

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 2019**

and

**Telecommunications
(Regional Broadband
Scheme) Charge Bill 2019**

December 2019

EXECUTIVE SUMMARY

1. Optus welcomes the opportunity to provide comment to the Senate Inquiry into the Telecommunications Legislation Amendment (Competition and Consumer Bill) 2019 and the Telecommunications (Regional Broadband Scheme) Charge Bill 2019. These two Bills form part of the Government's response to the Vertigan Review; and replacing the two similar Bills introduced in 2017 which have since lapsed.
2. While Optus agrees with the original policy intentions of the Bills, we reiterate our 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 the core function of NBN Co and which are not subject to the prohibition on new residential superfast networks.
3. 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 which benefit from the amendments to the superfast network rules. This position is consistent with the recommendations of the Vertigan Report and the Government's response. However, while there is merit in applying the levy to these protected residential services, there is little justification to extending the levy to services which were never subject to the prohibition on new superfast networks; and from which the internal NBN cross-subsidy was never designed to be recovered.
4. 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. The additional levy on enterprise networks raises important competitive neutrality issues which should be addressed.
5. 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 no impact on the ability of the NBN Co to cross-subsidise its wireless and satellite networks.
6. 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.
7. 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 communications market.
8. This submission addresses the following:
 - (a) The RBS charge is not a universal service scheme; and
 - (b) RBS charge should not extend to enterprise and government networks.
9. For clarity, Optus has no concerns with the application of the RBS levy to residential alternate high-speed networks that could cherry-pick metro-based NBN services.

THE REGIONAL BROADBAND SCHEME IS NOT A UNIVERSAL SERVICE SCHEME

10. Optus is concerned that the purpose of the Regional Broadband Scheme (RBS) is sometimes conflated to a roll more akin to the existing Universal Service Obligation (USO). In other words, that the RBS has a role or will be used to fund deployment of regional telecommunications infrastructure.
11. Such an extension, however, is not consistent with the policy intent of the RBS nor the analysis undertaken which gave rise to the RBS. The RBS has a much more targeted purpose, and it is important that this targeted focus be remembered when considering the drafting of the enacting legislation.
12. To that end, it is important to acknowledge the work undertaken in the original Vertigan Report which resulted in the proposed reforms to Parts 7 and 8 of the Telecommunications Act, and which recommended making the internal cross-subsidy of NBN Co explicit.
13. 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. As a result, it recommended that the existing restrictions on new residential fibre network be lifted, subject to certain conditions.
14. The Government noted that the NBN reforms over 2009-11 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.¹
15. The Government noted that this model is unsustainable in the long run. The Government sought to establish a more competitive regulatory framework and to deliver competitive neutrality for NBN Co and other industry players. This policy is to be achieved by the amendments proposed in Schedules 1 and 2 of the Telecommunications Legislation Amendment (Competition and Consumer) Bill 2019 relating to the superfast network rules (Parts 7 and 8 of the *Telecommunications Act 1997*).
16. 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. The Vertigan Report made clear that its review only looked at **networks captured** by the Part 7 and 8 superfast network rules, specifically stating that enterprise networks should not be captured by its recommendations:

*On the basis that **high-speed networks servicing business customers are not subject to special regulation under Parts 7 or 8, the panel has not concerned itself with these networks.** Telecommunications service providers have generally been responsive to the needs of larger business customers and can have every incentive to remain so. Consistent with this observation, no special intervention in support of those customers should be considered.²*
[emphasis added]
17. The Vertigan Report makes the clear connection between reform to the superfast network rules and the potential to undermine the internal cross-subsidy used by NBN Co

¹ Explanatory Notes, p.4

² Independent cost-benefit analysis of broadband and review of regulation; Volume I – National Broadband Network – Market and Regulatory Report, (Vertigan), p.74

to provide services in non-commercial areas through deployment of high-speed residential networks using the 1km exemption.³ The Vertigan Report also notes that recommendations to “remove restrictions on competition may exacerbate that erosion.”⁴

18. 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”.⁵
19. It is clear from a reading of sections 7 and 8 of the Vertigan Report that the removal of Parts 7 and 8 of the Telecommunications Act from **high-speed networks servicing residential customers** is directly linked to the identification of the internal NBN Co cross-subsidy and the recommendation for a levy on competing non-NBN Co residential high-speed broadband networks.
20. Optus submits that the targeted policy purpose of the RBS levy should be reflected in the enacting legislation. That is, it should only apply to networks impacted by the superfast network rules which are to be reformed.
21. Optus remains concerned that some interested parties may try to conflate the RBS and USO into the same policy. This should be avoided. The RBS 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 protected metropolitan residential 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.

THE RBS CHARGE SHOULD NOT EXTEND TO ENTERPRISE AND GOVERNMENT NETWORKS

22. 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.⁶ However, the provision of services to enterprise and government customers over non-NBN networks does not displace any NBN Co protected revenue or preclude NBN Co from making sufficient revenue from its metro connections to internally cross-subsidy the fixed wireless and satellite networks.
23. It is important not to forget that 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. This objective should be retained.
24. 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;

³ Vertigan, p.103

⁴ Ibid.

⁵ Vertigan, p.106

⁶ CAC Bill, EM, p.33

- (b) Reasons why reducing competition for contestable services is likely to increase costs and operational inefficiencies of NBN Co; and
- (c) Funding of the RBS by taxing enterprise and government services is inefficient and will damage efficient competition in these segments.

Identifying protected and contestable NBN services

25. 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 which are impacted by the amendments to the superfast network rules. This position is consistent with the recommendations of the Vertigan Report and the Government's response.
26. 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. These services are impacted by the proposed amendments to the superfast network rules. 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. NBN Co has recently moved into providing enterprise services in competition with many existing enterprise fibre networks. However, in doing so it will be entering an existing competitive market and competing with existing commercial services. The original NBN legislation in relation to superfast networks 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 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 for its fixed and wireless network.
27. The Vertigan Review and the Government's response recommended legislative reform to the protected services obligations (superfast network rules) on the proviso that any forgone 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 has the potential to deprive NBN Co the opportunity to acquire metro revenue required to fund the regional cross-subsidy (referred to as cherry-picking).
28. For example, 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
29. However, the proposed Bill extends the application of the NBN levy beyond revenues from protected services to revenue from services in contestable markets which were not subject to the superfast network rules. The Department has explained that the intent of

⁷ Vertigan, p.103

the levy is to protect all future revenue contained in NBN Co's Corporate Plan. This goes well beyond the intent 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. If implemented, it is not clear that such reforms are consistent with the competitive neutrality obligations of the Government.

Taxing contestable services result in inefficiencies and higher costs for NBN

30. 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.
31. 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, Vocus, and 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.
32. NBN Co's delivery of enterprise services and move into adjacent competitive markets (i.e. markets that are well served through multiple existing networks) should occur on a competitively neutral basis and should ensure that NBN Co competes on its own 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.
33. 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 enterprise and government are flawed

34. This section 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. For example,
 - (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.⁸
35. First, we note that NBN Co deciding to compete with existing competitive enterprise networks does not by itself justify the imposition of an additional tax on these network.

⁸ RBS Bill, EM, p.31

We consider that even if NBN Co offers corporate services; the same sentiments expressed since 2010 continue to hold true. In particular, that imposing a levy to help NBN Co compete in the market breaches neutrality rules; imposes inefficiencies on NBN; and damages efficient competition. Optus submits that the intent of the RBS is not to assist NBN Co compete in competitive markets – it is designed to compensate for foregone cross-subsidy revenue due to reforms to the superfast network rules.

36. Second, while medium and large businesses are consumers of broadband 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.
37. Third, 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 high trying to comply with the requirements in this Bill.

Competitive neutrality concerns

38. As noted above, the application of the proposed levy on competitive enterprise networks falls outside the original internalised cross-subsidy model in the national NBN model which was implemented through the acquisition of legacy residential networks (i.e. Telstra's PSTN and HFC network and Optus' HFC network) and the superfast network rules which prevented deployment of new residential fixed networks.
39. Optus is concerned that the imposition of a levy on competitive enterprise networks could give rise to competitive neutrality issues – requirements under the Commonwealth Competitive Neutrality Policy Statement 1996.
40. While the policy recognises that there are a number of advantages and disadvantages of government ownership, it focuses specifically on those competitive advantages enjoyed by government businesses that are widespread and relatively easy to observe and correct, including:
 - (a) Exemptions from various taxes (taxation neutrality)
 - (b) Access to borrowings at concessional interest rates (debt neutrality)
 - (c) Exemptions from complying with regulatory arrangements imposed on private sector competitors (regulatory neutrality)
 - (d) Other benefits associated with not having to achieve a commercial rate of return on assets (commercial rate of return requirements).⁹
41. The proposed levy on enterprise networks raises issue with regard to taxation neutrality – where NBN Co will not be required to pay the RBS levy for enterprise connections which is to be levied on all other non-NBN enterprise networks.
42. We observe that the fixed wireless and satellite components on the NBN may be considered a community service obligation (CSO) – that is a loss making service for the

⁹ Australian Government Competitive Neutrality Complaints Office 2011, *NBN Co*, Investigation No. 14, Canberra, November

benefit of the community. However, “competitive neutrality and other competition policy reforms may limit the ability for these CSOs to be financed through cross subsidies within the business.”¹⁰

43. Optus does not object to the funding of the NBN Co regional CSO obligations through the RBS Levy on residential networks consistent with the internal cross-subsidy within the NBN model. But the Government’s competitive neutrality requirements would limit the application of this levy to enterprise networks, even if it may be for CSO-like purposes.

¹⁰ Australian Government, Commonwealth Competitive Neutrality Policy Statement, 1996, p.5