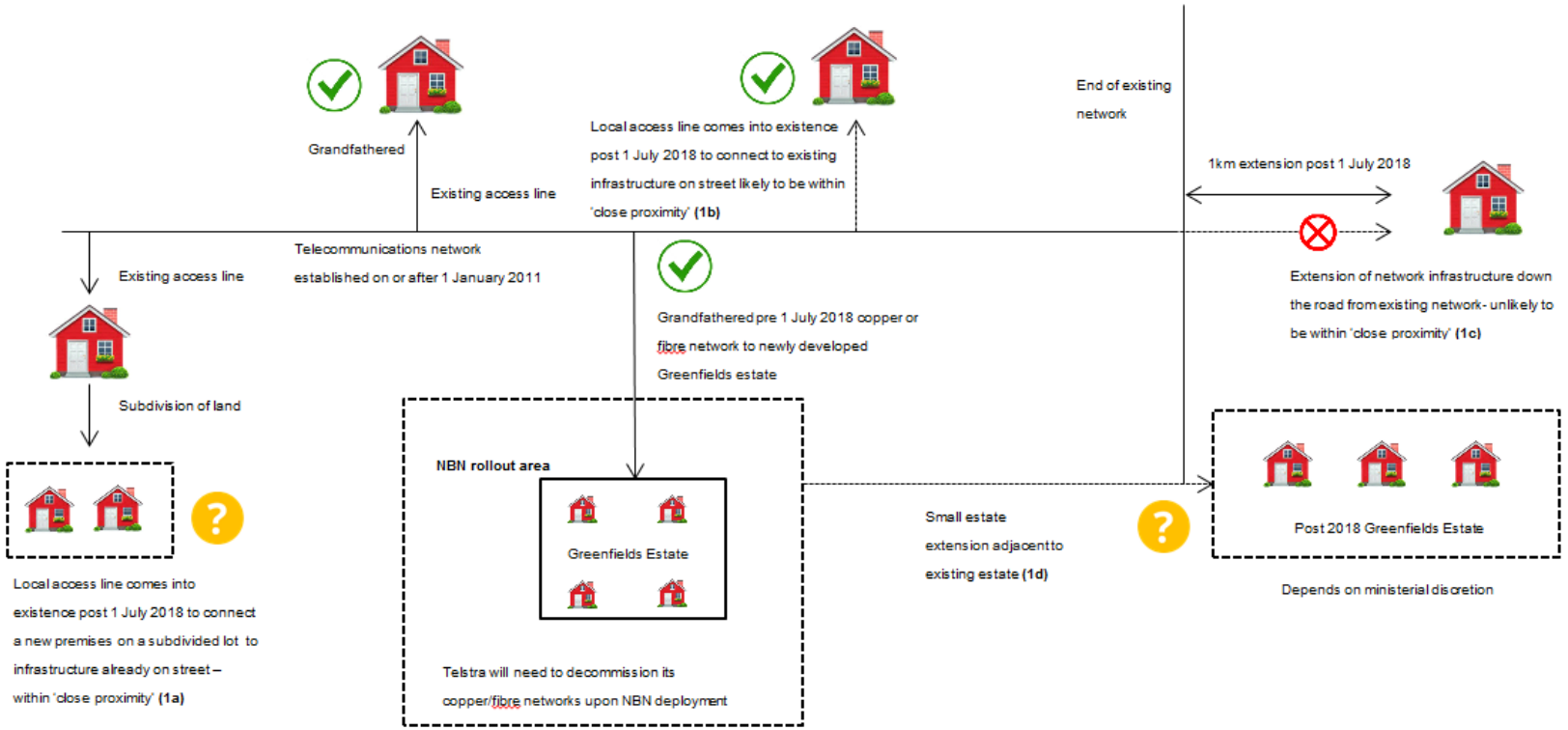
to be provided, it would appear not to allow a premises to be connected where land adjacent to that street is rezoned and the infrastructure has to be extended to that development in order to supply services to a premises.

Figure 5 – Proposed Section 143F Exemption – lines installed in close proximity to other lines

Outcome: Telstra queries whether a local access line that comes into existence after 1/7/18 to connect a new premises on a subdivided lot to existing infrastructure on the street is within 'close proximity? While this might work for a suburban subdivision, it is less clear where the block is a large rural property on multiple acres with a premises at the end of the block furthest away from the infrastructure?

Extension of the network to connect a premises down the road from existing infrastructure seems unlikely to be permitted.

Whether a network extension of a pre-1/7/18 Greenfields estate to a new Greenfields area is permitted depends on Ministerial discretion.



The existing '1km rule' has a degree of arbitrariness about it, but at least it was fairly straightforward to apply and the permitted maximum distance was long enough to allow a consistent and coherent connection approach in the same general area.

3.2. Alternatively, the '1km rule' should extend to all networks subject to overbuild arrangements with nbn co

Telstra welcomes the retention of the '1 km rule' for the Telstra and Optus HFC networks. As these two HFC networks are being transferred to nbn co or decommissioned once the NBN overbuilds them, they pose no threat to the NBN.

If the current '1km rule' is not to be retained in full, it should at least apply to any other networks – Telstra or a third party – which are, like the Telstra and Optus HFC networks, subject to commitments by the network owner to decommission them or transfer them to nbn co. This would include Telstra's fibre networks in Greenfields estates (Velocity). Measures are already in place to ensure nbn co is protected from significant overbuild by Telstra, including the cease sale restrictions under the Migration Plan and Telstra's contractual commitments to decommission its legacy copper, HFC and Velocity networks.

Extending the HFC '1 km rule' to these other networks would enable modest extensions to be made to these networks to meet consumer demand for superfast services pending the deployment of the NBN.

If the '1km rule' does not apply to these other networks pending transfer to nbn co or decommissioning, some consumers will only have access to a voice service on copper or fixed wireless, as required to meet the USO; whether they have access to fixed broadband access will depend on whether the developer is prepared to pay the additional costs of that infrastructure; and the broadband speeds will be capped out at ADSL speeds (i.e. maximum of 25Mbits) because higher speeds would trigger the SNOs. Copper network extensions also may not be the best and most efficient choice to use to supply these consumers, even pending rollout of the NBN in the area (if that occurs).

Finally, as a drafting matter, the proposed HFC exemption does not accurately reflect the arrangements between nbn co and Telstra. Under those arrangements, nbn co has the option, at its discretion, not to build in an area, in which case the Telstra network infrastructure remains in place, or if nbn co does decide to overbuild, nbn co has the option over which network assets it can require Telstra to transfer to nbn co and which assets it can require Telstra to decommission. Accordingly, Telstra considers that sub-section 156(4)(e)(i) should be amended to cover both transfer of assets and decommissioning and be capable of applying to arrangements where either option is at nbn co's discretion.

3.3. The Ministerial exemption power should be retained post 1 July 2018

Telstra considers that proposed sub-section 144(7), which prevents the Minister from making a new exemption instrument under sub-section 144(1), (2) or (3), should be removed.

The experience with the existing SNOs has been that this Ministerial flexibility has proved important. Even after several years of operation, circumstances may yet arise where it may be appropriate for the Minister to have the ability to exercise such discretion in the interests of Australian consumers.

While there are some specific Ministerial exemption powers that are proposed to be included for specific exemptions from the SNOs (for example, under proposed s 143E(3), (5), (6) and (8)), Telstra considers that the general exemption power is a neater way of dealing with isolated unforeseen situations which literally fall outside the other exceptions but do not pose a material threat to the nbn co business case.

3.3.1. An additional exemption from the SNOs is required where an extension of an existing superfast network is required to meet the USO

The proposed new SNO regime is not able to be clearly reconciled with Telstra's obligations to deliver the USO. Telstra is vertically integrated but to meet its USO, it may have to build infrastructure. While strictly that infrastructure need only support voice telephony, it is difficult for customers to accept that this new infrastructure Telstra is building has to, because of regulatory restrictions, be built to support broadband speeds of no more than 25Mbps.

If the '1km rule' is removed, Telstra recommends that an additional exemption is introduced that permits extension of existing superfast networks where the extension is required in order for Telstra to deliver services which include a voice service required to be supplied under the USO.

As noted above, these extensions do not pose any long-term threat to nbn co as they simply meet an interim need before these networks are required to be decommissioned (as part of Telstra's commitments under the Definitive Agreements). Without this additional exemption, USO requests will be forced to be met using non-superfast network technology that is less satisfactory to customers and does not accord with Government policy in making superfast broadband widely available to Australians as soon as practicable.

3.4. Some of the exemptions to the SNOs are now either unworkable or redundant

3.4.1. The change to the exemption for networks marketed as a business network is unworkable

While Telstra supports the change to exempt business customers from the reach of the SNOs, Telstra considers that the manner in which the exemption has been drafted is unworkable.

Section 143H exempts networks that are marketed exclusively as a business network. In order for the exemption from the SNOs to apply, each of the elements in s 143H needs to be satisfied. This has the effect that even if the use of a line to supply a superfast carriage service to a residential customer is minor compared with the use of all of the local access lines in the network as a whole, the exemption will not apply. This exemption does not reflect the commercial reality that almost every network will have mixed uses.

For example, where a network supplies services to business customers in a business park which is located within a residential suburb, even though the use of lines to supply services to a small number of

residential customers is minor, it is hard to see that the network is not also being marketed to residential customers (given products are sold using the network). Another example where we envisage a mixed use network would be caught by the SNOs is in a predominantly commercial area where there are shops downstairs along the street but where people live upstairs.

Telstra suggests that the focus should be on how the network is used, or proposed to be used, as opposed to how the network is marketed.

Further, the word 'exclusively' should be deleted from s 143H or, if the Government wishes to retain a materiality threshold, replaced with 'wholly or principally', which is the language currently used in section 141 to define what is a superfast broadband network.

3.4.2. The deeming provisions where use of a line has changed from business to residential now appear redundant

Under s 156A, a line is deemed to be created post 1 July 2018 where its use changes from supplying business customers to supplying residential customers.

While this 'deeming' provision could be said to be a collorary to limiting the SNOs to residential premises, it will be difficult to apply in practice. Network operators have limited direct knowledge of rebuilding or alteration works being undertaken by owners of buildings connected to their networks: e.g. a carrier will not necessarily know, or have reason to know, that the owner of a factory has converted the building into residential accommodation. The nature of the service plans (e.g. residential or business plan) that are supplied at such premises may not change as a result of the change in use. Telstra does not monitor what customers do in the millions of premises connected to our network – nor should we.

It is also hard to envisage circumstances in which the deeming provisions in s 156A would operate which would not be covered by the 'close proximity' exemption. As pre-2018 network already connected the premises before its change of use, even if the existing access line to be built after 2018, it would necessarily be in 'close proximity' to the pre-2018 network to which it is already connected.

Accordingly, Telstra considers that the inclusion of this deeming provision introduces more unnecessary complexity and therefore it should be removed.